HOMELAND SECURITY

FEDERAL LAW ENFORCEMENT TRAINING CENTER
GLYNCO, GEORGIA

LEGAL DIVISION HANDBOOK

2012

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Foreword

November 2011

The mission of the Federal Law Enforcement Training Center (FLETC) is to serve as the federal government's leader for and provider of world-class law enforcement training. As a division of the Office of Mission Integration, the Legal Division (LGD) is committed to delivering the highest quality legal training to both basic and advanced law enforcement personnel. In fulfilling this mandate, LGD instructors provide training on all areas of criminal law and procedure, including Constitutional law, authority and jurisdiction, search and seizure, use of force, self-incrimination, courtroom evidence, court testimony, electronic law and evidence, criminal statutes, and civil liability. While a large part of the LGD training mission focuses on newly hired law enforcement officers, the LGD also provides training for advanced law enforcement officers and attorneys in the Continuing Legal Education Training Program (CLETP) and the Police Legal Advisor Training Program (PLATP). The LGD also provides legal training for law enforcement instructors in the FLETC Instructor Legal Training Program (FILTP).

In this spirit, we offer our *Handbook*. This edition includes materials for basic training, advanced training, and for field use. The *Legal Division Reference Book* is a companion to the *Handbook*. The Additional Resources section in it contains numerous pieces of legal information helpful in your day-to-day activities as a law enforcement officer. It is our hope in the LGD that the *Handbook* can serve law enforcement students and law enforcement officers alike.

While this text provides an exceptional review of important legal concepts, you should not limit yourself to this publication. An additional resource for federal, state and local law enforcement officers and agents is the LGD website:

www.fletc.gov/legal

Located there are a number of resources including articles, podcasts, links, federal circuit court and Supreme Court case digests, and THE FEDERAL LAW ENFORCEMENT INFORMER. THE INFORMER is published monthly and includes articles and federal circuit court and Supreme Court case summaries of import to law enforcement.

I would like to extend a special thank you to the following individuals who contributed their time and expertise by reviewing the chapters of this Handbook in an effort to make them as user-friendly as possible: Mark J. Baskfield, Ricardo Carrasquillo, Retired Special Agent William Embick, Retired Special Agent Preston Farley, Program Specialist Steve Hemenway, Chad Hersey, Instructor Jason Lynema, Sergeant Tod Ritacco, Captain Noreen Schirmer, Instructor Tim Sperry, Special Agent Lee Stovall, Instructor Ken Tassie, Katherine Thomas SVC, and Darlene Langum Wilder, Division Chief, TIM Student Services.

Along with the entire staff at the FLETC Legal Division, I wish you success in your efforts. We hope to continue to provide excellent legal training programs, tools, and resources throughout your law enforcement career.

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Chapter One

Authority and Jurisdiction of Federal Land Management Agencies

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I. Introduction

This course examines the sources and scope of the authority and jurisdiction of federal land management law enforcement agencies. It includes federal regulations and

administrative inspection authority and will address both territorial and subject matter jurisdiction. The course also examines jurisdictional issues related to selected offenses that involve federal land management agencies.

II. Sources of Authority and Jurisdiction

The basic source of all federal law is the United States Constitution. While the Fourth Amendment and many other constitutional provisions affect law enforcement, there are also some less well known provisions that impact the jurisdiction of federal agencies. The Tenth Amendment reserves the power not expressly given to the federal government in the Constitution to the States or to the people. In section 8 of Article I, exclusive federal jurisdiction is established over forts and many other federal facilities. Section 3 of Article IV gives Congress the power to make rules and regulations regarding the territory and other property belonging to the United States.

The primary source of authority and jurisdiction for federal land management agencies is federal statutes. The easiest method to find federal statutes is using the U.S. Code citation to the statute. For example, section 3 of Title 16 of the U.S. Code is written as 16 U.S.C. § 3. The U.S. Code is officially published every six years. In more formal writing, the year of the last official publication of the Code is included in parentheses: 16 U.S.C. § 3 (2006). If a law passed by Congress changes many individual statutory provisions, the easiest way to find the full text of the law is the Public Law version. For example, the USA PATRIOT Act amended many federal statutes. It would be a significant task to find each one individually. P.L. 107-56 contains the full text of the USA PATRIOT Act.

Some federal statutes provide authority for specific federal agencies to adopt regulations to implement their statutory authority. This is called "enabling legislation" because it enables and authorizes the agency to adopt regulations for those areas specified in the statute. Without

such enabling legislation, the agency would not have authority to adopt regulations. Some of these regulations define crimes and establish punishments for violations of the regulation. These violations are enforced as misdemeanors in U.S. courts if the enabling legislation provides such authority.

During the process of adopting regulations, proposed regulations and the final regulation are published in the Federal Register.

Regulations that are adopted under the authority of the appropriate enabling legislation are published annually in the Code of Federal Regulations (C.F.R.). Citation to the C.F.R. is similar to the U.S. Code. For example, a regulation governing hitchhiking on any National Park Service property is found at 36 C.F.R. § 4.31. In formal writing, the year of the most recent version is included in parentheses: 36 C.F.R. § 4.31 (2011).

Occasionally, other sources of authority, such as treaties, may apply, particularly in relation to Indian lands and jurisdiction over coastal waters.

III. Types of Jurisdiction

There are two types of jurisdiction that govern the authority of law enforcement agencies: Territorial and subject matter jurisdiction. Territorial jurisdiction relates to law enforcement authority based upon the geographic location of the offense. Subject matter jurisdiction relates to the specific offenses over which the particular law enforcement agency has authority. Some agencies have general subject matter jurisdiction over all federal criminal offenses, while others have limited subject matter jurisdiction over certain offenses only.

IV. Territorial Jurisdiction

The concept of territorial jurisdiction has three components in federal law. The first type of territorial jurisdiction relates to what authority the federal government

has over the particular location involved. The second type relates to crimes that must occur within the special maritime and territorial jurisdiction (SMTJ) of the United States. The third type of territorial jurisdiction relates to geographic limitations placed upon an agency's law enforcement officers by legislation or agency regulations.

A. Jurisdiction Over a Particular Geographic Area

There are three general methods through which the federal government may acquire jurisdiction over a physical area. One method is for the state to grant land within the jurisdiction of the state to the federal government. Whether the state reserves any jurisdiction also within that land is determined by the grant from the state. A second method is for the federal government to assume exclusive jurisdiction over land purchased by the federal government with the consent of the state legislature. Since 1940, neither exclusive nor concurrent jurisdiction is automatic; the federal government has to expressly accept exclusive or concurrent jurisdiction. Exclusive and concurrent jurisdiction are discussed in the following sections. The third method is for the federal government to simply buy or condemn land in a state for a federal purpose without any involvement of the state.

Along with other considerations, the method and terms of the acquisition of the property determine the type of federal jurisdiction that applies to that particular parcel of land. The three types of federal jurisdiction are exclusive, concurrent, and proprietary.

1. Exclusive Jurisdiction

In areas of exclusive jurisdiction, only the federal government has law enforcement authority. This occurs when the federal government has received, through one of the methods outlined above, all of the authority of the state on a certain tract of land contained within the state's borders. With exclusive jurisdiction, no reservations have been made to the

state, except that state and local officers have the authority to serve criminal and civil process, such as arrest warrants, resulting from activities that occurred outside the area of exclusive jurisdiction.

2. Concurrent Jurisdiction

Concurrent jurisdiction exists when both the state and federal governments have authority over a particular area. Usually this occurs when a state has ceded land to the United States, but has reserved to itself the right to exercise its state authority. In these jurisdictions, both the state and federal governments may enforce their respective criminal laws and prosecute those who violate their respective laws.

3. Proprietary Jurisdiction

Proprietary jurisdiction is primarily state jurisdiction, with exceptions for federal laws of general application and federal laws and regulations specifically applicable to the particular type of land involved. Proprietary jurisdiction exists when the United States has acquired some right or title to an area within a state's borders, but has not acquired any measure of the state's authority over the area. In essence, the United States has rights generally equivalent to a private landowner. In these situations, state law applies within the proprietary area to the same extent that it does throughout the remainder of the state. However, under the Supremacy and Property Clauses of the United States Constitution, federal law enforcement officers and agents may also enforce federal statutes or regulations enacted to protect these proprietary areas.

Two kinds of federal statutes may be enforced even in a proprietary jurisdiction:

(a) Statutes of General Application

Many federal statutes can be enforced throughout the United States or in any other place where the United States has jurisdiction. The Constitution empowers Congress to pass such

statutes in order to protect and control uniquely federal functions. For example, it is a crime throughout the United States to assault a federal officer who is performing federal duties. The assailant can be prosecuted whether his crime is committed on or off federal property. Other examples of these types of statutes include: 18 U.S.C. § 3 (2006) (Accessory After the Fact); 18 U.S.C. § 201 (2006) (Bribery of Public Officials and Witnesses); 18 U.S.C. § 371 (2006) (Conspiracy); and 18 U.S.C. § 641 (2006) (Embezzlement and Theft of Public Money, Property or Records).

(b) Statutes Applicable to Designated Lands

There are also many federal statutes and C.F.R. regulations whose application is limited to designated lands only. Examples of these statutes include, but are not limited to, 18 U.S.C. § 41 (2006) (Hunting, Fishing, Trapping; Disturbance or Injury on Wildlife Refuges); 18 U.S.C. § 1852 (2006) (Cutting or Removing or Transporting Timber on Public Lands of United States); 18 U.S.C. § 1853 (2006) (Cutting or Injuring Trees on Land Reserved or Purchased by the United States or Upon Any Indian Reservation); and 18 U.S.C. § 1854 (2006) (Trees Boxed for Pitch or Turpentine on Land Belonging to the United States). Some 36 C.F.R. provisions apply to all lands within a park, regardless of land ownership. These violations include 36 C.F.R. § 2.31 (2011) (Trespassing); 36 C.F.R. § 4.31 (2011) (Hitchhiking); and 36 C.F.R. § 4.23 (2011) (Operating a Motor Vehicle Under the Influence of Alcohol or Drugs).

B. Special Maritime and Territorial Jurisdiction

Some federal criminal statutes apply only in the area known as the "special maritime and territorial jurisdiction" of the United States (SMTJ). 18 U.S.C. § 7 (2006) defines these places. Several descriptive categories are included within the definition, the most significant being § 7(3). This section provides:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

As noted above, one of the areas of land which falls within the SMTJ is where the United States has either exclusive or concurrent jurisdiction over that area. Other places and areas are also designated in the statute. Some of these are:

- High Seas and other waters… not under the jurisdiction of a state
- Vessels owned in whole or part by the U.S., U.S. citizens, U.S. corporations, or any state, territory, district or possession of the U.S. when the vessel is in such waters
- Aircraft owned in whole or in part by the U.S., U.S. citizens, U.S corporations, or any state, territory, district or possession of the U.S. when the aircraft is flying over these waters
- Waters of the Great Lakes and the St. Lawrence River
- Islands, rocks or keys containing guano if designated by the President
- Spacecraft while in flight

If an offense specifies that the crime must be committed in the SMTJ and the crime was not committed in the special maritime or territorial jurisdiction of the United States, that offense is not triable in federal court.

C. Agency Specific Territorial Jurisdiction

The third category of territorial jurisdiction is agency specific territorial jurisdiction. If and only if Congress has passed enabling legislation, the agency can adopt regulations applying to the federal land it controls and set criminal punishments for violations of these regulations. So long as the misconduct occurs on the agency's land, it can be punished regardless of whether the land is an area of exclusive, concurrent or proprietary jurisdiction. For example:

- The **National Park Service** has jurisdiction over offenses that occur within the National Park system and over the arrest of persons fleeing from that system. 16 U.S.C. § 1a-6 (2006).

- The **USDA Forest Service** has jurisdiction over offenses that occur within the National Forest System or which affect the administration of the National Forest System. 16 U.S.C. §§ 559, 559c, 559d (2006).

- The **Bureau of Land Management** does not have territorial limits, but the offense must relate to the public lands or their resources. 43 U.S.C. § 1733(c) (2006).

- The **Bureau of Reclamation** has jurisdiction over offenses that occur within a Reclamation project or on Reclamation lands. 43 U.S.C. § 373b (2006).

- The **Tennessee Valley Authority (TVA)** has jurisdiction over offenses that occur on any lands or facilities owned or leased by the corporation or within such adjoining areas in the vicinity of such lands or facilities as may be determined by the TVA Board of Directors under statutory guidelines and on other lands or facilities in certain specified situations. 16 U.S.C. § 831c-3 (c) (2006).

- The **United States Fish and Wildlife Service** and **National Marine Fisheries Service** do not have specific geographical boundaries, except as may be defined in specific statutory or regulatory provisions for which those agencies have subject matter jurisdiction. 16 U.S.C. §§ 668dd (g), 3375 (b) (2006).

- The territorial jurisdiction of **Department of Defense Land Management Enforcement Officers** is determined by DOD directives or other regulations.

V. Subject Matter Jurisdiction and Statutory Arrest Authority

Subject matter jurisdiction relates to the specific offenses over which a particular law enforcement agency has authority. Statutory provisions conveying authority and jurisdiction to particular federal agencies may specify certain offenses over which that agency has subject matter jurisdiction. Federal statutes also give specific statutory arrest authority to law enforcement officers of each agency. These statutes, in effect, define the primary mission of the agency's law enforcement officers. It follows that the agency statute which specifies statutory arrest authority is the primary source of arrest authority for officers of each agency.

A. Specific Statutory Subject Matter Jurisdiction and Statutory Arrest Authority

Some land management agencies and their officers have full law enforcement power and statutory arrest authority over all federal offenses, but only within the limited territorial jurisdiction of that agency. For example, National Park Service officers generally have the authority to arrest violators for all federal offenses committed in their presence or all federal felonies they have reason to believe were committed, as long as those offenses were committed in the National Park System.

National Park Service officers also have the authority to arrest persons fleeing the park system to avoid arrest. 16 U.S.C. § 1a-6(b)(1) (2006). By contrast, other agencies and their officers have no geographic limits on the power to arrest, but only may make arrests for offenses generally within their agency's purview. For example, LEO assigned to the National Forest Service "have authority to make arrests for the violation of the laws and regulations relating to the forest reserves [national forests]." 16 U.S.C. § 559 (2006). Other agencies and their officers, however, have specific statutory or regulatory authority (and statutory arrest authority) only for certain specified offenses. For example, the National Marine Fisheries Service has approximately 37 different federal laws which it enforces.

Given these variations, as well as the realities of Congressional revisions to the statutes and cross-designation (discussed below), land management officers must stay current on their statutory arrest authority and alert for changes to it.

B. Cross Designation of Officers

In the land management enforcement context, because of the overlap of functions among the various agencies, officers will frequently be cross-sworn to enforce another agency's statutes. First, the statute to be enforced must authorize an agreement between: (1) the agency given enforcement authority by the statute and (2) the agency which employs the officer to be cross-sworn. Second, there must be an agreement between the two agencies concerned. For example, a TVA officer may be cross-sworn as a USFWS officer, thereby acquiring the additional authority to enforce crimes within the subject-matter jurisdiction of the USFWS. Similarly, the Secretary of Agriculture, on behalf of the Forest Service, can permit other federal agency personnel to enforce forest service laws and permits Forest Service personnel to assist other federal agencies pursuant to appropriate agreements. 16 U.S.C. § 559g (2006).

C. Jurisdiction Over State Offenses

Another source of authority for land management officers is state law, particularly for those officers operating primarily in areas of proprietary jurisdiction. In areas of exclusive or concurrent federal jurisdiction, state law may be useful where no federal law governs the particular conduct involved. See the discussion, "Assimilative Crimes Act – 18 U.S.C. § 13," below.

D. Assimilative Crimes Act - 18 U.S.C. § 13 (2006)

The Assimilative Crimes Act sometimes adopts and applies state law to conduct occurring on federal lands. Three criteria must be met:

- the United States has exclusive or concurrent jurisdiction,
- there is no federal law covering the conduct, and
- there is an applicable state law.

Under the Act, the state law is adopted and used to prosecute the defendant in federal court as a federal offense. The Act does not apply when there is a federal law that covers the conduct. The Act does not apply to areas of proprietary federal jurisdiction.

E. State Peace Officer Authority

In some states, federal law enforcement officers of specified federal agencies have limited or complete state peace officer arrest authority. For example, in Iowa, all federal law enforcement officers with federal arrest authority who are authorized to carry a firearm also have state arrest authority over indictable state offenses. Iowa Code § 804.7A. In other states, the offense must be committed in the officer's presence. In still others, a state or local agency must request assistance

from the federal officer. Every state is different. It is important to know the law of the particular state in which you are working to determine whether you have state peace officer status. It is also important to know your agency's policy regarding state peace office authority. In particular, agency personnel do not exercise state peace officer authority unless their agency's policy permits their doing so.

F. Cross-Designation as State or Local Officer

You may acquire state jurisdiction by being deputized as a deputy sheriff or other state or local officer under the appropriate state law. Again, it is also important to know your agency's policy regarding cross-designation as a state or local officer. Agency personnel do not exercise this authority unless the agency's policy permits their doing so.

G. Citizen's Arrest or Detention Authority

The least preferred method of having state jurisdiction to arrest or detain a suspect may come from citizen's arrest or detention authority within that state. Some states have citizen's arrest authority which allows an arrest by any person for a felony. Some states require the crime to be committed in the person's presence while other states do not. Some states only permit a limited detention rather than an arrest. State law may limit or prohibit citizen's arrests for misdemeanors. In addition, offenses that are covered may differ widely. While more than one state may allow a citizen's arrest for a breach of the peace, they can differ greatly on what constitutes a "breach of the peace". You must know the law of the particular state in which you are working to determine whether you have citizen's arrest or detention authority. Using citizen arrest authority to make an arrest often will be beyond the scope of the officer's federal employment and can potentially expose the officer to personal civil liability if the arrest is improperly executed. For more information on this topic, see the discussion, "The Federal LEO 'Good Samaritan' Act," in the Officer Liability chapter of this Handbook. In sum, arresting under citizen's arrest powers is a high-risk procedure and should be used as a last resort.

VI. The Code of Federal Regulations (CFR)

A. Enabling Legislation

Until Congress passes legislation enabling an agency to adopt regulations and enforce them, agencies cannot do so. When enabling legislation exists authorizing a federal agency to adopt regulations, most agencies adopt detailed regulations to implement their statutory authority. The enabling statutes often permit considerable flexibility in rule making. Final regulations currently in force are published annually in the Code of Federal Regulations. Many of the violations enforced by land management law enforcement officers are violations of these regulations.

For example, the Secretary of the Interior has the following statutory rulemaking authority for public lands:

> The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than $1,000 or imprisoned no more than twelve months, or both. 43 U.S.C. § 1733(a) (2006).

For the National Park Service, the Secretary of Interior has the following statutory rulemaking authority:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this

> Act shall be punished by a fine of not more than $ 500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all costs of the proceedings. 16 U.S.C. § 3 (2006).

Applying the broad rulemaking authority permitted by enabling legislation, federal regulations frequently extend the authority of these agencies into many areas not specifically addressed by Congressional statute. Agencies can use their rule making authority to create regulations that adopt state laws. Particularly in such areas as motor vehicle laws, hunting and fishing laws, and vessel operation and safety laws, agencies often adopt as federal regulations those state laws that do not conflict with federal law. The agency's federal enabling legislation sets the punishment for violation, regardless of the punishment under the state law.

B. Examples

Numerous examples of agency regulations can be found in the Legal Division Reference Book.

VII. Significant Statutory Provisions

Land management agencies often have common interests in enforcing laws that may be under the jurisdiction of another land management agency. Several significant statutory provisions related to land management allow for cross-designation, although some do not.

A. Lacey Act

The Lacey Act makes it illegal to trade in fish, wildlife, or plants taken in violation of any U.S. or Indian tribal law, treaty, or regulation as well as in violation of foreign law. The Act provides for civil penalties, criminal sanctions, and forfeiture provisions. This law does not include activities regulated by the Magnuson Fishery Conservation and Management Act, the Tuna Conventions Act, the Atlantic Tunas Convention Act, or

any activity involving the harvest of highly migratory species. 16 U.S.C. §§ 3371-3378 (2006). While the U.S. Fish and Wildlife Service is a primary enforcer of Lacey Act violations, enforcement authority is assigned to agencies of the Departments of Interior, Commerce, Transportation, and Treasury. In addition, any of the appropriate lead agencies may, by agreement, use the personnel, services and facilities of any other federal agency or any state agency in the enforcement of the Lacey Act. 16 U.S.C. § 3375(a) (2006). Thus, whether as part of those Departments or by agreement, USFWS, NMFS, or the Animal and Plant Health Inspection Service are involved in Lacey Act enforcement.

B. Endangered Species Act

The Act provides for the conservation of species that are endangered or threatened with extinction throughout all or a significant portion of their range, and the conservation of the ecosystems on which they depend. The listing of an endangered species generally protects the species under federal law, thus making it illegal to "take" (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) a listed species. 16 U.S.C. §§ 1531 – 1543 (2006). The primary agencies for enforcement of the Endangered Species Act are the Department of Interior (through the USFWS) and, for marine species, the Department of Commerce (through the NMFS). Generally, USFWS manages land and freshwater species, while the National Marine Fisheries Service manages marine species, including anadromous salmon. For some plant importation/exportation issues the Department of Agriculture is responsible. The Coast Guard also has enforcement authority. In addition, the appropriate lead agency can, by agreement, use the personnel, services and facilities of any other federal agency or any state agency in the enforcement of the Endangered Species Act. (16 U.S.C. § 1540(e) (2006)).

C. Marine Mammal Protection Act (MMPA) of 1972

The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. 16 U.S.C. § 1377 (2006). The Departments of the Interior and Commerce are responsible for different aspects of this law. The Department of Interior handles U.S. takings of these species. The Department of Commerce handles importation of these species. The appropriate lead agency may, by agreement, use the personnel, services and facilities of any other federal agency in the enforcement of the Marine Mammal Protection Act. (16 U.S.C. § 1377(a) (2006)). Either Secretary may also designate officers and employees of any state or of any possession of the United States to enforce the act. (16 U.S.C. § 1377(b) (2006)).

D. Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979 (ARPA) protects archaeological resources and facilitates cooperation and the exchange of information between agencies regarding these resources. Civil and criminal penalties are possible for the damage and excavation of archaeological resources. Under the statute, the archaeological resources recovered and any instruments used to commit the violations may be forfeited. The ARPA also provides restrictions against trafficking in illegally obtained artifacts. 16 U.S.C. §§ 470aa (2006) et seq. Each agency having archaeological resources on public lands under its jurisdiction has authority over those particular lands, but may also ask the Department of the Interior to assume authority. (16 U.S.C. § 470bb(2) (2006)). The Indian Arts and Crafts Act (18 U.S.C. §§ 1158, 1159 (2006)) criminalizes counterfeiting the Indian Arts and Crafts Board trademark (18 U.S.C. § 1158 (2006)) and falsely representing or suggesting that goods are an Indian product (18 U.S.C. § 1159 (2006)). 25 U.S.C. § 305d (2006) allows the Board to "refer an alleged violation of 18 U.S.C. § 1159 to any Federal law enforcement officer for appropriate investigation,"

and adds that "a Federal law enforcement officer may investigate an alleged violation regardless of whether the Federal law enforcement officer receives [such] a referral."

E. Bald Eagle Protection Act of 1940

This law protects the bald eagle (the national emblem) and the golden eagle by prohibiting, except under certain specified conditions, the taking, possession and commerce of such birds. The 1972 amendments increased penalties for violating provisions of the Act or implementing regulations and strengthened other enforcement measures. Rewards are provided for information leading to arrest and conviction for violation of the Act. 16 U.S.C. §§ 668-668d (2006). The bald and golden eagle are actually protected by two acts of Congress: the Bald and Golden Eagle Protection Act (BGEPA)(16 U.S.C. § 668 (2006)) and the Migratory Bird Treaty Act of 1918 (MBTA)(16 U.S.C. §§ 703-712 (2006)). The Department of the Interior has the primary responsibility for enforcement of this act. According to the statute, enforcement authority may be delegated also to state fish and wildlife authorities, but notably not to other federal agencies. 16 U.S.C. § 668b (2006).

With almost all of these significant statutory provisions, if an agency is not the primary enforcement agency, a Memorandum of Agreement and/or a cooperative agreement may be used to convey enforcement authority.

VIII. Administrative Inspection Authority

If and only if authorized by statute or regulation, federal agencies and their officers may set up a reasonable regulatory inspection scheme and exercise administrative inspection authority. Many land management agency regulations include various types of inspection authority. For example, the National Park Service provision below, written in a question-and-answer format, illustrates the typical inspection authority for land management agencies.

36 C.F.R. § 3.4 (2011) For what purposes may my vessel be inspected?

(a) An authorized person may at any time stop and/or board a vessel to examine documents, licenses or permits relating to operation of the vessel, and to inspect the vessel to determine compliance with regulations pertaining to safety equipment, vessel capacity, marine sanitation devices, and other pollution and noise abatement requirements.

(b) An authorized person who identifies a vessel being operated without sufficient life saving or firefighting devices, in an overloaded or other unsafe condition, as defined in United States Coast Guard regulations, or in violation of a noise level specified in § 3.15(a) of this part, may direct the operator to suspend further use of the vessel until the condition is corrected.

As this provision illustrates, administrative inspections do not require a search warrant. Nor must an officer have reasonable suspicion or probable cause that a violation has occurred.

The Supreme Court in *Camara v. Municipal Court* set out a three-prong balancing analysis to determine the reasonableness of a warrantless intrusion into an individual's Fourth Amendment interests. The three factors considered are (1) the importance of the governmental interest; (2) the degree of the intrusion by the government; and (3) the inability to achieve reasonable results by using the normal probable cause standard. In *New York v. Burger*, the Supreme Court applied a similar test to the warrantless inspection of a junk yard because junkyards are commercial premises of a highly-regulated industry. In *Burger*, the three requirements were described as follows:

- There must be a substantial governmental interest.

- The warrantless inspections must be necessary to further the substantial government interest.

- The inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. In simpler terms, it must advise the owner that the search is being made pursuant to law and it must have a properly defined scope while limiting the discretion of the inspecting officers.

When all of these requirements are met, the courts have upheld inspection programs as "reasonable regulatory schemes." Inspections performed under such a program are legal. Criminal evidence discovered through such an inspection is admissible.

But when an inspection is conducted as a ploy or subterfuge to locate and seize criminal evidence, that evidence will not be admissible. Inspections are constitutionally permitted because they are an effective way for the government to accomplish legitimate government missions **besides** traditional law enforcement. Inspections are also discussed in the Fourth Amendment chapter of this Handbook.

Recreational hunting, fishing, and boating are pervasively or closely regulated no matter where they occur. When they occur on federal public lands (such as National Parks), the government's interest is even more substantial. Individual inspections and vehicle checkpoints by federal law enforcement officers to enforce applicable regulations must be conducted in accordance with agency regulation or policy guidance concerning checkpoints and inspections.

Officers conducting inspections and checkpoints are limited in two ways by the agency's reasonable regulatory

scheme. First, the officer's discretion to decide who will be inspected is limited. In the context of vehicle checkpoints, this is often done by randomizing the choice of which vehicle to stop or by stopping every vehicle passing through in a given timeframe. Second, the scope and extent of the officer's inspection must be limited to the purpose of the inspection. For example, an officer conducting an inspection during antlered deer season to ensure that hunters are taking legal bucks (instead of illegal does) is not able to check a pickup truck's ashtray. In sum, the government's discretion is limited and scoped by the reasonable regulatory scheme. It follows that the authority to conduct a boat safety inspection could not be used as a ploy or subterfuge to do a detailed search of a locked briefcase on board based on a groundless hunch that it might contain drugs.

Chapter Two

Conspiracy and Parties

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I. Introduction

The crime of conspiracy was created because of the inherent dangers posed to society when two or more individuals join together to violate the law. A person who joins with others to commit a crime strengthens the criminal scheme and enhances the potential success of the scheme. Furthermore, once an individual joins with others, that person is less likely to change their mind than one who has made a solitary decision to

violate the law. Once conspiracies are formed, there is the danger they will get out of control, members of the conspiracy will recruit others to join their enterprise, and they will become more dangerous and difficult to immobilize. For all these reasons, the identification and targeting of multi-defendant criminal networks is essential to successful law enforcement.

The conspiracy statutes can be used to great advantage by criminal investigators. Some of the advantages of a conspiracy charge include the ability (1) to get beyond the first layer of a criminal enterprise, (2) to allow the jury to see the whole picture behind a given criminal act, and (3) to enable investigators to be proactive, even prevent a substantive offense while still being able to charge felony criminal conduct. There are some disadvantages to a conspiracy charge as well including (1) the fact that such investigations can be time-consuming, (2) there are difficulties with witnesses who are often co-conspirators, and (3) potential frustration over the lack of immediate results. In spite of these disadvantages, the conspiracy investigation is one of the most effective weapons in the law enforcement officer's arsenal. It is designed to immobilize and eliminate those that bind together to strengthen their criminal endeavors. This chapter provides a working knowledge of the law of conspiracy.

II. The Statute

A. Title 18 U.S.C. § 371[1]

There are a number of federal statutes that criminalize certain types of conspiracies, such as 18 U.S.C. § 241 (Conspiracy Against Civil Rights) and 21 U.S.C. § 846 (Controlled Substance Conspiracy. This course is concerned only with the general federal conspiracy statute, 18 U.S.C. § 371. This statute reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

> defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons perform any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The plain language of the statute prohibits two distinct types of conspiracies. First, it prohibits any conspiracy to violate a civil or criminal federal law (e.g., bribery). Second, the statute prohibits any conspiracy to defraud the United States or any agency of the United States, including conspiracies formed for the purpose of impairing, obstructing, or defeating the lawful functions of any department of the United States government, such as the Internal Revenue Service.

The statute provides a maximum punishment of not more than five years, as well as a fine up to $250,000.00, but only if the intended or committed substantive offense is a felony. If the offense committed or intended is a misdemeanor, the maximum punishment for the conspiracy charge cannot exceed the maximum possible punishment for the misdemeanor.

B. <u>The Elements</u>

There are five essential elements the government must prove beyond a reasonable doubt to establish a violation of § 371. A conspiracy exists when:

- Two or More Persons
- Intentionally
- Agree

- To Violate Federal Law or Defraud the United States

and

- Commit an Overt Act in Furtherance of the Agreement

Once these elements have been met, the crime of conspiracy is **COMPLETE**. In other words, once a co-conspirator commits an overt act in furtherance of the agreement, all of the co-conspirators may be prosecuted for conspiracy, even if they take no further steps to accomplish their ultimate goal.

1. Two or More Persons

A conspiracy requires the participation of "two or more persons." The persons need to be capable of forming the necessary criminal intent to agree to the objects of the conspiracy. One person cannot be convicted of conspiring with himself, an undercover law enforcement officer, or a cooperating informant. Because a government agent or a cooperating informant does not truly intend to commit the ultimate crime of the conspiracy, they cannot be counted as a conspirator. Likewise, individuals who do not have the mental capacity to form the criminal intent to conspire may not be one of the required two or more persons in a conspiracy. Minors and mentally ill persons could fall into this category.

Co-conspirators need not meet. They need not know each other's identities. But, they must be aware of, or must reasonably foresee, each other's existence and roles. For example, in a conspiracy to hijack goods, the person who steals a tractor-trailer from a truck stop may not know the person who provided advice as to when the tractor-trailer could be easily taken, nor would he necessarily know the person who was purchasing the stolen goods. Furthermore, as long as there are at least two members, the conspiracy continues, even if the members change and the original members have withdrawn and are no longer involved in the conspiracy.

2. *Knowledge and Intent*

The government must prove that the defendant had knowledge of the conspiracy and intended to participate in it.

(a) Knowledge

To be a party to a conspiracy, an individual must know of the conspiracy's existence and its overall plan or purpose. However, each conspirator need not know all of the details of the plan. While the defendant must know that at least one other person is involved in the conspiracy (so that an agreement is possible), there is no requirement that the defendant know the identity, number, or role of all co-conspirators. Secrecy and concealment are often features of a successful conspiracy. Accordingly, the law allows for the conviction of individuals without requiring that they have knowledge of all of the details of the conspiracy or of all of the members participating in it.

(b) Intent

The defendant must intend to participate in the conspiracy. The government must present evidence that the defendant joined the conspiracy voluntarily, by agreeing to play some part in it with the intent to help it succeed. Showing that a defendant was aware of the plan or that the defendant approved of the plan is not enough by itself to prosecute. The defendant's intent to participate in the conspiracy must be proven. A defendant's intent may be proven through circumstantial evidence, such as the defendant's relationship with other members of the conspiracy, the length of the association between the members, the defendant's attitude and conduct, and the nature of the conspiracy. Acts committed by the defendant that furthered the objective of the conspiracy are strong circumstantial evidence that the defendant was a knowing and willing participant in the conspiracy.

3. *The Agreement*

The essence of any conspiracy is the agreement. With conspiracy, the mere agreement to violate the law or defraud

the United States becomes criminal once an overt act in furtherance of that agreement takes place. Seldom, if ever, is there proof of a formal agreement, and the agreement does not have to be put into words, either oral or written. The agreement is often established through circumstantial evidence and may only be shown to be a mutual understanding. Association with members of a conspiracy is helpful in establishing a defendant's willing participation; however, mere presence at the scene is not enough to show agreement. An individual can be present with other known conspirators without intending to join or further the objects of the conspiracy.

An individual can also do something to help the conspiracy without actually joining. For example, an individual may rent an apartment to members of a conspiracy. The conspirators use the apartment to set up their "bookmaking" operation. As such, the apartment owner has aided the conspiracy. However, absent a showing that he had a stake in the venture (doubled the rent) or knew of the conspiracy and intended to help it by providing a hiding place, he has not joined in the agreement. Mere presence and helping without joining in the agreement are common defenses to conspiracy charges. Efforts must be made to establish a defendant's joining in the agreement. This can be shown directly by co-conspirators' testifying about the defendant's role in the organization or indirectly by documenting a series of acts or events that demonstrate that the defendant acted in concert with and therefore must have been in agreement with other members of the conspiracy.

4. Unlawful or Fraudulent Means or Objective

To successfully prosecute under § 371, either the objective of the conspiracy or the means to accomplish the objective must (1) be an offense against the United States or (2) defraud the United States. If neither the objective, nor the means to accomplish the objective, violate federal law or defraud the United States, prosecution under § 371 is not available. Note that the objective of the conspiracy does not have to be a crime. It is sufficient to show that the

contemplated objective would (defraud) impede, impair, defeat, or obstruct the proper functions of the United States Government. This could be accomplished through a scheme such as "bid-rigging" or through an agreement to obstruct the regulatory functions of a government agency, such as the Internal Revenue Service, which is often a civil violation of law.

It is not a defense that the objective of a conspiracy is factually impossible to achieve. For example, if the objective of the conspiracy is to kill an individual who, unknown to the conspirators, is already dead, then it is factually impossible for the conspirators to carry out their plan. However, the conspiracy charge is still complete the moment the first overt act in furtherance of the agreement is committed.

5. The Overt Act

The final element in a conspiracy prosecution under § 371 is that, following an agreement, one of the conspirators must commit an "overt act" in furtherance of the agreement. The overt act demonstrates that the conspirators have moved from a "thought" crime to one of action. Instead of simply talking about the crime, the conspirators have actually taken a step towards making it a reality. An overt act shows that the agreement is not dormant, but is actually being pursued by the conspirators.

Only one overt act must be committed to complete the crime of conspiracy. An overt act is any act done for the purpose of advancing or helping the conspiracy. The act must be done in furtherance of the agreement. For example, if two individuals agree to rob a bank and then one of them purchases ski masks to use in a robbery and the other then steals guns to use in the robbery, each co-conspirator has committed an overt act in furtherance of the agreement. Either act would be sufficient to complete the offense of conspiracy to rob the bank. A single overt act is sufficient to complete the conspiracy for all members, including those who join the conspiracy after it has begun. The overt act must occur after the agreement. The government may not rely on acts committed before the agreement to complete the conspiracy.

Additionally, the overt act need not be criminal in nature to complete the conspiracy, but may, in fact, be entirely lawful. For example, the overt act may be preparatory in nature, such as buying a car or mask to use in a bank robbery. If the substantive offense is actually committed, that offense may be used as the overt act necessary to complete the conspiracy. For instance, if two persons agree to rob a bank and do so without any intervening overt acts, the bank robbery would be the overt act necessary to complete the conspiracy.

III. The Law of Conspiracy

In addition to the elements to be proved in conspiracy cases, there is significant law you should know when undertaking a conspiracy investigation. The following sections provide the criminal investigator some additional legal principles to guide investigations.

A. The Doctrine of Merger/Double Jeopardy

A conspiracy charge is a separate and distinct offense from the crime being planned and does not merge with the substantive offense, should it ultimately be committed. The Doctrine of Merger holds that inchoate offenses (those committed to lead to another crime) such as solicitation and attempts to commit crimes merge into the substantive offense if that offense is committed. Unlike those inchoate offenses, conspiracy, which is also an inchoate offense, does not merge into the substantive offense. Conspiracy to commit a substantive offense has different elements than the substantive offense and will survive a double jeopardy challenge when both are charged using the exact same evidence.

B. *Pinkerton* Theory of Vicarious Liability

Conspirators are criminally responsible for the reasonably foreseeable acts of any co-conspirator that are committed in furtherance of the overall plan. This is known as the *Pinkerton* Theory of "vicarious liability." For example, if the plan was to smuggle counterfeit computer software into the United States, bribing a Customs and Border Protection Officer would be a

reasonably foreseeable act. In such a case, each conspirator would be liable for the substantive act of bribery, regardless of who actually committed the bribery. If an act was not a reasonably foreseeable consequence of the overall plan, a defendant could not be held liable for that act unless he or she was the individual who actually committed it. One benefit of this rule is that all foreseeable acts of the conspiracy can be introduced at trial even though those on trial may not have participated in the acts.

C. Late Joiners to a Conspiracy

The law recognizes that an individual may join a conspiracy after it has begun but before it has been terminated. Such an individual is referred to as a "late joiner" to the conspiracy. "Late joiners" do not have to commit an overt act, they only have to join an ongoing conspiracy. "Late joiners" take the conspiracy as they find it. Late joiners are not only criminally liable for the conspiracy they joined, but also for any reasonably foreseeable acts committed by any co-conspirator while the "late joiner" is a member of the conspiracy. "Late joiners" are not criminally responsible for the criminal offenses of co-conspirators committed prior to their joining the conspiracy. Nonetheless, the prior acts of the co-conspirators are admissible at the trial of the "late joiner," in order to show the existence of the conspiracy.

D. Withdrawal from a Conspiracy

Just as the law recognizes that individuals may join a conspiracy after it begins, the law also recognizes that individuals may withdraw from the conspiracy prior to its termination. Withdrawal from a conspiracy requires more than simply no longer participating. A valid withdrawal from a conspiracy has two basic requirements. First, the individual must perform some affirmative act inconsistent with the goals of the conspiracy. Unless a conspirator produces affirmative evidence of withdrawal, his or her participation is presumed to continue. Second, the affirmative act must be reasonably calculated to be communicated to at least one other known

conspirator or law enforcement personnel. Withdrawal is an affirmative defense. The burden is on the defendant to prove that he has withdrawn.

If an individual validly withdraws from a conspiracy, the statute of limitations (explained below) on the conspiracy charge for that individual will begin to run the date of the withdrawal. Further, the withdrawal of a conspirator does not generally change the status of the remaining members. The valid withdrawal of a single conspirator from a two-person conspiracy however, will result in the termination of the conspiracy, because the requisite "two or more persons" are no longer present. Once a valid withdrawal occurs, the withdrawing defendant will escape liability for any subsequent criminal acts of the remaining conspirators, but remains liable for conspiracy and for any criminal acts committed while a member of the conspiracy. Only by withdrawing from the agreement before the commission of the overt act will the individual escape liability for the conspiracy charge.

E. Statute of Limitations (18 U.S.C. § 3282)

The statute of limitations for the crime of conspiracy is five years and can run from various dates depending on the facts of each case. The statute of limitations begins to run from the date the conspiracy is completed, terminated, or abandoned. The statute of limitations can also run from the date the last overt act was committed in furtherance of the conspiracy (e.g., dividing the money from the bank robbery). The conspiracy itself may, depending on the nature of the agreement, continue past achieving the objective, in order to conceal the crime or to destroy or suppress evidence. In such cases, the statute of limitations would be extended and would not start to run until such time as the last overt act (i.e., the last act of concealment) occurs. For substantive offenses committed during the timeframe of the conspiracy, the statute of limitations begins to run from the date the substantive offense was committed.

F. Venue

The Sixth Amendment requires that prosecution occur "in the State and District wherein the crime shall have been committed." Because the legal basis for a conspiracy is an agreement and an overt act in furtherance of that agreement, venue for a conspiracy charge exists in the district where the agreement was entered into, or in any district in which an overt act in furtherance of the agreement was committed. Since the act of one conspirator is an act of all conspirators, an act in a district by one will result in venue in that district for all conspirators, even where the others were never physically present in the district.

If a substantive offense is committed, venue for the substantive offense will be in the district where it occurred. As a practical matter, cases are charged in the district where venue for both the conspiracy and the substantive offense overlap.

Part Two - Parties to Criminal Offenses

I. Introduction

When a crime is committed, the individual who actually commits the crime is referred to as the "principal" of the offense. However, there are often individuals who assist or help the principal to commit the offense. Some of these individuals provide assistance before the crime is committed, while others provide some manner of assistance after the crime has been committed. Still others may have knowledge that a federal crime was committed, yet take affirmative steps to conceal this knowledge from federal investigators. All of these persons are known as "parties" to the offense.

II. Aiding and Abetting (18 U.S.C. § 2(a))[2]

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of an offense may be found guilty of that offense. For example, a charge would read: Theft of Government Property, Aiding and Abetting; in violation of 18 U.S.C. § 641 and 2. That person must knowingly associate with the criminal activity, participate in the activity, and try to make it succeed.

In other words, the defendant must actually do something to assist the commission of the crime. The affirmative act of association must occur either before or during the commission of the crime by the principal. An individual cannot aid and abet a completed crime. If the affirmative act occurs after the commission of the crime, the defendant is not guilty of "aiding and abetting," but may be liable as an "accessory after the fact" (discussed below).

An aider and abettor is not required to be present at the time the actual crime is committed, nor know all the details of the crime. Further, presence at the scene of the crime, even in the presence of the principal, does not, standing alone, make an individual an aider and abettor. The government must show that the association with the principal was for the purpose of assisting in committing the crime. "Mere association" with the principal is a common defense to an aiding and abetting charge.

In addition to an affirmative act of association, the defendant must also know that he or she is assisting in the commission of a crime. Deliberate avoidance of knowledge (otherwise known as "willful blindness") may suffice. Deliberate avoidance occurs when a defendant claims a lack of guilty knowledge, but the evidence shows that he or she instead chose to intentionally avoid gaining knowledge about the circumstances surrounding their assistance in order to avoid criminal responsibility.

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[2] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

Finally, a crime must actually be committed in order to charge an individual as an aider and abettor. A defendant may be convicted of aiding and abetting even though the actual principal of the crime is never convicted or even identified.

III. Causing the Commission of a Crime (18 U.S.C. § 2(b))

If a person willfully causes another to commit a federal crime, that person may be found guilty of the offense he caused the other person to commit.

It is not necessary that the defendant know the individual who actually committed the offense, or that the defendant is present when the crime is committed. There is also no requirement that the individual who actually committed the offense be convicted in order to convict the individual who caused the crime.

IV. Accessory after the Fact (18 U.S.C. § 3)[3]

An accessory after the fact is one who, with knowledge that an offense was committed, receives, relieves, comforts or assists the offender with the intent to hinder or prevent the offender's apprehension, trial or punishment. The offense that was committed can be a felony or a misdemeanor. Silence alone does not constitute the offense of accessory after the fact. However, where an individual provides false or misleading statements to law enforcement officers in an effort to assist a principal in evading apprehension, trial or punishment, those statements may be used to prove the offense. Thus, when a family member lies to the police about the whereabouts of a sibling who is involved in a theft of government property to protect the sibling from being arrested and punished for the theft, the family member is an accessory after the fact to the theft. As with aiding and abetting, the conviction of the principal is not necessary to convict a defendant as an accessory after the fact.

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[3] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

A defendant convicted of being an accessory after the fact is not guilty of the offense that was committed, as is a defendant who is convicted of aiding and abetting. If an individual is convicted of being an accessory after the fact, the maximum possible punishment is one-half the maximum punishment possible for the principal of the offense (not the actual sentence received), up to a total of 15 years in those cases where the principal could receive either life imprisonment or the death penalty.

V. Misprision of Felony (18 U.S.C. § 4)[4]

This statute is directed at those individuals who have knowledge of a felony offense and take affirmative steps to conceal the crime and fail to disclose their knowledge to criminal investigators. Misprision of felony is concealing a felony with no requirement that the party intend to help the principal. The penalty for misprision of felony is up to 3 years in prison and a fine up to $250,000.00.

In order to convict a defendant of misprision of felony, the government must prove a federal felony was committed, the defendant had knowledge of the felony that was committed, the defendant performed either an affirmative act of concealment or an act that concealed the true nature of the crime, and defendant failed to disclose knowledge of the crime as soon as possible.

As with the crime of accessory after the fact, an individual's silence alone is not a crime. A simple failure to report a crime does not, without an affirmative act of concealment, make one guilty of misprision of felony. However, where an individual lies to or misleads criminal investigators, this element may be met.

[4] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

A defendant accused of being an accessory after the fact must intentionally assist the principal of the crime, while one accused of misprision of felony need only commit an act of concealment without necessarily intending to assist the principal. Finally, accessory after the fact does not require the defendant to disclose his knowledge as soon as possible, while misprision of felony does.

The offenses of accessory after the fact and misprision of felony are closely related and often there will be sufficient evidence to charge either or both. Collect all the facts and let the Assistant United States Attorney make the charging decision.

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Chapter Three

Constitutional Law

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I. Historical Background

Americans lived under colonial charters for over a century before they declared their independence from England. The purpose and effect of the Declaration of Independence by the thirteen colonies was to create thirteen separate and individual sovereigns (states) and to present a united front against the British Crown.

After the ratification of the Declaration of Independence, establishing the thirteen colonies as "united" states, it became apparent that a central government was necessary to carry on the day to day affairs of the states. As a result, the Articles of Confederation were written during the early part of the American Revolution and approved in 1781. Deliberately kept weak by the authors, the national government left much of the power to the states. For example, some states adopted laws that hampered trade by discriminating against goods and services from other states. To retaliate, these states enacted taxes on commerce which only frustrated trade among the colonies.

By the mid 1780's it was clear that the federal government under the Articles of Confederation had to be reorganized into a more viable form. In May of 1787, delegates from the states met in Philadelphia to revise the Articles of Confederation. However, the delegates soon recognized that simply revising the Articles would not work. They undertook to write a new document, the United States Constitution.

II. Framing the Constitution of the United States[1]

The United States Constitution is the most important document in American governance. It is the cornerstone, the foundation upon which is built the relationship between the citizens and their government. The Constitution defines the rights, privileges and responsibilities of the people and limits government authority over the people. It is a contract between the people and the government. The people are bound by the laws of the government and the government is bound by the provisions and principles of the Constitution.

The Constitution is the source of all federal law. Our government is one of enumerated powers and it can only exercise powers granted to it. Article I of Section 8 grants to Congress the authority to make laws regarding specific subjects. The powers not specifically delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or the people. Other laws may deal with matters not specifically considered in the Constitution, but no law, be it state or federal, can conflict with the Constitution.

Federal law enforcement officers must affirm their personal commitment to this contract between the people and the government. That is why federal officers and agents take a solemn oath to preserve, protect and defend the Constitution of the United States of America. They must know constitutional law not only to protect the rights of one citizen from infringement by another, but also to prevent government from infringing on the rights of the people.

III. Organization of the Federal Government

The authors of the Constitution divided the federal government among three separate but equal branches of government: the Legislative, Executive and Judicial Branches.

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[1] The U.S. Constitution and its amendments are located in the companion book, *Legal Division Reference Book*, in the segment entitled "Additional Resources."

A. The Legislative Branch

The Legislative Branch (Congress) consists of the House of Representatives and the Senate, together forming the United States Congress. Article I lists the specific powers of Congress, some of which include the power to collect taxes, regulate foreign and domestic trade, establish post offices and post roads, and establish federal courts inferior to the United States Supreme Court.

B. The Executive Branch

The Executive Branch (President) is established in Article II of the Constitution. The President enforces the law, but other duties include the ability to enter into treaties with foreign nations, the power to veto acts of Congress, grant pardons for federal crimes, and appoint members of the administration, such as cabinet members and United States Attorneys. The President is also the commander-in-chief of the military.

C. The Judicial Branch

The Judicial Branch (The Court), consisting of the United States Supreme Court and the lower federal courts, interprets laws through its decisions as provided in Article III. The Constitution is unique in that Article III establishes only one court, the Supreme Court. As already mentioned above, all inferior courts are created by act of Congress. The Supreme Court has the power to declare laws unconstitutional and is the final authority on matters of constitutional interpretation.

D. A System of Checks and Balances

In order to ensure that no single branch of government becomes excessively strong, a system of checks and balances creates complex interrelationships between the branches. Each branch exercises a certain degree of control over the other two. There are many examples of this complex arrangement, but the following are a few of the more important ones:

- The Congress can pass laws, but the President may veto them.

- By a 2/3 vote of each house, the Congress can override the President's veto.

- The President appoints Justices to serve on the Supreme Court, but the Senate must approve them. Once confirmed, the Justices serve for life or good behavior.

- The President can be impeached and tried by the Senate, as can all federal judges, including Justices of the Supreme Court.

- The Congress can establish Federal Courts inferior to the Supreme Court and, with certain limitations, can regulate the appellate jurisdiction of the Supreme Court.

- Only Congress can appropriate the funds necessary to run the government.

- Congress can pass laws and even appropriate the money to run the government, but the President can choose not to implement and enforce the laws.

- The Supreme Court can declare laws passed by Congress and signed by the President to be unconstitutional. There is no specific authority in the Constitution for this power. In *Marbury v. Madison*, the Supreme Court said that a law that is repugnant to the Constitution is void.

IV. Amendments to the Constitution

The Constitution provides many safeguards through the checks and balances system against an excessively strong and potentially abusive central government. However, many scholars speculate that the Constitution would not have been

ratified but for assurances that one of the first priorities of the new government would be the passage of the first ten Amendments to the Constitution, often referred to as the Bill of Rights. With the exception of the Ninth and Tenth Amendments, the Amendments are specific guarantees of individual liberties to the people. They proscribe government conduct that infringes on the rights of the people. Those Amendments do not deal with private actions.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

A. First Amendment

The First Amendment protects personal belief, opinion, and action. It addresses four basic freedoms that are necessary for a free society functioning within a democratic government. Those rights are freedom of religion, freedom of speech, freedom of the press, and the dual right to assemble peaceably and to petition the government. It has generally been held by the Supreme Court that a balance is required between First Amendment freedoms and the powers of a government to govern effectively. Supreme Court decisions throughout the 20th century balanced First Amendment rights with the requirements of public order, and the Supreme Court has removed certain speech (fighting words, true threats, obscenity) from First Amendment protections.

1. Religion

Two clauses, the establishment clause and the free exercise clause, protect freedom of religion. The establishment clause prohibits the establishment of a national religion or the preference of one religion over another. The clause was

intended to erect a wall of separation between church and state. Laws enacted by the government must have a secular purpose; that is, the action must have a primary effect that neither advances nor inhibits religion.

The free exercise clause, prevents the government from interfering with religious beliefs. However, religious practices may be limited and must be balanced against broader social values. A law with a legitimate secular purpose (not targeted at religion) may incidentally affect religious practices without violating the First Amendment. For example, criminal statutes proscribing possession of controlled substances are not aimed at religion, but they may incidentally affect some Native American religious practices because they prohibit the use and possession of peyote.

2. Speech

The people have a First Amendment right to express their thoughts and ideas. Expression, even that which is offensive, is protected against government interference under the First Amendment unless the government can prove that it falls within an unprotected category. Some of those unprotected categories of speech follow:

(a) Speech constituting a clear and present danger

Knowingly conveying false information about an impending peril, such as yelling "fire!" in a crowded theatre or yelling "bomb!" on an airplane, creates a likelihood of danger to people. The most stringent protection of speech would not protect words causing a panic. (A more complete discussion is at paragraph VIII F. 4)

(b) Advocating imminent lawless action

Historically, the people have not only criticized the United States, but advocated its laws be ignored and government overthrown. Sometimes called political speech, advocacy of this

nature in public forums is protected under the First Amendment, unless it is directed to incite or produce imminent lawless action and is likely to incite or produce such action. (A more complete discussion is at paragraph VIII F.3)

(c) Fighting words

Fighting words are words that tend to incite an immediate breach of the peace. More than profanity, they are an invitation to fight. Uttering fighting words to another person can be a crime. Profane words alone, unaccompanied by any evidence of violent arousal, are not fighting words, and, therefore, are protected speech.

The fighting words doctrine is at its narrowest, if it exists at all, with respect to speech directed at public officials like police officers. Police officers are expected to exercise a higher degree of restraint than the average citizen. Moreover, Americans have a constitutional right to criticize their government and government officials. In *Lewis v. City of New Orleans*, the Supreme Court found unconstitutional a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while engaged in the performance of duty." Freedom to verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. In essence, "contempt of cop" is not a crime. (A more complete discussion is at paragraph VIII F.1)

(d) Obscenity

The Supreme Court defined obscenity in *Miller v. California* as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interests." "Prurient" means material having a tendency to excite lustful thoughts, below normal or healthy sexual desires. It is grossly

offensive to modesty, decency, or propriety. It shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. It must violate community standards. For example, the First Amendment does not protect possession of child pornography. Child pornography is depictions of "actual children" under the age of 18 engaged in sexually explicit acts. *Ashcroft v. Free Speech Coalition.*

(e) Fraudulent misrepresentation

Fraud, perjury, libel, and slander are not protected under the First Amendment. A fraud is a misrepresentation of a material fact and is intended to cheat people out of their property. Libel and slander are false and malicious statements about another. Perjury is lying under oath.

(f) True threats

A true threat is a crime. The defendant must intentionally and knowingly communicate a threat; that is, a clear or present determination or intent to injure someone presently or in the future. Secondly, the speaker must make the threat under circumstances that would cause a reasonable person to believe that he is serious about executing the threat. A more complete discussion is at paragraph VIII F.2.

3. Peaceful Assembly

The people may attempt to assemble and exercise their First Amendment freedoms on private property, non-public forums, and public forums. The right of the people to assemble in these areas is described below.

A speaker does not have a First Amendment right to express his views on another person's private property. A grocery store owner, for example, can stop an anti-war activist's speech in his store, and if the activist refuses to leave, sue or seek to prosecute for trespassing.

Non-public forums are under government control; but, are not open for public expression. Military bases are non-

public forums. The Federal Law Enforcement Training Center is another. The government can prohibit demonstrations on FLETC for security reasons and to reduce student distractions.

Public forums are where the people have traditionally exercised First Amendment freedoms. Public forums include public streets, sidewalks, and parks. The U.S. Park Service has jurisdiction over one of the nation's most-frequented public forums - the National Mall.

The people, however, do not have unfettered access to public forums. Demonstrators cannot march down a public street anytime they wish. The government can require demonstrators to get a permit. Permits may restrict the time, place, and manner of expression. Time, place, and manner restrictions have the incidental by-product of interfering with the speaker's message; however, they will be upheld if they serve a significant government purpose and are not intended to restrict the speaker's message. (A more complete discussion is at paragraph VIII D.2.)

FOURTH AMENDMENT

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

B. Fourth Amendment

The Fourth Amendment prohibits unreasonable government searches and seizures. These rights are covered in more detail in a following chapter; however, some general principles are described below.

The Fourth Amendment protects "the people," meaning those having a substantial connection to the United States. People inside the United States, its territories, or possessions

have such a connection, whether they are U.S. citizens or not. U.S. citizens receive Fourth Amendment protections, whether in the United States or abroad. Still, not everyone is protected. For example, the Fourth Amendment does not apply when a DEA agent searches a foreign national's property in a foreign country.

A "search" under the Fourth Amendment is defined as a government intrusion into a place where the people have a reasonable expectation of privacy (e.g., a house). The Fourth Amendment does not regulate searches by private citizens. To be reasonable under the Fourth Amendment, government agents are normally required to get a warrant supported by probable cause.

FIFTH AMENDMENT

No person shall be held for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

C. Fifth Amendment

Many concepts covered under the Fifth Amendment will be addressed in later legal courses, but several terms deserve explanation.

1. Double Jeopardy

Double jeopardy means to be tried twice, by the same sovereign, for the same offense. The Constitution prohibits prosecutors from repeated prosecutions until a conviction is ultimately obtained. Thus, once the accused is acquitted, the same sovereign cannot retry the defendant for the same crime,

even if he confesses to his guilt or new evidence is found. The following situations, however, are NOT double jeopardy:

(a) Dual Sovereignty

One who commits a single act, which violates the laws of two sovereigns, can be tried by both. For example, someone who robs a federally insured bank in Brunswick, Georgia, can be prosecuted by the state and, regardless of the state court verdict, can be prosecuted again for the same acts in federal district court.

(b) Mistrial

A mistrial is a serious procedural error that stops the trial. If at any time prior to the verdict, a judge declares a mistrial, the trial becomes void and does not prevent the accused from being tried again. A mistrial might be declared in any case in which the judge feels the ends of justice cannot be served.

(c) *Nolle prosequi* (*nol pros*)

Nolle prosequi is a formal entry upon the record by the prosecutor by which he or she declares that the government will not further prosecute the case, either as to some of the counts, or some of the defendants, or both. A *nol pros* does not bar prosecution at a later time, as long as the *nol pros* is made before the swearing of the jury in a jury trial or before the swearing of the first witness in a bench trial.

(d) Remand of the case

A remand is when an appellate court sends a case back to the trial court due to an error committed in the original trial.

2. Self-Incrimination

The self-incrimination clause of the Fifth Amendment is covered in depth in a following chapter, but some general observations are appropriate. While the Fourth Amendment concerns government searches for physical evidence, the Fifth Amendment's self-incrimination (SI) clause focuses on government interrogations seeking communicative evidence. Government interrogation means words or actions likely to elicit an incriminating response (e.g., "Did you do it?"). Communicative or testimonial evidence from the suspect can be verbal (e.g., "Yes I did"), written, or non-verbal (nodding); in any case, however, it requires the accused to use a thought process about the crime. Booking information, finger prints and physical evidence do not require a thought process and therefore, do not present a Fifth Amendment (SI) issue.

3. Grand Jury Indictment

All "infamous" crimes must be prosecuted by grand jury indictment. "Infamous" means felony offenses.

4. Due Process of Law

No person may be denied life, liberty or property without due process of law. Due Process is a body of rules and procedures incorporated into our judicial system. Due Process directly impacts several important law enforcement practices such as show-ups, line-ups, and photo arrays.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

D. Sixth Amendment

Many of the federal criminal procedural rules have their origins in the Sixth Amendment. It is the basis for several important rights:

1. Speedy Trial

The Sixth Amendment affords an accused the right to speedy trial . As a result of the Speedy Trial Act of 1974, 18 U.S.C. § 3161, all persons charged with a federal crime must be brought to trial within specified timeframes.

2. Confrontation of Witnesses

The Sixth Amendment affords the accused the right to confront the witnesses against him. This right provides the accused with the most effective way of challenging the accuracy of testimony, and it is the only fair way to permit a jury to decide what weight it will give the testimony.

3. Compulsory Process

The Sixth provides the defendant with the power to subpoena witnesses in his behalf, thus balancing the prosecution's power to subpoena witnesses against the accused.

4. Assistance of Counsel

The defendant has a Sixth Amendment right to assistance of counsel regarding the offenses with which he is charged.

5. Informed of the Nature and Cause of Charges

This right forms the basis for the Initial Appearance. It is typically at the Initial Appearance when the Criminal Complaint and Search Warrant are returned, that the accused is first formally told of the charges and informed of other constitutional rights.

6. Venue

Jurisdiction is the power and authority of a court to deal with a person or particular subject matter. Original jurisdiction for the prosecution of federal crimes rests with the Federal District Court. Venue deals with the actual location of the trial. Absent extraordinary circumstances, venue is proper (the trial will take place) in the State and district where the crime was committed.

EIGHTH AMENDMENT

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

E. Eighth Amendment

The purpose of bail is not to punish, but rather to allow the pretrial release from custody of a person who is presumed innocent until proven otherwise. At the same time, bail provides the government with a reasonable assurance that the defendant will, in fact, appear at the next stage in the judicial proceedings. What is considered to be "excessive" is difficult to determine, but generally the bail should be the absolute minimum that will reasonably assure the appearance of the accused (see 18 U.S.C. § 3141 et seq.).

F. Fourteenth Amendment

The Bill of Rights limits the power of the federal government. Following the Civil War, Congress enacted the Fourteenth Amendment, which selectively incorporates the fundamental rights in the Bill of Rights and makes them applicable to the states. Today, if a federal law enforcement officer conducts an unreasonable search and seizure, that officer violates the Fourth Amendment. If a state law enforcement officer does so, he violates the Fourth Amendment as made applicable to the states through the Fourteenth Amendment.

V. Criminal Justice Components from the Constitution

Various components of the criminal justice system may be traced directly to the Constitution and its amendments. For instance, the right to a trial by jury is found in Article III, Section 2.

The amendments incorporate many additional components of the criminal justice system. The Fourth Amendment protects people from unreasonable searches and seizure of their persons and properties. The Fifth Amendment includes the rights to be free from compelled self-incriminating testimony, to generally have felony cases presented to juries for indictments, to be free of double jeopardy and to enjoy the fundamental fairness of due process. The Sixth Amendment guarantees the defendant rights at trial. For instance, the accused is assured of a "speedy and public trial," and impartial jury, the venue for a trial, the right to be informed of the charges, to confront witnesses, to subpoena witnesses and to have the assistance of counsel. The Eighth Amendment protects the defendant from excessive bails or cruel and unusual punishment.

VI. Controlling Speech under the First Amendment

[This section is intended for LMPT students.]

A. Generally

The people have a First Amendment right to express their thoughts and ideas in public forums. Expression can be offensive, even "anti-American;" nonetheless, expression is protected unless the government can prove it falls within one of the unprotected categories in paragraphs E and F, below. Rights of expression are greatest in public forums as these are the places where the people have traditionally exercised their First Amendment rights.

B. Government Action

The First Amendment provides that "Congress shall make no law … abridging the freedom speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." Literally, the First Amendment restricts Congress; in practice, it protects the people from any branch of government, state or federal.

Following the Civil War, Congress enacted the Fourteenth Amendment, which selectively incorporates the fundamental rights in the Bill of Rights and makes them applicable to the states. Today, if a federal law enforcement officer unduly restricts expression, that agent violates the First Amendment. If a state law enforcement officer does so, he violates the First Amendment as made applicable to the states through the Fourteenth Amendment. Private action, however, never triggers First Amendment protections or any other constitutional protection, for that matter, no matter how unreasonable it might be.

C. Expression

The First Amendment rights of freedom of speech or of the press; or the right of the people peaceably to assemble are

often grouped together and called freedom of expression. The First Amendment protects the people from unreasonable government restrictions expressing their thoughts and ideas.

The people have expressed themselves through the written word, the spoken word, symbols, and conduct. The Federalist Papers, for example, were a series of articles written by Alexander Hamilton, James Madison, and John Jay to gain support for the Constitution. Dr. Martin Luther King's "I Have a Dream" speech was a catalyst behind the Civil Rights Act of 1964. Symbols and conduct also receive First Amendment protection when there is intent to convey a particular message and the likelihood is great that the message will be understood by those who view it.

From a law enforcement perspective, the point to remember is this: the First Amendment protects both ideas. It is not the government's place to control ideas because they are wrong, offensive, or anti-American. In essence, the Constitution gives the people the right to express their ideas, and the responsibility to pick the best one. Those ideas are protected unless shown likely to produce a clear and present danger of serious substantive evil that rises far above just offending someone. Some examples of protected expression follow:

- Expressing disapproval (through the spoken word) of Canada's decision not to support Operation Iraqi Freedom by shouting, "F--- Canada" as the Canadian flag passed in a parade.

- Expressing disapproval (through the written word) of the Vietnam War by sewing the words, "F--- the Draft" on the back of a jacket.

- Expressing disapproval of American policy (through speech and conduct) by dousing an American flag with kerosene, setting it on fire, and chanting, "America, the red, white, and blue, we spit on you."

- Wearing and displaying symbols of racial superiority, like the Nazi uniform and Swastika.

D. Government Restrictions

Historically, the government has attempted to restrict expression for two reasons.

1. Content-Based Restrictions

First, the government may not like a speaker's message or may fear that the idea will offend the listener and try to restrict it. These are "content-based" restrictions. They are intended to control the communicative impact of the message on the listener. Content-based restrictions are subject to strict scrutiny by the courts and almost invariably struck down.

"When the Nazis Came to Skokie – Freedom for Speech We Hate" by Philippa Strum provides an excellent example of government, content- based restrictions on speech. In the late 1970's, the Chicago suburb of Skokie was predominately Jewish. One out of every six Jewish citizens was a survivor or directly related to a survivor of the Holocaust. When a neo-Nazi group announced its intention to demonstrate there in 1977, the city enacted ordinances prohibiting "public display of markings and clothing of symbolic significance." In effect, the ordinances prohibited the Nazis from wearing their brown-shirt uniforms and flying the Swastika. These government restrictions were intended to protect Jewish citizens from the communicative impact (shock affect) of the Nazis' message. As such, they restricted ideas and were struck down by the courts. Ironically, a Jewish attorney working for the American Civil Liberties Union won the case for the Nazis.

Finding government action content-based is normally its death blow. In strictly scrutinizing such action, the court will require the government to prove that restricting the idea not only serves a compelling state interest, but is also narrowly drawn to achieve that end. Of course, averting violent clashes between two competing crowds (the Nazis and the Jews) is a compelling state interest. That, however, is not enough. The government must also show that the state interest is not achievable through some alternative other than restricting the

message. For example, if the police can control the crowd to avert violence, the restriction is not narrowly drawn, and the court tosses it into the unconstitutional scrap heap. More often the government is unable to prove to the court why the police cannot control the crowd.

The following are examples of unconstitutional, content-based government restrictions intended to control the communicative impact on the listener.

- A Texas statute that prohibited the desecration of a state or national flag in a way which seriously offends one or more persons likely to observe that act.

- Reducing a Ku Klux Klan march in Washington D.C. from 14 blocks to 4 based on the crowds potentially violent reaction to the Klan's message.

2. Content-Neutral Restrictions in Public Forums

The second reason the government may restrict expression has nothing to do with the speaker's message. Content-neutral restrictions seek to avoid some evil unconnected to the message. Because they are not aimed at controlling ideas, content-neutral restrictions receive less scrutiny and are much more likely to pass constitutional muster.

Content-neutral restrictions allow the government to control expression in public forums. There are three potential forums or places for expression – private property, non-public forums, and public forums. A speaker does not have a First Amendment right to express his views on another's private property. A grocery store owner, for example, can stop an anti-war activist's speech in his store. If the activist refuses to leave, the owner can sue or seek to prosecute for trespassing.

Non-public forums are under government control; but, are not open for public expression. Military bases are non-public forums. The Federal Law Enforcement Training Center (FLETC) is another. The government can prohibit demonstrations on FLETC for security reasons and to reduce student distractions.

Public forums are where the people have traditionally exercised First Amendment freedoms. They include public streets, sidewalks, and parks. The U.S. Park Service has jurisdiction over one of the nation's most-frequented public forums, the National Mall.

Nonetheless, people do not have unfettered access to public forums. Demonstrators cannot march down a public street anytime they wish. The government can require demonstrators to get a permit. Permits may restrict the time, place, and manner of expression. Time, place, and manner restrictions may have the incidental by-product of interfering with the speaker's message; however, they will be upheld if they serve a significant government purpose, are enforced in a content-neutral manner, and do not allow government agents to use their own discretion about when to issue a permit. Federal law enforcement officers must strictly adhere to the guidelines in the permitting process. Some examples follow:

- The U.S. Park Service may require an organization to obtain a permit that restricts the time of its demonstration in order to prevent one demonstration from interfering with another.

- The Park Service's permitting process may restrict where the demonstration takes place in order to prevent demonstrations from blocking traffic.

- The permit may require sound amplification devices (bull horns) to remain under a certain amplification level in order to prevent the demonstration from unduly disturbing other people using the park.

E. Unprotected Conduct

Conduct receives less First Amendment protection than other types of expression for a couple of reasons. First, the Supreme Court rejects the view that all conduct can be labeled First Amendment expression simply because the person engaging in it intends to express an idea. The Constitution protects the exposition of thoughts and ideas; violence and destruction of another's property is not protected expression. Moreover, in criminalizing such behavior, the government's intent is to stop destructive behavior, not ideas. Examples of unprotected conduct follow:

- A defendant may be charged with 18 U.S.C. § 111, assaulting a U.S. Marine on account of his service in Iraq. The statute is content-neutral because it's intended to protect federal employees, not thoughts and ideas about the war.

- A defendant may be charged with burning an American flag in violation of an ordinance prohibiting outdoor fires. The ordinance is intended to stop forest fires, not demonstrators from dishonoring the flag.

- A state criminal statute may prohibit cross burning in a public place if done with the intent to intimidate any person or group of persons. The statute distinguishes protective, albeit offensive expression (symbols identifying the Ku Klux Klan), from criminal conduct (intentional intimidation).

F. Unprotected Speech

While other forms of expression (speech, words, symbols, and pictures) receive higher protection than conduct, they, too, may fall outside the constitutional umbrella. The Supreme Court has identified categories of unprotected speech that the government can prohibit. Those categories are defined based on the subject matter of the speech and are exceptions to the

rule that the government may not regulate the message of the speaker.

1. Fighting Words

Fighting words are personally abusive epithets which, when addressed to the ordinary citizen, are reasonably likely to provoke a violent reaction. More than profanity, they are an invitation to fight. Profane words, alone, unaccompanied by any evidence of violent arousal, are not fighting words and are, therefore, protected.

Fighting words are often proscribed under disorderly conduct statutes. For instance, 36 C.F.R. 2.34 prohibits speech that is intentionally threatening or menacing. For example:

- Sheriff Deputies had probable cause to arrest the defendant for fighting words. From a short distance, the defendant faced the victims, repeatedly yelled "f--- you," called one victim a "fat son-of-a b----," and made clucking sounds like a chicken, as if one of the victims was afraid to fight. The court also considered that the night before, the defendant had brandished a knife toward the victims, which increased the chance for violence. That the victims exercised restraint did not change the result. A reasonable onlooker could believe that the defendant's actions were a direct personal insult and an invitation to fight.

- However, a Nazi demonstrator is not using fighting words when he says to a crowd, "The Holocaust is a big lie, made up by the f ---ing Jews." Standing alone, these words are not an invitation to fight.

The fighting words doctrine is at its narrowest, if it exists at all, with respect to by speech directed at public officials like police officers. Police officers are expected to exercise a higher degree of restraint than the average citizen. Moreover, Americans have a constitutional right to criticize their

government and government officials. In *Lewis v. City of New Orleans*, the Supreme Court found unconstitutional a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while engaged in the performance of duty." Freedom to verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. In essence, "contempt of cop" is not a crime. For example:

- A woman telling a police officer, "You G—d--- mother f---ing police. I'm going to the Superintendent of Police about this" is protected expression.

- An Arkansas state trooper was denied qualified immunity for a constitutional tort after arresting the plaintiff for "flipping him off."

- But, distinguish mere criticism of police action (contempt of cop) from actual interference with law enforcement activities. A U.S. Park Service ranger was in the process of making an arrest, when the defendant (an onlooker) yelled statements of police brutality, "f--- this, f--- that, and this is f---ked." The ranger told the defendant to back up. Instead, the defendant clenched his fists, stuck out his chest, stepped forward, and yelled "f--- you." The court was not concerned with the defendant's verbal criticism, but sustained a conviction for violating 36 C.F.R. 2.329(a)(2) – violating the lawful order of a government agent during law enforcement actions.

2. True Threats

While the people may criticize, they may not threaten. Federal statutes that proscribe true threats are:

- Title 18 U.S.C. § 115 states in part that "Whoever - …threatens to assault … a Federal law enforcement officer (or a member of her immediate family) with intent to … interfere with such official … while engaged in the performance of official duties, or with intent to retaliate against such official…. It also prohibits a similar threat "on account of" the officer's past service.

- Title 18 U.S.C. § 844, regarding fire or explosives, states in part that "Whoever, through the use of the mail … or other instrument of interstate … commerce, willfully makes any threat … concerning an attempt to kill, injure, or intimidate any individual or to unlawfully damage or destroy any building….

- Title 18 U.S.C. § 876(c), states in part that "Whoever knowingly … deposits or causes to be delivered (through the use of the mail), any threat to injure the person of the addressee or of another….

True threats have common characteristics. They express a present determination or intent to hurt someone, now or in the future. "I *will* kill you" shows a present determination. Conditional threats, however, are not punishable when the condition negates the threat (e.g., "I would kill you if I were younger."). On the other hand, conditions that are likely to become true may amount to true threats. For example, "I will kill you when I get out of jail." Finally, the speaker's words may amount to a true threat if he announces a condition he cannot lawfully make, e.g., "If you say anything, I'll make sure you spend time in the hospital."

The crux of a true threat is this: would a reasonable person hearing the words believe the defendant was serious about carrying out the threat? Whether the defendant was serious, in fact, is not an element. However, an utterance in jest or conditioned on a variable that cannot occur (being

younger) is not a threat. Moreover, the defendant need not communicate the threat to the intended victim. Communicating the threat to a third party is sufficient. Finally, the defendant does not have to spell out how he will hurt the victim. A reasonable person may believe that "I will make sure you spend time in the hospital" is a true threat. The following might be true threats under 18 U.S.C. § 115 if made under circumstances that would lead a reasonable person to believe the speaker was serious:

- The speaker tells a U.S. Park ranger during the execution of an arrest, "I'm going to kick your a--." However, "I would kick your ass if I were sober" is not a true threat.

- The speaker sees a U.S. Park ranger at the mall and says, "You're the stupid b---- that arrested me two years ago. I'm going to kick your a--."

- Defendant sees a U.S. Park ranger's husband at the mall and says, "Your wife arrested me two years ago. I'm going to kick your a--."

- The speaker sees a U.S. Park ranger's husband at the mall and says, "Your wife arrested me two years ago. Neither of you will live to see Christmas."

3. Advocating Imminent Lawless Action

Historically, people have not only criticized their country, but advocated that laws be ignored and the government overthrown. Government restrictions on speech that advocates lawlessness is tightly circumscribed when the advocacy occurs in public. Advocating lawlessness in public is punishable when two conditions are satisfied. First, the advocacy must be directed to inciting or producing *imminent* lawless action. Consequently, advocating lawlessness at some future time is protected. Secondly, the advocacy must be likely to incite or produce lawlessness. So even if the speaker advocates immediate lawlessness, the crowd must still be receptive to the idea. *Brandenburg v. Ohio*. Some examples follow:

- Advocating imminent lawlessness: During a public demonstration, a speaker yells at a crowd, "If you're a Muslim, then you're responsible for 9/11." At this, the non-Muslim crowd cheers in approval. The speaker continues, "See that store over there" pointing to a grocery store. "That's owned by Muslims. Let's give them a taste of their own medicine and bust out their windows." At this the crowd cheers louder and even begins to pick up rocks as if they might throw them at the store windows.

- Advocacy based on a contingency that does not incite *imminent* lawlessness: During a demonstration, a speaker yells, "The war in Iraq violates international law. Unless U.S. troops are pulled out of Iraq, we are going to come back and give President Bush a taste of what war is like and torch government buildings." The crowd cheers in agreement.

- Advocacy that is *not likely* to incite lawlessness: During a demonstration about the war in Iraq, a demonstrator yells, "There's no way you're going to make me go to Iraq. If they try to send me, the first guy I'll shoot will be George Bush." The crowd laughs.

Advocating lawlessness is sometimes called political speech. Although advocating lawlessness in public speech is generally protected; privately directing or soliciting the commission of a crime is not.

4. Creating a clear and present danger

Comments that place the public in fear of an impending peril are punishable. For example, telephoning security personnel at a federal building and saying, "There's a bomb in the building." Or, joking with a flight attendant on an airline and saying, "I've got a bomb." The bomb threat is punishable

under 18 U.S.C. § 844, above. The joke (false information) about the bomb on the airplane is punishable under 18 U.S.C. § 32.

5. Obscenity

The Supreme Court defined obscenity this way: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." "Prurient" means material having a tendency to excite lustful thoughts, below normal or healthy sexual desires. Obscenity is grossly offensive to modesty, decency, or propriety. It shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. It must violate community standards. Child pornography violates community standards of decency, so long as it depicts actual children under the age of 18 engaged in sexually explicit acts. *Ashcroft v. Free Speech Coalition*. Several federal statutes proscribe obscenity. 18 U.S.C. § 2252A proscribes possession of child pornography that has been transported in interstate commerce. 18 U.S.C. § 1460 prohibits possession with intent to sell or the sale of any obscene material on federal property.

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I. Introduction

Evidence is the backbone of every criminal prosecution. Unless evidence is properly collected, preserved, and presented, the evidence will not be admissible in court, and the jury cannot consider it no matter how important or powerful it may be. To ensure that evidence is collected and preserved in a way that it can be admitted, you must have a general appreciation of some fundamentals of the Federal Rules of Evidence.[1]

The jury decides what to do with the evidence that is admitted at trial and how much weight to give it. The jury may consider the evidence as powerful proof or they might disregard it altogether. Collecting evidence in a way that complies with the Federal Rules of Evidence not only ensures that the judge will admit it complying with the rules also makes the evidence more convincing to juries.

The law enforcement community uses the word "evidence" in many ways. For purposes of this Chapter, evidence refers to anything that either side - the prosecution or the defense - offers in court to prove or disprove something.

A. Forms of Evidence

Evidence comes in several forms:

- **Testimonial.** A witness takes the stand, is placed under oath, and answers questions.

- **Real.** Real evidence is physical - it is something you can actually touch or see. Items that are found, collected, seized or otherwise obtained become exhibits and can be offered into evidence. Guns, drugs, or documents are common forms of real evidence. Real evidence will be given an exhibit number when offered into evidence (Prosecution Exhibit _____; Defense Exhibit_____).

[1] All cited Federal Rules of Evidence can be found in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Rules of Evidence."

- **Demonstrative**. Demonstrative evidence consists of items that demonstrate or illustrate something to the jury such as models, charts, and graphic aids.

B. Admissibility

The judge decides the admissibility of the evidence. When evidence is offered, the opposing party may object. If the objection is overruled, the evidence is received and the jury may consider it in deciding the verdict. If the objection is sustained, the evidence is not admitted and the jury may not consider it. The judge applies the Federal Rules of Evidence (FRE) in deciding whether to admit evidence.

C. Applicability of the Federal Rules of Evidence

The FRE apply only to trials, and with the exception of privileges, they do not apply at initial appearances, detention and identity hearings, preliminary hearings, arraignments, Grand Jury hearings, sentencing proceedings, or appeals.

The FRE also do not limit what information officers may consider when investigating a case. For example, officers may consider hearsay information when conducting an investigation or deciding whether there is reasonable suspicion or probable cause.

II. The Procedural Stages of a Criminal Trial

A. Suppression Hearings (Motion Hearings)

If there is evidence one side does not want the jury to hear or see, they will file a motion to suppress or exclude the evidence. Most often, it is the defense that files suppression motions and usually because they claim that evidence was unlawfully seized or a confession improperly obtained. Law enforcement officers frequently testify at suppression hearings. The jury is not present and the judge will decide whether the evidence will be admitted and go to the jury.

If the judge grants a motion to suppress, the jury will not know about the evidence. If the judge denies a motion to suppress, the evidence may be presented to the jury.

B. *Voir Dire*

During *voir dire* the lawyers question the potential jurors and the jury is selected.

C. Opening Statements by Counsel

At this stage lawyers tell the jury what they expect the evidence will show. The defense may reserve their opening statement until after conclusion of the prosecution's case. These statements by counsel are not evidence.

D. The Case-in-Chief

The prosecution's "case-in-chief" is also known as the case on "the merits." The government presents its evidence by calling witnesses and offering exhibits. The defense may cross-examine any witness that is called and may challenge the admissibility of exhibits. If the witness is cross-examined, the prosecution may conduct a "re-direct" examination. There can be further re-cross and re-direct. The prosecution always goes first because the burden is on the government to prove the defendant's guilt beyond a reasonable doubt.

E. The Defense Case

The defense is **never** required to present evidence because the burden is, and always remains, on the government to prove the defendant's guilt. Just as in the prosecution's case, any defense witnesses presented can be cross-examined, defense exhibits can be objected to, and there can be re-direct questioning of witnesses.

F. The Rebuttal Case

If the defense presents a case, the prosecution may offer rebuttal evidence. In the rebuttal case, the prosecution may

only present evidence that rebuts or challenges the evidence that the defense presented. If the prosecution presents a rebuttal case, the defense may then rebut what the prosecution just presented. The rebuttal cases continue until all rebuttal evidence has been presented.

G. Closing Argument

During closing arguments, the lawyers tell the jury what they think the evidence showed. The lawyers may argue only that which was admitted into evidence. Argument by counsel is not evidence.

H. The Charge to the Jury

During "the charge" (instructions) to the jury, the judge will tell the jury what the law is so the jury may apply the law to the facts in reaching the verdict. After deliberation the jury will announce the verdict.

I. Sentencing

If the defendant is found guilty of any offense the judge will conduct a sentencing hearing. This does not involve the jury except in capital (death penalty) cases in which the jury will be asked to make certain findings.

J. Post-Trial Proceedings

There are many different appeal procedures that the defendant may attempt to use.

III. Relevant Evidence

A. The Requirement for Evidence to be Relevant

Evidence must be relevant to be admissible. Evidence is relevant if it has any tendency to prove or disprove a fact that is in issue in the trial.

Evidence which tends to: (a) prove (or disprove) an element of the crime charged, (b) prove or rebut a defense, or (c) concerns the credibility (believability) of a witness is always relevant. Evidence does not always have to be the smoking gun. If evidence has any tendency to prove a part of the case - directly or indirectly - the evidence is relevant. Law enforcement officers must find and collect all evidence because what might not appear relevant at first may become relevant later.

B. Other Crimes, Wrongs, and Acts of the Defendant (Uncharged Misconduct)

The government is required to prove the elements of the offenses with which the defendant is charged. Evidence of crimes or other acts that are not charged or relevant to prove a charged offense are inadmissible.

Specifically, the prosecution cannot offer evidence of the defendant's uncharged misconduct to prove he "did it before, so he must have done it again" or that the defendant is a "bad person." This is "propensity evidence" and is not admissible. The prosecution, however, may offer other acts of the defendant - to include bad or criminal acts - if those acts help prove the charged crime, impeach a witness, or contradict a witness' testimony.

Examples:

- **Motive.** Does a prior act tend to prove the defendant's motive to commit the charged crime? A prior altercation between the defendant and the victim is admissible to prove motive for a later assault. In a bank fraud case, evidence that the defendant had outstanding debts is admissible to prove the motive for using a false name on a bank loan.

- **Intent.** Does a prior act tend to prove whether the defendant had a specific intent to commit the

charged offense? One case held that a prior conviction for distributing drugs was admissible to prove intent in a charge for conspiracy to distribute drugs.

- **Knowledge.** Do the defendant's acts tend to prove the defendant knew a certain fact? Evidence of a large number of firearms found in the defendant's house would be admissible to prove the defendant knew he had firearms in his home, even if he was only charged with possessing one firearm in connection with drug trafficking.

- **Plan or preparation.** Do the defendant's acts tend to prove how the defendant planned or prepared for the charged crime? In a trial for carnal knowledge (sex with a minor), evidence that the defendant gave marijuana to the victim before having sex is admissible to show the defendant's plan to lower the victim's resistance.

- **Opportunity to commit the crime.** The prosecution was permitted to show a photo of the defendant holding a "large gun," taken before the charged crimes, to show defendant had access to guns.

- ***Modus Operandi.*** If the defendant has a particular way of committing an offense, evidence of prior offenses may be admitted to prove the defendant committed the offense being tried.

- **Identity of the perpetrator.** Evidence that on a prior occasion the defendant, under "signature-like" circumstances, committed an offense, may be admissible to prove that the defendant was the person who committed the charged offense.

- **Impeachment by contradiction.** If the defendant makes a factual claim while testifying, that fact can be contradicted. The contradiction might include evidence the defendant engaged in prior crimes or misconduct if a defendant denies such past wrongdoing. Another example would be if the defendant claims she was never at a particular location, the prosecution could rebut that testimony with a prior conviction for an offense that occurred at that very location.

- **Predisposition to defeat entrapment.** If a defendant raises an entrapment defense, prior criminal acts are admissible to prove that the defendant was predisposed to commit the crime.

IV. Direct and Circumstantial Evidence

Direct evidence tends to prove a fact directly and without the need to draw an inference or a conclusion. Direct evidence most often comes from what a witness sees, hears, smells, tastes, or touches. In contrast, circumstantial evidence (also known as "indirect evidence") tends to prove a fact indirectly through an inference, deduction, or a conclusion. For example, testimony that "The street was wet when I got up in the morning" would be circumstantial evidence that it had rained during the night.

Sometimes you hear, "That's just circumstantial evidence" or "The case was entirely circumstantial." Circumstantial evidence can be very powerful, and sometimes is even more reliable and convincing than eyewitness testimony. Most physical evidence is circumstantial because it proves something indirectly. For example, a ballistics test that proves a certain gun fired a certain bullet is circumstantial evidence that the defendant (who was found in possession of the gun) killed the victim. There is no rule that one type of evidence is more powerful than another. The weight of different types of evidence always depends on the case and the other evidence.

V. Lay (And Expert) Witness Testimony

(Not all programs are responsible for the material in this section. Check your course syllabus.)

Generally, a witness may only testify from personal knowledge. Witnesses may offer their opinion only if they are an expert or if the matter is the proper subject of a "lay witness opinion."

Criminal trials often involve expert witness testimony due to advances in forensic evidence such as fingerprint identification, DNA, ballistics, toxicology, blood splatter (or spatter), fiber comparison, tool and die marks, questioned documents and similar disciplines. To testify about a scientific or technical matter or other area of specialized knowledge, the witness must be qualified by their knowledge, skill, expertise, training, or education. (FRE 702). Recent Supreme Court cases have emphasized that the Confrontation Clause demands in-court testimony of the experts who perform forensic analysis to determine, for example, the identity of controlled substances. See the Confrontation Clause discussion below in the Hearsay section.

Most law enforcement officers (LEOs) are not qualified to testify as an expert in forensic areas if they have only generalized police training. For example, while most LEOs have had training in collecting latent prints and fingerprint identification basics, they have insufficient qualifications to testify in court about a fingerprint comparison. LEOs who have had specialized training, education, knowledge or experience can be qualified as experts.

A person who is not an expert witness is called a lay witness. A lay witness may give an opinion only when: (a) the opinion is rationally based on the witness' perception and personal knowledge, (b) the opinion is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) the opinion is not one that is based on

scientific, technical, or other specialized knowledge. In sum, a lay witness may offer an opinion about matters that are within the perception of an ordinary person that results, as one court said, "from a process of reasoning familiar in everyday life." Some examples of a proper lay witness opinion are:

A. Handwriting

Identification of handwriting if the witness has sufficient familiarity with that handwriting. A secretary or co-worker, for example, might be sufficiently familiar with someone's handwriting to say, "That's it."

B. Voice

Identification of a person's voice (whether hearing it first hand or from a recording) provided the witness has heard the voice before under circumstances where they knew who the speaker was.

C. Emotional Condition

"She looked nervous." "He was in pain."

D. Not Requiring Scientific or Technical Knowledge

A witness may testify "it looked like blood" because most people know what blood looks like.

VI. Witness Credibility and Impeachment

Witnesses are called "credible" if they are believable. Each side in a trial wants their witnesses to be believed, and the jury (or the judge in a bench trial without a jury) decides whether a witness is credible and can elect to believe all, nothing, or part of what a witness says.

A. Impeachment

Impeachment is an attack on the credibility of a witness. Any witness who testifies can be impeached. The impeachment

evidence can be offered during cross-examination or can be offered through the testimony of another witness.

Examples:

- Impeachment through cross-examination. "Isn't it true that you must wear glasses to see distances?"
- Impeachment by calling another witness. "Mr. Smith, who testified earlier, wears thick glasses, doesn't he?"

If a witness is impeached, the jury may find the witness' testimony less believable. The side that called the witness will then be allowed to "rehabilitate" (to restore) the witness' credibility. For example, if a witness was impeached with questions about wearing glasses, the witness could be rehabilitated with evidence that the prescription was current and the witness was wearing clean glasses in a correct manner.

While impeachment and rehabilitation occur in the courtroom, both require facts to be effective. The prosecutor depends on LEOs to find these facts. In particular, facts and evidence must be collected when they can be used: (1) by the Assistant United States Attorney (AUSA) to impeach defense witnesses; (2) by the defense to impeach government witnesses (so the AUSA can prepare for it); and (3) by the AUSA to rehabilitate government witnesses who are impeached at trial.

B. Factors that Affect Witness Credibility

1. Bias

A biased witness may tend to color or slant testimony. Bias can arise when witnesses are related by blood or marriage to defendants or victims, or when they are members of similar groups (gangs, places of worship, college fraternities). Bias may also exist in other relationships such as fellow LEOs, former prison cellmates, or partners-in-crime.

2. *Motive to Fabricate Testimony*

A witness with a stake in the outcome of the trial or a vendetta against another witness or the other side may have a motive to lie (motive and bias are similar). Motive is illustrated by witnesses who are financially or emotionally dependent on the defendant or witnesses who have a reason to help (or hurt) the defendant. Co-defendants and co-conspirators are easily attacked if they try to shift the blame toward the defendant.

3. *Inability to Observe or Accurately Remember*

A witness' inability to see or hear what happened or an impediment to the ability to remember or recall may be used to impeach. Examples include witnesses who have problems with vision or hearing, who were not in a position to see or hear what occurred, who were under the influence of alcohol or drugs at the time of the event, or who have a mental impairment.

4. *Contradiction*

A common form of impeachment is to challenge the testimony of a witness to show what was said is not true. A witness who says the car was green can be impeached with evidence that the car was in fact red.

5. *Prior Inconsistent Statements*

Perhaps the best possible impeachment is to contradict witnesses with their own words from prior testimony, reports, notes, or statements to others.

6. *Specific Instances of Conduct that Indicate a Witness is Untruthful*

A witness may be cross-examined about his past conduct if it would indicate he is untruthful. The conduct does not have to relate to the case being tried. Examples would include lying in an investigation, forging checks, or engaging in acts of deceit. LEOs who have engaged in such conduct, on or off duty, might have that conduct exposed in court.

7. *Prior Convictions to Show Untruthfulness (FRE 609)*

A prior conviction (NOT an arrest) can be used to impeach any witness (including the defendant) who testifies. The idea behind allowing prior convictions in as evidence is that one who has been convicted may be the type of person who is untruthful. A prior conviction is NOT admissible to show the defendant "did it before so he must have done it again" or that he is a bad person, and therefore committed the charged crime. (This, remember, is propensity evidence which is inadmissible.) Convictions that are less than 10 years old that are either felony convictions for any offense, or misdemeanor convictions for perjury or false statement, may be used to impeach a witness who has testified.[2] The 10 years is measured from the date of conviction or the date of release from confinement, whichever is later. If the conviction is under appeal it may still be used. Convictions that have been reversed or the subject of a pardon may not be used. Generally, a juvenile adjudication may not be used but the AUSA should be informed about any juvenile adjudications.

VII. Privileges

(Not all programs are responsible for the material in this section. Check your course syllabus.)

Privileges are protections given to information shared between people in specific relationships. When a privilege exists, it means that a person cannot be required to provide certain information and can prevent others from doing so. Ordinarily a witness can be required to testify at a grand jury or a trial under threat of being held in contempt. However, if the information is privileged, a person cannot be compelled to give the information no matter how relevant and important it may be. The courts developed the privileges used in federal criminal trials.

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[2] Convictions more than 10 years old are admissible only if the judge determines, "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."
"

Privileges reflect societal concerns that certain information - though relevant and important - will not be revealed in order to promote some other societal good. For example, in order to ensure that criminal defendants will candidly communicate with their defense attorneys, the law makes their communications privileged. Society has decided that it is better to have clients talk to their lawyers than to reveal attorney-client discussions.

A. Holders of a Privilege

The holder of a privilege is the person who can refuse to divulge the privileged information. In some cases, certain persons can exercise the privilege on behalf of the holder such as when attorneys refuse to reveal what clients tell them.

B. Waiver of Privileges

The existence of a privilege means a person cannot be made (or compelled) to provide information, not that the information cannot be used. For example, if a person holds a valid privilege for which there is no exception, and the person is subpoenaed to testify at the grand jury or another proceeding, that person can lawfully refuse to divulge the information without being held in contempt of court. On the other hand, the person can waive the privilege and testify. In addition, if the same information is available through a non-privileged source, the information can be admitted at trial.

Unlike a waiver of *Miranda* rights, there is no special method to have a person waive a privilege. Even if a person holds a privilege, LEOs may still attempt to question the person. If the person answers the question, the privilege is waived. LEOs should presume that the person may attempt to invoke the privilege at a later proceeding. To guard against this possibility, LEOs should obtain independent information that proves or corroborates what the holder of the privilege said.

C. Privileges and the Rules of Evidence

The general rule is that FRE apply only during trials, and not to other proceedings such as the initial appearance, the preliminary hearing, arraignment, grand jury hearings, sentencing proceedings, detention and identity hearings, and appeals. An exception is that privileges apply to all proceedings.

D. The Federal Privileges

Not all federal privileges are discussed in this text but only those that you will commonly encounter. Federal privileges include:

- The 5th Amendment privilege against self-incrimination. This is the subject of the Self-Incrimination chapter and will not be further discussed here.
- The attorney-client privilege.
- The husband-wife privileges.
- The psychotherapist-patient privilege.
- The government-informant privilege.
- The clergy-communicant privilege.

E. Non-Federally Recognized Privileges

Some state courts may recognize other privileges that are not recognized in federal criminal trials such as the (1) doctor-patient (unless the doctor was a psychotherapist); (2) accountant-client; (3) journalist-source[3]; and (4) parent-child.

[3] Some federal courts recognize there may be a qualified (limited) journalist-source privilege.

F. The Attorney-Client Privilege

The privilege covers communications - written or oral - between attorney and client made during professional consultation. It includes communications before payment for services, and the privilege remains even if the attorney-client relationship is severed such as when a client fires the lawyer. The privilege exists to encourage clients charged or under investigation with a crime to speak candidly with their attorney in order to obtain an adequate defense.

Elements of the privilege: (a) the attorney must be acting as an attorney in a professional capacity, (b) the communication must have been intended to be confidential, and (c) the communication must have been confidential in fact.

The client holds the privilege. The attorney may exercise the privilege for the client by refusing to divulge what the client told the attorney.

The privilege does not apply when the attorney is serving in some function other than a legal adviser such as a mere conduit for funds, real estate transactions, stock sales, or other ordinary business transactions. Such dealings are not strictly attorney functions.

While the privilege applies to communications about past crimes, it does not apply to the commission of future crimes such as when the attorney and client are committing crimes together, or the attorney is advising the client how to commit a crime. Communications intended to facilitate or conceal criminal or fraudulent activity are also unprotected.

Attorney-client communications when a third person is present or in a public place where people can overhear will usually destroy the confidentiality of the communication and, therefore, the privilege. The law recognizes, however, that if the presence of a third person is essential for the attorney to prepare a defense in a criminal case, then these third persons

fall under the "umbrella" of the privilege. Examples would be a legal secretary, paralegal, defense-employed investigator, or interpreter working for the attorney.

G. The Husband-Wife Privileges

There are two husband-wife privileges. The testimonial privilege provides that people have the right to refuse to testify against their spouses. This privilege extends to what the spouse saw, was told, or knows, including information discovered before the marriage. The testifying spouse holds this privilege, and the privilege is waived if the spouse elects to testify. The privilege ends with divorce.

The marital communication privilege, on the other hand, protects private communications between the spouses made during the marriage. The communication does not have to be of an intimate nature or even concern the marriage. A statement in private by a husband to his wife, "I robbed a bank" is protected by this privilege. If the communication is made under conditions that are not private - such as in the presence of their children or friends - there is no private marital communication. This privilege protects only those private communications between spouses made during the marriage, and this privilege extends beyond divorce. The privilege is held by the spouse who made the communication. More and more courts are holding that this privilege belongs to both spouses.

The marital privileges exist to encourage husbands and wives to communicate with each other and to preserve marriages. There are several exceptions to the privileges such as when the marriage is determined to be a sham, when a spouse or the child of either spouse is the victim of the crime charged, and in many circuits, when both spouses participated in the crime.

H. The Psychotherapist-Patient Privilege

Confidential communications between licensed psychiatrists, psychotherapists or social workers and their patients in the course of psychotherapy diagnosis or treatment are privileged. Though there is not a general doctor-patient privilege, if the doctor is a psychiatrist or other mental health professional, the psychotherapist-patient privilege may exist. This privilege exists because effective psychotherapy depends upon an atmosphere of confidence and trust.

A party asserting the psychotherapist-patient privilege must show that the communications were made: (a) confidentially, (b) between a licensed psychotherapist and the patient, and (c) in the course of diagnosis or treatment. The patient holds the privilege. The person providing the psychotherapy may exercise the privilege on behalf of the patient.

The privilege does not apply if the communications were not confidential. Statements made during the course of a group therapy session or statements made by patients to others about what they said to the psychotherapist would not be confidential. Since this is a relatively new federal privilege, the Supreme Court may later recognize other exceptions that some states already observe. For example, the privilege might not be recognized if the patient communicates serious threats to himself or others, or the patient and therapist were engaged in a criminal enterprise.

I. The Clergy-Communicant Privilege

The Supreme Court has not specifically adopted the clergy-communicant privilege though most circuits have.

A party asserting the clergy-communicant privilege must show that the communications were made: (a) to a member of the clergy, (b) in the clergy's spiritual and professional capacity, and (c) with a reasonable expectation of confidentiality. "Clergy" includes minister, priest, pastor, rabbi, or other similar leader

of a religious organization, or an individual reasonably believed to be so by the person consulting him. The presence of others necessary to communicate the information does not defeat the privilege. The privilege exists to encourage people to communicate with members of the clergy on spiritual matters.

The communicant holds the privilege. The clergy may exercise the privilege for the client by refusing to divulge what the communicant said. If the communication was not on a spiritual matter - such as a joint criminal enterprise - the privilege will not apply.

J. The Government-Informant Privilege

In the other privileges discussed so far, the privileged information is what the person holding the privilege said. The government-informant privilege is different in two respects: (a) what is privileged is not the communication, but the identity of the informant and information that would reveal the informant's identity and (b) the holder of the privilege is not the person who made the communication, but the government to whom the communication was made. The privilege exists to encourage people to report crime and cooperate with the police.

Not everyone who provides information to the government is an informant for the purposes of this privilege. For example, victims of crimes and LEOs provide information that does not fall within the privilege. All agencies have special rules and procedures to follow that bring informants under the umbrella of this privilege, and LEOs must be sure that confidentiality is not promised contrary to agency policy.

The government holds the privilege. The AUSA will exercise the privilege on behalf of the government. LEOs may **not** reveal the identity of the informant unless directed to do so by a judge or the AUSA.

A judge may order that the identity of a confidential informant be revealed. If the judge decides that the informant's

identity should be revealed, the AUSA must either do so or dismiss the case. The judge will not order the informant's identity to be revealed unless the informant's identity is relevant and helpful to the defense of an accused, and is essential to a fair determination of the case. The proper balance depends on the particular circumstances of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors.

- If the informant is just a tipster or the source of probable cause, the informant's identity will not usually be revealed.

- If the informant merely introduces the defendant to an undercover agent, this will not usually require the informant's identity to be revealed since what transpires between the undercover agent and the defendant is what is relevant.

- If the informant witnessed activities that are part of either the government's or the defense's case, the judge will have to decide whether revealing the informant's identity is relevant and helpful to the defense and necessary to a fair trial. Here the chance that the informant's identity will be revealed becomes more likely.

- If the informant is a co-defendant, conspirator, confederate, or a party to a charged offense, it is likely that the informant's identity will be revealed.

VIII. Evidentiary Foundations

Evidence must be authenticated to be admissible in court. Authentication shows that there are facts to prove that the item is what the person offering the evidence claims it to be. The process of authenticating evidence in court is called "laying a foundation." The AUSA is responsible for laying a foundation for evidence using facts collected by the law enforcement officer.

Even if the judge admits evidence, it does not mean the jury has to place any value on it. For example, though a judge may admit a gun into evidence, the jury does not have to believe that the gun was the one that was found at the scene or used in a murder.

A. Laying a Foundation

The attorney offering an item into evidence is required to lay a foundation for it. A proper foundation consists of evidence - usually in the form of testimony - that the item is what the party offering it claims it to be. In other words, the lawyer cannot simply claim, "This is the gun that was found at the scene," or "The defendant prepared this fraudulent document." A foundation is usually laid through the testimony of a witness who can say from personal knowledge that the exhibit being offered in court is the one they saw, seized, or collected.

B. Marking/Tagging Evidence

The evidence tag documents where and when the evidence was found and who found it. Proper marking, tagging and bagging will ensure that evidence can be authenticated when it is offered in court. The evidence should be marked, tagged, or bagged in such a way that the person who found or seized it will recognize it in court.

C. Chain of Custody

An evidence tag documents where and when the evidence was found and who found it. A properly prepared chain of custody documents where the evidence has been and who has handled it from the time it was discovered until the time it is offered in court. It also documents any alterations to the evidence. The first entry on the chain of custody should be the person who found the evidence. A chain of custody does not eliminate the need to call a witness to lay a foundation and does not substitute for having the item in court. It can, however, reduce the number of witnesses required, better ensure a foundation, and protect the foundation from attack.

D. Legal Admissibility and Preserving Trace Evidence

Evidence collectors have two challenges: (1) ensuring that the evidence can be admitted in court; and (2) preserving the item's characteristics and associated trace evidence such as fingerprint~~s~~, hair, and fiber evidence. Laying a foundation for the admissibility of evidence does not satisfy evidence-handling techniques designed to preserve trace evidence. Handling evidence in a way that preserves trace evidence may not always satisfy legal admissibility rules. Law enforcement officers must collect and preserve evidence to ensure that **both** a foundation can be laid in court and trace evidence is preserved.

E. Condition of the Evidence at the Time of Trial

There is no established legal standard that requires evidence to be in a certain condition in court when compared to how it appeared when it was collected. Usually it is sufficient that the evidence is in the same or substantially the same condition as when collected, and if there have been alterations, that the alterations can be explained and are documented. For example, if 20 grams of cocaine are seized and the laboratory consumes .05 grams in laboratory analysis, there will only be 19.95 grams of cocaine at the time of trial. This is not a problem because the chain of custody will document that the cocaine was sent to the laboratory, and the laboratory report will document that .05 grams of cocaine was consumed in analysis. Mishandling evidence or alterations that cannot be documented may mean being unable to lay a proper foundation. The evidence may then be inadmissible. There is no limit to the ways an evidentiary foundation can be challenged, but here are some examples:

- The foundation witness cannot identify the exhibit at trial.
- Unmarked, mismarked or incomplete tags, bags, or chain of custody documents.
- Improperly recorded transfers of evidence on chain of custody documents ("broken" chain of custody).

- Failure to wear gloves or other protective garb and obliterating trace evidence or contaminating the scene (use proper trace evidence handling techniques; bring in a specially trained evidence team when necessary).

- Improper storage of evidence such as un-refrigerated biological materials or computer disks and magnetic tapes stored near excessive heat or a magnetic source (consult evidence handling experts).

- Reuse of evidence tape, swabs, bags, or seals (these items are cheap; discard contaminated or used supplies).

- Documents or evidence marked in such a way that the evidence is "altered" (Did the LEO obliterate a fingerprint when the item was marked? Did page numbering of documents alter the meaning or authenticity of the document?).

- Work done on originals of computer disks, photos, documents, tape recordings or the like (make copies and work with copies).

IX. Foundations for Business Records and Public Documents

(Not all programs are responsible for the material in this section. Check your course syllabus.)

A. The Best Evidence Rule (FRE 1001; 1002)

This is best remembered as the "Original Document or Writing Rule." Before copy machines, carbon paper, and other duplicating processes, copies of documents were made by hand. This process lent itself to errors in copying, and what was supposed to be an exact copy was not always so. Though many

of the rule's concerns have been resolved by technology, the rule must be followed.

1. An "Original"

The original of a document is the actual document itself or counterparts intended to be the equivalent of the original such as identical documents executed by both parties at the same time. An original of a photograph is any print made from the negative. As to data stored on a computer or similar device, an original is any printout or other output readable by sight, shown to reflect the data accurately.

2. "Duplicates"

Duplicates include carbon copies, photocopies, or copies made from other techniques that accurately reproduce the original. A duplicate is admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original, or it would be unfair to use a duplicate instead of the original such as when a duplicate is of poor quality or otherwise not legible. You must always, however, endeavor to find and safeguard originals.

The Best Evidence Rule states that to prove the contents of a writing, the original writing itself must be admitted into evidence. Witnesses are not permitted to testify what a document says over objection by counsel. If the document or writing is available, it must be offered into evidence. There are exceptions such as when all originals have been lost or are unobtainable, or the other side has the original and will not produce it.

B. Self-Authentication

A foundation is required to introduce a business record or public record. Ordinarily the foundation is laid by the custodian of the record who can state how the record was created and maintained. Special rules, however, allow certain documents and records to be "self-authenticating." Self-

authenticating records and reports do not require a witness to testify and lay a foundation.

1. Public Records and Documents

The FRE permit documents that are public records to be self-authenticating if they are accompanied by a seal or certified as correct by the custodian. Federal agencies have established procedures and the necessary forms to provide public documents and records under seal or to certify them. The custodian does not have to lay a foundation for the document if the document or record is certified or under seal. You do not have to personally obtain these records by hand.

2. Business Records

The FRE permit business records to be self-authenticating similar to public documents and reports. To make business records self-authenticating, and avoid calling the custodian to testify, the custodian must certify that:

- The record was made at or near the time to which the record pertains by a person with knowledge of the matter,

- The record was kept in the ordinary course of business,

and

- The business made such a record as a regular practice (it was not specially generated just for the trial).

C. <u>Hearsay and Public Records and Documents and Business Records</u>

Offering the contents of public records and documents and business records for the truth of their contents can be

hearsay, but there is a specific hearsay exception for them. If there is a seal or certificate that complies with the self-authentication rules, then not only will the business records or the public documents or records be self-authenticating, the contents will be admissible to prove the truth of the contents as an exception to the hearsay rule. This exception to the hearsay rule does not apply to matters observed by law enforcement. Even self-authenticated police reports are still subject to the hearsay rule.

X. Hearsay

(Not all programs are responsible for the material in this section. Check your course syllabus.)

A. Hearsay Defined

Hearsay occurs when: (a) a statement is made out of court, (b) the out of court statement is offered in court (trial), and (3) the out of court statement is offered for the truth of the matter asserted in the statement.

B. Hearsay Examples

In each case, the witness wants to offer the quoted statement in court.

(1) "Susan said Bob stole her purse." (To prove that Bob is a thief).

(2) "John said he saw the green car that night." (To prove there was a green car at the scene).

C. Applicability of the Hearsay Rule

The hearsay rule applies only to trials. You can and often do rely on hearsay to develop probable cause, develop reasonable suspicion, guide your decisions, and develop leads. Hearsay may also be used in criminal complaints and search warrant affidavits.

D. Reason for the Hearsay Rule

Hearsay is inadmissible at trial because it is not possible to confront and cross-examine the person who made the out-of-court statement, and the jury is unable to assess that person's demeanor and credibility. Hearsay is not considered sufficiently trustworthy to let the jury consider it.

E. What is a Statement?

A "statement" can be verbal, written (such as a written statement of a person) or an act intended to communicate information (nodding the head, pointing, gesturing). Memoranda, writings, statements, and reports – even under oath - are "statements" within the meaning of hearsay.

F. "Truth of the Matter Asserted"

The third component of the hearsay rule is that the out-of-court statement is being offered for the truth of the matter asserted in the statement being offered. If the jury is asked to believe the statement is true, the statement is hearsay. If the statement is being offered for a legitimate reason other than to prove that the statement is true, then the statement is not hearsay. For example, if the statement offered is "Bill told me that Joe shot him" to prove Joe shot Bill, the statement is hearsay. If the statement is offered to show why an officer was looking for Joe, the statement is not hearsay because it is not offered to prove Joe shot Bill.

G. Non-Hearsay

1. Statements of the Defendant

Because the prosecution cannot call the defendant to the stand to testify, statements made by the defendant and offered by the prosecution are specifically excluded from the definition of hearsay. It really does not matter whether the statement is classified as an admission, confession or just information.

2. Other Statements

Statements of the defendant's co-conspirators made during and in furtherance of the conspiracy are excluded from the definition of hearsay. Also, earlier statements made by trial witnesses can sometimes be admitted to attack or support their trial testimony.

H. Confrontation Clause Requires That Witnesses Against the Defendant Testify at Trial

The Sixth Amendment's Confrontation Clause provides that "the accused shall enjoy the right… to be confronted with the witnesses against him…." In recent years, the Supreme Court has read this strictly and demanded that the prosecution's lay and expert witnesses appear in court. There are exceptions. But generally, even if the prosecution could overcome a hearsay objection, it must still be able to produce its witnesses. LEOs taking witness statements must document how to track those witnesses down for trial.

XI. Exceptions to the Hearsay Rule

(Not all programs are responsible for the material in this section. Check your course syllabus.)

If an exception to the hearsay rule applies, the statement is admissible. There are many hearsay exceptions, and this text will discuss only two of them. When taking a statement that might be hearsay, LEO must document the facts and circumstances under which the statement was made. This may later aid the AUSA in getting the statement admitted at trial under a hearsay exception.

A. "Excited Utterances"

The law recognizes that a "non-testimonial" statement made under emotional stress is unlikely to be fabricated. The elements of the exception are: (a) the person making the statement experienced a startling event, (b) the statement was made while the person was under the stress or excitement (influence) caused by that event, and (c) the statement was

about the startling event. For example, while yelling, holding their hand over a gunshot wound, and in a high emotional state, a victim blurts out, "Joe shot me!" This statement would meet the exception for excited utterance.

B. Statements for Purposes of Medical Diagnosis or Treatment

The law recognizes that when a person is speaking to health care providers about their illness or injury, they are unlikely to fabricate those facts. The elements of this exception are: (a) a statement is made for the purposes of medical diagnosis or treatment, (b) the statement concerns medical history, past or present symptoms, pain, sensations, or the cause of the medical problem, and (c) the statement is pertinent to diagnosis or treatment. The person who receives the statement does not have to be a physician. If the person making the statement believes that the person they are speaking to is someone who is going to help them medically, the statement can qualify under this exception. Such statements can be made to nurses, emergency medical technicians, or to those working in the medical field who are treating the person.

XII. Statements, Reports and Courtroom Testimony

Except for some expert witnesses and in a few other limited circumstances, witnesses cannot testify from their reports or notes. LEO should check with the AUSA about whether to bring reports or notes to trial.

LEO reports, and notes, as well as written statements and notes of other witnesses, can be used to impeach a witness' in-court testimony. For example, if a witness testifies that the license plate of a certain car was ABC but the report or the on-scene notes indicate otherwise, the defense can use the contradiction to impeach the witness.

Memory can be "refreshed" if a witness forgets a fact while testifying. The rule is that "anything can be used to

refresh a witness' memory." Sketches, photos, physical objects, reports, notes, and even documents prepared by other LEOs or non-LEOs can be used. Documents or statements used to refresh a witness' memory do not have to be made under oath. When a witness' memory is refreshed, the witness can then testify from memory. The report or item that was used to refresh memory is neither read nor given to the jury.

Notes, reports, statements or other writings that are used to refresh a witness' testimony are available to the other side. These items can be used to cross-examine the witness and for other purposes.

Non-LEO witnesses may testify at trial, and they too may need their memories refreshed. If during an investigation LEO interview a witness and the witness needs to refresh their memory with an item, LEO should obtain the item so it will be available at trial to refresh the witness' memory if that becomes necessary. For example, if during an interview a witness must refer to a phone bill to remember when they spoke to someone, the officer should obtain a copy of the phone bill so it will be available in court should the AUSA need to refresh the witness' memory.

XIII. Authenticating Information Contained in Computers

(Not all programs are responsible for the material in this section. Check your course syllabus.)

A. Involving Computer Forensics Experts

Computer forensics experts should participate in all search warrant phases - determining whether probable cause exists to search computers, drafting the search warrant, and executing the search. Not having a computer expert can jeopardize the admissibility of the evidence seized. Title 18 U.S.C. § 3105 provides that no person, except in the aid of the officer requiring it, may be present and acting in the execution of a search warrant. If a computer forensics expert is needed, make sure the warrant indicates one is needed to aid in the search.

B. Rules of Evidence Issues when Authenticating "Digital (or Electronic) Evidence"

Digital evidence is nothing but an electronic series of 0s and 1s that is interpreted by a computer program. Below are some of the special, significant issues in having digital evidence admitted into court.

- Were the records altered, manipulated, or damaged after they were created?
- Who was the author of the record?
- Was the program that converted the digital evidence to words or graphics reliable?

Proving authorship is usually solved by collecting circumstantial and other evidence during the search such as where the storage device (drive, disk, or other medium) was found; who had access to the data; trace evidence (DNA, fingerprints); passwords and screen names and who had access to them; names on computer folders containing the data or passwords; and sources of e-mails that contain attachments.

C. Admissibility of Digital Evidence

To be admissible, there must be a showing that there is a reliable computer program that converted the digital evidence to something that a human can read. Computer records can be easily altered, and opposing parties may allege that computer records lack authenticity because they have been tampered with or changed after they were created. A few things can be done to reduce this possibility. For example, Windows® based computers associate certain file types with the software designed to create and read them so it is important to seize the computer software to show computer generated "associations" between particular file types and software. Having the program that creates the data goes a long way to prove the same program will accurately print it out. Many software applications embed data regarding when a document was created and

modified that identifies the computer on which this was done. Forensic experts should look for this data.

The government can overcome the claim that the programs are unreliable by providing sufficient facts to warrant a finding that the records are trustworthy, and the defense is afforded an opportunity to inquire into the accuracy of those records.

D. The Best Evidence Rule Requirement for an "Original"

According to FRE 1001(d): "For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information."

Thus, an accurate printout of computer data satisfies the Best Evidence Rule. *Doe v. United States*.

E. Hearsay Issues

Whether the hearsay rules apply depends on whether the document is one generated by a computer or contains statements of a human being. Documents created by humans that are stored on a computer are "statements" if the document is offered into evidence for the "truth of the matter asserted." (If the document is a statement of the defendant, it is excluded from the definition of hearsay.) You must still provide facts to prove it was the defendant's statement.

Records that are generated by a computer are NOT hearsay. Hearsay rules apply only to statements of humans. Records generated by a computer from computer data (phone billings, bank statements and the like) are admissible if they are authenticated as business records.

Other "statements" that are seized from a computer must meet a hearsay exception or the author, who can authenticate and testify to the statement, must be located. So, a letter found on the computer from someone other than the defendant must meet hearsay exceptions before the contents of the letter can be admitted for the truth of the matter asserted.

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I. Introduction

No matter how well law enforcement officers perform their duties, justice ultimately depends upon the facts presented in court and how they are perceived by the jury or the court in a judge alone trial. In many criminal trials, the law enforcement officer is the key witness in the government's case. Since a witnesses' credibility is crucial to obtaining convictions, it is imperative that the law enforcement officers are familiar with traits and characteristics that can both favorably an adversely impact their credibility at trial.

II. Stages of a Criminal Trial

In some programs, Courtroom Testimony includes an **EPO** on stages of a criminal trial. (Check your syllabus.) If your program has this EPO, the material is located in Section II of the Courtroom Evidence chapter of this Handbook.

III. Effective Witness Characteristics

A. Meeting the Jury's Expectations

Juries expect government witnesses to tell the truth at all times. Justice is served only when the truth is provided to the fact finder. There is no substitute for the truth – our criminal justice system mandates the truth be told, regardless of who may ultimately be helped or hurt.

B. Characteristics that Jurors Expect of Witnesses

1. Tell the Truth

The most important characteristic of any witness at trial or hearing is to tell the truth. There is no substitute for telling the truth. A witnesses' failure to tell the truth is not only a crime, it is a morally reprehensible act that jeopardizes the very foundations of the criminal justice system.

2. Be Impartial and Objective

A witness who impartially, objectively and dispassionately tells the truth strengthens the justice system beyond measurement. Such a witness is more likely to be believed by the fact finder.

3. Treat the Jury, Judge, and Counsel with Respect

Treat counsel and the judge with absolute respect. Be professional. Do not show deference to the government. Treat all counsel the same.

4. Be Prepared

To be an effective witness, an officer must be thoroughly prepared. As a general rule, there is a substantial delay between time of arrest and trial. Delays usually benefit the defendant by fogging the memory of witnesses. To counter this

natural tendency, witnesses should thoroughly review their notes, reports, case file, etc., associated with the case. Even visiting the crime scene may prove to be helpful. Reviewing physical evidence in the case can help as well. Furthermore, it is perfectly permissible to review your testimony with your prosecutor and actually practice answering questions from the witness stand. As the old adage goes, proper prior preparation prevents poor performance.

5. Be Properly Attired

A witnesses' credibility can be adversely affected by his or her choice of clothing, jewelry, and personal grooming standards. Common sense tells us that we should dress for success. A clean, pressed suit or coat and tie and minimal tasteful jewelry is the order of the day. Be smart. Clothing that is clean, pressed and conservative in appearance is appropriate for court appearances. Remember, you are making non-verbal statements in the way you dress and carry yourself.

Almost every federal court will have court rules as to what is permitted in terms of appropriate dress for all witnesses. Furthermore, court rules will identify those items that are not permitted in court. Do not violate court rules regarding attire or jewelry, etc. Some federal judges have a penchant for ensuring that you learn your lessons the hard way via contempt proceedings. This is especially true with respect to carrying weapons, cell phones, pagers, noise making jewelry, etc.

Although it may be fashionable to wear tie tacks of the trade (handcuff or smoking gun tie tacks, a hangman's noose, or pins of social, fraternal, or religious organizations in your area of operations), it is not fashion statement you want to make in court. This type of jewelry is not acceptable when testifying!

6. Demeanor Counts

Juries and judges consider your demeanor in evaluating your credibility (believability). How you approach the witness stand,

how you look while taking the oath, and your posture in the witness chair can all have an effect on whether the jury or judge will believe you. A convincing "Yes, I do" in response to the oath makes a positive first impression. Make a conscious effort to avoid sending unwanted messages through nonverbal communications. For example, rolling your eyes is readily understood to be an attempt to ridicule. Bottom line – be professional!

7. Stay Serious

Trials are serious occasions. When you testify, project a professional image and avoid laughing or smiling. Defense attorneys will commonly draw attention to an officer who smiles or laughs by asking, "Do you think this is funny?" An individual's life and liberty may be at stake. Do not allow the defense attorney to imply that you believe the matter to be less than serious.

8. Avoid a "Bad Attitude"

A clever, superior, or cocky attitude turns people off. Answering clearly, succinctly, accurately, and professionally makes the testimony more convincing. A witness may be truthful in their testimony, but the judge or jury may not give the witness credence because of a "bad attitude." Avoid sarcastic responses.

9. Admit Mistakes

Witnesses often will make mistakes in their testimony. A mistake must be corrected as soon as possible, even if it means bringing it up in the middle of a different line of questioning. If the subject matter of the mistake comes up during cross-examination or redirect examination, make it a point to identify the mistake and correct it. If not given the opportunity to correct the mistake during your testimony, inform the **AUSA** at the earliest opportunity.

IV. Essential Law Enforcement Testimonial Skills

A. Manner of Answers

Your demeanor and the manner in which you answer questions are important to ensure the jury or judge is convinced of the truth of the officer's testimony. These skills apply equally to direct and cross-examination.

B. Testimonial Skills that make LEO Testimony Convincing

1. Listen, Think, and then Answer

Listen carefully to the questions asked and think about your response before speaking. While answers should not be rushed, long delays before answering simple questions can lead the jury to question your credibility.

2. Give Audible Responses

Court reporters take down verbatim testimony. Nodding your head to answer a question cannot be recorded by the court reporter. Do not nod your head to give a "yes" or "no" answer. Speak so that the court reporter can record the response. Similarly, if you use a gesture by holding your hands apart to provide a visual portrayal of size and say, "It was this big," the record will not reflect the information you hope to convey. You must provide an audible response that matches the size you are conveying with your hands – "it was about 14 inches long." Speak clearly, intelligibly, and loudly enough so that you will be heard and understood throughout the courtroom. Monotone presentations are far less effective than presentations that contain variations in volume, speed of delivery, and tone. Be mindful that some courtrooms have microphones. Do not assume the microphone is for sound projection. Many microphones are only for recording testimony.

3. Do Not Volunteer Information

Answer the question that is asked. Do not add information that is not requested. Do not allow subsequent silence by counsel to lead you to believing that more information is expected and counsel is waiting for you to respond. This is a common tactic used to get you to say things that were not requested. The general rule when testifying is to address the question asked and then wait for the next question. Do not put information into your answer that is not in response to the question which is asked.

4. Wait for Rulings on Objections

When counsel object to questions, stop speaking. Allow the judge to rule on the objection. If an objection has been overruled, and you have forgotten the question, ask counsel to repeat the question. If the judge sustains the objection, say nothing further on that subject. Simply wait for the next question. Continuing to testify after an objection and before a ruling is unprofessional and will result in an admonishment from the court.

5. Prosecutorial Assistance

When asked a question that you do not like, do not look to the prosecutor or others for help. If counsel's question is improper, the prosecutor will object. At times, there may be tactical reasons that the prosecutor may want you to answer questions that are objectionable. Do not second guess the tactics of your prosecutor. However, if you do not understand the question or it is unclear, you can ask that the question be repeated or rephrased.

6. Speaking to the Judge

Unless the judge speaks to you directly, you should not address your questions or concerns to the judge. If the judge

does address you directly, respond by using the term "Your Honor". Do not call him "Judge". Address requests to repeat, clarify, or rephrase questions to the counsel who asked the question. Address requests to refer to your notes or reports while testifying to the examining counsel.

7. Avoid Cop Talk

Avoid using legalese or police jargon such as, "I proned him out," "I did a protective sweep," or "I frisked him." These terms have particular meanings that are not known to the general public. To be an effective witness, talk to jurors in a language they will understand. Simply explain in everyday language what you did. If you use those terms, then explain them in your response to the question.

8. Just the Facts

Testify only about matters that are within your personal knowledge. You can testify to what you observed, heard, smelled, tasted, and touched. Do not try to testify as to what others observed. Let other witnesses testify to what they observed. Do not offer an opinion unless you are specifically asked for the opinion. Witnesses must have a basis of knowledge based on facts to provide an opinion.

9. "I Don't Know"

"I do not know" means that you never knew the information that is the subject of the question. If the correct answer to the question is "I do not know," say so in the same voice and manner used to answer other questions.

10. "I Don't Recall"

This answer implies you once knew the information, but at the moment cannot recall it. If true, it is okay to say it. This answer is not a truthful one if you remember, but just do not want to answer the question that is asked.

11. Positive and Definitive Answers

Give positive, definite answers. Avoid saying, "I think," or "I believe." What you think or believe is generally not relevant. If you do not know, say so. If you cannot offer a precise answer but can provide an estimate, be sure to state that it is only an estimate.

12. Memorized Testimony

Don't memorize reports so that you can provide a verbatim response. Prepare for trial and review the case, but do not memorize what you are going to say. Memorized testimony is suspect. No one wants to listen to a robo-witness.

13. Speak to the Audience

Make it a point to ensure you have eye contact with those to whom you are addressing. Maintaining eye contact with those you address is an intangible human attribute that provides a measure of respect to the recipient. By maintaining eye contact with the jury, you provide deference to the jury, while simultaneously establishing your own credibility in their eyes. Although eye contact is important, you will have to measure the amount of eye contact you provide to counsel. At trial, when a jury is present, the most important group of people in the court that require your direct attention is the jury. Since the jury is the fact finder who makes life altering decisions concerning the defendant, you should address the jury and not counsel. This will require you to look at the jury while answering questions of counsel. It is not necessary to spend 100% of the time looking at / addressing the jury because not every answer will warrant that type of effort. However, for important aspects of your testimony, address the jury. It will have a huge impact as to how they evaluate your testimony.

V. Using Statements and Reports to Aid and Prepare for Courtroom Testimony

Except for some expert witnesses and other limited circumstances, witnesses cannot testify from their reports or notes. You should check with the AUSA about whether to bring reports or notes to trial.

Your reports, and notes, as well as written statements and notes of other witnesses, can be used to impeach a witness' in-court testimony. For example, if a witness testifies that the license plate of a certain car was ABC but the report or the on-scene notes indicate otherwise, the defense can use the contradiction to impeach the witness.

Memory can be "refreshed" if a witness forgets a fact while testifying. The rule is that "anything can be used to refresh a witness' memory." Sketches, photos, physical objects, reports, notes, and even documents prepared by other LEOs or non-LEOs can be used. Documents or statements used to refresh a witness' memory do not have to be made under oath. When a witness' memory is refreshed, the witness can then testify from memory. The report or item that was used to refresh memory is neither read nor given to the jury.

Notes, reports, statements or other writings that are used to refresh a witness' testimony will be made available to opposing counsel. They can be used on cross examination for the purpose of impeachment.

Non-LEO witnesses may testify at trial, and they too may need their memories refreshed. If during an investigation you interview a witness and the witness needs to refresh their memory with an item, you should obtain the item so it will be available at trial to refresh the witness' memory if that becomes necessary. For example, if during an interview a witness must refer to a phone bill to remember when they spoke to someone, the officer should obtain a copy of the phone bill so it will be

available in court should the AUSA need to refresh the witness' memory.

VI. Impeachment of Witnesses during Cross-Examination

A. Direct Examination, Cross-Examination, and Impeachment

1. Direct Examination

When counsel calls a witness to the stand to testify, the witness is "testifying on direct examination." Direct examination questions are opened ended – "tell me what happened." Direct examination questions may not suggest the answer in the question that is asked. Direct examination questions will ordinarily begin with who, what, why, where, when, or how. In effect, direct examination questions allows the witness to explain in their own words what happened.

2. Cross-examination

When the counsel that called the witness to the stand has finished questioning the witness, the witness is passed to opposing counsel for cross-examination. On cross-examination, opposing counsel is permitted to ask leading questions. Leading questions are framed in a way which evokes a specific response from the witness. In effect, leading questions allow counsel to suggest the answer and the witness simply agrees or disagrees with the question. So, instead of having to ask a question like, "What happened", counsel could ask "Isn't it true Officer Smuckatello that you pulled your pistol on my very attractive 17 year old female client, pointed it at her head, forced her face down on the ground, handcuffed her hands behind her back, and then placed your bare hands over various parts of her body ostensibly for the purpose of looking for a weapon?"

Cross-examination can at times be very unobtrusive. However, as the previous example suggests, cross-examination can also be designed to put a twist on facts to make the

witnesses acts appear to be unseemly, crude, self-serving, unprofessional and even criminal.

A professional response to such an inquiry might have the officer responding as follows: "Yes, based on the facts known to me at the time, I had a reasonable basis for believing your client was armed and dangerous, so I pulled my weapon, pointed it at her, ordered her to the ground, handcuffed her, and then conducted a frisk for weapons. A frisk is a pat-down for weapons. It is a limited search for the sole purpose of locating weapons that could harm me. I performed these duties in accordance with the law."

3. Impeachment

On cross-examination, an attorney is permitted to impeach the witness. Impeachment is used to attack the credibility of the witness. There are many ways to impeach testimony. Often the during the impeachment process, the witnesses' professionalism and integrity are attacked. Regardless of counsel's method, officers must always ensure that they tell the truth.

4. Redirect Examination

It is hard for witnesses to limit themselves to a yes or no answer and be denied the opportunity to explain it. Your opportunity to explain answers or expand on a yes or no answer may come after cross-examination during redirect examination. On redirect, government counsel will ask questions that allow you to explain your testimony during cross-examination.

B. LEOs and the Frustration of Cross-Examination

You are trained to, and survive by, being in control of the scene and the situation. Testifying in court, and especially on cross-examination, is frustrating for you because you are in an environment where the lawyers are in control. There is nothing that can be done about this except to learn how cross-examination works, being prepared for common cross-

examination techniques, and trust that your prosecutor on redirect examination will clear up confusion caused by the defense during cross-examination.

C. Common Cross-Examination Techniques

Below are some common cross-examination techniques. Regardless of what technique is used, the obvious response is to always tell the truth.

1. Yes or No Questions

Generally, a party is entitled to a yes or no answer if one is possible. Such an answer is not possible if you do not know the answer, do not recall the answer, or the question is a compound question - two questions rolled up into one and asking for a single response. Attempts to fully explain an answer can be cut-off, but the prosecutor is entitled to have the explanation provided on re-direct examination. On cross examination, you may also answer each part of the compound question separately.

2. Putting Words in the Witness' Mouth

Trial advocates are trained to "testify for the witness" on cross-examination and then get the witness to agree with what the lawyer said. That is the essence of leading questions that begin (or end) with, "Wouldn't you agree that....?", "Isn't it true ....?", or "You did X, didn't you?" To properly answer a leading question that suggests the answer, **carefully** listen to what the defense counsel is asking. If what the defense suggests is true, then answer yes. If not, answer no or provide the correct answer.

3. The Badgered Witness

Defense counsel knows that if a witness - especially a law enforcement officer - becomes angry on the witness stand, two things happen. First, you appear biased or not objective, because you look like you are taking sides. Next, you focus on

the anger and not the facts of the case, thereby becoming distracted. Do not become angry or antagonistic even when the defense counsel is clearly doing their best to bait you. An officer who is angry often exaggerates or appears to be less than objective. Juries expect you to remain professional at all times. Don't walk into defense attorney traps.

4. Do Not Volunteer Information

Do not volunteer extraneous information. If a question cannot be truthfully answered with a "yes" or "no," request permission to expand upon or explain the answer. Sometimes defense counsel will not say anything after the witness has answered suggesting to the witness they should keep talking. Remain silent in the face of this tactic. You should wait for the next question.

5. Pretrial Discussions with the Prosecutor

There is nothing improper with having discussed or even rehearsed testimony before the trial. That is part of normal trial preparation. If asked by the defense counsel, "Isn't it a fact you rehearsed your testimony with the prosecutor?" do not hesitate to say, "Yes, Ma'am" or "Yes, Sir", if that is the correct answer.

6. Repetitive Questions

The defense attorney may rephrase questions and ask the same question from a different angle. This is done to either emphasize a defense-favorable point, or to see if the answer will change. When a defense attorney starts asking the same question in a slightly different manner, respond "As I stated earlier…" – when responding do not sound sarcastic.

7. Compound Questions

Often defense counsel will ask two questions in one. For example, defense counsel may ask, "Officer, didn't you arrest my client and search him." If you were both the arresting

officer and the officer that conducted the search the answer to the question is easy. But if you arrested his client but your partner searched him, then it is incumbent upon you to respond correctly. At trial, witnesses quite often fail to recognize that there are two questions being asked as one. If you do not recognize that there are two questions, you are playing directly into defense counsel's hands for subsequent impeachment. Be alert to these tactics and slow down your responses.

8. Rapid-fire Questions

This technique is meant to rush the testimony, denying the witness the time to understand the question and provide a correct answer. Resist the temptation to keep up with the defense counsel, but instead speak at your own pace in providing a truthful and accurate answer. You control the pace of your own testimony. Do not feel obligated to follow the defense attorney's pace.

9. Admitting Mistakes

"Have you ever made a mistake?" The answer will be "yes." Do not be afraid to admit a mistake. Jurors find officers who honestly admit mistakes to be credible. We all make mistakes; it is a human condition. There is nothing wrong with making mistakes.

10. Possibilities

"Isn't it possible that…." Anything is possible, but in many cases not probable. Testifying that something is possible, but not probable, based upon the facts of the case, is responsive while remaining believable. If not allowed to provide a complete answer, a simple, "Yes" or "Yes, but not likely" will do.

11. Friendly Defense Counsel

The defense attorney may appear friendly to you during cross examination. This may lull you in to becoming overly

familiar with defense counsel or appear to be less than professional. Additionally, if the defense attorney speaks softly or in a friendly tone and manner, often you will do the same. This technique is called mirroring. As a result, you may not speak up, the jurors may not hear your testimony, and your testimony will be less effective.

12. Twisting Prior Testimony

The defense attorney may attempt to restate your testimony, and in doing so, misstate it. In such cases, listen very carefully when the defense attorney starts with the question "You stated earlier...." Do not presume that the defense counsel will accurately portray the prior testimony accurately and in many cases, may intentionally misstate the testimony.

13. Conflicting Witness Testimony

If two or more officers have participated in the same investigation, the defense attorney may question both officers about each officer's observations in an attempt to find conflicts. Do not be bullied into admitting an error, declaring another officer "wrong," or losing confidence in your own command of the facts. Testify to what you did and what you know!

14. Impeachment by Prior Statements

Showing a conflict between a witness's earlier statement or report and the witness's in-court testimony is powerful impeachment. Review your prior statements (preliminary hearings, grand jury testimony, motions hearings). Listen carefully to all prior statements attributed to you and decide whether the current testimony is truly different.

15. Corrected Statements

"So, you lied (in your report) (in your testimony)?" This question arises when there is a mistake in testimony that is corrected or there is an irreconcilable difference between

testimony and a prior statement. Distinguish between a lie or being untruthful on one hand, and a mistake on the other. A lie or being untruthful is an intentional act. Mistakes are not lies.

16. Previous Lies

"Have you ever told a lie before?" The answer will be yes; everyone has lied. Leave it to the prosecutor to conduct a redirect that any lie was never under oath, not in a report or in an official matter.

VII. Subjects that should not be Volunteered when Testifying

A. Prior Criminal History

Unless specifically directed by the Court (or by the prosecutor based upon the judge's ruling), do not volunteer or offer the defendant's prior criminal history during a trial. The admissibility of a defendant's criminal history is subject to strict admissibility rules best left to the prosecutor.

B. Issues Involving Constitutional Rights

Commenting in front of a jury about a defendant's choice to exercise his Constitutional right to remain silent is grounds for a mistrial. A person questioned by law enforcement in a custodial setting has the Constitutional right to remain silent and/or have counsel present during questioning. Commenting on the fact that a defendant exercised either or both of these constitutional rights is inherently prejudicial, and is a recognized basis for a mistrial or reversal of a conviction.

If you are asked at trial about what happened when the defendant was arrested or booked, talk about what you did (i.e., "I processed the defendant and turned them over to the jail") without mentioning the *Miranda* warnings. Because this is a very tricky area, when in doubt, do not mention *Miranda* warnings, the defendant's invocation of the right to silence, or invocation of the right to counsel.

In the limited instances where it is permissible for you to testify about the *Miranda* process or the defendant's *Miranda* choices, counsel will ask specific questions calling for exactly that information.

C. Suppressed Evidence

If the judge grants a motion to suppress evidence in a suppression hearing or at the trial, such evidence is not admissible in trial. The jury may not see or hear about the suppressed evidence. The jury is not to consider the suppressed evidence. For example, if a confession is obtained in violation of *Miranda*, the judge will suppress the confession. In other cases, evidence may be suppressed because it was obtained in violation of the Fourth Amendment.

While there are exceptions that might allow suppressed evidence to be admitted, during the trial, you should not mention or allude to evidence that has been suppressed unless specifically asked. Under the Fruit of the Poisonous Tree Doctrine, evidence that is derived from evidence that has been suppressed cannot be referenced as well, unless you are specifically asked about that evidence.

The FLETC would like to thank Mr. Ron Smith, Associate Director of the Mississippi Crime Laboratory, Meridian, Mississippi for his contribution to this chapter. Mr. Smith is both a certified Latent Print Examiner and Certified Senior Crime Scene Analyst. Mr. Smith has graciously given the FLETC permission to use his text.

Chapter Six

Introduction to Criminal Law

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*****

I. Introduction to Criminal Law

The subject of criminal law is very broad. By studying the selected federal laws presented in this course, you will gain an understanding of how to analyze and apply criminal statutes. Following this introduction, the course is divided into numerous independent sections. Read the appropriate section prior to attending the class on that subject. Separate chapters have been created in the text for the largest criminal law topics.

Certain concepts of criminal law apply to all federal crimes. These concepts include: the elements of an offense, the difference between a felony and misdemeanor, and jurisdiction. Additionally, the Assimilative Crimes Act outlines when and how state statutes are assimilated into federal law and can be prosecuted in federal court.

A. What is a Crime?

A crime is an act, or failure to act, prohibited by law and punishable by the government. A tort is an act, or failure to act, for which the law provides a remedy for the victim through a civil action (claim and/or lawsuit). Crimes are different from torts in that criminal actions are brought by the government for the purpose of punishing the wrongdoer and deterring others from similar conduct. Tort actions are brought by the victim

seeking compensation for the damages and/or injury suffered. Crimes and torts are not mutually exclusive remedies. For example, if a law enforcement officer is assaulted, the government could prosecute the perpetrator. In addition, the officer could pursue a tort action (sue) for the harm incurred during the assault.

B. Elements of Criminal Statutes

On a few occasions, this text may refer to the "common law." You might also hear this term while on the job. "Common law" refers to ancient rights, customs, and principles developed over time through the English court system. The courts actually adopted and followed the common customs known and used by the people throughout the entire English realm. Through this process, the principles and rules of criminal and tort law were developed. These principles and rules were eventually replaced by written statutes and the court decisions interpreting them.

There are no common law crimes in the United States. All of our criminal laws are in written statutes (statutory law). Each criminal statute contains elements. Each element must be established to a probable cause threshold to substantiate a criminal charge. Each element must be proven beyond a reasonable doubt to obtain a conviction.

Most crimes consist of both a prohibited act and a criminal intent. An individual must both intend to commit a prohibited act and then act in furtherance of that intent. However, that is not true for all crimes. For example, a parent could be criminally charged with child abuse for not acting to care for his or her child. Failing to act can be a crime. To convict for a criminal offense, the government must prove beyond a reasonable doubt that a defendant with the required mental state performed (or failed to perform) a prohibited act that caused the proscribed social harm.

There are two kinds of criminal intent (state of mind) offenses.

- A general intent offense only requires the intent to do the prohibited act. No specific mental state, evil motive, or intent to violate the law is required. All that need be shown is that the act was done willfully, deliberately, intentionally, and was not accidental or a misadventure. If the act results in harm, it does not matter that harm was not intended; it is sufficient that the act was intended and that harm resulted. For example, if a defendant intentionally hits a person and gives him a bloody nose, it does not matter that the resulting harm of a bloody nose was not intended. All that is required to violate the statute is the intent to perform the act that results in harm.

- A specific intent offense expressly requires proof of a particular mental state. A specific intent offense requires proof that the perpetrator desires the consequences of the actions, as set forth in the statute. Common specific intent terms include, but are not limited to: intentionally, willfully, maliciously, purposefully, with intent to, through design, with malice aforethought, and premeditation. For example, burglary is breaking and entering *with the intent to* commit a felony therein; it is unlawful to possess drugs *with the intent to* distribute. Thus, for specific intent offenses (offenses that contain these special terms), the government must prove beyond a reasonable doubt the statutory act (or failure to act), as well as the perpetrator's specific intent.

Intent, a state of mind, can be difficult to prove. The suspect's own words, whether a confession or admission made to law enforcement or statements to others, are the best, most compelling proof of intent. It may also be possible to prove the required intent through the suspect's actions. For example, if someone has been stabbed in the chest with deep penetrating wounds 50 times, it can be reasonably inferred the perpetrator intended to kill the victim.

The elements of crimes are best explained by example. The federal crime of murder, 18 U.S.C. § 1111, is a specific intent offense. Murder requires a criminal act, the unlawful killing of a human being, and a specific intent, malice aforethought – the specific intent to kill when the act was performed. To prove the offense, the government must prove that a human being was unlawfully killed and that the person who took the human life did so with malice aforethought.

Title 21 U.S.C. § 844, makes it an offense to knowingly or intentionally possess a controlled substance. Therefore, to secure a conviction, the government must prove that the defendant "knowingly or intentionally" possessed a controlled substance. If the defendant agreed to hold his girlfriend's purse for her, he would in fact "intentionally possess" the purse. However, the defendant would not be guilty of a crime unless the government could prove the defendant "knew" the purse contained a controlled substance.

Motive can be a very important issue for both the investigator and prosecutor. It can be used to solve crimes by identifying potential perpetrators and proving criminal intent. Motive can help explain the "who and why" of a crime. However, motive itself is generally not a required element of proof of a crime. As a general rule, why someone committed the crime (motive) does not have to proven at trial. Hate crimes are an exception. To convict of a hate crime, the government must prove that the act was committed because of the special status – sex, age or race – of the victim.

C. Felonies and Misdemeanors

All criminal statutes also require a penalty. Without penalties, our criminal system would have no meaning. These penalties can include fines, incarceration and death. The range of potential penalties is normally based on the severity of the offense.

Crimes are classified by the maximum penalty authorized. Whether a crime is classified as a felony or a misdemeanor depends on the possible term of punishment

authorized by the statute, not the actual sentence imposed. Title 18 U.S.C. § 3559 specifically classifies a federal felony as an offense for which the maximum term of imprisonment authorized by statute is more than one year. A misdemeanor is an offense for which the maximum term of imprisonment authorized by statute is one year or less. An infraction is a type of misdemeanor where the term of imprisonment, if any, is no more than five days. (For further discussion of the classification of federal crimes, see *Handbook* Chapter Eight, Federal Court Procedures.)

D. Attempts

An attempt to commit a crime is a crime. To prove a person attempted to commit a crime, the government must show the defendant's intent to commit a crime together with the commission of an act that "constitutes a substantial step towards commission of the crime." A substantial step must be more than mere preparation; it must be a substantial movement towards the commission of the offense. The government's burden of proving the defendant took a substantial step toward commission of the crime protects a defendant from being convicted for mere thoughts, desires or motive. The degree of a defendant's performance of a substantial act in furtherance of the illegal activity is a factual issue depending on the circumstances of each particular case. Generally speaking, something less than a completed transaction supports an attempt, provided there is a substantial step toward completion of the crime.

E. Jurisdiction and the Assimilative Crimes Act

Jurisdiction is the power of the government to act when a criminal offense has been committed. In many cases, the federal government can act regardless of the location of the offense. For example, it is a federal crime to assault a federal employee and a federal crime to steal federal government property regardless of where the assault or theft takes place. For other violations, however, the federal government and its

law enforcement officers are only empowered to act when the offense is committed on federal property. In some cases, the state in which the federal property is located may also have jurisdiction over the same offense. Whether the federal or state government, or both, can exercise jurisdiction depends on whether the federal government has exclusive, concurrent, or proprietary jurisdiction over the place where the offense occurred.

Exclusive jurisdiction means that only the United States Government has criminal justice authority (jurisdiction) over the area. All policing, investigating, and prosecuting is conducted by the federal government because state and local authorities have no authority over areas of exclusive federal jurisdiction.

Concurrent jurisdiction means that both the United States Government and the state government have criminal jurisdiction over the area. Both the United States and the state authorities can police, investigate and prosecute crimes committed within areas of concurrent jurisdiction. This means that an individual who commits an act in a place of concurrent jurisdiction that violates both federal and state law can be tried twice - once in state court and once in federal court. Each government makes an independent prosecutorial decision.

Proprietary jurisdiction means that the United States has no more authority over the area than any other owner of private property. In other words, proprietary jurisdiction provides no special authority or power to the federal government. For example, if the federal government leases an office building to house various federal agencies, it has only proprietary jurisdiction. Most crimes committed in the building would be investigated and prosecuted by the state. However, if a federal government employee is assaulted there or if federal property is stolen from there, the perpetrator could also be prosecuted in federal court.

Many criminal offenses found in state law are not found in federal law. This is important when investigating offenses on exclusive and concurrent jurisdiction property. What happens

if someone commits an act on either exclusive or concurrent jurisdiction property that is a state criminal offense, but not a federal criminal offense? Does this mean that the perpetrator cannot be tried in federal court? The answer to this question is found in The Assimilative Crimes Act, 18 U.S.C. § 13. When acts occur on exclusive and concurrent jurisdiction property and there is no federal criminal statute that prohibits the conduct, The Assimilative Crimes Act allows the federal government to adopt a state criminal statute and prosecute it in federal court as a federal criminal offense. However, state criminal offenses cannot be assimilated if there is a federal statute that criminalizes the specific conduct.

NOTES

Subpart A

Assault on Federal Employees

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I. The Law of Assault and Battery

At common law, there were two basic kinds of assault – an offer assault and an attempted battery assault. An offer assault is any willful threat to inflict injury upon another person with the apparent present ability and intent to do so. The offer need not make the intended victim fearful, but must give the victim reason to expect immediate bodily harm. For example, John commits an offer assault if he approaches Bob while holding a baseball bat and tells Bob that he is going to pulverize his head with it. It is reasonable for Bob to expect immediate bodily harm based on John's words and actions. For the expectation of harm to exist, the intended victim must be aware of the threat. There must be a *present* apparent ability and intent to inflict bodily harm. A threat of the use of force some time in the indefinite future ("One of these days, I'm going to….") does not constitute an offer assault. An attempted battery assault is an unsuccessful battery. If John attempts to punch Bob, but misses him, John has committed an attempted battery assault. It is not necessary for the victim to be aware of the failed attempt.

A battery is an intentional, harmful or offensive touching of another person, without consent. Actual injury is not required. Minimal physical contact can qualify as a violation. If

John successfully punches Bob in the face he has committed a battery. If John pokes Bob in the chest with his finger, he has also committed a battery.

A person does not need to actually touch another with his own body to commit a battery. Objects that are held by a person are considered extensions of the body. If John hits Bob in the head with a baseball bat he has committed a battery. Similarly, items thrown at another are extensions of the person who threw them. If John throws a rock at Bob and hits him in the head or spits in his face, he has committed a battery.

II. Assaulting Federal Officers or Employees

Title 18 U.S.C. § 111[1] entitled, "Assaulting, resisting, or impeding certain officers or employees," does not distinguish between the separate offenses of assault and battery. Federal courts have determined that both types of conduct are prosecutable under § 111.

Title 18 U.S.C. § 111 has two sections that cover a broad range of conduct, making it a crime to forcibly assault, resist, oppose, impede, intimidate or interfere with any person designated in 18 U.S.C. § 1114, while that person is engaged in his official duties, or on account of something that person did while performing his official duties. The first section of § 111 protects current federal employees (and those assisting them) when (1) they are assaulted while performing their jobs, or (2) if not currently performing their jobs (off duty), they are assaulted because of something they did while performing their jobs. The second section of § 111 protects former federal employees (and those who assisted them) when assaulted because of something they did while a federal employee performing official duties.

III. Who is Covered?

As mentioned before, § 111 provides protection for any person designated in 18 U.S.C. § 1114, or any person who formerly served as a person designated in § 1114. Therefore, in

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

order to determine who is covered by § 111, it is necessary to examine § 1114. Title 18 U.S.C. § 1114 provides for the protection of officers and employees of the United States, and reads, in part, as follows:

> . . . any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) . . . or any person assisting such an officer or employee in the performance of such duties or on account of that assistance ....

This means that every federal employee (including federal law enforcement officers) and every person who assists a federal employee in the performance of his official duties is afforded protection under § 111.

IV. "Forcibly"

Title 18 U.S.C. § 111 makes it a crime to "forcibly" assault, resist, oppose, impede, intimidate or interfere. "Forcibly" applies to each of the distinct ways in which the statute can be violated. For there to be a violation of § 111, the force element must be satisfied. Forcibly includes force actually used or imminently threatened. The government must establish the defendant's behavior would have reasonably inspired fear in a reasonable person. Proof of actual physical contact or threats or displays of physical aggression toward an officer, so as to inspire fear of pain, bodily harm or death suffices. Violently pounding on an officer's patrol car door or by advancing toward an officer in an extremely agitated manner would satisfy the force requirement. However, "tensing up" in anticipation of arrest and disobeying orders to move and lie down, may make your job more difficult, but it does not by itself amount to an assault. Mere passive resistance is not sufficient for a conviction under § 111.

V. "Engaged in or on Account of the Performance of Official Duties"

Current federal officers and employees (and those assisting them) are covered by § 111 if assaulted while they are

"engaged in" the performance of official duties. For example, while on duty and making an arrest, a federal law enforcement officer is punched by the suspect. The suspect may be charged with assault under § 111. When a federal employee is assaulted while engaged in the performance of official duties, it is not necessary for the government to prove that the defendant knew that the person assaulted was a federal employee. Therefore, if an undercover officer is assaulted while performing undercover duties, the suspect may be charged under § 111 even though he was unaware that the person assaulted was a federal officer.

Current federal employees (and those assisting them) who are off-duty are covered by § 111 if assaulted on account of something done while performing official duties. For example, after having made an arrest earlier in the day, an officer, while off duty, is seen by the arrestee's brother. The brother punches the officer because of the officer's earlier arrest. He, too, may be charged with assault under § 111.

Former federal employees (and those assisting them) are covered by § 111 if assaulted on account of something done while performing official duties. For example, a federal law enforcement officer arrests a suspect who is convicted and sent to prison. The officer leaves government employment. After his release from prison, the suspect finds and assaults the former federal officer because he is still angry at having been arrested. The suspect may be charged with assault under § 111 because he assaulted the former federal officer on account of something the officer did while performing official duties.

VI. Penalty

When the defendant's conduct amounts to only simple assault (no touching), it is a misdemeanor. The maximum penalty for misdemeanor, simple assault under § 111 is not more than one year in prison. In an assault that involves contact, but does not result in bodily injury, the penalty is not more than eight years in prison. If the assault results in bodily injury or involves a deadly or dangerous weapon, the maximum punishment is not more than twenty years in prison. Almost

any object has the potential for being a deadly or dangerous weapon. Examples of violations of § 111 which resulted in enhanced penalty for using a deadly or dangerous weapon include hitting an officer over the head with a phone, throwing a water pitcher at an Assistant United States Attorney, hitting a federal officer with a stick, and attempting to run over a federal agent with an automobile.

NOTES

Subpart B

Bribery

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*****

I. Introduction - Title 18 U.S.C. § 201[1]

Title 18 U.S.C. § 201 entitled, bribery of public officials and witnesses, was enacted to protect government officials and witnesses from corrupting influences while they are performing their official duties. It covers any situation in which the judgment of a government official or witness might be influenced because of payments or gifts made to him, while performing his official duties.

II. Public Officials

Two sections of 18 U.S.C. § 201 cover "public officials." It is a crime to give, offer or promise, a public official, directly or indirectly, anything of value, with the intent to influence any official act by that public official. Conversely, it is a crime for a public official to either, directly or indirectly, corruptly demand, seek, receive, accept, or agree to accept anything of value, in return for influencing any official act by that public official. The term "public official" includes any officer or employee or person acting for or on behalf of the United States, or any department or branch of the United States government, or a juror.

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[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

It is an offense for a person to offer a federal agent five thousand dollars to destroy a piece of evidence that was going to be used in a criminal case. It is also an offense for the agent to accept the five thousand dollars in exchange for destroying the piece of evidence.

III. Witnesses

Two sections of 18 U.S.C. § 201 cover witnesses. It is a crime to, directly or indirectly, corruptly give, offer or promise, anything of value, to any witness, with the intent to influence that witness' testimony under oath, at any trial, hearing, or other proceeding before any court, any committee of either House or both House of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony. It is also a crime to, directly or indirectly, corruptly give, offer or promise, anything of value, to any witness, with the intent to influence the witness to be absent from any trial, hearing or other proceeding as described above.

It is also a crime under § 201 for a witness to, directly or indirectly, corruptly demand, seek, receive or accept or agree to accept, anything of value, in return for being influenced in testimony as a witness or in return for being absent from any trial, hearing or other proceeding as described above.

Under this provision it is a crime to offer Bob the witness five hundred dollars to testify that the defendant was at his house watching television, when the robbery occurred, when this was not true. It would also be a crime for Bob to accept the five hundred dollars in exchange for his fabricated testimony. Also, it would be a crime for a person to pay Bob the witness five hundred dollars so Bob would intentionally not appear in court to give testimony. Bob could be charged under § 201 if he received the five hundred dollars in exchange for intentionally being absent from court. Furthermore, it would also be crime if Bob initiated the offense by requesting money in exchange for fabricated testimony or offering to fail to appear and testify.

IV. Directly or Indirectly

In the previous examples something of value, the currency, was given directly to either the "public official" or witness. It is also a crime under § 201 if something of value is given "indirectly" to someone selected or designated by the "public official" or witness. For example, if a person agreed to give five thousand dollars to the federal agent's spouse, in exchange for the agent destroying a piece of evidence in a case, this would qualify as a violation of § 201. Using the same example it would also be a violation if the person gave the five thousand dollars to a private school to cover the cost of tuition for the agent's children.

V. Anything of Value

To charge a defendant with bribery under § 201, the government must prove that "a thing of value" was given, offered, promised, demanded, sought or accepted. A "thing of value" is broadly construed with the focus being on the subjective value the defendant places on the item. Examples of "things of value" include: U.S. currency, automobiles, jewelry, promises of future employment, and all expense paid trips or vacations. It would be a crime under § 201 for a person to give a federal agent an all expense paid trip to Hawaii in exchange for the agent destroying a piece of evidence in a criminal case.

VI. To Influence Any Official Act

To prove a § 201 violation, the government must establish a connection between the "thing of value" and an official act to be performed by the public official. The "thing of value" must be given, offered, promised, demanded, sought or accepted with the corrupt intent to influence an official act. For example, as part of his official duties an IRS Revenue Agent conducts a tax audit and determines that an individual owes the government a sum of money. If that individual offers the IRS agent one thousand dollars to alter the results of the audit to show that no taxes are owed, he may be charged with violation of § 201.

The individual offered a "thing of value" to corruptly influence the IRS agent to violate his official duty to perform accurate audits. Likewise, if the IRS agent suggests that if the tax payer gives him a thousand dollars he will alter the results of the audit to reflect no taxes are owed, the offense of bribery has occurred. The IRS agent has committed the offense of bribery. If the tax payer accepts the offer, the tax payer has committed the offense of bribery, as well.

VII. Gratuities

Gratuities are also covered by 18 U.S.C. § 201. A gratuity involves giving, offering, promising, demanding, seeking, receiving, or accepting anything of value for, or because of any official act performed, or to be performed by the "public official." A gratuity is similar to a bribe in that a "thing of value" is involved; however, there is no corrupt intent to influence an official act by the "public official." It is sufficient to demonstrate that a gratuity was offered or requested, given or accepted for the performance of an official act. Indirect benefits provided to a public official's family members are prohibited as well. It is no defense that the gratuity had no effect upon the actions taken by the public official.

Government employees may also be prohibited from receiving or taking gifts of all types and value by their agency's administrative policies. Though some acts may not be worthy of criminal prosecution, the employee could be disciplined for violations of the agency policy. Should there be a question as to what you, as a federal law enforcement officer, may or may not legally receive every agency has a designated ethics official that will provide guidance to you. It is better to be safe instead of sorry. Ask your ethics official. Be safe and not sorry!

Subpart C

Federal Firearms Violations

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I. Introduction

All law enforcement officers face the possibility of encountering firearms on the job. This course introduces selected federal firearms laws. There are many federal firearms laws which this course does not address. Likewise, this course does not address agency-specific officer concerns, such as the ability to carry off-duty, the ability to carry personal weapons, etc.

Many states and municipalities have firearms laws which are more restrictive than federal law. You should acquaint yourself with state and local firearms laws in your jurisdiction. This knowledge can be invaluable. For example, in a state with less restrictive firearms laws, it is not uncommon to spot a citizen carrying a concealed weapon. However, in a state that prohibits citizens from carrying concealed weapons, your observation of such a weapon could create reasonable suspicion to justify an investigative stop and often a frisk for weapons.

Some dangerous weapons such as machine guns and sawed-off ("short-barrel") shotguns can be legally possessed if those in possession have met strict legal requirements. However, as in all cases involving armed suspects, safety is of paramount concern. You should always take steps to ensure your safety and the safety of others before investigating to see if a weapon is legally possessed.

II. Title 18 U.S.C. § 922(g) - Prohibited Persons

A. Definition of "Firearm"

Firearms are generally described as weapons that will expel a projectile by explosion, including the frames or receivers of such weapons. The definition of "firearm" also includes silencers and destructive devices, such as bombs. However, the definition of "firearm" does not include "antique firearms" (those manufactured prior to 1899), air-powered weapons like BB and pellet guns, black powder weapons and authentic replicas of antique firearms.

B. Prohibited Persons

Federal law prohibits certain persons from possessing a firearm or ammunition. At trial, the government must prove a connection ("nexus") between the firearm and interstate commerce.

Federal law prohibits the following persons from knowingly possessing firearms or ammunition:

1. Convicted felon

A "convicted felon" is anyone "who has been convicted in a state, federal, or military court of a crime punishable by imprisonment for a term exceeding one year." The Supreme Court determined in 2005 that convictions by foreign courts do not bar an individual from possessing a firearm even if the conviction was for a felony-level offense.

This is called the "convicted felon" prohibition. There are a few felony-level convictions that do not bar an individual from possessing a firearm. These exceptions include: (1) individuals convicted of "a federal or state offense pertaining to antitrust violations, unfair trade practices, restraints on trade or similar offenses relating to the regulation of business practices;" or (2) "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20).

2. Fugitive from justice

The term "fugitive from justice" means "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15).

3. *Unlawful user of or addicted to a controlled substance*

4. *An individual who has been adjudicated a mental defective or who has been committed to a mental institution*

Note that the individual must have been "adjudicated" mentally defective or "committed" to a mental institution. Legal advice is sometimes helpful in deciding whether a specific case falls within this category. Voluntary outpatient treatment or counseling does not make an individual a prohibited person.

5. *Anyone, who being an alien is illegally or unlawfully in the United States (except for lawfully admitted aliens under nonimmigrant visa for lawful hunting or sporting purposes or is in possession of hunting license or permit lawfully issued in the United States)*

6. *An individual who has been discharged from the Armed Forces under dishonorable conditions*

7. *Anyone who has renounced United States citizenship*

8. *Anyone subject to a court order restraining him from harassing, stalking or threatening an intimate partner, or child of such intimate partner*

This prohibition applies only after the prohibited person has had a chance to participate in a hearing before the court. Additionally, the restraining order must find the person a credible threat or explicitly restrain the prohibited person from the use of force against the protected person.

9. Anyone who has been convicted of a misdemeanor crime of domestic violence

This means a conviction for a crime that is a misdemeanor under federal, state, or tribal law and that

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33)(A).

For a domestic violence conviction to forbid lawful possession of a firearm, it must meet two qualifications: the defendant (1) must have been represented by counsel, or knowingly and intelligently waived the right to counsel; and (2) if right to trial by jury existed, the defendant either waived that right or had been convicted by jury. 18 U.S.C. § 921 (a)(33)(B)(i).

C. Pardon or Expungement

A person who receives a complete pardon, restoration of civil rights, or expungement of a felony or misdemeanor crime of domestic violence conviction is no longer considered convicted, and is, therefore, no longer disqualified from possessing a firearm. However, possessing firearms remains a crime under federal law if the pardon or expungement states that the person may not possess firearms. 18 U.S.C. § 921 (a)(20) and 18 U.S.C. § 921 (a)(33)(B)(ii).

III. Title 18 U.S.C. § 924(c)(1) - Use or Carrying of Firearm during a Federal Crime of Violence or Federal Drug Trafficking Crime

A. Introduction

Title 18 U.S.C. § 924(c)(1) provides enhanced mandatory penalties for any person who possesses, brandishes or

discharges a firearm during the commission of a federal crime of violence or federal drug trafficking crime. The term "brandish" means to display the weapon or make possession of the weapon known. Any person subject to these enhanced penalties is not eligible for parole, probation or a suspended sentence. Further, the law requires that the enhanced penalty run consecutively to the term of imprisonment imposed for the crime of violence or drug trafficking crime.

B. Definitions

1. "Federal Crime of Violence"

The term "federal crime of violence" means

a federal offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. "Federal Drug Trafficking Crime"

The term "federal drug trafficking crime" means "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." This is a very broad definition.

C. Enhanced Penalties

1. Firearm Possessed

If the firearm is possessed during the commission of a crime of violence or a drug trafficking crime, the mandatory penalty is imprisonment for not less than five years.

2. Firearm Brandished

If the firearm is brandished during the commission of a crime of violence or drug trafficking crime, the mandatory penalty is imprisonment for not less than seven years.

3. Firearm Discharged

If the firearm is discharged during the commission of a crime of violence or drug trafficking crime, the mandatory penalty is imprisonment for not less than 10 years.

IV. 18 U.S.C. § 930 - Possession of Firearms and Dangerous Weapons in Federal Facilities

It is unlawful to knowingly bring or possess a "dangerous weapon" into a "federal facility." The term "federal facility" is defined broadly to include any building (or parts of buildings) owned or leased by the federal government where federal employees are regularly present for performing their duties.

The term "dangerous weapon" is also broadly defined. It includes any weapon or substance capable of causing death or serious bodily injury. A knife with a blade length of 2 ½ inches or longer is a dangerous weapon.

State, local and federal law enforcement officers are exempt from this law while performing their official duties. However, this does not give you an automatic right to carry weapons into federal facilities. For example, most federal courts require you to check your weapons and not bring them into the court.

V. Weapons listed in 18 U.S.C. § 922(a)(4) which require registration with the Bureau of Alcohol, Tobacco, Firearms and Explosives ["ATF" or "BATF"]

A. Introduction

Certain weapons are under strict scrutiny. Some weapons must be registered with ATF in order to possess legally. Title 26

U.S.C. § 5861 prohibits possession of such unregistered weapons. These weapons include short-barrel shotguns, short-barrel rifles, machine guns, silencers/mufflers and destructive devices.

B. Procedure

If you encounter or reasonably suspect that a weapon must be registered, the following procedures are recommended:

1. Determine if Registration Required

Determine whether the weapon is required to be registered by examining the weapon or measuring the weapon.

2. Determine if Weapon Is Registered

If registration is required, determine if the weapon is properly registered to the current possessor of the weapon.

C. Weapons Requiring Registration (18 U.S.C. § 5845)

1. Short-Barrel Shotgun or Weapon Made From a Shotgun

Any short-barrel shotgun or weapon made from a shotgun must be registered if the barrel of the weapon is less than 18 inches in length and/or the overall length of the weapon is less than 26 inches. To check the weapon for compliance of overall length requirements, measure the weapon from the tip of the muzzle to a point perpendicular to the end of the stock of the weapon.

2. Short-Barrel Rifle or Weapon Made From a Rifle

Any short-barrel rifle or weapon made from a rifle must be registered if the barrel of the weapon is less than 16 inches in length and/or the overall length of the weapon is less than 26 inches. Again, to check the weapon for compliance of overall length requirements, measure the weapon from the tip of the

muzzle to a point perpendicular to the end of the stock of the weapon.

3. Machine Gun

All machine guns must be registered. A machine gun is any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger. This term includes the frame or receiver of any such weapon, any combination of parts from which a machine gun can be assembled, and parts which convert an ordinary firearm into a machine gun. Generally, there are two types of machine guns encountered by law enforcement officers: Originally manufactured machine guns and those converted from semiautomatic weapons.

4. Silencer/Muffler

Any device for silencing, muffling, or diminishing the explosion noise of a firearm must be registered.

5. Destructive Device

All destructive devices must be registered. The term destructive device means any explosive, incendiary, or poison gas, bomb, grenade, rocket (with more than 4 oz. of propellant), missile (with more than .25 oz. of explosive), mine, or similar device. The term also includes any type of weapon (regardless of name) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than ½ inch in diameter, except a shotgun or shotgun shell which is generally recognized as particularly suitable for sporting purposes. Common examples of destructive devices include: rocket launchers, mortars, land mines, and hand grenades.

VI. Tracing a Firearm through the National Tracing Center, Bureau of Alcohol, Tobacco, Firearms and Explosives

A. Introduction

The ATF National Tracing Center handles about 250,000 firearm trace requests annually. Tracing a firearm may assist your investigation in any number of ways. The main reason you trace firearms is to link weapons used criminally to a specific person. Additionally, the trace may assist in identifying: (1) stolen property; (2) associates of suspects; and (3) sources and suppliers of firearms for criminal suspects. Finally, tracing firearms helps to prove the connection ("nexus") between the firearm and interstate commerce-- a connection that must be proved for some federal firearms violations.

B. What Information is Required to Trace a Firearm?

In order to trace a firearm, the following information must be provided to ATF.

- **Make:** For example, a "Colt, Taurus, or Ruger."
- **Model:** For example, a "Detective Special or Model 26."
- **Caliber/Gauge:** For example, ".38 Caliber."
- **Serial Number:** For example, "33419."

C. Information Gained from Successful Trace

Tracing the weapon should reveal the following information: the manufacturer, the exporter/importer if the weapon is foreign-made, the wholesale distributor, the retail gun dealer and the first lawful retail purchaser from the dealer. A weapons trace will not reveal transfers of weapons between private individuals. There is no national database for recording weapon transfers between individuals.

Subpart D

Federal Drug Offenses

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I. Introduction

Due to pervasive substance abuse in our society, it is imperative that law enforcement officers have a working knowledge of controlled substance offenses. At various times during their careers, law enforcement officers, regardless of agency assignment, are likely to encounter a variety of controlled substance offenses.

II. Controlled Substances

Unlawful and knowing possession and possession with the intent to distribute (transfer) controlled substances are criminal offenses. These substances would be legal to possess and distribute, but for the statutes which "control" them. Alcohol and tobacco are not listed as controlled substances.

A. Defined

A controlled substance is defined by federal statute as a "drug or other substance…" identified in schedules I, II, III, IV, and V of Part B of [21 U.S.C. § 812]. Schedule I substances are considered the most dangerous, as they have little or no currently accepted medical use and have a very high potential for abuse. The remaining schedules list drugs based on their accepted medical use and their potential for abuse. The schedules list drugs by their scientific names. They also list

finished drugs like cocaine, and the raw material, such as coca leaves, from which it is created. Controlled substance analogs are substances which have substantially similar chemical structures to controlled substances. Analogs are criminalized, as are immediate precursor chemicals necessary to create the drugs. When charging these offenses, the controlled substance must be listed in one of the five schedules and must be proven beyond a reasonable doubt.

B. Possession

Pursuant to 21 U.S.C. § 844[1], it is "unlawful for any person knowingly or intentionally to possess a controlled substance…" unless such substance was obtained directly from a medical practitioner pursuant to a valid prescription or as otherwise authorized by law. Thus, a person with a valid prescription from his physician or who has received a controlled substance from his physician for use in treating an ailment would be in lawful possession of the controlled substance. If an officer takes possession of controlled substance during a search incident to arrest, the possession of the controlled substance would be lawful. If however, instead of turning the controlled substance in as evidence, the officer keeps it and takes it home for personal use, the officer would unlawfully possess the controlled substance. Unlawful, knowing possession of a controlled substance are elements of this offense. Knowingly means that a person realizes what he is doing and is aware of the nature of the conduct and does not act through ignorance, mistake, or accident. A person's words, acts, or omissions can be used to determine if they acted "knowingly." Mere presence at the scene of a controlled substance offense is not, by itself, sufficient evidence to convict a defendant. However, if a suspect has a suspicion a crime was being committed and shut his eyes for fear of what he may learn, a jury may conclude the defendant had sufficient knowledge to establish criminal culpability. It is the law enforcement officer's responsibility to develop facts to prove all the elements of the offense.

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

Possession is the ability to control the substance. Knowing possession means that the person has knowledge of the nature of the possessed substance. It is not necessary that the person knows the exact nature of the substance (that it is cocaine for example). It is sufficient the person knows it is prohibited. Similarly, if the person believes the substance to be cocaine when in fact it is heroin, the person has sufficient knowledge it is prohibited. However, a person who possesses cocaine, but actually believes it to be powdered sugar, does not knowingly possess a controlled substance.

Possession of a controlled substance can be actual or constructive. Actual possession occurs when the substance is physically controlled by the person (in their hand for example). Constructive possession occurs when the person is not in actual physical contact with the substance, but has the power and intention to exercise direction and control over it. If the controlled substance is in the trunk of their car, on their dresser, or in their desk drawer, they have constructive possession. Joint possession occurs when more than one person possesses the same controlled substance. For example, if two people knowingly transport cocaine, a controlled substance, in the trunk of a car, they jointly possess the cocaine through constructive possession.

Any amount of a controlled substance can support a conviction for a properly charged offense. A trace amount of cocaine, a marijuana seed, residue on a roach clip, or a dried solution on a syringe is all that is needed to support a conviction when the offense is properly charged. The amount and type of the controlled substance to include the statutes used to charge the offense will have a direct impact on the sentence, but not the conviction itself.

C. Distribution

Title 21 U.S.C. § 841(a)[2] makes it unlawful for any person to unlawfully, knowingly or intentionally: "(1) manufacture,

[2] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance…" Possession with intent to manufacture, distribute, or dispense is usually proved through circumstantial evidence. Words, acts, omissions, packaging materials, method of packaging, scales, quantity, value, purity, presence of cash, distribution paraphernalia and transportation arrangements can all be used to circumstantially prove possession with intent to distribute. No commercial transaction (exchange of drugs for money) is required. All that is necessary is evidence to support the unlawful, knowing distribution (transfer) or possession with intent to distribute (transfer) the controlled substance. It is the law enforcement officer's responsibility to develop facts to prove elements of the offense.

D. Penalties and Charging

Penalties are dependent upon the amount and type of drug (which schedule is affected) and how the offense is charged. Distributing controlled substances within 1,000 feet of a school or playground, or at a public transportation highway rest stop or truck stop, or by using or employing a minor, are chargeable offenses with enhanced punishments. Attempts, conspiracies (no overt act is required for a drug conspiracy – only the agreement is required), and importation are other examples of ways in which controlled substances can be charged and penalized. Furthermore, possession of drug making equipment, using a communication facility (phone/cell phone) in facilitating a controlled substance offense, endangering human life while manufacturing a controlled substance, distributing controlled substances to persons under 21 years of age or to anyone that is pregnant, or employing persons under the age 21 in drug operations are other offenses that may be charged. Simple possession of "user amounts" is a misdemeanor offense. Offenses can result in criminal forfeitures and civil penalties as well.

Subpart E

The Entrapment Defense

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I. Introduction and Overview

Entrapment is the act of government officers or their agents (e.g., informants) inducing a person to commit a crime not contemplated by that person, for the purpose of prosecuting that individual. It is the conception and planning of an offense by officers or their agents and their procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer/agent. Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit the criminal act, and then induce commission of the crime so that the government may prosecute.

Entrapment occurs only when the criminal conduct was the product of the activity of government officials. This

means that entrapment cannot result from the inducements of a purely private citizen, but must be the product of government conduct initiated by its officers or their agents.

II. Overview of How the Entrapment Defense Works

Entrapment is an affirmative defense. The evidence must establish sufficient facts from which a reasonable jury could find entrapment. This is typically done during the government's case-in-chief through the cross-examination of the government's witnesses. It can also be a part of the defense case if one is presented. The question of entrapment is one for the jury to decide unless the right to jury trial is waived and the case is submitted to the judge.

The critical factor in the entrapment defense is the state of mind of the defendant. At issue is the defendant's predisposition to commit the offense charged. The question is whether the defendant, before contact with law enforcement officers or their agents, already possessed the state of mind to commit the offense charged. Once the defendant has raised the entrapment defense, the government must negate it by establishing predisposition beyond a reasonable doubt. If defendant's predisposition is established, there is no entrapment.

III. Analysis of the Entrapment Defense

A valid entrapment defense consists of two components:

- Government inducement of the crime, and
- Lack of predisposition by the defendant to commit the crime.

A. Government Inducement

Entrapment occurs when the criminal activity is induced by government officers or agents. Inducement by law enforcement officers may take many forms including

persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based upon need, sympathy, or friendship.

1. Permitted inducements

Some inducements are unlikely to tempt a law-abiding person to commit a crime. Some inducements are so innocuous that courts generally condone their use. Examples include: use of decoys ('robo' deer – decoys (metal or Styrofoam) used to entice poachers), payments of reasonable amounts of money, assistance in facilitating the commission of the crime by providing equipment or supplies (e.g., paper for counterfeiting or chemicals for drug manufacture).

2. Prohibited inducements

Some inducements are so coercive that their use jeopardizes any chance of successful prosecution. These may create the appearance, and sometimes the reality, of outright duress. Examples are:

- threats against the well-being of the target's family
- extreme appeals to the sympathy or emotions of the person solicited
- offers of unreasonable amounts of money to an impoverished or financially desperate target
- continuous pressure such as repeated phone calls, visits or requests; repeated insistence, badgering
- violent demonstrations or threats.

In some cases, government conduct can be so outrageous that due process principles will absolutely bar the government from obtaining a conviction. To establish outrageous government conduct, there must be over-involvement by the government combined with a passive role by the defendant. In other words,

the government conduct must be so outrageous that it shocks the universal sense of justice and fundamentals principles of fair play. For example, when the government supplies a defendant with counterfeit currency and then indicts him for receiving counterfeit currency with the intent to pass it as genuine, the government's actions violate due process.

B. Predisposition

Predisposition does not mean that the defendant on his own, under some conceivable set of circumstances, might commit the crime. Predisposition means that the defendant is presently ready and willing to commit the crime. Predisposition is a state of mind that readily responds to the opportunity furnished by the government or its agent to commit the offense.

Predisposition can be shown in many ways such as:

- statements made by the defendant before, during, and even after the inducement
- character and reputation
- motive for committing the crime
- eagerness or ready acceptance of the government's suggestion
- possession of contraband for sale on his premises
- prior convictions or criminal activity of the same or similar nature evidencing intent, motive or knowledge
- acceptance of an offer to supply the last essential ingredient to manufacture drugs.

C. Examples of Fact Situations Establishing Predisposition

1. An Existing Course of Similar Conduct

The defendants have been selling cocaine for some time when an undercover agent makes a purchase from them. The criminal intent or design did not originate from the government.

2. Previously Formed Intent

The defendant had purchased paper and ink and was trying to get a counterfeit operation underway when government agents heard of her intent and provided additional materials and expertise. The criminal intent in this instance was not the creation of the government.

3. A Ready Response to a Criminal Offer

An undercover agent asks a bootlegger, "How much for a bottle?" The bootlegger promptly replies, "$5.00." Here, it was obviously not necessary for the agent to "lure, inspire, or persuade" the bootlegger, who was clearly ready and willing to commit the crime as soon as an opportunity arose.

D. Examples of Fact Situations Suggesting NO Predisposition

1. Extreme Appeals to Emotion

An undercover government agent approaches a nurse in a hospital and asks for a prescription pain-killing drug. The nurse is reluctant to provide it. The agent persists, telling the nurse that his daughter is dying of cancer and he can't stand to see his daughter suffer. After numerous requests, the nurse finally relents and provides a small amount of the drug.

2. *Threats*

A government informant advises a government agent that Bob might be interested in drug smuggling. The informant then kidnaps Bob's wife and tells Bob he had better smuggle a load of cocaine for the informant to sell or the informant will kill his wife. Bob agrees to smuggle the cocaine.

3. *Excessive Amounts of Money*

An ATF agent knows that a middle class businessman is having serious money problems. The agent offers the businessman $75 million to smuggle some illegal weapons into the country. After a few requests, the businessman agrees to smuggle the weapons.

IV. Conclusion

Whenever you induce a person to commit a crime, you should be prepared to refute an entrapment defense with facts that demonstrate the defendant's predisposition. Thorough reports detailing statements and actions of the defendant can greatly enhance the government's ability to negate the defense. Be aware however, the Supreme Court has clearly indicated that outrageous government conduct, which orchestrates a criminal offense, can be as a matter of law, an absolute bar to a prosecution even if the defendant is predisposed. Thus, proper investigation planning, to include monitoring and controlling informants to ensure even-handed treatment, is essential.

Subpart F

False Statements

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I. Elements

In order to successfully prosecute a defendant for violating 18 U.S.C. § 1001[1], the following elements must be met:

- The defendant
- regarding certain federal matters
- knowingly and willfully
- made a false material statement, or
- concealed or covered up a material fact, or
- made or used a document containing a false material statement.

A. Regarding Certain Federal Matters

Section 1001 applies to false statements made in a matter within the criminal jurisdiction of the executive, legislative, or judicial branches. False material statements include

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

statements and documents, made or used, that contain material false statements or those which cover up or conceal material facts. The statute applies to statements made during administrative, civil, or criminal investigations, or during regulatory or rule-making activities, with the following limitations:

1. Judicial Proceedings

Section (a) of the Act does not apply to a party or that party's counsel for any statements, representations, writings or documents submitted by them to a judge or magistrate during a judicial proceeding. Thus, non-parties could be prosecuted for any false statements made during a judicial proceeding, while a party could only be prosecuted for false submissions made to a judicial entity during administrative housekeeping matters. Such entities include, for example, the Office of Probation and the Clerk of the Court.

2. Legislative Branch Matters

Section (a) of the Act applies to matters within the jurisdiction of the legislative branch only if they relate to administrative matters or Congressional investigations conducted consistent with applicable Congressional rules. Administrative matters include such things as financial disclosure filings, claims for payment made to the House Finance Office, and submissions to legislative entities, such as the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House, and the Capitol Police.

Duly authorized investigations or reviews are those that are initiated through a formal action of a House or Senate committee, or the whole House or Senate. Inquiries by members of Congress or their staff are not a duly authorized investigation under § 1001.

The statute covers material false statements made to a federal agency by a witness/informant about alleged criminal acts within the jurisdiction of the agency, even when no such

criminal acts actually occurred. False material statements made to an agency regarding the regulatory functions of a federal department or agency fall under § 1001. Courts have upheld convictions under this section where individuals have made false material statements to state agencies which are recipients of federal funds.

B. Knowingly and Willfully - Intent

To constitute a § 1001 violation, a false material statement must be capable of affecting the exercise of a government function. The intent must be to deceive or mislead. Intent to defraud is not required for a successful § 1001 prosecution.

C. Makes a False Material Statement or Conceals or Covers Up a Material Fact

For a person to be convicted of making a false statement under § 1001, the false statement must be material. The Supreme Court has held that a material statement ... must have a natural tendency to influence, or be capable of influencing, the decision of the decision making body to which it was addressed. Materiality is a mixed question of law and fact for the jury.

A false material statement, under § 1001, is not required to be made under oath or affirmation. The false material statement can be oral (a statement made during an interview) or can be written (part of a document submitted to an agency). False material statements made on federal tax documents, in interviews related to a tax investigation, on an application for federal employment, and during an interview with a Customs official at a secondary inspection site are violations of § 1001.

At one time, some circuits held that false "exculpatory no" statements made by a suspect to agents in a criminal investigation did not violate § 1001. An "exculpatory no" statement is a statement in which a suspect merely denies that he is guilty of the crime which he committed. However, the

Supreme Court has now ruled that § 1001 covers any false material statement, of whatever kind, including the use of the word "no" in response to a question. The "exculpatory no" statement must be material to the investigation. Title 18 U.S.C. § 1001 does not require a suspect to talk to law enforcement. A suspect has a constitutional right to remain silent. However, if the suspect chooses to speak, the suspect has no constitutional right to lie to a federal law enforcement officer.

Subpart G

Theft, Embezzlement, and Conversion

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I. Introduction

Title 18 U.S.C. § 641[1], titled "Public Money, Property or Records," is a comprehensive statute designed to address four crimes which, at common law, were separate and distinct offenses. The statute applies to theft, embezzlement, theft by conversion, and theft by receiving stolen property of the United States government or any department or agency thereof.

II. Terms of the Statute

For purposes of the statute and this text, "property" refers to any records, vouchers, money, or things of value of (or any property made or being made under contract for) the United States or any department or agency thereof. If the value of the

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

property stolen, embezzled, converted, or received is more than $1,000, the offense is a felony and could result in ten years confinement and a maximum fine of $250,000. If the value of the property stolen, embezzled, converted, or received is $1,000 or less, the offense is a misdemeanor and could result in confinement of up to one year and, pursuant to 18 U.S.C. § 3571, a maximum fine of $100,000. To allege a felony, the value of the property must be in excess of $1,000. The value of the property taken must be alleged in the charging document and proved beyond a reasonable doubt at trial.

III. Theft

Section 641 codifies the common law crime of larceny. "Theft" is defined as the wrongful taking and carrying away of property belonging to the United States government or any agency thereof with the intent to deprive the United States government of the use or benefit of the property so taken.

A. Elements

Three elements must be proven to convict a defendant of "theft" under § 641. These elements are:

- That the defendant voluntarily, intentionally, and knowingly
- Stole property belonging to the United States or any department or agency thereof
- With the intent to deprive the United States of the use or benefit of the property so taken.

B. Example

A defendant takes a vehicle that belongs to the United States government, intending to keep it for his own use and enjoyment. The defendant is guilty of theft of government property. He knowingly stole property belonging to the United States with the intent to deprive the United States of the use of the property.

A defendant "steals" property when he or she takes and carries away property belonging to another with the intent to deprive the owner of the property. To successfully prosecute a defendant for theft under § 641, the government must prove that the defendant had, at the time of the taking, the specific intent to deprive the United States of the use or benefit of government property or property made or being made under contract for the United States. The defendant is not required to know that the item he stole belonged to the United States or one of its departments or agencies. Rather, all that needs to be proven is that the defendant knew he was taking something that did not belong to him. The fact that the item belonged to the United States government is something the government must establish in order to furnish a basis for federal jurisdiction over the crime. The defendant's knowledge of this jurisdictional fact is irrelevant. In order to prove that an item belongs to the United States, the government must prove that it had "title to, possession of, or control over" that item. If the defendant takes the property believing that it was abandoned, that is a defense to a prosecution brought under § 641. In cases where the crime is alleged to have been a felony, the government must prove one additional element: that the value of the item stolen is greater than $1,000.

IV. Embezzlement

"Embezzlement" is defined as the wrongful, intentional taking of property of another by an individual to whom the property had been lawfully given by reason of some office, employment, or position of trust (such as a bank manager). In other words, the original taking of the property is lawful or done with the express or implied consent of the owner. However, once the property is lawfully acquired by reason of the defendant's position of trust (sometimes referred to as a "fiduciary" relationship), the defendant intentionally takes the property with the intent of depriving the United States of the use or benefit of the property.

A. Elements

In order to prove the crime of embezzlement, the government must again prove three elements. With the exception of the second element, the elements of embezzlement are the same as those for theft. These elements are:

- That the defendant voluntarily, intentionally, and knowingly
- Embezzled property belonging to the United States or any department or agency thereof
- With the intent to deprive the United States of the use or benefit of the property so taken.

B. Example

A federal postal employee is responsible for selling stamps to the public. Instead of depositing the money received into a government account, the employee keeps the money for his personal use. The employee has committed the crime of embezzlement. The money was property of the United States; the employee was entrusted with the money legally; he deprived the United States of the use of the money taken; and intentionally appropriated the money to his own personal use.

While the elements are virtually identical for both crimes, embezzlement and theft are separate and distinct offenses. With the crime of embezzlement, the original acquisition of the property is lawful; there is no fraud or crime committed in the original obtaining of the property. It is only after the property has been entrusted to him or her that the defendant forms the intent to deprive the owner of the use of the property taken. This is the primary difference between embezzlement and theft of government property. In embezzlement, the original taking was lawful or with the consent of the owner, and the intent to deprive the United States of the property originated later. In theft, the intent to deprive the United States of the property must exist at the time of the taking. Again, if the crime is

alleged to have been a felony, the government must also prove that the value of the property embezzled was over $1,000.

V. Theft by Conversion

"Conversion" is defined as wrongfully depriving the United States or any department or agency thereof of its property. In its most basic form, "conversion" simply means that an individual lawfully comes into possession of United States property and wrongfully converts it to his or her own use. Theft by conversion does not require that the defendant intend to keep the property permanently, nor does it require an unlawful taking by the defendant. Under § 641, theft by conversion may include misuse or abuse of government property, as well as use of the property in an unauthorized manner or to an unauthorized extent.

A. Elements

Like theft and embezzlement, there are three elements necessary to convict a defendant of theft by conversion under § 641. Again, with the exception of the second element, the elements of conversion are identical to those of theft and embezzlement. These elements are:

- That the defendant voluntarily, intentionally, and knowingly;
- Converted property belonging to the United States or any department or agency thereof;
- With the intent to deprive the United States of the use or benefit of the property so taken.

B. Example

A federal agency has a government vehicle for its employees to use for official purposes. At lunch one afternoon, one of the employees uses the government vehicle to go shopping for a couple of hours at a local mall. The employee is

guilty of conversion under § 641. The employee wrongfully deprived the United States government of its property during the unauthorized use of the government vehicle.

VI. Theft by Receipt of Stolen Property

The statute also prohibits knowingly receiving stolen, embezzled, or converted United States government property. Because the individual receiving the stolen property knows that it has been stolen, he or she does not have any legal interest in the property, which continues to belong to the party from which it was stolen (i.e., the United States).

A. Elements

In order to convict a defendant of theft by receiving stolen property, the government must prove these four elements:

- That the defendant voluntarily, intentionally, and knowingly received
- Stolen, embezzled, or converted property belonging to the United States government or any department or agency thereof
- Knowing that the property had been stolen, embezzled, or converted
- With the intent to deprive the United States of the use or benefit of the property.

B. Example

A federal employee steals a computer belonging to the United States government. The employee takes it to a friend and asks him if he would like to buy it at a discount. When asked about the origin of the computer, the employee admits to the friend that it was stolen. The friend decides to purchase the computer anyway for his own use. While the federal employee is responsible for theft of government property, the friend is

responsible for theft by receiving stolen property. The friend knowingly received the computer; the computer had been stolen from the United States government or any agency or department thereof; the friend had knowledge that the computer had been stolen; and the friend received the property with the intent to deprive the United States of the use of the property by converting it to his own use.

As with theft, a defendant accused of theft by receiving stolen property under § 641 need not have knowledge that the stolen property belonged to the United States government or any agency or department thereof, although he does need to know that the property was stolen, embezzled or converted. Knowledge of who actually owned the property is a jurisdictional issue, not an element of the offense. If the value of the property is over $1,000, the crime is a felony.

NOTES

Subpart H

Federal Fraud Statutes

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I. Introduction

The concept of "federalism" embodied in our U.S. Constitution - independent states relinquishing certain of their

rights, while maintaining others to form a more workable union - helped create the world's greatest democracy, but also posed significant challenges. In the realm of law enforcement, issues arose regarding how to prevent and prosecute crimes spanning more than one state. When con artists used the mail, transported by pony express, to defraud victims in distant states, which state's law did they violate and where were they properly prosecuted once apprehended? If personal items stolen in one state were transported across boundaries for sale in another state, which sovereign's laws applied and which state officials were responsible for the investigation, arrest and prosecution of the thieves? As a result, early in our history, a suspect's flight across state lines for all but the most heinous crimes was the most effective means of eluding capture and conviction.

As the nation's borders expanded and its population grew, Congress recognized the increasing need to combat these interstate crimes and responded by enacting legislation based primarily on its authority under Article I, Section 8 of the Constitution to regulate commerce among the several States. Consequently, federal investigators and prosecutors now have a vast array of federal statutes to combat crimes that cross state lines by employing means of interstate transportation and communication. In the fraud area, those statutes include 18 U.S.C. § 1343, Fraud by Wire, Radio, or Television (more commonly referred to as the Wire Fraud Statute), and 18 U.S.C. § 2314, Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting (more commonly known as the Interstate Transport of Stolen Property or "ITSP"). Congress also looked to its Constitutional authority to establish post offices and post roads to enact 18 U.S.C. § 1341, Frauds and Swindles (the Mail Fraud Statute). Together, these three statutes constitute the federal government's primary weapons in prosecuting fraud schemes touching interstate commerce or using the mails.

II. Mail Fraud - 18 U.S.C. § 1341[1]

A. The Elements

The statute requires proof of the following elements:

- Any person who
- Intentionally
- Devises a fraudulent scheme and
- Uses or causes the mails to be used (postal service or private/commercial interstate carrier)
- In furtherance or in support of the scheme

B. Definition of Fraud

Fraud is the intentional presentation of falsehoods as truth with the goal of causing someone to part with something of value under false pretenses. The words "to defraud" commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify deprivation of something of value by trick, deceit, chicane or overreaching.

C. Application of the Mail Fraud Statute

1. In General

Several essential features of the mail fraud statute are worthy of mention. First, each use of the mail or an interstate carrier (such as United Parcel Service or Federal Express) in furtherance of a fraud scheme constitutes a chargeable count of mail fraud. A simple example would be a defendant who used the mail to order goods for which he had no intention of paying. His mailing of the order form would be chargeable as one count

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

of mail fraud and the mailing of the goods he ordered by the victimized vendor would constitute a second count of mail fraud under § 1341. It is well-established that the defendant need not intend, nor even know, that the mail was or will be used. In fact, he or she may take deliberate actions to avoid using the mail and still violate the statute. It is sufficient that the use of the mail was reasonably foreseeable. Thus, a defendant who hand-delivers his fraudulent claim for insurance proceeds can be still be prosecuted under the mail fraud statute if his insurance agent then sends the claim by mail to the home office for processing. Though the defendant sought to avoid the mail, the mailing of his claim by the agent was reasonably foreseeable. In addition, a defendant can be charged with a mailing which he or she did not personally place in the mail and which does not itself contain any false representations. It is sufficient that the defendant caused the mail to be used and that the mailing was in furtherance of the scheme. Finally, unlike the Wire Fraud statute (§ 1343) discussed below, the mailings charged in a mail fraud prosecution can be intrastate (solely with in one state) as long as the U.S. Mail or an interstate carrier is used. Thus, a victim's check mailed from Manhattan to the defendant in Brooklyn, N.Y., can be charged as a mail fraud count.

2. "In Furtherance of the Scheme"

A mailing is chargeable under the mail fraud statute if it is made in furtherance of the scheme to defraud. To meet this requirement, a use of the mail or an interstate carrier does not need to be an "essential" part of the scheme; it need only be incident to an essential part of the scheme or a step in the plot. Mailings made after the fraudulent scheme has reached fruition are not chargeable. Thus, where the defendant used a stolen credit card to purchase products and services, the invoices mailed to the authorized holder of the credit card seeking payment for these items and checks mailed in payment of the invoices by the victim occurred after the fraud was completed, and cannot be charged as mail fraud counts. However, the courts have distinguished between mailings after the completion of the fraud, which are not chargeable under

§ 1341, and "lulling letters." Lulling letters are mailings designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place. As an example, if an investment adviser sold bogus stocks to his clients and converted their funds to his own use, he could still be charged with subsequent mailings of false statements which indicated their accounts had risen in value. Though these mailings are made after the victims have already lost their money, they effectively deceive the investors as to the true condition of their accounts, and allow the scheme to go undetected. The ability to charge lulling letters as mail fraud counts enables prosecutors to indict cases which otherwise would have been precluded by the expiration of the five-year statute of limitations.

D. A Sampler of Common Schemes

Fraud schemes come in all shapes and sizes, limited only by the perpetrator's creativity. The great benefit of the mail fraud statute is its easy adaptability to any type of scheme in which the defendant has obtained something of value by "conning" his or her victim. Described below are a few of the "garden variety" schemes that have been successfully prosecuted utilizing the mail fraud statute. The investigator should keep in mind, however, that these are only a sampling of the many schemes to which the mail fraud statute can be applied.

1. Bribes and Kickbacks – Public Corruption

Where a public official solicits or receives a kickback in exchange for official action benefiting certain persons or groups, the government may prosecute that public official for mail fraud if the mails were used in furtherance of the scheme.

2. Bribes and Kickbacks – Private Corruption

In mail fraud cases involving misuse of corporate positions by executives seeking private gain, the scheme to

defraud must involve bribery or kickbacks that deprive the corporation or its shareholders of honest services. Any mailing to execute the bribery or kickback scheme constitutes mail fraud.

3. Fraud Against Consumers

A business is allowed to "puff" or exaggerate the virtues of its product, but is not permitted to fabricate non-existent qualities; nor may a business offer an item and fail to deliver it or substitute another of materially different quality or characteristics. Any mailing which assists in the execution or completion of such a scheme is chargeable as mail fraud. Examples include odometer roll-back schemes (the mailing occurs when the false odometer certification is sent in to the state); telemarketing fraud (the mailing occurs when the victims send the money to obtain the non-existent product); and sweepstakes that require people to send money to win or receive their prize.

4. Fraud Against Business

Anyone who files a false claim with a business by using the mail violates the mail fraud statute. Such schemes include false claims for insurance benefits, bad faith refusals to pay for rendered goods and services, sales of supplies and equipment of inferior quality or not conforming to agreed-upon specifications, and false applications for financing.

5. Fraud Against Government

Anyone who files a false claim with the federal, state or local government by using the mail violates the mail fraud statute. Examples include state or local tax fraud, false claims for Veterans Administration, social security, workers compensation and other government benefits; false education certifications; or false college loan applications.

6. Private Fraud

Any person who commits a fraud against another person and either uses the mail or causes the mail to be used in

furtherance of the scheme has committed mail fraud. For example, a defendant who married a recently-widowed person and used the mail in furtherance of a scheme to deplete the assets left to that person by the deceased spouse has violated the mail fraud statute.

III. Wire Fraud - 18 U.S.C. § 1343[2]

A. The Elements

The statute requires proof of the following elements:

- Any person who
- Intentionally
- Devises a fraudulent scheme and
- Uses or causes an interstate wire transmission to be used
- In furtherance or in support of the scheme

B. Application of the Wire Fraud Statute

The wire fraud statute prohibits the telephone, television, telegraph, and more recently, the internet, from being used in interstate commerce to promote a fraud scheme. In applying § 1343, the courts have stated consistently that its elements are the same as those of the mail fraud statute. Thus, just as in mail fraud cases, wire fraud involving misuse of corporate positions by executives seeking private gain, the scheme to defraud must involve bribery or kickbacks that deprive the corporation or its shareholders of honest services.

The major differences between wire fraud and mail fraud statutes are the nature of the communication method. The wire

[2] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

fraud statute requires that the signal or wire transmission forming the basis of the charge must cross state lines. Thus, a telephone call placed by the defendant to his next-door neighbor which is otherwise in furtherance of his fraud scheme will not be chargeable under § 1343 because it was not an interstate call. However, that same call made to an out-of-state victim would serve as an indictable wire fraud charge. However, a cell phone call that connects through a tower in another state would be sufficient to establish the interstate connection, even if the phone call was made to a person living next door to the person making the call.

As with the mail fraud statute, there is no requirement under the wire fraud statute for the defendant himself to place the telephone call or send the facsimile message. It is sufficient if the use of the telephone, facsimile, computer, television or radio was reasonably foreseeable. Federal investigators have commonly relied on the wire fraud statute in cases involving the wiring of funds through the banking system by fraud victims; schemes in which defendants have used the internet to order products for which they had no intention of paying; "pump and dump" schemes in which defendants have sold stocks for huge profits after using the internet to fraudulently tout their value; and most popular of all, the ever-present fraudulent telemarketing schemes. Like the mail fraud statute, § 1343 is extremely versatile and remains a favorite weapon of federal prosecutors. In one case, the government successfully prosecuted a fertility specialist under the wire fraud statute whose fraud victims made interstate telephone calls to schedule appointments at his office.

As technology changes and our interstate communications system evolves from "wire" to "broadband" and other yet to be developed hardware, federal investigators can expect to see innovative applications of the wire fraud statute, as well as new legislation aimed specifically at combating these new mechanisms of fraud. It should be noted that, despite its short title as the "wire fraud" statute, § 1343 has already been applied to interstate communications effected by telephones other than "land lines," based on its application to radio transmissions.

IV. The National Stolen Property Act - 18 U.S.C. § 2314[3]

The National Stolen Property Act, codified at 18 U.S.C. § 2314, is commonly referred to as the Interstate Transport of Stolen Property or "ITSP". It was originally enacted in 1934 to "federalize" thefts and frauds that crossed state lines. In 1990, ITSP was amended to encompass the transportation of stolen goods through foreign commerce.

Section 2314 is comprised of five distinct provisions which together proscribe activities involving the transportation of certain specified items and persons across state lines and in interstate commerce. Each such provision requires its own elements of proof and will be considered in order of appearance. This course will address only the first three provisions of the statute.

A. Paragraph One

1. The Elements

The first paragraph of ITSP prohibits the interstate transportation of stolen, converted or fraudulently obtained goods. It requires proof of the following elements:

- Transportation in interstate or foreign commerce
- Of any goods, wares, merchandise, securities or money valued at $5,000 or more
- Knowing the same to have been stolen, converted or taken by fraud

2. Proving the Elements

(a) Interstate or Foreign Commerce

The property or monies obtained by theft or fraud must have been transported or transferred across state lines or in

[3] The pertinent parts of this statute can be found in their entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

foreign commerce. Transportation or transfer of such items within a single state does not satisfy the requirements of the statute. It is the transport or transfer of the stolen or fraudulently obtained property or moneys from one state to another or between the United States and a foreign country that violates the statute and confers federal jurisdiction over the crime. Thus, a thief who steals property in Georgia and then transports it to Florida commits a violation of the first paragraph of ITSP. If instead he remains in Georgia with the proceeds of his theft, the suspect has violated state law, not federal law.

(b) Transport, transfer or transmit

The means by which the stolen or fraudulently obtained property or money is transported, transferred or transmitted across state lines is not material. It is sufficient that the defendant transported the item personally or caused the item to be transported, transferred or transmitted in interstate or foreign commerce. Thus, reliance on a private or commercial courier, or use of the U.S. mail, thereby causing the interstate transport of the stolen merchandise, satisfies this element of the statute. Interstate wire transfers of funds obtained through theft or fraud constitute violations of ITSP. The courts have consistently held that ITSP can be charged concurrently with the mail fraud and wire fraud statutes because they demand proof of at least one different element. With regard to foreign commerce, ITSP makes it a crime to transport to the United States goods stolen in a foreign country, even if they do not subsequently travel in interstate commerce once they arrive in the United States. Likewise, the transportation or transmission to a foreign country of property or moneys obtained by fraud or theft in the United States violates ITSP.

(c) Value of $5,000 or more

The stolen or fraudulently obtained property transported in interstate or foreign commerce must be valued at $5,000 or more. This requirement prevents the over-extension of federal law enforcement resources by restricting their application to

more substantial frauds and thefts. To determine the appropriate measure of value, the courts refer initially to 18 U.S.C. § 2311, which defines value as face, par, or market value, whichever is the greatest. For items with no face or par value, the courts have generally defined market value as the price a willing buyer would pay a willing seller either at the time and the place that the property was stolen or at any time during the receipt or concealment of the property. In applying this standard, the courts look to the particular facts of each case and pose the question: in what type of transaction would the person from whom the property was stolen have engaged? If the victim was a wholesale merchant, the value for purposes of ITSP is the wholesale market price; if the victim was a retail merchant, the value of the stolen property is the retail market price. Where there is no established market for the stolen item, courts have relied on the prices paid among those dealing in the stolen property, referring to this as the "thieves market." Each interstate or foreign transport or transfer of an item valued at $5,000 or more can be charged as a separate count of ITSP. Further, where the shipments [of stolen goods] have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The aggregated value can be based upon a series of shipments to a particular defendant.

(d) Knowledge

To obtain a conviction under ITSP, the government must show that the defendant knew that the items he transported or caused to be transported in interstate or foreign commerce were stolen, embezzled, or obtained by fraud. The government is not required to prove that the defendant knew, foresaw, or intended that the stolen items were or would be transported in interstate or foreign commerce. The courts have generally held that the jury may infer that a person in possession of recently stolen property knew the property was stolen, unless such possession is satisfactorily explained.

B. Paragraph Two

1. The Elements

The second paragraph of ITSP prohibits "travel fraud" - causing potential victims of a fraudulent scheme to travel in interstate or foreign commerce in furtherance of or to conceal the scheme. Thus, a con artist who misleads his victim in a face-to-face encounter can still be charged with ITSP if the victim crossed state lines or traveled into or out of the United States to investigate or learn of the fraudulent offer. The elements of this second paragraph are:

- Transportation of or inducement of a person to travel in interstate or foreign commerce

- For the purpose of defrauding that person of money or property valued at $5000 or more.

2. Proving the Elements

(a) Transport or induce to travel in interstate or foreign commerce

This element of the second paragraph of ITSP is met if a potential or actual victim of a fraud scheme travels in interstate or foreign commerce in connection with the scheme. It is not necessary to prove the victim actually parted with their money or property; instead it is sufficient if the defendant induced them to travel in an effort to defraud them. Likewise, the government need not prove that the money or property lost by the victim to the defendant traveled in interstate or foreign commerce. Thus, where a con artist induces his next-door neighbor to travel out of state to view certain real estate parcels offered in a fraudulent scheme, he can be charged with ITSP whether or not the neighbor invests. Further, he can be charged with ITSP based on the interstate travel of the neighbor even if the neighbor does not invest until he returns home and hands his funds to the con artist.

(b) To Defraud a person of $5000 or More

As with the Mail Fraud and Wire Fraud statutes, the government must prove the defendant's intent to defraud. See the prior discussion concerning that element under the Mail Fraud statute above. As with the first paragraph of ITSP, travel fraud under the second paragraph of ITSP requires that the suspect defrauded or endeavored to defraud the victim of $5000 or more.

C. Paragraph Three

1. The Elements

The third paragraph of ITSP prohibits the transportation of falsely made, forged, altered or counterfeited securities or tax stamps in interstate and foreign commerce. It requires proof of the following elements:

- Transport in interstate or foreign commerce
- Falsely made, forged, altered or counterfeited securities or tax stamps
- With unlawful or fraudulent intent
- Knowing the securities or tax stamps to be forged, altered or counterfeited.

2. Proving the Elements

(a) Securities

Securities include stock certificates, bonds, money orders, motor vehicle titles, and checks. While the courts have included checks within the definition, they have found the language "falsely made, forged, altered or counterfeited securities" does not include checks with forged endorsements. It does include checks signed by a maker using a fictitious name, checks drawn on an account opened with a fictitious

name, checks bearing a forged signature of an authorized signatory to the account, checks drawn on closed accounts, and checks bearing the actual signature of a person not authorized to act as a signatory on the account. (Note that checks with forged endorsements that are stolen or obtained by fraud and transported across state lines could be charged under paragraph one of ITSP if they meet the $5000 valuation requirement).

Airline tickets, credit cards, credit card slips, and leases do not fall within the definition of "securities" under this third paragraph. In addition, the final paragraph of Section 2314 states that the statute's provisions do not apply to counterfeit obligations and securities of the United States or any foreign government, nor falsely made or counterfeit foreign currency. The primary reason for this exclusion of United States obligations and securities lies in the fact that "trafficking in counterfeits, forgeries and spurious representations of [these instruments] is made criminal elsewhere in the United States Code by anti-counterfeiting statutes", such as 18 U.S.C. § 471.

(b) Interstate or Foreign Commerce

Each act of transporting falsely made, forged, or counterfeited securities in interstate or foreign commerce constitutes a single offense under ITSP. Thus, a defendant who transports several forged checks or securities at one time may be charged with only one count of ITSP. Alternatively, the government may charge as separate counts of ITSP each negotiated check that enters interstate commerce to be processed through the banking system. Thus, a defendant who makes payment with falsely made or forged checks drawn on an out-of-state bank can be charged with ITSP based on each negotiation and subsequent interstate transfer of the check in the bank collection process.

(c) Fraudulent Intent

The government must establish that the defendant transported the forged or counterfeit check or security with

unlawful or fraudulent intent. The requisite intent may be established through the defendant's own statements and/or his participation in the scheme to transport or negotiate the securities.

(d) Knowledge of Forgery or Counterfeit

To sustain a conviction under this paragraph of ITSP, the government must prove the defendant knew the security transported in interstate or foreign commerce was forged or counterfeited at the time of its transportation. It is not necessary to prove in the case of a forged security that the defendant forged the signature himself; the government only needs to establish that he knew the instruments he cashed had been forged.

V. Venue

Venue for violations of the Mail Fraud statute, Wire Fraud statute and ITSP is governed by 18 U.S.C. § 3237, which provides in pertinent part: "Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves." Consequently, mail fraud cases may be indicted in the district where the subject mail matter is placed in the mail, any district through which it travels, or the district in which it is received by the addressee; wire fraud cases may be brought in the districts from which the transmission was sent, through which it passed, and in which it was received; and ITSP may be charged in the districts from which the stolen items or victims originated, through which they traveled, and in which they completed their journey. Generally, however, it is the policy of the Department of Justice to bring charges under these three statutes at their beginning or ending points, rather than in the districts through which the mail, transmission, victims or property merely passed.

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Chapter Seven

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I. Introduction

Electronic surveillance methods have taken on an increased importance because criminals are making more use of technology. This chapter gives you a basic overview of federal laws to (1) intercept wire, oral and electronic communications; (2) track the movements of vehicles and other objects; and (3) trace telephone calls and electronic communications. This chapter will also address using video-only surveillance and the federal requirements governing access to stored electronic communications held by an internet service provider (ISP).

This chapter will not cover state law regarding electronic surveillance. While state and local law enforcement must, at a minimum, provide the same individual protections as the federal laws regarding electronic surveillance, each state is free to make its laws more restrictive than federal law. This chapter will also not cover the Foreign Intelligence Surveillance Act (FISA) which addresses the use of wiretaps and searches in connection with national security investigations.

II. Electronic Surveillance: A Little History

Before 1934, no federal statute regulated wiretapping. In 1928, the Supreme Court held in *Olmstead v. U.S.*[1] that agents who tapped a suspect's telephone lines from a location off the suspect's premises, without his consent and without a search warrant, did not violate the Fourth Amendment. The Court's decision was based upon a finding that the agents did not intrude onto the suspect's property when tapping the telephone line, and thus there was no Fourth Amendment "search."

The Court noted, however, that Congress could regulate wiretapping if it so desired. Six years after *Olmstead*, Congress passed the Federal Communications Act of 1934 (FCA) which prohibited wiretapping by any person, including federal law enforcement officers. On the other hand, the FCA permitted federal law enforcement officers to use eavesdropping techniques in law enforcement operations.

In 1967, nearly 40 years after *Olmstead*, the Supreme Court decided the landmark case of *U.S. v. Katz*. The Fourth Amendment still protects property rights, but *Katz* changed the focus of Fourth Amendment analysis from one based on property rights to one based on individual "privacy" rights. In Katz, the defendant used a public telephone located in a booth on a public street to transmit wagering information across state lines. To monitor these conversations, federal law enforcement officers placed a sensitive microphone on top of the telephone booth that permitted the recording of his side of any phone conversation. Because they had not intruded onto the defendant's property in installing and utilizing this device, the officers had complied with *Olmstead*. Additionally, they did not violate the FCA given that it permitted the use of eavesdropping devices. Nevertheless, the Supreme Court held that Katz had demonstrated a reasonable expectation of privacy in his use of a phone booth to make his calls, and, further, that the officers had intruded upon that reasonable expectation of privacy.

[1] Cases named in this chapter without a case cite are briefed in the companion publication, *Legal Division Reference Book*.

Thus, the warrantless recording of his side of conversations with others constituted a violation of the Fourth Amendment.

Congress' response to the Supreme Court's decision in *Katz* came in 1968 in the form of the Omnibus Safe Streets and Crime Control Act found at 18 U.S.C. § 2510, et seq. Title III of that Act regulated the manner in which law enforcement officers may lawfully conduct real-time interceptions of wire and oral communications.[2] The purpose of Title III was twofold: first, to protect the privacy of wire and oral communications; and second, to set forth, on a uniform basis, the circumstances and conditions under which the interception of wire and oral communications may be authorized. Under Title III, you may use evidence obtained through electronic surveillance if you first obtain a court order authorized under the statute.

In 1968, when Congress enacted Title III, many of the technologies did not exist that later became commonplace. Congress eventually extended privacy protections to modern, more advanced technologies when it passed the Electronic Communications Privacy Act of 1986 (ECPA). In ECPA, Congress added "electronic communications" as a third category of communications the interception of which would be regulated by Title III. Where Title III had been limited to voice communications, whether face-to-face or over a wire, the ECPA extended Title III to include non-oral or wire communications that occur over computers, digital-display pagers, facsimile machines, and other electronic devices. (United States Attorney's Manual, Chapter 9-7.100.)

III. When a Title III Court Order is Required

Title 18, United States Code, Section 2510 et seq., often referenced as "Title III" or "T III," prohibits the warrantless non-consensual interception of wire or electronic communications. It also prohibits the warrantless non-consensual use of devices to

[2] When Congress passed the "Omnibus Crime Control and Safe Streets Act," these provisions were in Title III of the Act. Subsequently, these provisions were moved to another section; however, this body of law is still referenced as "Title III."

intercept oral communications in which one or more of the participants in such communications has a reasonable expectation of privacy. Such intercepts may be lawfully done only with a Title III court order.

To obtain an order allowing real time intercepts of oral, wire, or electronic communications, it is necessary to satisfy the procedural and substantive requirements set forth in Title III. It is important therefore that you correctly understand the definitions of several terms used in the statute.

- **oral communications**: those spoken by a person who exhibits an expectation of privacy when speaking.

- **wire communications:** the transfer of the human voice via a wire, cable, or "other like connection" even if there is no reasonable expectation of privacy. An example of a wire communication would be the digitized human voice transmitted over a phone line, network, the Internet, or other similar medium.

- **electronic communication:** the transfer of data via a wire, cable, or "other like connection" even if there is no reasonable expectation of privacy. E-mail and facsimile transmissions are examples of data that are transferred by way of an electronic communication.

Unlike oral communications, the definitions of electronic and wire communications do not require that someone have an expectation of privacy in the communication. The omission of this component from the definitions was intentional as Congress realized that by their nature, wire and electronic communications had to be revealed to third parties to transmit them, yet Congress still intended to afford these communications some protection from unwarranted intrusions.

The Courts have interpreted the term "interception" to mean a real time interception. Thus, Title III would be applicable to wire and electronic communications only if the interception of such communications occurs during the actual transmission thereof by sound waves, wire, or radio. As to oral

communications, there is no interception unless done with a "device" while the communication is being made. A device is anything other than the human ear. The general rule is that Title III does not apply to any oral communications overheard with the unaided human ear while the listener is in a place where he or she has the right to be.[3]

Another exception to the application of Title III to intercepted communications is where at least one party to the communication has consented to the interception. This exception applies regardless of whether the intercepted communication is oral, by wire, or electronic.

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

IV. How to Obtain a Title III Court Order

This section addresses the requirements to obtain a Title III court order *if* one is required.

[3] The statute excludes, from the definition of "device," hearing aids set to correct subnormal hearing to normal.

A. Who May Apply for a Title III Court Order?

Any "investigative or law enforcement officer" may apply for a Title III court order. This phrase is defined as "any officer of the United States ... who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7).

B. Enumerated Crimes Requirement

Depending on the type of intercept being requested, Title III may require as a predicate that you demonstrate probable cause that one of the crimes listed in 18 U.S.C. § 2516 has been violated.

1. Wire or Oral Communications

To intercept wire or oral communications, you must have probable cause to believe that one of the predicate offenses specifically listed in Title 18 U.S.C. § 2516(1) is being committed. As a practical matter, most significant felony crimes are listed.

2. Electronic Communications

When you seek to intercept electronic communications, you must have probable cause that any federal felony is being committed. 18 U.S.C. § 2516(3).

C. Authorization to Apply for a Title III Court Order

Before you may submit an application for a Title III court order to the appropriate judge, the application should first be reviewed and approved by the United States Attorney in the district where the intercept will occur. Final approval of your application must come from an appropriate Department of Justice official designated by the U.S. Attorney General. Usually, that will be the Assistant Attorney General for the Criminal Division.

1. Wire or Oral Communications

Under 18 U.S.C. § 2516(1), the designated Department of Justice official must first review and authorize any application requesting permission to intercept wire or oral communications without the consent of one or more parties to the conversation. This requirement is to ensure that this powerful investigative tool is used with restraint and only where the circumstances warrant it.

2. Electronic Communications

Under 18 U.S.C. § 2516(3), any government attorney may authorize a Title III application to intercept electronic communications in the investigation of any federal felony. Under Department of Justice policy, however, the approval of the Assistant Attorney General for its Criminal Division is required before a criminal investigator may apply to a judge to intercept other electronic communications over any other device, such as computers and facsimile machines. For a Title III of a digital pager, however, only the approval of an AUSA is required.

D. Contents of the Application

Under 18 U.S.C. § 2518, each application for a Title III court order must contain specific information before a court may authorize the interception. In addition to being in writing, under oath, and signed by either the United States Attorney or an Assistant United States Attorney, the application must contain the following:

1. Identity

The application must contain the identity of the investigative or law enforcement officer making the application, as well as the DOJ official who authorized it. 18 U.S.C. § 2518(1)(a).

2. *Statement of Facts and Circumstances*

Title 18 U.S.C. § 2518(1)(b) requires a full and complete statement by the applicant of the facts and circumstances relied upon to justify the applicant's belief that a Title III court order should be issued. The applicant's statement must demonstrate probable cause that the sought-for evidence will be obtained through the use of the proposed surveillance. *U. S. v. Nixon*, 918 F.2d 895, 900 (11th Cir. 1990). This statement must include the following information:

- Details about the particular offense that has been, is being, or is about to be committed;

- A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

- A particular description of the type of communications sought to be intercepted; and

- The identity of the individuals, if known, committing the offense and whose communications are to be intercepted. The Supreme Court requires that a Title III application identify (1) the names of all individuals as to whom the government's evidence shows probable cause that they are engaged in the criminal activity under investigation and (2) whose conversations the government expects to intercept. Additionally, it is the policy of the Department of Justice to "name as potential subjects all persons whose involvement in the alleged offenses is indicated." (United States Attorney's Manual, Chapter 9, Criminal Resources Manual at 28.)

3. *Necessity Statement*

Under 18 U.S.C. § 2518(1)(c), a Title III application must contain a full and complete statement as to whether other

investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or would be too dangerous. This section is sometimes referred to as the "necessity" requirement and simply means that the interception must be shown to be necessary to the investigation of the case. This section was designed to assure wiretapping is not conducted where traditional investigative techniques would suffice to expose the crime under investigation. It is not necessary, however, that the Government attempt or exhaust all conceivable investigative techniques before resorting to electronic surveillance. The statute only requires that the authorizing judicial officer be made aware of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods in that investigation. *U. S. v. Concepcion*, 579 F.3d 214 (2nd Cir. 2009).

4. Time Period

The application must contain a statement of the period of time for which the interception is to be maintained. 18 U.S.C. § 2518(1)(d). Under 18 U.S.C. § 2518(5), Title III court orders are valid only for the period necessary to achieve the objective of the authorization, but in no event longer than 30 days. This 30-day period begins on the earlier of either (1) the day on which the investigative or law enforcement officer begins to conduct an interception under the order, or (2) ten days after the order is issued, whichever occurs first. This 10-day period is intended primarily for the installation of whatever device will be used to conduct the interceptions. Extensions of the 30-day period are permissible, but only after again meeting the requirements of the initial Title III application. Further, where the Title III application is for an extension of a previously approved order, the application "must include a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." 18 U.S.C. § 2518(1)(f).

5. Statement Regarding Previous Applications

Under 18 U.S.C. § 2518(1)(e), a Title III application must also contain a full and complete statement of the facts surrounding all previous Title III applications known to the individual authorizing and making the application that involved any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each of these previous applications. Such information is recorded in electronic surveillance indexes maintained by Department of Justice and its law enforcement agencies and may be accessed by an appropriate representative of your agency for use in a Title III application.

6. Minimization Statement

A Title III application should also contain a statement that the surveillance, if approved, will be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). In determining compliance with this requirement, courts look to the "totality of the circumstances" to see if the minimization effort was reasonable. Among the factors the courts have considered in making this judgment are: (1) the nature and complexity of the suspected crimes; (2) the number of target individuals; (3) the ambiguity of the intercepted conversations; (4) the thoroughness of the government precautions to bring about minimization; and (5) the degree of judicial supervision over the surveillance practices. Where the government fails to adequately minimize the electronic surveillance, *any* evidence obtained from those impermissible intercepts may be suppressed; however, errors in minimizing one portion of an interception do not automatically result in the suppression of all the evidence obtained through the use of electronic surveillance. Instead, suppression of all electronic surveillance is proper only where the defendant demonstrates that the entire surveillance was tainted by the impermissible intercepts.

7. *Request for Covert Entry*

The Department of Justice requires that Title III applications specifically contain a request for permission to surreptitiously enter to install, maintain, and remove electronic surveillance devices. (United States Attorney's Manual, Chapter 9, Criminal Resources Manual at 28.)[4]

E. Who may Issue a Title III Court Order?

A Title III order may only be issued by a United States District Court Judge or a United States Circuit Court of Appeals Judge. 18 U.S.C. § 2510(9). United States Magistrate Judges are not authorized to issue a Title III order.

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

[4] The Supreme Court has held that a Title III application does not have to contain a specific request for permission to covertly enter a location to install, maintain, and remove surveillance devices because "[t]hose considering the surveillance legislation (*i.e.,* Congress) understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries." Dalia v. U.S, 441 U.S. 238 (1979). Nevertheless, DOJ policy requires that a Title III application include a request for covert entry.

V. Interceptions Exempted from Title III

Not all interceptions of wire, oral, or electronic communications require a Title III court order. Two of the most important exemptions to the requirements of Title III involve situations where (1) no reasonable expectation of privacy exists in an oral communication, and (2) at least one of the parties to the conversation has given consent to intercept the communication (sometimes referenced as "consensual monitoring").

A. No Reasonable Expectation of Privacy

In *Katz*, the Supreme Court established the standard for determining whether a reasonable expectation of privacy exists. The test is two-pronged: first, the individual must have exhibited an actual (subjective) expectation of privacy. Second, that expectation must be one that society is prepared to recognize as objectively reasonable. If either prong of this test is not met, then no reasonable expectation of privacy exists. 18 U.S.C. § 2510(2) defines an "oral communication" as one "uttered by a person exhibiting an expectation of privacy that such communication is not subject to interception under circumstances justifying such expectation…." The legislative history of Title III indicates that Congress intended this definition to parallel the *Katz* "reasonable expectation of privacy" test.

As a general rule, there is no expectation of privacy in a conversation that can be overheard from a location where the interceptor has a legal right to be and where the interceptor uses only his or her unaided ear. As noted by the Supreme Court in *Katz*: "[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." Accordingly, if two individuals have conversation in a public restaurant, and speak loudly enough for others in the restaurant to overhear their conversation, they would have no reasonable expectation of privacy as to their conversation.

Finally, even though a speaker may subjectively intend for his conversation to remain private, that speaker has no objectively reasonable expectation that the person to whom he is speaking will not later reveal the contents of the conversation. There is only a legitimate expectation of privacy as long as both parties expect it. If, however, one party to the conversation decides to reveal the contents of the conversation, the other party has no "right to privacy" that would prevent this revelation. So, if an individual engages in conversation with another, the individual does so at his own peril. An expectation of privacy does not attach to a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society." *Hoffa v. U.S.,* 387 U.S. 231 (1966).

As stated earlier, the statute does not include the requirement of a demonstrated reasonable expectation of privacy in order for wire and electronic communications to be subject to Title III. It may be inferred, therefore, that an expectation of privacy is assumed when communications in these forms occur or that, in the absence of a Title court order, Congress intended to prohibit the non-consensual interception of wire communications regardless of the communicating parties' expectation of privacy. See United States Attorney's Manual, Chapter 9-7.301.

B. Consensual Monitoring

Title 18 U.S.C. § 2511(2)(c) "permits government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications, as well as oral and electronic communications." (United States Attorney's Manual, Chapter 9-7.301.) The consent must be given voluntarily, without physical coercion or duress. The Attorney General established guidelines for the investigative use of consensual monitoring by law enforcement agencies within the Executive Branch. The

most recent version of these guidelines were promulgated by the Attorney General on May 30, 2002, and are set forth in the United States Attorney's Manual, Chapter 9-7.302. The following is a general summary of those guidelines. You must become familiar, however, with the particular requirements of your agency regarding this issue.

1. Written Approval Required in Certain Cases

In certain sensitive or high-visibility cases, the Department of Justice requires written approval before an oral communication can be monitored without the consent of all parties to the communication. This requirement would apply, for example, when the monitoring relates to the investigation of a Congressman, federal judge, Governor or Lieutenant Governor of a State or Territory, etc.

2. Prior AUSA Advice to Monitor Oral Conversations

Current Department of Justice policy requires that, prior to approval of any consensual face-to-face monitoring by the head of a department or agency or his or her designee, a designated representative of that department or agency must obtain oral or written advice from the Assistant U.S. Attorney or Department of Justice attorney responsible for that particular investigation. Such contact, consent, advice, or approval is not required prior to the consensual monitoring of telephone or radio communications.

C. Special Limitations on Consensual Monitoring

Questions often arise during consensual monitoring concerning where the monitoring device may be located and when that device may be property monitored. Some general discussion of these issues is outlined in the United States Attorney's Manual:

> When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his

> or her person, in personal effects, or in a fixed location. When engaging in consensual monitoring, the law enforcement agency involved must ensure that the consenting party will be present at all times when the device is operating. United States Attorneys Manual, Chapter 9-7.302.

1. Device Located on the Person

You may place the monitoring device on the consenting person. If the monitoring device is so placed, the party (be it an undercover agent or confidential informant) may record any conversations that he has with the suspect.

2. Device in a Fixed Location

It is not legally required that a monitoring device be placed on the consenting person. In many instances, it may be more tactically advisable to place the device in a specified location, for example, a hotel room where a confidential informant and the suspect are to meet.

When the device is placed in a fixed location, you need to consider two important issues. First, do you need to obtain a warrant for the installation of the device? When a confidential informant rents a hotel room and consents to having the device placed in the room, no warrant would be required for the installation. On the other hand, if your operational plan is to install the device within the REP of a non-consenting person, you will need a court order to do so.

Second, will your consenting party be absent at any time when you will be monitoring the device? If a consenting party is present when you intercept conversations with that device, no further order is necessary. If you intercept a non-consenting person's statements made in the absence of a consenting party, however, that would require a Title III order.

D. Electronic Communications Exempt from Title III

Though ECPA extended Title III protections to "electronic communications," certain types of communications were specifically excluded from this protection. Accordingly, a Title III court order is not required to intercept the following types of electronic communications:

- *Tone-Only Pagers*. 18 U.S.C. § 2510(12)(B).
- *Tracking Devices, Beepers and Transponders*. 18 U.S.C. § 2510 (12)(C). Tracking devices are defined in 18 U.S.C. § 3117 and include GPS devices.
- *Video-Only Surveillance*. The use of video-only surveillance is not regulated by Title III, but is regulated by the Fourth Amendment.
- *General Public Communications*. General public communications that are easily received by the public, such as AM/FM radio station broadcasts, and citizen band radio transmissions.

VI. Electronic Tracking Devices

Title 18 U.S.C. § 3117 discusses the use of "electronic or mechanical device[s] which permit the tracking of the movement of a person or object." Electronic tracking devices serve an important law enforcement function by allowing you to track and monitor the movements of suspects or objects from a distance, thereby reducing the possibility of detection. Three of the most commonly used tracking devices are "beepers," "transponders," and GPS devices. A "beeper" is a radio transmitter which emits periodic signals that can be picked up by radio receiver. *U.S. v. Knotts,* 460 U.S. 276 (1983). Similar to a beeper in many respects, a "transponder" is most often used to track the location of aircraft.

The Fourth Amendment, not Title III, regulates the installation and monitoring of electronic tracking devices. Two separate questions must be asked to determine whether the use

of an electronic tracking device is lawful: first, did the *installation* of the electronic tracking device comply with the Fourth Amendment? Second, did the *monitoring* of the electronic tracking device comply with the Fourth Amendment?

A. Installation of an Electronic Tracking Device

In deciding whether an electronic tracking device was legally installed, the courts utilize a traditional Fourth Amendment analysis focusing on whether installation of the device required intrusion into an area where an individual has a reasonable expectation of privacy. If so, then the Fourth Amendment has been implicated because a "search" was conducted. If not, then no "search" occurred, and the Fourth Amendment is inapplicable. Most commonly, questions regarding the legality of installing electronic tracking devices concern installation of the device into or on vehicles, and into or on government property.

1. Vehicles

When installation of the tracking device requires some form of physical intrusion into the vehicle (*i.e.,* under the hood or in the interior) or connecting to the wiring of the vehicle, courts have found that this action constitutes a "search" requiring either a warrant or an exception to the warrant requirement to satisfy the Fourth Amendment. Similarly, if installation requires physical entry onto the curtilage of a residence, or into a garage or other place as to which there is generally no public access, the Fourth Amendment requires a search warrant or an exception to the warrant requirement.

Neither a warrant nor an exception is required, however, to install an electronic tracking device onto the outside of a vehicle without intruding into vehicle's interior or the wiring. Further, no warrant or exception to the warrant requirement is necessary to install a tracking device on a vehicle that is parked in a public place. This is because no intrusion into REP has

taken place.[5] One federal appellate court has held that the warrantless installation of a tracking device on a vehicle parked in a suspect's driveway was permissible because the portion of the driveway where the vehicle was parked was publicly accessible. *U. S. v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

2. *Government Property*

An issue that often arises in tracking cases involves the installation of the device into or on government property that is later transferred to an unsuspecting target. This issue was addressed by the Supreme Court in *U.S. v. Karo,* 468 U.S. 705 (1984). The Court held that the installation of a tracking device into or on government property that is later transferred to an unknowing suspect does not violate the Fourth Amendment. First, when the device is placed into or on the government property, the suspect does not have any legitimate expectation of privacy in the property. Second, the transfer to the defendant does not amount to a "seizure" of the defendant's property.

B. Monitoring of an Electronic Tracking Device

Whether there are reasonable expectation of privacy implications in installing and in monitoring the device are two separate issues, and they must therefore be addressed and resolved separately. If a reasonable expectation of privacy is implicated in *either* the installation or the monitoring, a warrant (or exception such as consent) is required.

[5] Some district courts, however, have questioned this rule. One court held that while the installation of a tracking device on the exterior of a vehicle is not a "search," reasonable suspicion is still required for the installation. Another court found that the installation of a tracking device on the exterior of a vehicle constituted a "search," but the warrantless installation is lawful so long as the officers installing the device had probable cause. Because of this division among the courts, agents are cautioned to confer with an AUSA before any warrantless installation of a tracking device.

As with the installation of an electronic tracking device, the legality of monitoring the device depends on whether the object to which the device is attached is located in an area where there is a reasonable expectation of privacy.

1. *Areas With No REP*

When an electronic tracking device is located in an area where no there is no reasonable expectation of privacy, the Fourth Amendment is not implicated in the monitoring. For example, if a device is lawfully installed onto the exterior of a vehicle, you may monitor the device while the vehicle is traveling on public streets and highways. In these cases, a defendant's movements are open to visual surveillance by anyone who wishes to look, including the police. For this reason, a defendant has no reasonable expectation that his movements on a public thoroughfare will not be observed. *U.S. v. Knotts*. One federal appellate court has ruled, however, that, notwithstanding the Supreme Court's decision in *Knotts*, continuous monitoring of the movements of a suspect in public places for 28 days required a search warrant. *U.S. v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

2. Areas With REP

In contrast, when an electronic tracking device is located in an area not open to visual surveillance and where a reasonable expectation of privacy exists, such as inside a home, the Fourth Amendment is implicated in the monitoring of the device and a warrant (or consent) is required.

In these types of cases, the monitoring of the device reveals aspects of the home that could not be observed through traditional visual surveillance. For example, while you may observe the object to which the beeper is attached enter a home, the later monitoring of the device in the home not only verifies your observations, but also establishes that the object remains on the premises, a fact not verifiable by visual surveillance. Because it is often difficult to determine where an object containing an electronic tracking device will ultimately come to

rest, and since it may become critical to monitor the device to determine that it is actually located in a place not open to visual surveillance, the Supreme Court has stated that warrants for the installation and monitoring of an electronic tracking device are desirable. *U.S. v. Karo*.

C. Warrants to Install and Monitor Tracking Devices – Rule 41

Rule 41[6] of the Federal Rules of Criminal Procedure provides the process to obtain the warrant when a warrant is required to install or monitor a tracking device. (This Rule is reprinted in its entirety in the supplemental materials.)

Generally, Rule 41 provides as follows with respect to tracking warrants:

- A magistrate judge in the district where the device will be installed may issue a warrant to install a tracking device. The issuing magistrate judge may authorize tracking in the district where the device will be installed, another district, or both.

- The warrant must contain the following:

    - Identity of the person or property to be tracked.

    - Identity of the magistrate judge to whom the return on the warrant will be made.

    - A reasonable period of time that the device may be used. The time will not exceed 45 days. Extensions for not more than 45 days may be granted for good cause shown.

[6] Federal Rules of Criminal Procedure 41(e)(2)(B) and 41(f)(2) specifically address warrants for tracking devices. This rule can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Rules of Evidence."

- A command that the device be installed within 10 days or less from the time the warrant is issued, and during the daytime, unless the magistrate for good cause shown authorizes another time.

- A command that there shall be a return on the warrant.

The officer executing the warrant must make the return to the magistrate judge specified in the warrant. The return must contain the exact dates and times of both the installing of the device and the period in which it was used. The return must be served on the person who was tracked, or whose property was tracked, within ten days after use of the device has ended. Upon request of the government, the magistrate judge may delay providing the notice required by the return.

D. Cell Phone Tracking

In recent years, advances in technology have made it possible to "track" the approximate present whereabouts of anyone in possession of a power-on cell phone by obtaining real time cell site data from a cell phone service provider. At a minimum, such data will identify the single cell tower that with which the cell phone would communicate if an actual call were placed at a given time. The cell phone companies also have the capability using data from multiple cell sites to triangulate a nearly exact location of a cell phone.

If acquisition of real time cell site information were the legal equivalent to using a GPS tracking device, it would follow that the Government is not constitutionally required to obtain a warrant provided the phone remains in a public place where visual surveillance would be available. There is an additional entity involved, however, when the government seeks to obtain cell site data: the cell phone service provider. Their primary interests are the privacy concerns of their subscribers and compliance with various privacy laws relating to electronic communications; thus, they will not provide cell phone

information about its subscribers unless legally required to do so. Moreover, the nature of cell phone usage is that it occurs in both private and public areas. For these reasons, tracking a person by use of cell site data will require some sort of court order.

The courts are generally divided into two views about what authority is required in order for the government to obtain real time and prospective cell site information. The majority view is that, while an order granted under 18 USC §2703(d) is sufficient to obtain stored cell site information from a cell phone service provider, probable cause and a Rule 41 warrant are required in order to compel the cell phone service provider to disclose real time and prospective cell site data. A minority of courts has allowed the government to use its pen register/trap and trace authority to obtain single cell site information in real time, that is, the location of the cell phone tower with which a cell phone is in communication at a given moment. Federal courts have been consistent, however, in requiring the government to have a search warrant in order to obtain multiple cell site triangulation information from cell phone service providers.

VII. Pen Registers and Trap and Trace Devices

Pen registers and trap and trace devices are not regulated by Title III. Rather, use of such devices is subject to the provisions of Title 18 U.S.C. §§ 3121 – 3127.

A. Definitions and Purposes

1. Pen Registers

A "pen register" captures all numbers that are being dialed out from a specific telephone line, and allows you to learn what numbers a suspect is calling from his telephone. Pen registers can also be used to capture the email addresses from an email sent by a target. Pen registers do not reveal the contents of the phone conversation or email.[7]

[7] The U.S. Code definition of a pen register is a "device which records or decodes dialing, routing, addressing, or signaling information transmitted by

2. *Trap and Trace Devices*

"Trap and trace" devices capture all numbers that are coming into a specified telephone line, and allows you to learn where telephone calls to the targeted phone are originating from. They can also be used to capture the email addresses of those who send emails to the target. A trap and trace does not reveal the content of the conversation or email.[8]

B. Applicable Federal Statutes

The statutes governing pen registers and trap and trace devices are contained at 18 U.S.C. §§ 3121 – 3127. These devices are not regulated by Title III, and the Supreme Court has held that the use of pen registers and trap and trace devices does not implicate the Fourth Amendment because there is no actual expectation of privacy in phone numbers dialed. *Smith v. Maryland*, 442 U.S. 735 (1979). Instead, the general rule regarding the use of pen registers and trap and trace devices is contained at 18 U.S.C. § 3121(a), which provides that "no person may install or use a pen register or trap and trace device without first obtaining a court order under section 3123."

C. Obtaining a Court Order

There are a number of procedural steps to obtain a court order to use a pen register or trap and trace device. First, an "attorney for the government" must make the application for the court order, not the individual law enforcement officer. Second, the application must be in writing, under oath, and directed to a United States Magistrate Court, United States District Court,

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an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such communication shall not include the contents of any communication…." 18 U.S.C. § 3127(3).

[8] The U.S. Code definition of a trap and trace is "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication." 18 U.S.C. § 3127(4).

or United States Circuit Court of Appeals. Third, the application must include the following three pieces of information:

- The identity of the attorney for the government who is making the application;
- The identity of the law enforcement agency conducting the investigation;

  and

- A certification by the attorney for the government that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency. 18 U.S.C. § 3122(b).

If these procedural steps are followed, a court order may be issued authorizing installation and use of a pen register or trap and trace device anywhere within the United States. This court order cannot exceed sixty days, although extensions of sixty days may be granted if the initial requirements for issuing the court order are again met.

It is a criminal offense to obtain evidence that required a pen or trap order without the required court order, however it will not result in suppression of the evidence on 4th Amendment exclusionary rule grounds.

VIII. Video-Only Surveillance in an Area where a Reasonable Expectation of Privacy Exists

Using video-only surveillance to record activity in an area where a reasonable expectation of privacy exists is governed by the Fourth Amendment, not Title III. Thus, before either installing a video camera or using it to record a criminal target's actions where a reasonable expectation of privacy exists, you must obtain either a search warrant or consent. For example, if you wish to install a video camera in a public location but do so such that you will record activities in your target's curtilage or other private place, you will need a search warrant. If the device is installed and monitors only activities in a location

where no reasonable expectation of privacy exists, no search warrant is required.

While recognizing that Title III does not govern the use of video-only surveillance in unprotected areas, many circuit courts require that search warrants for video-only surveillance meet the higher, constitutional standards required by Title III. United States Attorney's Manual, Chapter 9.7-200. Specifically, in addition to showing that probable cause exists to believe that evidence of a crime will be obtained from the planned use of video-only surveillance, six federal circuit courts also require that the following information be included in a search warrant for video-only surveillance:

- A factual statement that alternative investigative methods have been tried and failed or reasonably appear to be unlikely to succeed if tried or would be too dangerous;
- A statement of the steps to be taken to assure that the surveillance will be minimized to effectuate only the purposes for which the order is issued;
- A particularized description of the premises to be surveilled;
- A statement of the duration of the order, which shall not be longer than necessary to achieve the objective of the authorization, nor, in any event, longer than thirty days, measured from the date of the order (with thirty day extension periods possible); and
- The names of the persons to be surveilled, if known.

Department of Justice policy also requires that the investigative agency seeking to use court-ordered video surveillance obtain approval from the appropriate Department of Justice official prior to obtaining a court order for video-only surveillance in areas where REP exists. United States Attorneys Manual, Chapter 9-7.200.

IX. Stored Electronic Communications

The Electronic Communications Privacy Act of 1986 (ECPA), found at 18 U.S.C. § 2510, was enacted by Congress to extend government restrictions on the interception of telephone calls to include transmissions of electronic data by computer. Specifically, ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which was primarily designed to prevent unauthorized real time interception by the government of private oral, wire, and electronic communications.

ECPA also contains the Stored Communications Act (SCA), found at 18 U.S.C. §§ 2701-12, that controls government access to electronic communications that have been stored by publicly-accessible internet service providers (ISP), such as Google, Yahoo, and Comcast. Electronic mail (email) stored on a network server is the primary example of a stored communication. While this portion of the statute is unusually complicated, it may be simplified into two basic questions:

(1) what type of information is being sought from the ISP;

(2) what type of legal document is necessary to require the ISP to disclose the type of information being sought.

A. Classifying the Information Being Sought

There are three types of information that you may wish to obtain from an ISP: (1) Basic subscriber information; (2) transactional records; and (3) the contents of stored communications.

1. Basic Subscriber Information

Title 18 U.S.C. § 2703(c)(2) provides that "basic subscriber information" includes the following: "Name; address; local and long distance telephone connection records, or records

of session times and durations; length of service (including start date) and types of services utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service."

2. Transactional Records

Title 18 U.S.C. § 2703(c)(1)(A) defines "transactional records" as "record[s] or other information pertaining to a subscriber to or customer of such service (not including the contents of communications....)." In short, such information relates to how the internet service subscriber uses his account. Described by many as a "catch-all" category, transactional records include "only historical data involving past activity on the account." Examples of "transactional records" include:

- Web sites visited by the customer or subscriber;
- Cell-site data for cellular telephone calls; and
- Email addresses of other individuals with whom the account holder has corresponded (*e.g.,* those who have sent email to, or received email from, the customer or subscriber).

3. Contents

The "contents" of a network account includes the actual files stored in the account, for example, the actual text contained within an email and attachments to the email. "Contents" includes "any information concerning the substance, purport, or meaning of that communication." That would also include any data in the subject line of an email.

It is important to remember that this provision applies only to "stored electronic communications." That term is defined in the statute as "any temporary, intermediate storage of a wire

or electronic communication incidental to electronic transmission thereof,"[9] and then only when held by the email provider. So, while a target may store emails on a home computer, they do not fall into the definition of a stored electronic communication because it does not meet the criteria above.

B. Methods for Obtaining the Information Being Sought

Three types of documents may be used to compel disclosure of the information listed above: (1) search warrants; (2) 18 U.S.C. § 2703(d) court orders; and (3) subpoenas. The choice of which document is appropriate will depend upon the type of information sought. While the consent of the customer or subscriber may always be obtained, often consent is not sought for tactical reasons. Listed below are the *minimum* legal methods to compel an ISP to disclose information. Of course, you may always use a more stringent method to access information that could have been obtained with a "lesser" form of process. For example, you may obtain a search warrant to compel the production of certain information, even if a § 2703(d) court order or subpoena would suffice.

1. Basic Subscriber Information - Subpoena

Only a subpoena is required in order to obtain "basic subscriber information" from an ISP. 18 U.S.C. § 2703(c)(2). When such information is obtained using a subpoena, the government is not required to provide notice to the subscriber or customer. The subpoena may be issued by a federal grand jury or a federal trial court, or may be an administrative subpoena authorized by a federal statute, such as 6(a)(4) of the Inspector General Act.

2. Transactional Records – Court Order

To obtain "transactional records," you must, at a minimum, use a court order issued pursuant to 18 U.S.C. §

[9] 18 U.S.C. § 2510(17).

2703(d). Either a United States Magistrate Judge, United States District Court Judge, or United States Circuit Court of Appeals Judge may issue a § 2703(d) court order. To obtain a 2703(d) order, you must "offer specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic information, or the records or other information sought, are 'relevant and material' to an ongoing criminal investigation." The government is not required to provide prior notice to the customer or subscriber before requiring the ISP to disclose the records sought pursuant to a § 2703(d) order.

3. *Contents – Search Warrant, Court Order or Subpoena Depending on Time and Retrieval Status*

You may require an ISP to provide the actual contents of wire or electronic communications held in storage. Content includes the subject line as well as the body of an email.

The legal method you must use varies depending on whether the email has been "retrieved" (opened) and how long the communication has been held in storage.

(a) Unretrieved (Unopened) Communications That Have Been in Storage for 180 Days Or Less

To require an ISP to disclose the unretrieved contents of a wire or electronic communication that has been in storage for 180 days or less, you must obtain a search warrant. 18 U.S.C. § 2703(a). When using a search warrant, you are not required to give prior notice to the customer or subscriber. Further, you may apply for a court order to prohibit the ISP from notifying the customer or subscriber of the existence of the warrant. If the court determines that notification would result in an "adverse result," such as: endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly

delaying a trial, a request for delayed notice will be approved. 18 U.S.C. § 2705(b). There is no specified period established in the statute for how long an ISP may be required to delay notice to the customer. Instead, the statute provides that such an order may be issued "for such period as the court deems appropriate."

(b) Retrieved Communications and Communications that Have Been In Storage For More Than 180 Days

There are three options for compelling an ISP to disclose the contents of a wire or electronic communication that has been retrieved, or those that have been in storage for more than 180 days, whether retrieved or not. You may use a search warrant to obtain wire or electronic communications that have been retrieved or held in storage for more than 180 days whether retrieved or not. When a search warrant is used, there is no requirement of prior notice to the subscriber or customer.

You may also use an 18 U.S.C. § 2703(d) court order to require an ISP to disclose the contents of wire or electronic communications that have been retrieved or held in storage for more than 180 days whether retrieved or not. Unlike when using a warrant, however, when a § 2703(d) court order is used to obtain this information, you must provide prior notice to the customer or subscriber. 18 U.S.C. § 2703(b)(1)(B)(ii). This prior notice may be delayed for a period not to exceed ninety days, if you request a delay and the court determines that notifying the customer of the existence of the court order may have an "adverse result." That term is defined in 18 U.S.C. § 2705(a)(4) as (A) endangering the life of physical safety of an individual, (B) flight from prosecution, (C) destruction or tampering with evidence, (D) intimidation of witnesses, or (E) anything that might seriously jeopardize an investigation or cause undue delay of a trial.

Extensions of the delay period are possible, but must be justified each time using the same "adverse result" standard. Once the delayed notice period expires, you must notify the

customer of the court order and explain the procedures surrounding the delay in notification. As with a search warrant, you may apply for a court order preventing the ISP from notifying the customer or subscriber of the existence of the court order "for such period as the court deems appropriate."

Finally, you may use a subpoena to obtain the contents of wire or electronic communications that have been retrieved or held in storage for more than 180 days, whether retrieved or not. 18 U.S.C. § 2703(b)(1)(B)(i). As is the case with "basic subscriber information," the subpoena may be a federal grand jury subpoena, a federal trial subpoena, or an administrative subpoena authorized by a federal statute.

When a government entity obtains a subpoena for the contents of wire or electronic communications, it must ordinarily give notice to the customer prior to the disclosure by the internet service provider. Notification to the customer may be delayed, however, if a "supervisory official" certifies in writing that there is reason to believe that prior notice may have an "adverse result." A "supervisory official" is defined by statute as either "the investigative agent in charge, assistant investigative agent in charge, or an equivalent of an investigating agency's headquarters or regional office, or the chief prosecuting attorney, the first assistant prosecuting attorney or an equivalent of a prosecuting attorney's headquarters or regional office." 18 U.S.C. § 2705(6).

Upon request, the court may delay notice for successive ninety-day periods, as long as the requirements of a supervisory official certification and an adverse result are present.

C. Preservation Letters

There is no requirement under the law that internet service providers retain the emails of their customers for any specific period of time. Thus, there is the danger that, between the time when the investigator's need for the emails becomes apparent and an order is issued, those emails could be destroyed.

To guard against the deletion or other destruction of email evidence by an internet service provider (ISP) before an order or other legal process can be obtained, 18 U.S.C. § 2703(f)[10] authorizes a government agency to issue a "preservation letter" to that ISP. Generally, Preservation Letters should be issued on government agency stationery by an agency supervisor. Once served with a Preservation Letter, the statute requires that the ISP "shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." The statute further requires the ISP to retain the records for a period of ninety days, with a ninety-day extension possible upon a renewed request by the government.

D. Multi-Jurisdiction Warrants

Ordinarily, a search warrant may only be issued by a judge in the district where the evidence that is subject to seizure is located. This could present a problem with a warrant for stored electronic communications because even a single ISP may store emails on servers in more than one district. For this reason, 18 U.S.C. Section 2703(a) authorizes any federal court with jurisdiction over the offense under investigation to issue a warrant that is effective in all districts where such evidence is located.

[10] This statute section may be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

Chapter Eight

Federal Court Procedures

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I. Introduction to the Federal Court System and the Law Enforcement Officer's Role

This chapter discusses how the federal courts operate, focusing on your role in obtaining the necessary documents, and following the necessary procedures, to have a defendant brought before a court to answer a criminal charge. The course is based on the Federal Rules of Criminal Procedure (hereinafter, Rules)[1], but focuses on only those Rules that directly affect federal law enforcement officers. Rule numbers are provided for future reference. Knowing rule numbers is unnecessary.

[Students in UPTP and GSA-FPS must read Sections I through VI and Section VIII. Reading other sections for these programs is optional.]

[1] All cited Rules can be found in their entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Rules of Criminal Procedure."

II. Trial Courts, Appellate Courts, and Judicial Districts

A. Functions of Criminal Courts

Federal criminal courts perform one of two functions: either they conduct the trial in a criminal case, or they hear any appeal by the government or defendant in a case that has already been tried. In a trial, evidence is presented, witnesses testify, and a verdict is reached. That evidence and the transcripts of the testimony by the witnesses constitute the official record of the case. In an appeal, witnesses do not testify and no evidence is presented. Instead, the appellant (the person bringing the appeal), using the official record from the trial, attempts to demonstrate either that there is insufficient evidence in the record to justify his conviction or that the trial judge erred in ruling on a legal issue, or both.

B. Districts

The United States and its territories are divided into 94 judicial districts. Each state (as well as the District of Columbia, Puerto Rico, and 3 territories – Virgin Islands, Guam, and the Northern Mariana Islands) has at least one judicial district court. Some states have more than one. A district never crosses a state line. The exact boundaries are established in a series of statutes in the U.S. Code.

You must know your district boundaries because many functions can be performed only in a certain district. For example, you must obtain an arrest warrant in the district where the crime was allegedly committed. Most search warrants may only be issued in the district where the evidence is located. A defendant has the right to be tried in the state and district where the crime allegedly occurred.

III. The Federal Courts

A. The Supreme Court of the United States

The Supreme Court is the final authority on the interpretation of federal law. Virtually all cases considered by the United States Supreme Court are appeals from the decisions of other courts (federal or state). There is no right to an appeal to the Supreme Court, and that Court only considers a small percentage of cases. A party who loses an appeal before the Circuit Court of Appeal must, in order to obtain review by the Supreme Court, file a motion called a *Petition for a Writ of Certiorari* ("to make certain"). There are nine justices on the Supreme Court. Only if at least four of the nine justices vote to do so will a *writ of certiorari* be granted.

Usually, all nine justices participate in each case, and the decision is by majority vote. One of the justices will be responsible for writing the majority opinion. Justices who concur in or dissent from the majority opinion may also write separate opinions.

In the spring of each year, the Supreme Court proposes changes to the Federal Rules of Criminal Procedure. Those proposed changes to the Rules are automatically implemented unless Congress rejects or changes them. Each district court can also adopt its own local rules that govern procedural matters within the district. A local rule may, for example, establish a dress code or require that a certain procedure be accomplished within a certain period of time. Local rules may require the use of particular forms of, for example, arrest complaints, warrants, etc. The sample forms in the additional resources section of this student text may differ slightly among districts. Familiarize yourself with the local rules when arriving in a new district.

B. The Circuit Courts of Appeals

There are 13 federal circuit courts of appeals spread across the United States consisting of 11 federal appellate circuits, the District of Columbia Circuit Court of Appeals, and

the U.S. Court of Appeals for the Federal Circuit. The 11 appellate circuits consist of several districts and hear appeals from the district courts located within its circuit. The Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases such as those involving patent laws, and its decisions in these cases are binding on all circuits. The courts of appeals have only appellate jurisdiction with three judge panels hearing most appeals. On rare occasions, a court of appeals may sit *en banc* (all judges hear the appeal). Once a court of appeals rules, any further appeal will be to the Supreme Court. Other than the Court of Appeals for the Federal Circuit, the decisions of the court of appeals is binding only on the district courts within its circuit, but the opinion may influence the decision of the courts in other districts. The law may differ among the circuits as to particular legal issues.

C. Classification of Offenses

Offenses are classified by the maximum possible confinement upon conviction. A felony is an offense punishable by more than one year incarceration or death. (When the death penalty is possible, the offense is also known as a "capital offense.") A Class A misdemeanor is punishable by one year or less, but more than six months incarceration. A Class B misdemeanor is punishable by six months or less, but more than 30 days incarceration. A Class C misdemeanor is punishable by 30 days or less, but more than 5 days incarceration. An infraction is punishable by 5 days or less incarceration.

Class B Misdemeanors, Class C Misdemeanors, and Infractions are collectively known as **petty offenses**.

D. Federal District Courts

Federal district courts are the federal felony trial courts. While district courts may also try misdemeanors and infractions, usually they do not. Only a district court may try a felony. In addition to the actual trial of the case, district courts also conduct associated proceedings leading up to and following the trial. The nature of these proceedings is discussed later, but by way of example, a district court may set bail, take the defendant's plea, conduct suppression hearings, and sentence the accused after conviction. District courts may also perform functions that are part of a criminal investigation that may lead to a trial such as issuing search and arrest warrants.

E. U.S. Magistrate Courts

Every district has one or more magistrate judges who are appointed by the District Court judges. You may expect to make frequent appearances before a magistrate judge to obtain necessary court documents (such as an arrest or search warrant) or to testify at pre-trial hearings.

Magistrate judges may try Class A misdemeanors if the defendant consents. If the defendant does not consent to have a magistrate judge hear a Class A misdemeanor case, the case must be heard in district court. Magistrate judges may also try any petty offense (Class B and C misdemeanors and infractions) whether or not the defendant consents.

Although magistrate judges may not conduct trials in felony cases, they routinely will conduct pre-trial hearings related to those cases. For example, you would take a defendant you arrested on a felony before a magistrate judge for an initial appearance and a detention hearing even though the magistrate judge will not conduct the trial. Although District Court judges could conduct such pre-trial proceedings, in most felony cases District Judges usually delegate their authority to do so to magistrate judges.

F. Review of Jurisdiction to Try Federal, Criminal Cases

A felony case will be tried in the district court. A Class A misdemeanor can be tried in the magistrate court if the defendant consents. If not, it will be tried in the district court. Petty offenses (Class B and C misdemeanors and infractions) will be tried in the magistrate court.

G. Appointment of Justices and Judges

Supreme Court justices and judges of the courts of appeals and district courts are nominated by the President, confirmed by the Senate, and serve for life unless impeached. Magistrate judges are appointed by, and serve under the supervision of, district court judges for a specific term (eight years). The district court judges may re-appoint a magistrate judge for one or more successive terms.

IV. An Introduction to Court Documents

You must know what legal documents are necessary to accomplish a certain purpose. This section is an introduction to some of those documents. Later in this chapter some of the documents will be discussed in greater detail.

A. Criminal Complaint

You will prepare criminal complaints. A criminal complaint states a charge along with facts establishing probable cause that the crime was committed and the defendant committed it. The complaint is signed by the officer, under oath, in front of the judge (usually a magistrate judge). Criminal complaints are used in two situations: to obtain an arrest warrant or summons, or to state the charge when you make a warrantless arrest. When a suspect is charged in a criminal complaint with a felony or class A misdemeanor, the criminal complaint is a temporary charging document. The charges will ultimately be charged in an indictment or an

information. Felonies will usually be charged in an indictment, unless the indictment is waived by the defendant in a non-capital case in which case an information will be used. Class A misdemeanors will be charged in an information.

If you have probable cause a suspect committed an offense, you may prepare a criminal complaint and obtain an arrest warrant. (Instead of an arrest warrant, you may elect to obtain a summons.) If you have probable cause, you may also arrest a suspect before you are able to obtain an arrest warrant. In that case, you will prepare a criminal complaint after the arrest but before taking the arrested person before a judge. A sample criminal complaint is in the additional resources section.

B. Information

An information is a list of criminal charges brought against a particular defendant by the United States Attorney. Where the charge is a felony, prosecution of a defendant based on an information may only ensue where the defendant has waived his constitutional right to be charged by way of a grand jury indictment (see below). An information is routinely used to charge misdemeanor offenses.

C. Indictment

An indictment is a list of criminal charges brought against a particular defendant by a grand jury. The grand jury consists of 23 members of the community selected by a District Court judge to sit for a period of 18 months. The grand jury may return an indictment only where 12 of its members have found that there is probable cause to believe that a crime was committed and that the defendant committed it. In order to try a defendant for a felony, the government must obtain an indictment. Exceptions to this rule, and how an indictment is obtained, will be discussed later.

D. Arrest Warrant

An arrest warrant is issued by a judge and commands that a defendant be arrested and brought before the court. The

arrest warrant identifies who is to be arrested and the offense. An arrest warrant is obtained when a judge is given a criminal complaint, an information, or an indictment with a request that an arrest warrant be issued. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible. After executing the warrant through the arrest, the officer must make a return (report) to the judge before whom the defendant is taken after arrest. If the arrest was made pursuant to an NCIC (National Crime Information Center) hit, then the arresting officer or the prosecuting attorney should contact the district that issued the warrant to obtain a faxed copy prior to the initial appearance. A sample application for an arrest warrant and an arrest warrant are in the additional resources section.

E. Summons

A summons is issued by a judge, served on a defendant, and requires that the defendant appear before the court at a stated time and place. A summons is obtained in the same manner as an arrest warrant by presenting a complaint, information, or indictment to the judge. If the defendant does not appear after being served a summons, an arrest warrant may be issued. U.S. Marshals and federal officers serve summonses. A summons is served by personally delivering a copy of the summons to the defendant. If the defendant cannot be found, a summons is served by leaving a copy of the summons at the defendant's residence or usual place of abode with a person of "suitable age and discretion" residing at that location. When a summons is not personally served on the defendant, a copy of the summons must also be mailed to the defendant's last known address. The officer who serves a summons must complete the back of the summons stating how and when the summons was served. Filling out the back of the summons is known as making a "return" of the summons. A sample summons is in the additional resources section.

F. "Tickets"

A citation or violation notice is similar to a traffic ticket and is issued by an officer.

V. The Initial Appearance (Rule 5)

A. The Initial Appearance

A defendant's first appearance before a federal judge will be at a proceeding called an initial appearance. While a district court judge could conduct the initial appearance, a magistrate judge usually conducts them even in felony cases.

B. Methods of Bringing a Defendant before a Magistrate Judge

1. Warrantless Arrest

You typically may make a warrantless arrest when you have probable cause that the defendant committed a felony offense and when a misdemeanor was committed in your presence. Since the defendant has the right to know of the charges for which he has been arrested, you must prepare a criminal complaint after the defendant is arrested and before taking the defendant to the initial appearance. (The authority to arrest and when a misdemeanor arrest may be made is covered in the Fourth Amendment section of this handbook).

2. Arrest with a Warrant

You may obtain arrest warrants in several ways.

(a) With a criminal complaint.

You may prepare a criminal complaint, swear to it before a magistrate judge and request an arrest warrant.

(b) With an indictment.

If the defendant has been indicted by a grand jury, the indictment will be filed with the clerk of the court in that district. The clerk of the court will issue an arrest warrant based on the charge or charges contained in the indictment.

(c) With an information.

If the AUSA has filed an information, you may obtain an arrest warrant by presenting the information to a judge and requesting a warrant.

3. Appearance on a Summons

Instead of obtaining an arrest warrant with a criminal complaint, indictment or information, you may obtain a summons. The summons will direct the defendant to appear in court for an initial appearance without being arrested.

C. Using Non-Federal Judges for an Initial Appearance

Federal law permits certain state and local judicial officers to perform some federal court functions to include swearing officers to criminal complaints, issuing search or arrest warrants, and conducting initial appearances. Avoid using state or local judges to issue federal warrants or conduct federal proceedings except in exigent circumstances and only after first coordinating the need with your AUSA. 18 U.S.C. § 3041.

VI. The Officer's Responsibility upon Arrest - The Initial Appearance

After an arrest but before the initial appearance, you will take certain steps to secure and prepare the defendant for processing by the courts. Such steps include: a search incident to arrest; booking procedures (fingerprinting, photographing, preparing various forms); transporting the defendant to a federally approved detention facility; a possible inventory of impounded property; and notifying the Pretrial Services Office of the arrest and the location of the defendant. If the arrest was

without a warrant, and a criminal complaint, indictment, or information has not already been prepared, you must prepare a criminal complaint.

A. The Requirement and Timing of the Initial Appearance

Rule 5a states that, upon arrest, a suspect must be taken to an initial appearance before a magistrate judge without unnecessary delay. Failure to do so can have an adverse effect on statements made during a post-arrest interview. First, of course, any statement taken has to be voluntary. Proper *Miranda* warnings must be given and a valid waiver obtained. Assuming this has been done, the courts may then look at whether there was a delay in getting to the magistrate.

By statute, Congress created a "safe zone" for the first 6 hours. In accordance with 18 U.S.C. § 3501(c), statements taken during the first 6 hours will not be suppressed because of any delay. That 6 hour safe zone can be extended if the delay is reasonable given means of transportation and distance to the magistrate. Thus, a statement taken 9 hours after arrest will still be usable if extensive travel was required to get to the magistrate for the initial appearance.

A statement will not automatically be suppressed just because it is made after that 6 hour safe zone. After the 6 hours, courts will simply begin to assess whether any delay is reasonable and necessary. For example, if a defendant had to be taken to the emergency room for treatment, then the delay would be deemed necessary, and any statements made could still be used at trial. If there is a problem with availability of the magistrate, officers should coordinate with an AUSA as to what should be done.

Delays solely for the purpose of continuing or conducting an interrogation will be seen as unnecessary and statements may be lost. So, if a magistrate is readily available, and a 2 hour interview is begun 5 hours after an arrest, statements

given during the first hour will be usable, but those made in the second hour might not be.

The Supreme Court has never defined exactly what "unnecessary delay" is, but a good rule of thumb is that you should ordinarily have the defendant in court for an initial appearance the next time the Magistrate Judge holds court following the defendant's arrest. You should be aware of any particular requirements in this regard set forth in the district's Local Rules.

The courts have given examples of unnecessary delay as: delay for the purpose of gathering additional evidence to justify the arrest; delay motivated by ill will against the arrested individual; or delay for delay's sake. If there is the possibility it may take longer than 48 hours to have the defendant at the initial appearance, you should immediately notify the AUSA or the duty AUSA after hours. If a federal judge or magistrate judge is unavailable, you may take the defendant before a local or state judge, mayor of a city, or other official designated in 18 U.S.C. § 3041 for an initial appearance. This alternative should not be used unless approved by the AUSA.

B. The Purpose and Procedure of the Initial Appearance

The primary purpose of the initial appearance is to inform the defendant of the charges for which the arrest was made and the procedural rights in the upcoming trial. Pre-trial release (bail) may also be considered at this time.

C. The Defendant's Rights at the Initial Appearance

The judge informs the defendant of the charge usually by providing the defendant with a copy of the indictment, information, or criminal complaint, or by having the AUSA describe the charges pending against the defendant. The defendant will be told of his right to retain counsel, and if the defendant cannot afford counsel, the right to have counsel appointed. The defendant will also be told how he can secure

pretrial release, the defendant's right not to make a statement, and that any statement made can be used against him.

D. Pretrial Release or Detention

The defendant can be released or detained pending the trial date. This determination is made by applying the Bail Reform Act, 18 U.S.C. §§ 3141 - 42. In most cases, there is a presumption that the defendant will be released on bond and conditions. The government may only overcome that presumption by demonstrating to the Court that the defendant, if released on bond, would pose a risk of flight or danger to the community. Where the charges are narcotics related (Titles 21 or 46) and have a maximum penalty of ten years or more, there is a rebuttable presumption that the defendant, if released, will pose the risk of flight and danger to the community. In that event, the law affords the defendant the opportunity to rebut that presumption.

The process of making the determination is as follows:

1. Pretrial Services Interview and Recommendation

Prior to being taken to the initial appearance, the Pretrial Services Office within the district collects information from the defendant and other sources. It then recommends to the judge whether a defendant should be detained or released. The recommendation may include conditions of release. Judges often follow the recommendations of the Pretrial Services Office. If that office recommends release pending trial, and you believe that detention is warranted, inform the AUSA immediately so the AUSA can decide whether to request a detention hearing. The report prepared by the Pretrial Services Office is confidential, but it may be released to the AUSA. A copy will not automatically be given to you.

2. Judge's Options

At the initial appearance, the judge may:

- Release the defendant on his own recognizance,

- Release the defendant on condition or conditions that may include bail,
- Conduct a detention hearing if the lawyers for both side are prepared to proceed, or

- Temporarily detain the defendant until the detention hearing can be held.

3. Conditional Release

The judge has wide discretion in selecting conditions that are reasonably necessary to assure the defendant's appearance and the safety of others and the community. Every release is conditioned upon the defendant's not committing a crime during the period of release. There are many other options the judge may choose such as: maintaining employment; travel restrictions; restrictions on place of residence and associating with other persons to include victims and witnesses; curfews; drug and alcohol use; medical evaluation and treatment; bail; limited custody when the defendant is not at work; and "tethering" by electronically monitoring the defendant's location.

E. Detention Hearings and Decision

The decision to detain the defendant in custody is made at a detention hearing. At that hearing, the defendant is permitted to present evidence, call witnesses, cross-examine other witnesses, and be represented by counsel.

F. Release is Preferred

The Bail Reform Act requires the pretrial release of a defendant on either his personal recognizance or an unsecured appearance bond (neither of which requires a deposit of money or property as security), subject to conditions while on release, unless the judge determines release: (1) Will not reasonably assure the appearance of the defendant (flight risk), or (2) Will endanger the safety of any other person in the community. The judge will consider the seriousness of the charged offense, the

strength of the case, criminal history, and the possible danger that the defendant may present to the community.

G. "Bail Jumping"

If the defendant fails to appear in court after being released, the judge has many options, and the government can, and usually does, seek an indictment on charging the defendant with a violation of the federal Failure to Appear statute, also known as "bail jumping." If later convicted of bail jumping, the sentence for bail jumping will be in addition to (consecutive sentence) any sentence for the offense for which the defendant failed to appear. 18 U.S.C. § 3146.

VII. Arrests outside the District where the Crime was Committed

If you arrest the defendant in the district where the crime occurred, you must take the defendant for his initial appearance in that district. When possible, an arrest should be made in the district where the offense was committed because the officers, AUSA, and judge will already be familiar with the case, and it will be easier to obtain witnesses for any necessary proceedings.

A. Arrests in a District other than the District where the Crime Occurred

When you arrest the defendant in any district other than the one in which the crime occurred, there are several options for where to take the defendant for the initial appearance, depending on the proximity of other districts and how quickly the initial appearance can be held. You may take the defendant to a district that meets the following criteria:

- The district in which the defendant was arrested, or
- An adjacent district (a district that touches the district of arrest) if:

the initial appearance can occur more promptly in the adjacent district, or

the offense was committed in the adjacent district and the initial appearance can be held on the same day as the day of arrest.

B. Removal and Identity Hearings

When the initial appearance is held in a district other than one in which the crime occurred, the judge must conduct a removal, and often, an identity hearing.

"Removal" is the process of transferring the defendant to the district where the crime occurred to stand trial. If the defendant was arrested without a warrant in hand, then you must obtain an arrest warrant from the district where the crime occurred. The documents can be sent by facsimile.

As part of the removal hearing process, the judge must determine that the defendant is the same person named in the arrest warrant. This will be done at an identity hearing. When the defendant admits his true name, this requirement is satisfied. Otherwise, the AUSA may have to produce witnesses who can identify the defendant or match descriptions from other evidence.

VIII. Diplomats, Foreign Nationals, Members of Congress, and Juveniles

A. Diplomats

1. Diplomatic Immunity

Diplomats are representatives of foreign countries who work in the United States on behalf of the government of that foreign country. In order to enjoy status as a diplomat, a foreign government representative must be officially recognized by the U.S. government.

Diplomatic immunity is based on international law and treaties that the United States has made with other nations. A person with diplomatic immunity is not subject to the jurisdiction of U.S. courts either for official, or, to a large extent, personal activities and therefore may not be arrested or prosecuted for any offense no matter how serious.

The same laws that protect foreign diplomats in the U.S. also protect U.S. diplomats overseas.

2. Verifying the Status of Diplomats

There are many levels of diplomatic immunity; this course will only discuss those with full diplomatic immunity. When encountering suspects who claim diplomatic immunity, inform the suspect they will be detained until their identity and diplomatic status has been verified. Most diplomats carry diplomatic passports or identification cards issued by the U.S. Department of State. Nevertheless, verify the claimed status of every person by calling the Department of State at the Diplomatic Security Command Center (DSCC) at 202/647-7277. DSCC will respond with diplomatic status and degree of immunity.

If the State Department does not verify the person's diplomatic status, you may treat the person as any other suspect.

3. Handling Diplomats after Verifying Diplomatic Status

- Do not arrest.
- Investigate and prepare a report.
- Do not use handcuffs unless the diplomat poses an immediate threat to safety.
- Do not search or frisk the person, his vehicle, or personal belongings unless necessary for officer safety.

4. Traffic Incidents Involving Diplomats

You may stop and cite diplomats for moving traffic violations. This is not considered detention or arrest. The diplomat may not be compelled to sign a citation. In serious traffic incidents (DWI, DUI, and accidents involving personal injury) you may offer a field sobriety test, but the diplomat may not be required to take it. Vehicles may not be impounded or booted, but may be towed to prevent obstructing traffic. Intoxicated diplomat-drivers should be offered a ride, a taxi, or to have a friend transport them; however, the diplomat may refuse the offer.

A diplomat might refuse offers to assist with transportation or other arrangements and yet still be too intoxicated to drive or walk home. In such instances, contact your supervisor and call upon the diplomat's embassy to advise them of the situation. The diplomat's government may take action on its own or direct its diplomat to accept offers of assistance. If the diplomat persists in driving while intoxicated, you must use your common sense to secure the car keys or perhaps block the car so the diplomat cannot drive it. You should not stand by while an intoxicated person attempts to drive.

In other situations, a diplomat may still present a possible danger to others. For example, during a domestic assault, the diplomat may still be trying to strike a spouse. Again common sense should prevail, and you should notify a superior and the diplomat's embassy. You might offer protection to the potential victim of an assault. If the diplomat presents a threat of injury to you or another, you may use reasonable force to prevent injury; however, you still may not arrest.

Forward reports of diplomatic incidents to the U.S. Department of State as soon as possible after the incident. Copies of any citations or charges should accompany each report. The addressee for incident reports, etc. is Protective Liaison Division, DSS – fax (202) 895-3613.

By law, a foreign embassy or diplomatic mission must be treated as foreign (non-U.S.) soil. Even with a search or arrest warrant, you may not enter these places without permission from the foreign nation.

B. Foreign Nationals[2]- Compliance with the Vienna Convention on Consular Relations (VCCR)

The 1963 Vienna Convention on Consular Relations (VCCR) established the protocol for the treatment of foreign nationals arrested in the United States as well as for U.S. citizens arrested by foreign governments. The agreements contained in the VCCR have the status of treaties in international law. The U.S. Constitution provides that treaties once adopted have the force of law in the United States. Therefore the provisions of the VCCR are binding on federal, state and local government officials.

International legal obligations exist to assure foreign governments that the United States will extend appropriate consular services to their nationals in the United States. These are mutual obligations that also pertain to American citizens abroad. For purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen. The following situations create obligations for law enforcement officers.

1. Arrests/Detentions – Advising of Right to Consular Notification[3]

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government has the opportunity to offer him/her appropriate consular assistance. **In all cases, the foreign national must be told of the right of consular**

[2] The Legal Division thanks the U.S. Department of State Bureau of Consular Affairs for submitting the following material for this chapter. Additional information can be obtained by calling (202) 647-4415 or at http://travel.state.gov/law/notify.html.

[3] Please see "Consular Notification" materials in the companion book, *Legal Division Reference Book*, in the segment entitled "Additional Resources Section."

notification and access. In most cases, the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. Neither the gravity of the charges, nor the immigration status of the individual, is relevant to the consular notification decision; the only triggering factor is arrest or detention of a non-U.S. citizen.

(a) requested notification ("Basic Rule")

If the detained foreign national is a national of a country that is not on the mandatory notification list, the "Basic Rule" applies: you must inform the foreign national without delay of the option to have his/her government's consular representatives notified of the detention. If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay.

(b) mandatory notification ("Special Rule")

In some cases, however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes. Those countries requiring mandatory notification are identified in the State Department list of "Special Rule" (mandatory notification) countries. If a national of one of these countries is arrested or detained, notification to the individual's consular officials must be made without delay.

Whether the case falls under the "Basic Rule" or the "Special Rule", you should always keep a written record of all notification actions taken, including initial provision of information to the detained individual about the right of consular notification and access.

2. Consular Access

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular representatives must be forwarded

by the appropriate local officials to the consular post *without delay*. Foreign consular officers must be given access to and allowed to communicate with their nationals who are being held in detention. Further, they are entitled to provide consular assistance, such as arranging for legal representation and contacting family members. They must refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. The rights of consular access and communication generally must be exercised subject to local laws and regulations.

3. Deaths

When U.S. government officials become aware of the death of a foreign national, the nearest consulate of that national's country must be notified *without delay*. This will permit the foreign government to make an official record of the death for its own legal purposes.

4. Appointments of Guardians/Trustees

When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or an incompetent adult, consular officials must be informed *without delay*.

5. Ship/Aircraft Accidents

If a ship or airplane registered in a foreign country wrecks or crashes in the United States, consular officials of that country must be notified *without delay*.

C. Arresting Members of Congress

1. Privilege from Arrest

Members of congress are privileged from arrest while Congress is in session and while attending, or going to and from, sessions of congress. (Art.1, Section 6 of the U.S. Constitution.) The privilege does not prohibit issuing traffic and

other citations, investigating and preparing reports, serving a subpoena or summons, or prosecution for a crime.

2. Exceptions to the Privilege

Even if attending congressional sessions or on the way to and from them, a member of congress may be arrested for a felony or breach of the peace. Generally, a breach of the peace is an offense that involves violence. Because "breach of the peace" is a fluid term and subject to constant interpretation, you should investigate and document the breach of the peace and then submit your findings to your superiors. No arrest should be made unless authorized by your superiors in consultation with U.S. Attorney's Office.

D. Arresting Juveniles

A juvenile is a person who is under the age of 18. There are special procedures that you must follow when you arrest a juvenile:

- Immediately advise the juvenile of their *Miranda* rights in words that a juvenile can understand even if you do not intend to question the juvenile;

- Immediately notify the AUSA of the juvenile's arrest and the charge(s);

- Immediately notify the parents or guardian of the juvenile's arrest, the charges, and juvenile's legal rights under *Miranda*. (It is your responsibility to make a good faith effort to notify the juvenile's parents or guardian. If the parent or guardian requests to speak with the juvenile, you must allow it), and

- Take the juvenile forthwith before a United States magistrate judge. (Forthwith requires more speed than "unnecessary delay"), and

- Do not make a media release. You should not make public the name or the picture of any juvenile (or any reports, documents, fingerprints, and the like pertaining to them) without prior approval of the district court.

You may and should investigate the case as you would any other. If the juvenile understands and waives his *Miranda* rights, you may question the juvenile. Any statement obtained lawfully and without delay in bringing the juvenile before the magistrate judge will be admissible in court.

When you intend or expect to arrest a juvenile, attempt to obtain the approval and guidance of the AUSA before the arrest.

IX. Preliminary Hearings and Arraignments

A. Preliminary Hearings

A preliminary hearing is a proceeding during which the government is required to produce evidence from which the Court may conclude whether or not the defendant's arrest was based upon probable cause. Rule 5.1(a) requires that the magistrate judge hold a preliminary hearing for all defendants charged in a criminal complaint with a felony or class A misdemeanor, that is, defendants other than those charged with a petty offense, with the following exceptions:

- The defendant waives (gives up the right to) the hearing.

- The defendant was already indicted, or charged by information, before the time the preliminary hearing is to be held.

- The government dismisses the case on its own. A defendant who has been detained in custody must then be released.

1. The Preliminary Hearing Procedure

At a preliminary hearing, the magistrate judge will hear evidence to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. The AUSA will call witnesses and may offer other evidence. You may testify at preliminary hearings. The defense may cross-examine government witnesses, call its own witnesses, and offer evidence. Because the preliminary hearing is not a trial, there is no jury and hearsay is admissible. Because the preliminary hearing is not a suppression hearing, the defense may not object on the grounds that evidence was unlawfully seized. Testimony given at the preliminary hearing is recorded and could be used to impeach your testimony at a later proceeding.

2. The Preliminary Hearing Timing and Results

If the judge finds there is probable cause to believe an offense has been committed and the defendant committed it, the defendant will be required to appear for further proceedings. If the judge decides there is no probable cause, the judge will dismiss the complaint. If the defendant is in custody, he will be released. A finding of no probable cause does not prevent a subsequent prosecution. The investigation may continue, and the AUSA may still seek an indictment or file an information.

The preliminary hearing must be held not later than 14 days after the initial appearance if the defendant is detained in custody, or 21 days after the initial appearance if the defendant has been released from custody. Generally, a preliminary hearing is held in the same district as the initial appearance. When the defendant is arrested in a district other than where the crime occurred and the initial appearance is held in the district of arrest, he may elect to have the preliminary hearing in the district where the crime occurred.

Preliminary hearings consume resources, expose government witnesses to cross-examination, may compromise sensitive information, and may force the government to disclose information prematurely. Processing a case in a way to avoid

having a preliminary hearing is a legitimate tactic. For example, if an indictment or information is obtained before the arrest, the defendant is not entitled to a preliminary hearing. In many situations, however, it may be appropriate to arrest before the indictment or information is obtained, as illustrated by the below examples:

- The danger that a defendant may harm another, flee, or destroy evidence may require an immediate arrest.

- Before an indictment can be obtained, you realize that the defendant may be in possession of evidence at a particular time and wish to take advantage of a search incident to arrest.

B. Arraignment

The purposes of an arraignment are: (1) to ensure that the defendant has a copy of the indictment or information; (2) either to read the charging document to the defendant or to advise the defendant of the substance of the charges against him, (3) and for the defendant to enter a plea to those charges.

An arraignment does not occur until formal charges are filed against the defendant in the form of an indictment or an information. The judge may permit a defendant to waive formal arraignment if the defendant requests waiver, pleads not guilty, and certifies receipt of a copy of the indictment or information.

At the time of the arraignment, the defendant, through defense counsel, will typically enter a plea of not guilty. The court will accept the not guilty plea and, in response to it, will enter an order requiring the exchange of discovery by the government and defense counsel in preparation for trial.

X. The Grand Jury[4]

A. Purpose of the Grand Jury

A grand jury is an independent body that operates under the supervision of a district court judge and under the direction of an AUSA. From your point of view, a grand jury performs two essential functions.

First, grand juries return indictments. The Fifth Amendment to the U.S. Constitution provides that "... no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by grand jury." Accordingly, if the defendant is to be tried for a felony, a "true bill of indictment" (referred to simply as an indictment) is required unless the defendant waives it. Rule 7(a)(1).

Second, a grand jury may investigate crime within its district. Grand juries have broad powers to investigate crime and may, through the use of grand jury subpoenas, obtain testimony, documents, and other evidence that you cannot. If the grand jury concludes an investigation by finding probable cause that a crime was committed and that a particular person, or persons, committed that crime, it may then return an indictment naming that person or persons as defendants. A grand jury may not investigate civil (non-criminal) matters.

B. Selection, Empanelment, and Structure

Grand jurors are selected by a random drawing, usually by the Clerk of Court, from a "pool" consisting of registered voters. Grand jurors must be U.S. Citizens, at least 18 years of age, proficient in English, and have no felony convictions or pending prosecution. Federal grand juries consist of 23 such persons who generally serve for 18 months; however, the court may discharge the jury earlier or extend the jury's service six

[4] The Federal Grand Jury Handbook can be found in the companion book, *Legal Division Reference Book*, in the segment entitled "Additional Resources Section."

additional months. When the grand jury sits, there must be a minimum of 16 grand jurors present.

C. The Grand Jury Process

The grand jury usually meets in a special, private room. Grand jury proceedings are formal, but less formal than a trial. Unlike a trial jury, a grand jury does not sit to hear just a single case. Once a grand jury starts hearing evidence on a particular investigation, they do not have to finish that investigation before they begin another. A grand jury could hear evidence on case A in the morning, case B in the afternoon, and then continue on case A again the following day. A grand jury may not meet every day, and a grand jury may not always be in session in your area.

The grand jury serves under the guidance of the AUSA. While the grand jury is empanelled by a district court judge and legally functions under the judge's supervision, the AUSA presents the case to the grand jury, calls and examines witnesses, issues subpoenas in the name of the grand jury, and presents the proposed indictment.

Grand jury proceedings are secret and not open to the public. Grand jury secrecy ensures that untested and uncorroborated information is not leaked to the public. Secrecy also helps witnesses be more forthcoming and preserves the integrity of a criminal investigation. (The details of grand jury secrecy principles are discussed in a later section.) When testimony is presented to the grand jury, only certain people may be present: the AUSA; one witness at a time; an interpreter (if needed); a court reporter; and the members of the grand jury. Officers who testify will not be present to hear the testimony of other witnesses. Neither the target of a grand jury, nor the target's attorney, has the right to be present. Even if the target testifies, the target's attorney is not allowed to be present; however, at the AUSA's discretion the target may be allowed the opportunity to consult briefly with his attorney outside of the grand jury room. When the grand jury is deliberating and voting on the indictment, only the grand jury members may be present.

A “target” is a possible defendant. Infrequently, the AUSA may invite the target to testify before the grand jury. The target may refuse to testify if the testimony would be incriminating. The target could be given immunity and be compelled to testify, but that is rarely done because immunized testimony cannot be used against the target later on.

The AUSA presents evidence to the grand jury. The evidence will consist of witnesses, documents, and other evidentiary items that are subpoenaed by the grand jury or that may be voluntarily submitted by a witness before the grand jury. The grand jurors may also ask questions. Because there is no defense counsel present, there is no cross-examination. Because a grand jury hearing is not a trial, the Federal Rules of Evidence (with the exception of privileges) do not apply. This means that hearsay may be used, and that the AUSA is not required to lay a full foundation for evidence. In a “routine” case, a one-agent presentation may be sufficient even though many officers worked the case. Because the burden of proof at a grand jury is only probable cause, an AUSA might not present all the available evidence. Nevertheless, the Department of Justice policy is that indictments are not to be sought unless the responsible AUSA has determined that the evidence, viewed in its totality, constitutes proof beyond a reasonable doubt of the defendant’s guilt, the threshold of proof necessary for the trial jury to convict.

Though grand jury proceedings are secret, if a witness testifies at both a grand jury and the trial, the defense will receive a copy of the witness’s grand jury testimony under the Jencks Act (addressed later in this chapter). You must be accurate in your testimony because you may and likely will be cross-examined concerning any conflicts between your trial and grand jury testimony.

A “true bill of indictment” requires the agreement of at least 12 of the grand jurors that there is probable cause that a crime was committed and that the defendant committed it. If the grand jury votes a true bill, the foreperson and AUSA sign the indictment. The indictment is then “returned” (reported) to

the judge in open court unless the indictment is sealed. Once an indictment is returned, the indictment may be used to obtain an arrest warrant or summons. The warrant or summons will be signed by the clerk of court.

If less than 12 of the grand jurors vote for indictment, a "no bill" results, and that is reported to the judge. If the grand jury returns a no bill, the case may be presented again to the same or a different grand jury. This sometimes requires presentation of additional evidence and approval of senior DOJ officials.

D. Sealed Indictments

Ordinarily, an indictment is returned in open court making it public. The AUSA may request that the judge keep the indictment secret until the defendant is in custody. This is a valuable tool. In many cases, especially those involving multiple defendants, if indictments are made public or defendants are arrested at different times, other defendants may flee or destroy evidence. You may also be involved in cases with indictments being sought in several districts. By having an indictment sealed, you may coordinate multiple arrests to avoid tipping off defendants. Rule 6(e)(4).

E. Post-Indictment Grand Jury Powers

The purpose of a grand jury is to investigate crime and return indictments. Once an indictment has been returned on a charge, the power of the grand jury to investigate that charge ends. This rule means that the grand jury may not be used solely to obtain additional evidence against a defendant who has already been indicted. After indictment, however, the grand jury may issue subpoenas if the investigation is to seek a superseding (modified) indictment, the indictment of additional defendants, or indictment of additional crimes by an already-indicted defendant. In addition, the grand jury may not be used solely to assist the AUSA in pre-trial discovery or trial preparation.

XI. Grand Jury Subpoenas

A. Power and Flexibility of Grand Jury Subpoenas

Grand juries have the power to subpoena testimony and other evidence. What a grand jury may subpoena is often beyond your reach. Consider the following situations about how you often collect evidence and in parenthesis, the limitations you may face.

- You may seek consent to search. (But the person may refuse consent.)
- A witness may agree to an interview. (But you cannot force a person to submit to an interview.)
- You may request a search warrant. (But there may not be probable cause for the warrant.)
- You may get a court order to obtain information. (But the request may take too long, or the judge may refuse to issue it.)

In the above examples, you should consider whether a grand jury subpoena would meet your needs. In addition, subpoenas may be used to obtain the following (this list is by no means complete): (1) corporate records that would reveal evidence of a crime; (2) a copy of an apartment lease or car rental contract that you need; (3) fingerprints, handwriting or voice exemplars, or hair samples; (4) phone records to see what calls were made; (5) bank or credit card company records; (6) shipping records from interstate carriers.

B. Types of Grand Jury Subpoenas (Rule 17)

A subpoena *Ad Testificandum* commands the appearance of a witness to testify. A subpoena *Duces Tecum*, commands the person to produce specific books, papers, data, objects or documents designated in the subpoena and to testify about them. A sample grand jury subpoena is in the Additional Resources section of the text.

C. Service of Subpoenas

While the Rules specifically provide for service by U.S. Marshals, you may, and often will, serve subpoenas in your own cases. Unlike a summons that may be served upon a "person of suitable age and discretion" followed by mailing the summons, a subpoena must be personally served upon the person named in the subpoena. Substitute service is not permitted. The failure to comply with a properly served subpoena is punishable as contempt of court.

D. Quashing or Modifying a Subpoena

A person who has been subpoenaed to provide information and who is subject to a privilege (such as the 5th Amendment or the spousal privilege) or who otherwise objects to the subpoena may go to court to "quash" (cancel) the subpoena. The court may either grant or deny such a motion to quash, or may modify the subpoena to limit what the person must provide.

E. Legal Requirements for a Subpoena

The item or testimony sought must be relevant to a grand jury investigation. "Relevance" is a much lower standard than probable cause. In the case of a subpoena *Duces Tecum*, the items sought must be particularly described so the person subpoenaed can comply. The production of the item also may not be "unreasonably burdensome."

F. Limitations of Grand Jury Subpoenas

- A grand jury may only investigate crimes in the district where they sit.

- A subpoena may not be used to investigate civil (non-criminal) matters.

- Fifth Amendment (self-incrimination) and other privileges apply. A subpoena may not compel a

person to be a witness against himself if their testimony would tend to incriminate him. Persons who legitimately claim a privilege against self-incrimination may be compelled to testify if given a grant of immunity. If immunized, however, the testimony may not be used against that witness though it could be used against another. In addition, a subpoena may not compel disclosure of information that is subject to other recognized privileges (attorney-client, psychotherapist-patient, husband-wife, and clergy-communicant). DOJ requires special permission before issuing subpoenas to the media and to non-target attorneys, doctors, and members of the clergy. The AUSA will have the details explaining how this can be accomplished.

- A subpoena may not be used to compel a person to submit to an interview. For example, believing that a witness might not give an interview, you serve a subpoena on the witness implying that if the witness submits to an interview, you will have the subpoena withdrawn. That is an improper use of grand jury powers. On the other hand, if you serve a subpoena on a person, and if the witness then indicates willingness to be interviewed, you may lawfully conduct the interview. Your AUSA may thereafter release the witness from the necessity of appearing before the grand jury to testify.

- Subpoenas may not be issued to investigate the offense(s) that have already been indicted.

- While the grand jury may be used to investigate crimes such as harboring or escape, DOJ policy prohibits its prosecutors from using the grand jury's subpoena power solely to aid in locating and arresting fugitives.

G. What to do when a Serving a Subpoena may result in the Destruction of Evidence - Using a Search Warrant

In some cases, you may have reason to believe that a person served with a subpoena for documents or other evidence may destroy the evidence or falsely deny having the subpoenaed item(s). With the approval of a U.S. Attorney, you may obtain a "forthwith" subpoena when there is a risk of flight or destruction of evidence. A forthwith subpoena must be approved by a Judge and, if approved, requires the recipient's immediate compliance with the production demands within the subpoena. Even using a forthwith subpoena, however, there still may be some opportunity to destroy evidence.

When a subpoena would allow a person to destroy or alter evidence, or falsely claim they do not have the item, you should consider obtaining a search warrant. A search warrant has several advantages over a subpoena: you select when the search warrant is executed; you can find the item yourself, thereby denying the suspect an opportunity to destroy the evidence; evidence found in plain view during the search can be lawfully seized; and evidence obtained by a search warrant is not subject to grand jury secrecy rules.

Subpoenas, on the other hand, are easier to obtain because they do not require probable cause and can usually be obtained by contacting the AUSA's office.

H. The Mechanics of Obtaining a Subpoena

The exact procedure varies in each district. Ordinarily, after the grand jury has been empanelled, subpoenas are issued and signed in blank by the clerk of court. The AUSA or a grand jury subpoena coordinator in the AUSA's office keeps the subpoenas. The AUSA decides if a subpoena will be issued. When you need a subpoena, contact the AUSA's office and request one.

I. Inspector General (IG) Subpoenas

In addition to grand jury subpoenas, IG subpoenas might also be available. Most IG subpoenas are authorized by the Inspector General's Act, 5 USC App. §6(a)(4). The following text box contrasts some aspects between IG and grand jury subpoenas.

GJ: Secrecy rules apply (Rule 6(e)).
IG: No GJ secrecy rules

GJ: Criminal matters only.
IG: Criminal or civil matters

GJ: *Ad testifcandum* or *duces tecum*
IG: *Duces tecum* only.

GJ: Can obtain delay in notice in certain banking records.
IG: Person will be notified when certain bank records subpoenaed.

GJ: Can be relatively easy to obtain.
IG: Sometimes requires executive level approval.

XII. Secrecy of Grand Jury Proceedings (Rule 6(e)(2))

Rule 6(e)(2) requires that grand jury proceedings, and "matters occurring before the grand jury," may not be publicly disclosed and, subject to very specific exceptions noted below, must remain secret. The purpose of this secrecy rule is to encourage witnesses to come forward and testify freely and honestly, to minimize the risk that prospective defendants will flee or thwart investigations, and to protect accused persons who are ultimately exonerated from unfavorable publicity.

The following items are protected by grand jury secrecy rules, and you cannot disclose the item unless authorized to do so. Collectively, these items are known as "matters occurring before the grand jury," or simply, "grand jury matters:"

- The names of witnesses (including that you were a witness);

- The testimony of a witness (including your own testimony);

- Documents and other items that were subpoenaed by the grand jury; and

- Other grand jury matters including information provided by the AUSA, questions by grand jurors, and what occurred in front of the grand jury.

A. Exceptions to Rule 6(e)

Exceptions to Rule 6(e)'s secrecy requirement are as follows:

1. The Non-Government Witnesses Exception

A private citizen (non-government employee) who testifies before a grand jury may lawfully disclose that they testified and the subject matter of their own testimony.

2. District Court or AUSA Disclosure

A district court judge can order disclosure of grand jury matters. Typically, with notice to a district court judge, the AUSA controls disclosure of grand jury matters. Requests to a district court judge are processed by the AUSA and do not involve you. The remainder of this section will discuss only release of grand jury matters by the AUSA.

3. Access to Grand Jury Matters

The existence of grand jury matters is of little value unless you can have access and use it. Grand jury matters, however, may not be released to just anyone and may be released only for limited purposes on a "need to know" basis. The AUSA can give the following groups access to grand jury matters for the purposes indicated:

- Federal and state officers for the purpose of enforcing federal criminal law. Grand jury matters cannot be released for civil law purposes.

- Another AUSA for purposes of enforcing federal criminal laws.

- Another grand jury. If a grand jury in District A has matters useful to a grand jury investigation in District B, the AUSA may authorize disclosure of grand jury matters to the grand jury in District B.

- Under the Jencks Act and Rule 26.2, the grand jury testimony of a person who later testifies at a trial or hearing will be provided to the defense. (The Jencks Act and Rule 26.2 are discussed thoroughly in a later section.)

- The Patriot Act, Title II, Sec. 203a - Foreign intelligence and other persons and entities. There are other, limited situations when grand jury matters may be revealed that are beyond the scope of this course. For example, foreign intelligence information may be given to a wide variety of entities. Rule 6(e)(3)(C) permits the disclosure of grand jury information involving intelligence information to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of official duties. This section requires notice to the court of the agencies to which information was disseminated and adds a definition of "foreign intelligence information" to Rule 6(e).

4. The 6(e) list

You need, and may use, grand jury matters to conduct your criminal investigations. The AUSA who is assigned to your investigation may authorize you to have access to grand jury materials for that purpose and on a case-by-case basis. If you need access to grand jury matters, request approval from the AUSA. Officers from other agencies, or those in your chain of command who need grand jury information, must also obtain approval from the AUSA.

The AUSA is required to maintain a list of persons the AUSA has authorized to see grand jury matters. This is commonly known as "the 6(e) list." You may disclose grand jury matters only to those on the 6(e) list.

Consider the following examples when grand jury matters may be disclosed:

- You are on a task force with officer B. You are on the 6(e) list; officer B is not. Officer B may not have access to grand jury matters until officer B is placed on the 6(e) list by the AUSA.

- You testified as a grand jury witness targeting a local politician. While out with friends at dinner, your friends (who are not on the 6(e) list) start discussing rumors that the politician is about to be indicted. You may neither disclose that you were a grand jury witness nor reveal your testimony or other grand jury matters.

Information obtained independently of the grand jury is not subject to the restrictions of Rule 6(e), even if the same information has previously been obtained using the grand jury or its subpoena power. For example, a copy of Document X was obtained through a grand jury subpoena. You seized another copy of Document X during the execution of a search warrant. Copy 2, which was obtained by a source independent of the grand jury, may be given to anyone who needs to have it. Nevertheless, Rule 6(e) still prohibits your disclosure to anyone not on the 6(e) list that Copy 1 was obtained by the grand jury.

"Mixed information" poses different problems. Consider an investigation in which you prepare a financial analysis that shows that the target of an investigation has been spending more money than all known sources of income combined. Your analysis is based both upon documents subpoenaed by the grand jury as well as on documents and information from non grand jury sources. If your analysis does not identify or refer to the source of information as grand jury matter, you may reveal the analysis to those not on the 6(e) list. However, if the

analysis does reveal that grand jury matters are involved, you may only disclose it to those on the 6(e) list.

In general, government attorneys who are prosecuting a civil suit on behalf of the United States, or who are defending a civil suit against the United States, may not be given access to grand jury matters to help prepare the government's case. That is because grand jury matters ordinarily may not be used for civil proceedings. (In rare instances based upon specific needs and legal issues not necessary to cover here, a District Court judge (not the AUSA or even a Magistrate Judge) may enter an order allowing such disclosure.)

XIII. Documents Required to Formally Accuse a Defendant

Before trial, the government, defendant, and the court must know exactly the offenses with which the defendant is charged. The charging document informs the parties of the exact charges. The charges at trial may be different than the ones in the complaint or information that was used at the initial appearance or to obtain an arrest warrant or summons. The charges may also be different than the ones for which the defendant was originally indicted, because the defendant may have been indicted for additional offenses, or the AUSA may have obtained a superseding indictment.

The proper charging document depends on the level of offense charged and the court where the case will be tried. Capital felonies must be charged by indictment; a defendant may not waive indictment in a capital case. Non-capital felonies are normally charged against a defendant in an indictment. This is because of the defendant's right to an indictment as set forth in the Fifth Amendment. The defendant may waive that right, however, and, if he does, he may be tried for non-capital felonies on an information prepared by the AUSA. This typically occurs when a defendant enters into a plea bargain, waives indictment and agrees to be charged by an information as part of the agreement.

Misdemeanors may be charged by a criminal complaint. When a misdemeanor is to be tried in district court, the AUSA

will ordinarily prepare an information even if there is already a criminal complaint. AUSAs do this because they prefer a more "formal" charging document when before a district court judge for a trial. If the case is old, dismissing the complaint and filing an information will restart the speedy trial clock. Petty offenses in magistrate court may be tried on a citation or violation notice. These are the "minimum charging documents." A case that only requires a criminal complaint could be tried on an indictment, but that would rarely occur.

Review of charging documents:

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

A defendant charged with a Class A misdemeanor will be tried in magistrate court if the defendant consents. If a defendant charged with a Class A misdemeanor does not consent to be tried in magistrate's court, the defendant will be tried in district court. When a misdemeanor is tried in district court, the AUSA will ordinarily prepare an information even if there is already a criminal complaint.

XIV. Defense Access to Government Evidence

In preparing for trial, the defense is entitled by law to know what evidence the government has so that it may attack the government's case and mount a defense. Commonly referenced as "discovery material," this information must be

disclosed to the defense under one or more of the following sources of authority: (1) under Federal Rule of Criminal Procedure 16; (2) through the *Brady* doctrine; (3) under the *Giglio* case, and (4) under the Jencks Act/Rule 26.2. Additionally, most District Courts have local discovery rules that may require additional categories of information to be disclosed by the government and/or defense and that impose upon the parties certain time requirements for discovery.

A. Discovery under Rule 16

Upon a request by the defense at or following the defendant's arraignment, the government must disclose to the defense, and make the items available for inspection and copying, evidence in its possession, or of which it has knowledge, that falls within certain categories of information. The defense almost always makes a discovery request, so Rule 16 materials are almost always provided to the defense. Rule 16 discovery covers that which is in the possession and control of the government, that which the government should know, and in some instances, what the government could know.

Discovery requests are made by the defense to the AUSA. AUSAs, not you, respond to discovery requests. Your role in discovery is to keep the AUSA informed about all the information in the case so the AUSA is aware of the materials in the government's possession that must be disclosed to the defense.

Evidence discoverable under Rule 16 covers most statements made by the defendant to include:

- Any recorded or written statement made by the defendant that is relevant to the case to include any grand jury testimony. This includes not only recorded or written statements to law enforcement, but also to private citizens. For example, e-mails or letters between the defendant and friends, in the possession of the government, are discoverable.

- Oral statements made to a person the defendant knew was a government agent at the time the statement was made. Oral statements a defendant makes to an undercover officer are not discoverable.

- The defendant's prior criminal record, to include any arrest record.

- Documents and tangible objects, to include books, papers, documents, data, and photographs that are important to defense preparation of the case, or which the government intends to offer at trial.

- Items obtained from or that belonged to the defendant such as evidence that was subpoenaed from another or discovered during a search of the defendant or the defendant's property.

- Reports of examinations and tests such as handwriting, ballistic, or fingerprint comparisons.

Items that are not discoverable under Rule 16 include:

- Reports of witness interviews or recordings (written or electronic) statements. (If a witness testifies at a hearing or trial, however, the Jencks Act requires that the government then disclose any prior recorded (written or electronic) statements by that witness to the extent that such recorded information is relevant to the substance of that witness' testimony.)

- Internal government documents made by you or the AUSA. This would include reports, memoranda, memoranda of interview (MOIs), and reports of investigation (ROIs).

If the defense makes a discovery request, the government is also entitled to certain information ("reciprocal discovery") from the defense. This will be handled by the AUSA.

B. The *Brady* Doctrine

In the Supreme Court case of *Brady v. Maryland*[5], the defendant was convicted and sentenced to death for first-degree murder committed in the course of a robbery. The government knew, but Brady did not, that Brady's accomplice had confessed to the actual murder. The United States Supreme Court later reversed Brady's conviction because this information was not disclosed to the defense and thus the "*Brady* Doctrine" was born.

Examples of Brady Materials

- Evidence that another may have committed the charged offense.
- Information supporting an alibi.
- Information supporting an affirmative defense (such as entrapment or self defense.)
- Exculpatory (favorable) material.
  - The defendant may not be guilty,
  - Information that could lessen the defendant's punishment.

The *Brady* doctrine requires that the government tell the defense of any exculpatory (favorable) evidence known to the government. Exculpatory evidence is that which would cast doubt on the defendant's guilt or might lessen the defendant's punishment. The defense does not have to request the information - if the government knows of it, it must be disclosed. *Brady* materials must be provided a reasonable time in advance of trial so the defense may have a reasonable opportunity to decide how to use the information.

C. Disclosure under *Giglio*

The Supreme Court case of *United States v. Giglio* requires the government to disclose information that tends to

[5] Cases named in this chapter without a case cite are briefed in the companion book, *Legal Division Reference Book*.

impeach any government trial witness, including you. "Impeachment" is information that contradicts a witness or which may tend to make the witness seem less believable. You must tell the AUSA about potential *Giglio* information so AUSAs can decide what must be disclosed.

Information that may show the following must be disclosed to the AUSA:

- Affects the credibility or truthfulness of the witness to include having lied in an investigation, character evidence of untruthfulness, or any bias.
- Payment of money for information or testimony.
- Plea agreements or immunity.
- Past or pending criminal charges.
- Specific instances of inconsistent statements.
- Findings of a lack of candor during an administrative inquiry.
- Any credible allegation of misconduct that reflects upon truthfulness or bias that is the subject of a pending investigation. Allegations made by a magistrate judge, district court judge, or prosecutor, and allegations that received considerable publicity must be disclosed to the AUSA even if determined to be unsubstantiated

Information disclosed to the AUSA does not automatically go to the defense. The defense does not have an automatic and unrestricted right to see your personnel files. The government may be required to review files for *Giglio* information. If the AUSA does not believe that he or she alone can determine whether certain information must be disclosed to the defense, then the AUSA should produce that information for an *in camera* inspection (by the judge only). The judge will then decide if the defense will get the information.

D. The Jencks Act and Rule 26.2

The Jencks Act requires the AUSA to give the defense any prior "statements" of a trial witness that are in the possession of the government, so the defense can conduct an effective cross-examination of the witness. 18 U.S.C. § 3500[6]. The Jencks Act requires the AUSA to deliver prior statements only after a witness testifies and before cross-examination begins. To avoid unnecessary delays during the trial, however, the AUSA usually will give Jencks Act statements to the defense in advance of trial.

Jencks Act "statements" include:

- A written statement made and signed, or otherwise adopted, by the witness, such as an affidavit or a letter. If you show a witness notes that you have taken during an interview, for example, to have the witness confirm the accuracy of the notes, your notes may hereby become that witness' "adopted statement" for Jencks Act purposes.

- A stenographic, mechanical, electrical, or other recorded statement.

- A substantially verbatim transcript of an oral statement made at the time the witness was speaking.

- The transcript of the witness' grand jury testimony.

Your own notes may qualify as a Jencks Act statement in certain circumstances such as stated above when a witness is shown the notes and vouches for their accuracy (an adopted statement.) You must therefore safeguard your notes, including original rough notes of interviews and other activities, even if they are later formalized or included in other reports.

[6] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

Determine your agency and local AUSA policy concerning safeguarding notes.

Rule 26.2 extends Jencks Act requirements beyond trials to other court proceedings such as suppression or detention hearings. While the statements of officers and other witnesses may not be discoverable by the defense under Rule 16, *Brady*, or *Giglio*, anytime a witness testifies at a trial or hearing, prior "statements" of that witness must be given to the defense under the Jencks Act or Rule 26.2.

Example 1: A witness testifies at grand jury. Grand jury testimony is secret and will not be given to the defense. If the grand jury witness testifies at a hearing or trial, however, the grand jury testimony will be given to the defense under the Jencks Act or Rule 26.2.

Example 2: The signed or adopted statement of a government witness that he saw the defendant commit a crime (non-exculpatory statement) is not discoverable. If that witness testifies at a trial or hearing, however, the statement must be given to the defense.

E. Continuing Duty to Disclose

Complying with discovery and disclosure requirements is a continuing obligation. If the defense asks for an item that does not exist at the time of the request, but later comes into existence, the government must disclose it once it learns that the evidence exists. For example, if a ballistics test has not been performed at the time of a discovery request, but later the test is performed, the government must disclose the results of the test.

F. Sanctions for Non-Compliance

Failure to comply with discovery and disclosure requirements can have drastic consequences. While the AUSA is responsible for fulfilling discovery requirements, you must ensure the AUSA has all the information so that the AUSA can

comply. Failing to comply with discovery requirements can result in government evidence being excluded, a trial continuance for the defense to evaluate newly discovered information, mistrial, and even a reversal of conviction if the non-compliance is discovered after trial.

XV. Venue and Transfer

It is important for you to determine the venue for any offense under investigation. Venue controls what judge can perform certain functions, where you must obtain court documents, and where the defendant can be tried.

Jurisdiction is the power of a court to try a case. For example, a federal district court judge has the authority to try any federal criminal case. Venue means place. The U.S. Constitution provides that a defendant has the right to have his case tried in the state and district where the crime occurred.

Venue affects how you perform your duties. Each of the actions below must be performed in the district where the crime occurred (venue):

- Return of a grand jury indictment.
- Presenting a criminal complaint or filing an information.
- Obtaining an arrest warrant or summons.
- In most cases, a search warrant must be obtained in the district where the evidence is located.
- Trial of the defendant unless the judge permits otherwise.

In a typical case, venue is where the unlawful act occurred. For offenses begun in one district and completed in another, venue is in any district where the offense was begun, continued, or completed. 18 U.S.C. § 3237. In conspiracy

cases, venue is in the district in which the agreement, any overt act in furtherance of the agreement, or termination of the conspiracy occurred. Special statutes control venue for those federal offenses that occur outside of the jurisdiction of the U.S. or upon the high seas.

The defendant will be tried in the district where the crime occurred unless one of the below exceptions apply.

- Transfer for Plea and Sentence (Rule 20, F.R.Cr.P.). If a defendant is arrested in a district other than the one where the crime occurred and the prosecution is pending, the prosecution may be transferred to the district of arrest if the defendant states in writing a wish to plead guilty in the district of arrest and to waive trial in the district where the prosecution is pending, and the United States Attorneys and the judges in both districts agree. If the defendant thereafter changes his plea to not guilty, then the prosecution is transferred back to the district where the crime occurred and from which the prosecution was transferred.

- Transfer for Trial (Rule 21, F.R.Cr.P.) ("change of venue"). The defense may file a motion requesting a transfer of the prosecution to another district for trial or other disposition if the court finds (a) that the prejudice against the defendant is so great in the district of venue (where the crime occurred) that the defendant cannot obtain a fair and impartial trial, or (b) that the prosecution, or one or more counts, against the defendant should be transferred to another district for the convenience of the parties and the witnesses and in the interest of justice.

To state and local officers, "extradition" involves moving a defendant between states within the United States to stand trial. In the federal system, extradition is moving a defendant into the United States (or out of the United States) for trial. In other words, federal extradition is not the movement of a

defendant between districts and states, but between the United States and another nation. The process is a complicated one involving the Departments of State and Justice.

XVI. The Statute of Limitations and Speedy Trial Act

A. Statute of Limitations

A statute of limitations prohibits prosecution of a defendant after a certain period of time has passed. The statute is designed to protect individuals from having to defend against charges when the facts may have become obscured by time, or defense witnesses may have become unavailable to testify, and to encourage law enforcement officials to promptly investigate suspected criminal activity. If the defendant is indicted or an information is filed within the statute of limitations, then the prosecution may proceed. If not, then prosecution is barred.

The general statute of limitations requires the government to indict or file an information within five years from the date of the offense. 18 U.S.C. § 3282. Some crimes have their own statute of limitations. For example, the statute for Title 26 tax crimes is generally six years; arson is 10 years. There is no statute of limitations for a capital offense.

It is helpful to see the statute as a clock. The clock starts, that is, the statute starts to run, the day after the offense is completed. The clock runs until the defendant is indicted or an information is filed. If at the time of indictment or information the clock is not yet at the 5-year point, prosecution may proceed. If the clock has reached or passed the 5-year point, prosecution is barred. A statute of limitations runs even though the government does not know the defendant's identity.

An example of the computation for the general statute of limitations:

8/31/2000	Crime committed.
9/1/2000	First day of running of the statute.
8/31/2005	Last day to secure an indictment or information.

9/1/2005	Prosecution barred, unless indictment or information has been obtained.

The statute of limitations does not run while a defendant is a fugitive from justice. Using the clock example, the clock stops while the defendant is a fugitive. This is known as "tolling the statute." A fugitive is a person who commits an offense and then intentionally flees from the jurisdiction of the court where the crime was committed, or who departs from his usual place of abode and intentionally conceals himself for the purpose of avoiding prosecution. Fleeing from justice means the person has left to avoid trial and punishment.

An example of the computation for the general statute of limitations in a fugitive case:

8/31/2000	Crime committed.
9/1/2000	First day of running of the statute.
10/1/2000 - 9/30/2001	Defendant is a fugitive from justice, and the statute is tolled.
8/31/2006	Last day to secure indictment or information.
9/1/2006	Prosecution barred, unless indictment or information obtained.

Some offenses are called "continuing offenses" which means that though the crime occurred on a certain day, the statute of limitations does not begin to run until a later date. For example, in a conspiracy case, the statute begins to run on the date of the last overt act even though the agreement may have occurred earlier. Certain frauds are also continuing offenses. The statute of limitations for mail or wire fraud, for example, begins to run on the date of the last mailing or wire transmission in furtherance of the scheme to defraud.

B. The Speedy Trial Act: (18 U.S.C. §§ 3161-3174)

The Speedy Trial Act establishes time limits for bringing a defendant to trial after arrest or service of a summons. The statute ensures the timely progression of the case and serves to implement~~s~~ the Sixth Amendment "...right to a speedy and public trial."

No more than one hundred (100) days may elapse between date of arrest or service of a summons and the first day of the trial. The 100-day rule has two separate components:

a) An indictment or information must be filed within 30 days of the date of arrest or service of a summons.

b) The trial must begin within 70 days of the public filing of the indictment or information, or from the date the defendant appears before the court in which the charge is pending, whichever is later.

Many events may delay the start of a trial yet be excluded in calculating whether the Speedy Trial Act has been violated. These exclusions usually involve procedural matters that concern only the AUSA and are beyond your control. By way of example, the time to litigate pretrial motions or to perform necessary mental evaluations of a defendant would be excluded from Speedy Trial Act time.

You must appreciate that when you arrest a defendant, you have triggered the Speedy Trial Act. That may, in turn, cause the AUSA to try a case before it is ready. Therefore, it is critical that you coordinate with the AUSA on the timing of discretionary arrests. If an immediate arrest is necessary to prevent harm, preserve evidence, prevent flight, or take advantage of search incident to arrest rules, notify the AUSA immediately.

XVII. Officers and Presentencing Investigations and Reports

In the federal system for non-capital cases, defendants are sentenced by the trial judge. The judge will conduct a sentencing hearing. In a capital case (where the death penalty is authorized by statute), the judge may impose death if a jury recommends it. The defendant may waive the participation of a jury.

Each district has a U.S. Probation and Pretrial Services Office. Before the sentencing of a defendant, a U.S. Probation Officer will conduct a Pre-Sentence Investigation (PSI) that consists of interviewing witnesses and reviewing documents. Thereafter, the U.S. Probation Officer will prepare a presentencing report (PSR). The sentencing judge will use that report in determining an appropriate sentence. The report may contain a specific sentencing recommendation.

At a minimum, the PSR will include the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence.

You may be asked to provide certain information to the U.S. Probation Officer in the form of a witness interview or otherwise. You should comply with these requests. While most of the information for a PSR is available through sources other than you, some may only be available using the investigative file prepared by you. If you have information that would assist the probation officer, make it available, and assist Probation Services to ensure that the report contains complete and accurate information.

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I. Introduction

The Fourth Amendment to the United States Constitution states that:

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

The Fourth Amendment contains two distinct clauses. The first requires that all searches and seizures be reasonable, while the second mandates that probable cause exist before search or arrest warrants may be issued, and that warrants particularly describe the place(s) to be searched and person(s) or thing(s) to be seized.

II. Governmental Action

The Fourth Amendment regulates the actions of government officials. The term "government" does not solely refer to law enforcement conduct. Instead, the Fourth Amendment acts as a restraint on the entire government. For instance, the Court has held the Fourth Amendment applicable to the activities of civil authorities such as building inspectors, Occupational Safety and Health Act inspectors, firefighters entering privately-owned premises to battle a fire, and state hospital administrators.

The Fourth Amendment does not regulate private conduct, regardless of whether that conduct is reasonable or unreasonable. Evidence of a crime that is obtained through a "private search" may be admissible against a defendant, even if the private search was conducted illegally.

While the Fourth Amendment may not apply to a "private search" by a private citizen, it does apply when that citizen is acting as an instrument or agent of the government. The issue in such a search necessarily turns on the degree of the government's participation in the private party's activities. That question can only be resolved in light of all the circumstances. In making this determination, the courts typically focus on three factors: (1) Whether the government knows of or acquiesces in the private actor's conduct; (2) whether the private party intends to assist law enforcement officers at the time of the search; and (3) whether the government affirmatively encourages, initiates, or instigates the private action.

III. A Fourth Amendment "Search"

The Fourth Amendment prohibits unreasonable "searches" and unreasonable "seizures." Because of this, an officer must first understand what exactly a "search" or "seizure" is for purposes of the Fourth Amendment. This section will focus on the definition of a "search," while the following section will discuss the legal definition of a "seizure."

A. Reasonable Expectation of Privacy (REP)

Under the Fourth Amendment, a "search" occurs when the government intrudes upon an individual's reasonable expectation of privacy (REP). If the government action does not intrude upon a person's REP, then no "search" has occurred and the Fourth Amendment is not implicated.

1. *The Test for REP*

In *Katz v. United States*[1] the Supreme Court established the standard for determining whether REP exists. The test for REP is two-pronged:

- First, the individual must have exhibited an actual (subjective) expectation of privacy; and
- Second, that expectation must be one that society is prepared to recognize as reasonable.

The absence of either prong of the test means that no REP exists and no "search" has been conducted. It is not a "search" to observe conduct that occurs openly in public, such as on a public street. This same principle applies to perceptions made through hearing or smelling. For example, two people who meet and have a conversation in a public place, such as a restaurant, would not be protected from having their actions observed, or their conversations overheard, by others in the restaurant. Any claims of privacy under those circumstances would be unreasonable.

What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. In *Katz*, the Supreme Court held that an individual who enters a public telephone booth and shuts the door would be entitled to privacy in the conversation. First, by entering the phone booth and shutting the door, the individual has exhibited a subjective expectation of privacy. Second, this expectation is one that society is prepared to recognize as reasonable, based on, among other things, the fact that a door on a phone booth exists to allow those who use the phone to prevent people outside the booth from overhearing the conversations going on inside. Using a bugging device to eavesdrop on such a conversation would violate REP. On the other hand, if the phone booth occupant's words could be overheard by a nosy eavesdropper outside the booth who surreptitiously moved his

[1] Cases named in this chapter without a case cite are briefed in the companion publication, *Legal Division Reference Book*.

unaided ear closer to a gap in the booth's door, there would be no REP in those overheard words.

Ownership of a given piece of property, while an important factor in determining whether REP exists, does not automatically justify an expectation of privacy.

2. Common REP Areas

Listed below are some of the more common REP areas and situations.

(a) The Body

Obtaining evidence directly from a person's body will, obviously, require a seizure of that person. Once a person is lawfully seized, such as during a lawful arrest, the issue of REP turns on whether the evidence sought is internal or external. It is well-established that a physical intrusion, penetrating beneath the skin, infringes on an expectation of privacy that society is prepared to recognize as reasonable. Obtaining internal evidence such as blood, saliva, or urine samples from a person would constitute a "search," requiring a warrant, consent or exigency. This rule also applies to a breathalyzer test, or removing a physical object (such as a bullet) located beneath a person's skin. *Winston v. Lee*. It does not constitute a "search" to obtain external evidence such as fingerprints, handwriting, or voice samples from a lawfully seized suspect. External evidence can also be obtained from a subject by subpoena or a court order. Fingerprints left behind by the suspect, such as on an interview table, are fair game for law enforcement— securing them and using them creates no Fourth Amendment issue.

(b) Vehicles

An individual's expectation of privacy in a vehicle depends on whether the exterior or interior of the vehicle is being examined. There is no expectation of privacy in the exterior of a vehicle, including the undercarriage. The owner/operator

generally has REP for the interior of a vehicle, at least against physical intrusion. An officer may lawfully observe an item sitting on the front seat in open view. This does not necessarily give the officer the right to access the item seen, but it may provide the necessary probable cause to allow entry and seizure. Since vehicle identification numbers (VIN) are required by law to be located in an area that can be observed from the exterior of the vehicle, there is no REP in the VIN.

A passenger in a vehicle that he or she neither owns nor leases typically does not have REP in that vehicle, although the passenger will retain an expectation of privacy inside any personal property brought into the car with them (e.g., a purse or backpack). Such personal items are subject to a search or frisk when the same is authorized for the vehicle itself. A person listed as an authorized driver on a rental agreement will have REP in the vehicle, at least for the duration of the rental period. For a driver not authorized under the rental agreement, federal courts have taken different approaches to determining whether that individual has REP in the vehicle.

(c) Homes

An individual has a high expectation of privacy within the confines of his or her home. The Supreme Court has repeatedly emphasized that the warrantless entry and search of a home is the chief evil against which the Fourth Amendment is directed. REP exists even if the home is temporarily unoccupied. For example, REP persists in a primary residence while the occupants are away on vacation. An owner's REP persists in her vacation home even if she only occupies it a few weeks per year. The Supreme Court has also held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else. In such cases, REP depends on the visitor's purpose for being at the home. For example, overnight guests of a homeowner are entitled to REP in the host's home. *Minnesota v. Olson*. A social visitor normally does not have REP in the home visited; but, REP may exist if the person is a frequent visitor with free access to the home and is authorized to control the premises at times. A

commercial visitor generally has no REP in the home visited because of the purely commercial nature of the transaction, the relatively short period of time on the premises, and the lack of any previous connection with the homeowners or occupants.

The protection afforded to homes has been extended to hotel and motel rooms. No less than a tenant of a house or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. In determining whether a person has REP in a hotel or motel room, courts typically consider (a) whether the person was the registered occupant of the room; (b) whether the person shared the room with another to whom it was actually registered; (c) whether the person ever checked into the room; (d) whether the person paid for the room; and (e) whether the person had the right to control or exclude others' use of the property. Generally, a person's REP in a hotel or motel room ends at checkout time, although this may not always be the case if some past practice allowed the individual to retain the room past checkout time. Tenants of hotels, motels, and even apartment and condo buildings, typically have no REP in the common areas of those structures (e.g., the stairwells or hallways).

(d) Containers

An individual has REP in his or her containers (e.g., purses, briefcases, backpacks, etc.), at least where those containers do not reveal their contents by the way they are designed. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy. Knowledge of the contents does not necessarily destroy the REP altogether; there is still the problem of access, and a warrant may need to be obtained or an arrest effected first.

A private search that opens and examines a container can eliminate REP. Once a private search occurs, the Fourth Amendment does not prohibit governmental use of the now non-private information. In such cases, the Fourth Amendment

allows government agents to "search" to the same extent the private person did, without implicating the Fourth Amendment. This rule only applies to containers, not other protected areas. REP still exists in those portions of the container that were not subject to the private search. A "search" occurs within the meaning of the Fourth Amendment when an officer exceeds the scope of the private intrusion and enters into areas of the container where a person continues to have REP.

(e) Curtilage and Open Fields

As indicated earlier, there is a high degree of privacy inside homes. Included within the protections afforded a home are those areas that fall within a home's "curtilage," but not those areas of an individual's property that are considered "open fields." The term "curtilage" means the area to which extends the intimate activity associated with the sanctity of the home and the privacies of life. Curtilage is considered part of the home itself for Fourth Amendment purposes, and an individual has REP in the curtilage surrounding a dwelling. In contrast, "open fields" include any unoccupied or undeveloped area outside of the curtilage. There is no REP in "open fields." Even if the area is fenced, and the owner has posted "No Trespassing" signs, law enforcement officers may enter upon open fields for legitimate law enforcement purposes. An "open field" need not be "open" or a "field," but could instead be a large tract of thickly wooded area on a person's property. Although officers can enter upon open fields without any Fourth Amendment justification, they may not intrude into structures on open fields (such as sheds, barns, or other containers) without a warrant or an exception to the warrant requirement as those structures themselves may contain REP.

In most instances the boundaries of a home's curtilage are easily defined, especially in a suburban area. In more rural settings, determining exactly where "curtilage" ends and "open fields" begin can be a difficult task. In *United States v. Dunn* the Supreme Court set out four factors that must be considered when determining whether a given area is part of a home's curtilage:

- The proximity of the area claimed to be curtilage to the home itself, although courts have repeatedly refused to fix a specific distance at which curtilage ends;

- Whether the area is included within a single enclosure (natural or artificial) surrounding the home;

- The use of the area; and

- The steps taken by the resident to protect the area from observation by people passing by.

No one factor controls, and all must be considered to answer the ultimate question. Is the area within the property surrounding the dwelling in which the intimate, daily, family activities occur?

(f) Government Workplaces

In *O'Connor v. Ortega* the Supreme Court addressed whether a government employee may establish REP in a government workspace. Government employees can, and often do, establish reasonable expectations of privacy in their government offices, filing cabinets, and computers. In determining whether a government employee has REP in his or her workspace, courts have utilized a variety of factors. Among the most important are (1) prior notice to the employee, such as through the use of computer banners, that limit REP or state that no REP exists; (2) common practices and procedures of the employer; (3) openness and accessibility to the area or item in question; (4) whether the position of the employee requires a special trust and confidence (e.g., a position that has security requirements); and (5) whether the employee has waived any REP in the workplace, such as through the collective bargaining process. If an employee does have REP in his or her workplace, an intrusion into that workplace constitutes a "search" for purposes of the Fourth Amendment.

Special rules have been developed for workplace searches that take into consideration a government supervisor's dual responsibility of ensuring the public's work is being done while still protecting a government employee's Fourth Amendment right to be free from unreasonable searches and seizures. Even when a government employee has REP in the workplace, a supervisor may search that space without a warrant while looking for work-related items, files, or materials. A supervisor who has reasonable suspicion of employee work-related misconduct, which may or may not also be criminal, is entitled to search the employee's workplace without a warrant in order to determine whether such misconduct is in fact occurring. The supervisor is limited in scope to searching only those areas where the evidence of misconduct could be located. When a government employee's workplace is searched purely for evidence of criminal misconduct unrelated to work, the basic Fourth Amendment rules apply and require either a search warrant or an exception before a search can occur.

(g) Abandoned Property

There is no REP in abandoned property. Abandonment occurs when an individual, either through word or deed, indicates an intention to permanently disavow any interest in the item or place. An individual may "abandon" an expectation of privacy in an object by denying knowledge or ownership of it, such as when a person, previously seen in possession of a suitcase, denies owning it. An expectation of privacy in an object may also be "abandoned" by discarding it, such as when an individual being pursued by law enforcement officers throws away an object later determined to be contraband. Note that an individual's abandonment of certain property may be found involuntary when it is caused by unlawful police misconduct. For the abandonment to be considered involuntary due to police misconduct, there must be a nexus between the misconduct and the abandonment. For example, the abandonment may be found to be involuntary when it was the direct result of an unlawful seizure.

Garbage poses its own legal problems when attempting to determine if law enforcement officers can examine it. The key to

determining whether there is REP in garbage is the location of the garbage at the time the officer encounters it. There clearly is REP in garbage located inside a home. However, when garbage is placed on the curb of a public street for final pick-up by a third-party (e.g., a trash collector), REP in the garbage no longer exists.

A more difficult situation occurs when the trash is located outside the home, but still within the home's curtilage. As a general rule, an individual's REP will increase the closer the trash is to the home. There is no "bright-line" rule that garbage located within the curtilage of a home is protected by the Fourth Amendment. When analyzing these types of situations, courts typically look at the "public access" to the garbage to determine whether it is protected by the Fourth Amendment. Where the trash is readily accessible to the public from the street, a person may not have REP in that trash. In such cases, the officer may seize the garbage without a warrant even though a technical intrusion onto the curtilage has occurred. Any issue of this kind should be closely coordinated with the AUSA.

(h) Mail

A person has REP only in the contents of first class and higher mail sent through the U.S. Postal Service. Postal inspection regulations govern intrusions into lower class mailings. There is no REP in the outside of a letter or package (e.g., words written on the envelope). There is REP in the contents of letters and packages sent through private carriers such as AirBorne Express, FedEx, DHL, and UPS.

3. Search Methods and Devices

(a) Canine sniffs

The use of a dog to sniff a container, such as luggage, located in a public place, does not intrude into REP and is not considered a "search" for purposes of the Fourth Amendment. REP does not extend to the airspace around luggage or a container. *Illinois v. Caballes*.

(b) Sensory enhancements

The lawfulness of using devices to enhance an officer's senses generally turns upon (1) the sophistication of the device, and (2) whether the activity that was viewed occurred in public or in private. Binoculars and telescopes are fairly unsophisticated devices, so using them to observe public conduct does not generally turn surveillance into a search. However, when these devices are used to observe conduct taking place inside a person's residence, their use may constitute a "search." An officer's use of flashlights and searchlights for illumination does not constitute a "search," and officers can point them into a car, barn, or even a detached garage (this issue has yet to be resolved for the living area of a home). Darkness does not create REP that would otherwise not exist in daylight. The use of thermal imaging to detect the heat emanating from inside a residence constitutes a "search," requiring a warrant or exigent circumstance.

(c) Aircraft Overflights

The use of overflights to detect criminal activity is common in law enforcement. When conducting overflights, officers may operate in navigable airspace (as determined by FAA regulations) to the same extent as private persons. In such situations, the Fourth Amendment does not require the government traveling in the public airways to obtain a warrant in order to observe what is visible to the naked eye. Observations of "open fields" from aircraft do not implicate the Fourth Amendment.

IV. A Fourth Amendment "Seizure"

Not all interactions between law enforcement officers and citizens amount to a "seizure" under the Fourth Amendment. Some encounters are purely voluntary. When your encounter with a citizen is completely consensual, the Fourth Amendment does not apply. However, words and actions on an officer's part may convert a voluntary, consensual contact into a "seizure." It is also important for law enforcement officers to understand exactly when an individual is "seized" for purposes of the Fourth Amendment.

A person is "seized" when, based on the totality of the circumstances, including an officer's application of physical force (however slight) or the person's submission to the officer's show of authority, a reasonable person would not feel free to leave or otherwise terminate the encounter. Property is "seized" when there is some meaningful governmental interference with an individual's possessory interests in that property.

A. Police-citizen Encounters

There are three types of police-citizen encounters: (1) a consensual encounter; (2) an investigative detention or "*Terry* stop"; and (3) an arrest. Each of these types of encounters is discussed below. Only the *Terry* stop and the arrest are considered "seizures" for Fourth Amendment purposes. The Fourth Amendment applies only when a "seizure" occurs.

1. Consensual Encounters (Voluntary Contacts)

A consensual encounter is a brief, voluntary encounter between law enforcement officers and citizens. An encounter is consensual if a reasonable person feels entitled to terminate it and leave at any time. A voluntary contact is NOT considered a "seizure" and therefore is not controlled by the Fourth Amendment.

When conducting a consensual encounter, the officer may take any or all of the following actions without turning the contact into a "seizure." First, the officer may approach an individual and ask questions, even incriminating questions. Second, the officer may request, but not demand, to see an individual's identification. Third, the officer may identify him or herself and display credentials. Fourth, the officer may seek consent for a search or a frisk.

In contrast, there are some actions the officer might take during an encounter that may change the nature of the contact into a "seizure" at some point. The officer's actions during a voluntary contact may be closely scrutinized by a court to determine whether the encounter became a "seizure." Among

the factors courts will examine to determine whether a seizure has occurred include: (1) the time, place, and purpose of the encounter; (2) the words used by the officer; (3) language or tone of voice that might indicate compliance with the officer's request is mandatory; (4) the threatening presence of several officers; (5) whether weapons were displayed by the officer(s); (6) any physical touching of the citizen; (7) retention of the citizen's identification or personal property; and (8) whether the citizen was notified of the right to end the encounter (though this is NOT a requirement for voluntary contacts).

2. Investigative Detentions (Terry Stops)

Prior to 1968, encounters between law enforcement officers and citizens were categorized either as voluntary contacts (with no suspicion necessary) or arrests (which required probable cause). In *Terry v. Ohio*, the Supreme Court recognized a third type of police-citizen encounter, known as an investigative detention ("*Terry* stop"). An "investigative detention" is a compelled, brief, investigatory stop. To make an investigative detention, a law enforcement officer must have a reasonable, articulable suspicion that criminal activity is afoot and the person detained is somehow involved.

(a) The Requirements

To conduct an investigative detention of a person, an officer must have "reasonable suspicion" to believe that criminal activity is afoot. The officer need not be fully convinced that a crime is being committed, or even that he or she is stopping the right suspect. In allowing investigatory detentions, *Terry* accepts the risk that officers may stop innocent people. While "reasonable suspicion" is a lower standard than "probable cause," the officer must still have explainable (articulable) reasons to justify a temporary seizure of a person. "Criminal activity is afoot" means that the officer must reasonably suspect that: (1) a crime is about to be committed; (2) a crime is being committed; or (3) a crime has been committed. Some courts have disallowed investigative detentions, however, for misdemeanors *that have already been completed*, unless some ongoing danger to the public still exists (e.g., recent reckless

driving). Also, if no other means exists to identify the subject that committed a misdemeanor, the detention may still be considered reasonable. Detentions to prevent or stop a misdemeanor from occurring are, of course, permissible with reasonable suspicion. When an officer has reasonable suspicion that a piece of personal property, such as luggage, contains contraband or evidence of a crime, he or she may detain it in the same manner that the officer may detain a person.

To determine whether reasonable suspicion exists, courts look at the "totality of the circumstances' of each case. An officer must be able to articulate facts demonstrating the possibility that the person stopped is connected to criminal activity. Through the use of a "totality of the circumstances" test, the officer is allowed to draw on his or her experience and specialized training to reach conclusions based on all of the facts and circumstances available to you that an untrained person might not reach. For example, the officer may observe conduct that he or she believes is "casing" a store for a robbery, though it might not seem so to the untrained eye. In such a situation, the officer's training and experience allows him or her to determine that reasonable suspicion of criminal activity exists, even though all of the suspect's outward conduct might otherwise appear perfectly innocent.

(b) Means of Establishing Reasonable Suspicion

Law enforcement officers may use a variety of different investigative techniques to obtain enough information to establish reasonable suspicion to detain a person. For example, officer's personal observations may form the basis for reasonable suspicion to conduct an investigative detention. A great deal of deference is given to personal observations. Additionally, officers may establish reasonable suspicion based upon information provided by other law enforcement officers utilizing a concept sometimes referred to as "collective knowledge." Information from an identified third party, such as a victim or witness, can also provide the facts necessary to justify reasonable suspicion. Finally, officers may use

information provided by informants to establish reasonable suspicion for an investigative detention.

It is not uncommon for an informant or anonymous source to provide the information necessary to establish reasonable suspicion. While this is permissible, additional corroboration may sometimes be needed before reasonable suspicion can be established. The reliability of a tip provided by an informant depends on both the "quantity" and "quality" of the information provided by the source. A tip from a confidential informant with an established, positive track record would usually be considered reliable enough to establish reasonable suspicion with little or no corroboration. An anonymous tip by itself can be insufficient, especially when the source's truthfulness is unknown or the basis of knowledge is not clear (i.e., how does the source know that the information is true?). In determining whether a tip contains enough verifiable information to establish reasonable suspicion, courts look to and rely upon the following factors: (1) the amount of detail provided by the source of the information; (2) whether the source accurately predicted future behavior on the part of the suspect; (3) whether and to what extent law enforcement officers corroborate the source's information; (4) whether the information is based upon the source's first-hand observations; (5) whether, by providing the information, the source is putting his or her anonymity in jeopardy; (6) whether the information was provided in a face-to-face encounter with law enforcement officials; and (7) the timeliness of the source's report. Reasonable suspicion is a lower standard than probable cause, both as to the amount of evidence needed ["quantity"] as well as how strongly it helps prove that criminal activity is afoot ["quality"].

(c) Factors Justifying Investigative Detentions

The officer must be able to explain to a court why he or she decided to conduct an investigative detention of a suspect (i.e., what you heard or saw that led you to reasonably suspect that criminal activity was afoot). The officer can utilize a wide variety of factors to justify an investigative detention. Even

apparently innocent or wholly lawful conduct can, in appropriate instances, justify suspicion that criminal activity is afoot and thereby justify a *Terry* stop. For example, the legal purchase of a crowbar by a person with an extensive criminal record for burglary is a different matter than the same purchase made by a carpenter with no criminal record. Some common factors officers can use to justify investigative detentions include, but are not limited to:

- A suspect's nervous behavior, although the application of this justification is of limited value;
- A suspect's criminal history, although standing alone this factor will not establish reasonable suspicion;
- An officer's knowledge of recent criminal conduct;
- The time and location of a given situation;
- A suspect's flight upon observing law enforcement officers, at least when combined with other factors;
- A suspect's presence in a high crime area, at least when combined with other factors; and
- A suspect's non-responsive behavior.

(d) The Duration of an Investigative Detention

The duration of an investigative detention must be reasonable. An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. The investigative methods used should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. There is no "bright-line" time limit for an investigative detention. The courts look to whether the officer diligently and reasonably pursued the investigation to quickly confirm or dispel suspicions. The amount of force used and the level of restriction placed on

movement may also be considered, in addition to the length of the detention. A *Terry* stop must be reasonable in time, place, and manner.

(e) The Use of Force During an Investigative Detention

An officer's use of force during an investigative detention must be objectively reasonable based on the totality of the circumstances. The Supreme Court has long recognized that the right to make an investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it. Weapons may be pointed at a suspect or handcuffs used, so long as those actions are justified. For instance, a subject who will not comply with lawful orders may be handcuffed, and an officer may point a gun at a suspect believed to be dangerous. The officer's use of these types of force must be objectively reasonable under the circumstances known to him or her at the time of the stop. In determining whether the amount of force used during an investigative detention has turned the stop into an arrest, courts consider a number of factors, including: (1) the number of officers involved; (2) the nature of the crime and whether there is reason to believe the suspect is armed; (3) the strength of the articulable, objective suspicions; (4) the need for immediate action; and (5) the presence or lack of suspicious behavior or movement by the person under observation.

(f) When Does an Investigative Detention Become an Arrest?

An investigative detention may lead to a lawful arrest only if probable cause to arrest is developed. Remember, while an investigative detention only requires reasonable suspicion that criminal activity is afoot, an arrest requires probable cause that a crime is being, or has been, committed.

If an investigative detention is extended beyond the time it would take a reasonable officer to confirm or dispel her suspicions, a judge may find that a *de facto* arrest has occurred. In determining whether a *de facto* arrest has

occurred, courts will consider a variety of factors, including: (1) the purpose behind the stop and the nature of the crime; (2) whether the officer diligently sought to carry out the purpose behind the detention; (3) the amount of force used, and the need for such force; (4) the extent to which an individual's freedom of movement was restrained; (5) the number of officers involved; (6) the duration and intensity of the stop; (7) the time and location of the stop; and (8) the need for immediate action. If a *de facto* arrest occurred and it was not supported by probable cause, it is an illegal arrest and any evidence derived from it (for example, evidence found in the suspect's pocket as a result of a search incident to the unlawful arrest) will be inadmissible.

3. A Terry *"Frisk"*

In *Terry*, the Supreme Court outlined the legal requirements for what has become known as a "*Terry* frisk." If, during an investigative detention, an officer develops reasonable suspicion that the individual is presently armed and dangerous, he or she may conduct a limited pat-down search of the individual for weapons. This "frisk" is a pat-down search of a suspect's outer clothing to discover weapons that could be used against an officer during an investigative stop. The officer may not utilize a *Terry* frisk to look for evidence of a crime. To justify a "frisk," an officer must demonstrate two things: (1) first, the investigatory stop must be lawful; and (2) second, to proceed from a stop to a frisk, the officer must reasonably suspect that the person stopped is armed and dangerous. *Arizona v. Johnson*.

A "frisk" is a limited search for weapons. It may be conducted even after the suspect has been handcuffed. The officer may check the outside of the suspect's clothing for any hard objects that could potentially be a weapon concealed underneath. Once a potential weapon or hard object that could be used as a weapon is encountered, the officer is entitled to go inside the clothing and retrieve the object. When dealing with winter clothing, the officer may reach inside and beneath a heavy jacket and frisk underneath it to avoid missing any

potential weapons. The officer may also frisk the area under the suspect's immediate control, which can include any containers in the suspect's possession.

(a) Factors Used to Justify a *Terry* "Frisk"

As with investigative detentions, the officer may establish reasonable suspicion that a suspect is presently armed and dangerous through a variety of different methods, including personal observations, information from other officers, and information from third-parties, such as informants. The list of factors an officer may use to justify a *Terry* frisk is extensive. The following are some of the most commonly recognized:

- A suspect, through past criminal history or association with violent gangs, has a reputation for being armed and dangerous;

- A bulge in a suspect's clothing indicating the possible presence of a weapon;

- A "furtive" or other movement by the suspect indicating he is checking or adjusting a hidden weapon or ensuring that it remains concealed;

- A suspect's words and actions, such as refusing to comply with an officer's directions to display his open hands;

- A tip from a reliable informant that the suspect is armed and dangerous

- Reasonable suspicion that the suspect has committed a crime, such as armed robbery, burglary or drug trafficking, that by its very nature indicates the likelihood that the perpetrator is armed and dangerous.

This list is not exhaustive. Whether there are sufficient factors present to establish reasonable suspicion to conduct an

investigative detention is ultimately a totality of the circumstances test.

(b) The "Plain Touch" Doctrine

While the purpose of a *Terry* frisk is to discover weapons, not evidence of a crime, the Supreme Court has already held that an officer, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search. This has become known as the "plain touch" doctrine. The "plain touch" doctrine is nothing more than an expansion of the "plain view" doctrine discussed later in this chapter.

In order to lawfully seize evidence under the "plain touch" doctrine, an officer must meet two requirements. First, the frisk that led to the discovery of the evidence must have been lawful. Second, the incriminating nature of the item must be ***immediately*** apparent. This means the officer must have probable cause that the object encountered is contraband or criminal evidence based on what he or she initially felt. The officer is not permitted to manipulate soft objects for the purpose of identifying an item. *Minnesota v. Dickerson*. Hard objects, of course, can be retrieved by you as potential weapons, and any evidence or contraband encountered in that process may be seized.

4. Detaining Vehicles

The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle. *Brendlin v. California*. Stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief. Whether stopping a person on foot or in a vehicle, the standard is the same. The officer must have, at a minimum, reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. The officer may also conduct a stop if he or she has reasonable suspicion to believe that a person in the vehicle is wanted for past criminal conduct or when you have

reasonable suspicion to believe the vehicle is carrying contraband. In 2007 the Supreme Court decided the case of *Brendlin v. California*, holding that a passenger inside a vehicle is "seized" under the Fourth Amendment when the driver is stopped for a traffic offense. As discussed in Section VII, this gives a passenger "standing" to challenge the legality of the vehicle stop.

(a) Permissible Actions During Vehicle Stops

The Supreme Court has long recognized the very real dangers officers face when confronting suspects located in vehicles. For that reason, during vehicle stops officers may take such steps as are reasonably necessary to protect their personal safety. This would include, among other things:

- Removing the driver and passengers from the vehicle;
- Ordering the driver and passengers to remain in the vehicle;
- Using a flashlight to illuminate the interior of the vehicle;
- Conducting license and registration checks; and
- Questioning the driver regarding his or her travel plans.

(b) A *Terry* "Frisk" of a Vehicle

Officers may also be permitted to conduct a "frisk" of the vehicle for weapons. In *Michigan v. Long* the Supreme Court expanded the scope of a *Terry* frisk to include vehicles. *Long* provides that if an officer has reasonable suspicion to believe that the driver or passenger in a vehicle is dangerous and may gain immediate control of a weapon, the officer may "frisk" that person, as well as the entire passenger compartment of the vehicle. This "frisk" of the vehicle may include any unlocked containers located in the passenger compartment. Some, but

not all, federal appellate courts have extended this rule to include locked containers such as a locked glove compartment, when an occupant would have immediate access based on availability of the key. However, officers may not "frisk" the trunk of a vehicle.

(c) The Duration of Vehicle Stops

As with a traditional investigative detention, an investigative detention that occurs in a vehicle must be temporary and last no longer than is necessary to effectuate the purpose of the stop. This means that once the citation or warning has been issued, and all records checks have been conducted, the stop must end and the driver must be released. Should the detention continue past this point, the officer must show that the extension was based either upon the driver's consent, or because the officer established reasonable suspicion during the original stop that some additional misconduct was occurring. Failure to establish either of these additional bases for extending the stop may result in the continued detention being found unreasonable under the Fourth Amendment.

(d) Pretextual Vehicle Stops

Pretextual traffic stops are permissible. A "pretextual" traffic stop occurs when an officer uses a legal justification (e.g., an observed traffic violation) to stop an individual in order to investigate a different, more serious crime for which no reasonable suspicion exists (e.g., drug trafficking). In *Whren v. United States* the Supreme Court upheld pretextual traffic stops, noting that the constitutionality of a traffic stop does not depend on the actual motivations of the individual officers involved.

5. Arrests

The third type of "citizen-police" encounter is an arrest based upon probable cause. This concept is discussed more fully in sections IX and X, below.

V. The Use of Race in Law Enforcement

The use of race as a factor in the performance of law enforcement duties raises numerous Constitutional concerns. In light of these concerns, in June of 2003 the Department of Justice (DOJ) published a document entitled "Guidance Regarding the Use of Race By Federal Law Enforcement Agencies." On June 1, 2004, the Department of Homeland Security (DHS) explicitly adopted the DOJ policy on racial profiling. The following excerpts are taken directly from that document, and provide the standard taught by the FLETC Legal Division. A complete copy of the DOJ policy is included in the Legal Division Reference Book.

A. The Constitutional Framework

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). The decision of federal prosecutors "whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Armstrong*, 517 U.S 456, 464 (1996)[*quoting Oyler v. Boles*, 368 U.S. 448, 456 (1969)].

The same is true of Federal law enforcement officers. Federal courts repeatedly have held that any general policy of "utiliz[ing] impermissible racial classifications in determining whom to stop, detain, and search" would violate the Equal Protection Clause. *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001). As the Sixth Circuit has explained, "[i]f law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997). "A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden." *Avery*, at 354. The Supreme Court has held that this constitutional prohibition against selective enforcement of the law based on race "draw[s] on 'ordinary equal protection standards.'" *Armstrong*, 517 U.S. at 465 [*quoting Wayte v.*

United States, 470 U.S. 598, 608 (1985)]. Impermissible selective enforcement based on race occurs when the challenged policy has "a discriminatory effect and … was motivated by a discriminatory purpose." Id. (*quoting Wayte*, 470 U.S. at 608). Put simply, "to the extent that race is used as a proxy" for criminality, "a racial stereotype requiring strict scrutiny is in operation." *Cf. Bush v. Vera*, 517 U.S. 952, 968 (1996).

B. Guidance for Federal Officials Engaged in Law Enforcement Activities

1. Routine or Spontaneous Activities in Domestic Law Enforcement

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.

2. Law Enforcement Activities Related to Specific Investigations

In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, which links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise by lawful.

Reliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity. The rationale underlying this concept carefully limits its reach. In order to qualify as a legitimate investigative lead, the following must be true:

- The information must be relevant to the locality or time frame of the criminal activity;

- The information must be trustworthy;

- The information concerning identifying characteristics must be tied to the particular criminal incident, a particular criminal scheme, or a particular criminal organization.

This prohibition extends to the use of race-neutral pretexts as an excuse to target minorities. Federal law enforcement may not use such pretexts. This concern arises most frequently when aggressive law enforcement efforts are focused on "high crime areas." The issue is ultimately one of motivation and evidence; certain seemingly race-based efforts, if properly supported by reliable, empirical data, are in fact race-neutral.

Any information concerning the race of persons who may be involved in specific criminal activities must be relevant to both time and place. Where the information concerning potential criminal activity is unreliable or is too generalized and unspecific, use of racial descriptions is prohibited.

These standards contemplate the appropriate use of both "suspect-specific" and "incident-specific" information. As noted above, where a crime has occurred and authorities have eyewitness accounts including the race, ethnicity, or other distinguishing characteristics of the perpetrator, that information may be used. Federal authorities may also use reliable, locally relevant information linking persons of a certain race or ethnicity to a particular incident, unlawful scheme, or ongoing criminal enterprise - even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident or ongoing criminal activity will point strongly to a perpetrator of a certain race, even though authorities lack an eyewitness account. It is critical, however, that there be reliable information that ties persons of a particular description to a specific criminal incident, ongoing criminal activity, or particular criminal

organization. Otherwise, any use of race runs the risk of descending into reliance upon prohibited generalized stereotypes. Note that these standards allow the use of reliable identifying information about planned future crimes. Where federal authorities receive a credible tip from a reliable informant regarding a planned crime that has not yet occurred, authorities may use this information under the same restrictions applying to information obtained regarding a past incident. A prohibition on the use of reliable prospective information would severely hamper law enforcement efforts by essentially compelling authorities to wait for crimes to occur, instead of taking proactive measures to prevent crimes from happening.

C. Guidance for Federal Officials Engaged in Law Enforcement Activities Involving Threats to National Security, the Integrity of the Nation's Borders, **or Catastrophic Events**

In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

1. Compelling Governmental Interest

Since the terrorist attacks on September 11, 2001, prevailing authorities have emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981)[*quoting Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)].

2. *Exceptional Circumstances Are Required*

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution. Similarly, because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975). This policy will honor the rule of law and promote vigorous protection of our national security. As the Supreme Court has stated, all racial classifications by a governmental actor are subject to the "strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224-25 (1995). The application of strict scrutiny is of necessity a fact-intensive process. *Pena,*. at 236. The legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination. Indeed, the very purpose of the strict scrutiny test is to "smoke out" illegitimate use of race, *Adarand*, 515 U.S. at 226 [*quoting Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)], and law enforcement strategies not actually premised on *bona fide* national security or border integrity interests therefore will not stand. In sum, constitutional provisions limiting government action on the basis of race are wide-ranging and provide substantial protections at every step of the investigative and judicial process.

VI. Probable Cause (PC)

The Fourth Amendment provides that "no Warrant shall issue but upon probable cause ...." In cases in which the Fourth Amendment requires that a search warrant be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. Some searches may be performed without a warrant— many of these require probable cause. Probable cause is also required to obtain an arrest warrant or to arrest someone without an arrest warrant. The level of probable cause required to proceed without a warrant is the same level required to obtain a warrant.

A. Defining Probable Cause

Articulating precisely what "probable cause" means is not possible. Probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts-- "not readily, or even usefully, reduced to a neat set of legal rules." Nonetheless, some basic definitions for probable cause to "arrest" or "search" have been formulated. Probable cause to "search" exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in the place to be searched. Probable cause to "arrest" exists when the known facts and circumstances are sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense.

B. The Test for Probable Cause

Courts use a "totality of the circumstances" test to determine whether probable cause exists. This means that all facts known to the officer are considered. The focus in determining probable cause is not on the certainty that a crime was committed, but on the likelihood of it. An officer's determination of probable cause will be affirmed if a reasonable argument can be made, based in fact, that the suspect committed a specific crime, or that evidence will be found in the place to be searched.

C. Establishing Probable Cause

An officer may establish probable cause in a number of ways. Perhaps the easiest way is through direct observations. An officer may use sense of smell, such as when smelling the odor of marijuana emanating from a vehicle. The standard may be met by a report of another law enforcement officer who is aware of facts amounting to probable cause. Further, probable cause may be established by the "collective knowledge" of many law enforcement officers, each of whom has some fact available that, when taken in sum, establishes the existence of probable cause. An officer may rely on his or her training and experience in making a probable cause decision so long as there are sufficient facts to support it. Officers may also use non-human sources, such as a trained, drug-sniffing dog, to establish probable cause. Information provided solely by victims and/or witnesses can be sufficient to establish probable cause, given a proper basis of knowledge, when there is no evidence indicating that either the information or the victim/witness is not credible. Probable cause may be established through information provided by a confidential informant or anonymous source. When a confidential informant or anonymous source is the source of the information, however, certain issues must be considered.

1. Using Confidential Informants to Establish Probable Cause

The use of confidential informants in criminal investigations is fairly routine. However, the use of this particular investigative tool can raise concerns regarding the informant's veracity and reliability. In *Aguilar v. Texas* the Supreme Court outlined a two-prong test for determining whether information provided by a confidential informant establishes probable cause. The two prongs of the "*Aguilar* Test" are: (1) the credibility of the informant, and (2) the informant's basis of knowledge.

(a) Credibility of the Informant

When the government uses a confidential informant to establish probable cause, it must establish that the informant is credible (worthy of belief). The government can establish the credibility of a confidential informant in a variety of ways.

- *Proven Track Record.* The informant has a track record of supplying reliable information in the past.

- *Statements Against Interest.* When a confidential informant makes statements that are against his penal interest, (it gets him in trouble, too) the information is more likely to be reliable. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime carry their own indicia of credibility - sufficient at least to support a finding of probable cause.

- *Corroboration.* Independent corroboration of some information provided by a confidential informant increases the likelihood that other information provided is accurate.

- *First-Hand Information.* The personal observations of a confidential informant are more likely to be credible.

- *Face-to-Face Meetings with the Informant.* A face-to-face encounter allows a personal assessment of the informant's demeanor and credibility.

- *Consistency Between Independent Informants.* Credibility increases when two or more separate, unrelated informants provide consistent information.

- *The Degree of Detail Provided.* The greater the detail, the more likely the informant has accurate knowledge of the information provided.

(b) Basis of Knowledge

In addition to establishing the confidential informant's credibility, an officer must also establish that the informant has a sufficient basis of knowledge. The "basis of knowledge" prong requires the government to provide sufficient information to show the informant knows the following:

- How the informant became aware of this information.
- Who is involved in the criminal activity;
- What criminal activity is taking place;
- Where the criminal activity occurred or is occurring;
- When the criminal activity occurred; the fact that an informant saw stolen property in the suspect's car six months ago would not support a determination that the property was still in the car; and

(c) The Effect of Gates on Aguilar

In *Illinois v. Gates* the Supreme Court rejected the two-part *Aguilar* test (outlined above) as hyper-technical and divorced from the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Instead, the Court adopted a "totality of the circumstances" approach to determining probable cause. Even though *Gates* replaced *Aguilar's* two-prong test, the Supreme Court has continued to emphasize that a confidential informant's credibility and basis of knowledge are important factors in determining whether probable cause exists.

VII. The Exclusionary Rule

A. The Rule

The Fourth Amendment does not by its own terms require that evidence obtained in violation of its mandates be suppressed. Instead, the "exclusionary rule" was developed by the Supreme Court. The rule essentially states that evidence obtained as a result of an unlawful search and/or seizure is inadmissible in criminal trials. This is true even if the evidence was not seized as a direct result of the Fourth Amendment violation. Evidence which indirectly derives from information learned illegally is also inadmissible. This is often called the "fruit of the poisonous tree" doctrine. For example, although searching arrestees incident to their arrest is generally permitted, evidence found in a search incident to an arrest which was not supported by probable cause would be inadmissible. Stolen property would be inadmissible if it was retrieved by following a map found during an illegal search of a suspect's home. The exclusionary rule is intended to deter police misconduct by creating negative consequences for disregarding the Fourth Amendment requirements. However, the exclusionary rule does not prohibit the introduction of illegally seized evidence in every situation. Courts have developed a number of exceptions to the general rule.

B. The Exceptions

1. No Standing to Object

Fourth Amendment rights are personal and cannot be claimed by another. In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable. Only defendants whose Fourth Amendment rights have been violated may benefit from the exclusionary rule's protections. For example, a car thief would have no standing to object to the admission of the tool he used to break into the car he stole after officers found it by searching the stolen car. Nor would a drug dealer have standing to object to the admission of drugs he duped an

unsuspecting neighbor into storing in the neighbor's house. Nor would a passenger have standing to object to the admission of a stolen wallet he crammed down a car seat after the driver was pulled over for a speeding violation.

2. Impeachment

The Supreme Court has repeatedly held that when defendants testify, they must testify truthfully or suffer the consequences. When a defendant takes the witness stand and testifies falsely, the government may cross-examine the defendant and impeach him with evidence that was obtained in violation of the Fourth Amendment. Under the impeachment exception, illegally obtained evidence may be used to impeach (1) any testimony given by a defendant on direct examination, (2) or a defendant's statements made in response to proper cross-examination.

3. Good Faith

In *United States v. Leon* the Supreme Court established a "good faith" exception to the exclusionary rule. Evidence seized by the government in "good faith" reliance on a warrant issued by a neutral and detached judge based upon what is reasonably believed to be probable cause will be admissible even if a court later concludes that no probable cause existed.

The adoption of a "good faith" exception is based on three underlying rationales: (1) The exclusionary rule is meant to deter law enforcement misconduct rather than judicial errors; (2) there is no evidence that magistrates or judges tend to ignore the Fourth Amendment, or that they have done so to such an extent that suppression of evidence is necessary; and (3) application of the exclusionary rule will not have a significant deterrent effect on magistrates or judges.

The "good faith" exception will not apply when (1) the government misleads the issuing judge by including information in the affidavit that was known to be false or for which the affiant had a reckless disregard for the truth; (2) the judge issuing the warrant has abandoned the "neutral and detached" role; (3) the warrant is based on an affidavit so lacking in

indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) a warrant is so "facially deficient" that no officer would reasonably assume the warrant is valid. This could occur if the warrant fails to particularly describe the place to be searched or things to be seized.

4. Foreign Searches

Neither the Fourth Amendment nor the exclusionary rule applies to foreign searches and seizures. However, for United States citizens and resident aliens, the Fourth Amendment applies to foreign searches and seizures: (1) conducted exclusively by the United States government; (2) conducted by the United States in a "joint venture" with foreign authorities; or (3) when foreign authorities act as agents for the United States.

(a) Searches by Foreign Authorities

The exclusionary rule does not require the suppression of evidence seized by foreign officials during a search, even when the target of that search is an American citizen, unless:

- The conduct of the foreign officials would "shock the judicial conscience."

- United States law enforcement agents or officers substantially participate in the foreign search or seizure, or the foreign officials are being used as agents of the United States. In situations where law enforcement officers of the United States engage in a "joint venture" with foreign officials, the protections of the Fourth Amendment will apply, and application of the exclusionary rule may result. Whether the participation of federal law enforcement officers renders a search a "joint venture" must be determined on a case-by-case basis. The mere presence of federal officers will not automatically make the search a "joint venture," nor will simply providing information to a foreign official.

(b) Foreign Searches of Non-Resident Aliens By American Law Enforcement Officers

In *United States v. Verdugo-Urquidez* the Supreme Court addressed the issue of whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The Court answered this question in the negative, holding that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the federal government against aliens outside of the United States territory. The Court noted, however, that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.

Although the Fourth Amendment does not apply to foreign searches of the property of a non-resident alien, controls exist over the investigative activities of American agents operating in foreign countries. Besides the obligations imposed by the host countries themselves, Congress has restricted American agents' foreign activities. For example, in the narcotics area, Congress has prohibited American agents from directly effecting an arrest in any foreign country as part of any foreign police action with respect to narcotic control efforts and has prohibited American agents from interrogating or being present during the interrogation of any United States person arrested in any foreign country with respect to narcotic control efforts. Additionally, the United States has entered into agreements and treaties with other countries which provide for mutual legal assistance and establish procedures for obtaining evidence in criminal investigations abroad. The Office of International Affairs can be reached through the DOJ Main Switchboard (202) 514-2000. This office provides advice and assistance regarding the requirements for these agreements, and maintains a current list of mutual legal assistance agreements and treaties.

(c) Searches of United States Citizens and Resident Aliens in Foreign Countries

The Fourth Amendment applies to searches and seizures against U. S. citizens and resident aliens while abroad when conducted by, on behalf of, or jointly with the United States Government. The Fourth Amendment applies to overseas searches in three related situations: (1) when the search is being conducted solely by United States law enforcement personnel; (2) when the search is being conducted by foreign officials acting on behalf of the United States Government; and (3) when the search is a "joint venture" between the United States and foreign officials.

Foreign searches raise privacy issues that do not always have clear solutions. Except for U.S. embassies overseas, Rule 41 of the Federal Rules of Criminal Procedure does not authorize a federal judge to issue a search warrant for a location outside the United States. In fact, even if such a warrant were issued, it would be a dead letter outside the United States. Even when no warrant is required, American agents must articulate specific facts giving them probable cause to undertake a search or seizure in order to comply with the Fourth Amendment. Any search that is conducted must also meet the reasonableness requirements of the Fourth Amendment.

5. Inevitable Discovery

Evidence should be admitted if the prosecution can establish by a preponderance of the evidence that it ultimately or inevitably would have been discovered by lawful means. This has become known as the "inevitable discovery" exception. The federal circuits are split on whether the "inevitable discovery" exception requires that law enforcement officers be actively pursuing an alternative investigation at the time the constitutional violation occurred. The Second, Fifth, and Eighth Circuits require the government to be actively involved in an independent investigation that would have "inevitably" resulted in the discovery of the evidence. The First, Sixth, Ninth, and Tenth Circuits have held that the "inevitable

discovery" exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct.

6. Miscellaneous Exceptions

In addition to the exceptions to the exclusionary rule outlined above, there are a variety of miscellaneous exceptions that may have applicability in a given case. The exclusionary rule does not apply to deportation proceedings, grand jury proceedings, sentencing proceedings, or civil tax proceedings.

VIII. The "Plain View" Seizure Doctrine

The plain view seizure doctrine allows officers to seize evidence they discover while in a public place or lawfully inside an REP-protected area. There are three requirements the government must meet for a permissible plain view seizure of evidence. First, the officer must lawfully be in a position to observe the item; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have a lawful right of access to the object itself.

A. Lawful Position of Observation

The first requirement of any plain view seizure is that the officer must have a lawful reason to be in the location from which he or she observed the item. A lawful reason to be in a dwelling would be a warrant, consent, or an exigent circumstance. If the officer conducted a lawful protective sweep (see Section XII below) while serving an arrest warrant and found a sawed-off shotgun in a bedroom closet, the officer may seize that evidence under the plain view doctrine. If the officer exceeded the lawful scope of a protective sweep by opening the medicine cabinet, however, any evidence observed inside the medicine cabinet would fall outside the plain view doctrine.

B. The Incriminating Nature of the Item Must Be Immediately Apparent

Second, not only must the item be seen from a place the officer has a legal right to be, but its incriminating character must also be immediately apparent. This requires the officer to have probable cause to believe that the object is contraband or evidence of a crime. If the officer must conduct some further search of the object before he or she can establish probable cause to believe that it is contraband, then its incriminating character is not immediately apparent and the plain-view doctrine cannot justify its seizure. The standard is not high, and a plain view seizure is presumptively reasonable, provided there is probable cause to associate the property with criminal activity.

In determining whether an item's incriminating nature is immediately apparent, courts will examine factors such as: (1) the nexus between the seized object and the items particularized in a search warrant; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and (3) whether probable cause is the direct result of the executing officer's instantaneous sensory perceptions.

C. Lawful Right of Access

Finally, even if the officer can see the object from a place where he or she is lawfully present, the officer may not seize it unless he or she also has a lawful right of access to the object itself. Personal observations may convince an officer that criminal evidence is inside a premises. But even when the evidence is contraband, the basic rule is that the government may not enter and seize it without a warrant, consent, or exigent circumstances.

For example, you may stand on the public sidewalk and see a marijuana plant growing inside someone's living room. Without additional facts, however, you may not yet enter the residence and seize the plant. You have no lawful right of

access to the living room where the plant is located. If the resident were to grant you consent to enter, however, or if the resident saw you through the window and began destroying the plant, you could lawfully enter the house and access the evidence. Remember, the plain view doctrine is not a tool that allows you to search for evidence, but only to seize it if you meet the rule's criteria.

IX. Arrest Warrants

Within the federal system, arrest warrants may be obtained in several ways, including a criminal complaint, a grand jury indictment, or an information. The form and issuance of federal arrest warrants are detailed in Rules 4 and 9 of the Federal Rules of Criminal Procedure[2].

A. Arrest Warrant Upon Complaint

Rule 4 addresses the issuance of federal arrest warrants based upon a complaint. Subsection (a) of the rule provides that "if the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it." A "complaint" is defined by Rule 3 as "a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer."

B. Arrest Warrant Upon Indictment or Information

Rule 9 addresses the issuance of federal arrest warrants based upon an indictment or information. Subsection (a) of the rule provides that "the court must issue a warrant - or at the government's request, a summons - for each defendant named

[2] These rules can be found in their entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Rules of Criminal Procedure."

in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it." An information is similar to a criminal complaint except that an Assistant U.S. Attorney (AUSA) prepares it. An indictment is the result of a grand jury decision that there is probable cause to believe that a crime was committed and the defendant committed it.

C. The Form of a Federal Arrest Warrant

A federal arrest warrant must contain the following:

- *Signature of the Judge*. The warrant must be "signed by the magistrate judge" or by whatever judge issues the warrant. For arrest warrants based upon an indictment or information, the warrant "must be signed by the clerk."

- *Name of the Defendant*. "… the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty."

- *The Offense Charged*. The warrant must "describe the offense charged in the complaint." For arrest warrants based upon an indictment or information, the warrant "must describe the offense charged in the indictment or information."

- *Command to Arrest*. The warrant must "command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer."

D. Technical Aspects of Executing Arrest Warrants

Rule 4(c) describes the manner in which arrest warrants based upon a complaint must be executed.

- *Who Can Execute?* "Only a marshal or other authorized officer may execute a warrant." The arresting officer need not be the one who obtained the warrant.

- *Territorial Limits.* An arrest warrant "may be executed … within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest."

- *Time Limits.* Unlike a search warrant, there is typically no timeframe in which an arrest warrant is required to be executed.

E. Manner of Execution

A warrant is executed upon the arrest of the defendant. "Upon arrest, an officer possessing the warrant must show it to the defendant." There is no requirement, however, that the arresting officer have the warrant present at the time of the arrest. "If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible."

F. Return of the Arrest Warrant

Both Rule 4 and Rule 9 provide for a return of the arrest warrant. When an officer arrests someone on a warrant issued upon a complaint, indictment, or information, the officer must return the warrant to the judge before whom the defendant is brought for the Initial Appearance. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

X. Arrests

A warrant is not always required for an arrest to be lawful. However, when an individual is arrested, both statutory and constitutional requirements must be satisfied. The three requirements for a lawful arrest are (1) probable cause, (2) arrest authority, and (3) a lawful right of access to the suspect.

A. Arrest Authority

In the federal system, the authority to make arrests varies from agency to agency. The scope of arrest authority is established by statute. Officers must know the extent of their authority granted by these statutes. For some, authority and jurisdiction are limited to certain geographical areas; for others, authority is limited to certain subject matter. For example, a United States Park Police officer can enforce almost all federal laws, but only within specific physical boundaries. On the other hand, an Internal Revenue Service agent may enforce only internal revenue laws, but may do so anywhere within the jurisdiction of the United States. Officers may not make an arrest just because a federal crime has been committed, but may do so only if you have the statutory authority to arrest for that specific crime.

Authority to make arrests comes from three different sources.

- *Statutory Authority*. Most federal law enforcement officers have statutory grants of authority provided to them by Congress. For example, 8 U.S.C. § 3056 outlines the arrest authority for officers and agents of the United States Secret Service. 22 U.S.C. § 2709 provides the arrest authority for special agents of the Department of State.

- *Peace Officer Status*. Federal officers may, in certain states, make arrests for violations of state law. This is typically referred to as "peace officer" status. State law determines whether federal officers have such authority, which may then be restricted by agency policy.

- *Citizen's Arrest Authority*. Numerous states still have what is referred to as "citizen's arrest" authority, which allows a citizen with probable cause of a felony to make an arrest for that crime. An officer's reliance upon "citizen's arrest" authority should be rare.

B. Arrests Based on Outstanding Arrest Warrants

On occasion, federal officers discover the existence of an arrest warrant for a person during the course of their regular duties. Officers typically learn of the existence of the warrant through an identity check run with the Treasury Enforcement Communications System (TECS) or National Crime Information Center (NCIC).

1. Outstanding Federal Warrants

Authority to arrest is limited to statutory authority. The officer should verify that the warrant is still valid, and that the person arrested is the individual specified on the warrant. If an officer encounters a person with an outstanding federal warrant for a crime which is outside the scope of the officer's statutory arrest authority, he or she should detain the individual until an officer with the proper authority can make the arrest.

2. Outstanding State Warrant

No federal statute authorizes federal officers to arrest someone on an outstanding state warrant. Such arrests might be made with state peace officer authority, depending on the law of the state in which the arrest is made. In these types of situations, the best practice is to contact local police to determine if the requesting state wants the suspect detained and, if so, detain the person for a reasonable period until state or local police officers can make the arrest.

The discovery of a person with a pending state arrest warrant may indicate a violation of federal law. For example, 18 U.S.C. § 1073 prohibits persons from traveling in interstate commerce with the intent to avoid prosecution or to avoid giving testimony in any felony criminal proceeding.

C. Right of Access: Entering a Home to Make An Arrest

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*. For that reason, entering a home to arrest

a person without a warrant is typically a violation of the Fourth Amendment, regardless of whether the officer has probable cause to arrest the suspect. In order to lawfully enter a person's home to make an arrest, the officer must have: (1) a warrant; (2) consent; or (3) an exigent circumstance.

1. *Entering the Suspect's Home to Make an Arrest*

"[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within*." *Payton v. New York* (emphasis added). In essence, this means that the officer must have: (1) a reasonable belief that the suspect lives at the home to be entered, and (2) a reasonable belief that the suspect is currently present in the home.

In determining whether a suspect is present in the home before executing the arrest warrant, courts look to the totality of the circumstances known to the officer at the time of the entry. In deciding this issue, courts typically consider several factors, including:

- Any surveillance information indicating the suspect is in the home, although the actual viewing of the suspect is not required;
- The presence of the suspect's vehicle, which may indicate his presence;
- The time of day (e.g., 8:30 a.m. on a Sunday morning);
- Observation of lights or other electrical devices, such as televisions or stereos;
- The circumstances of a suspect's employment, which may indicate when he is likely to be at his home;

- Information from third parties (e.g., confidential informants or neighbors) indicating the suspect is present in the home.

2. *Entering a Third-Party's Home to Make an Arrest*

An arrest warrant does not allow the government to lawfully enter a home where the target does not reside to make the arrest. The government must have: (1) a search warrant; (2) the consent of the third-party homeowner/occupier; or (3) an exigent circumstance. *Steagald v. United States*.

D. Warrantless Arrests

The level of probable cause required to make a warrantless arrest is the same as that required to obtain an arrest warrant. Assuming it is supported by probable cause, the legality of a warrantless arrest depends on whether the crime is a felony or a misdemeanor, and whether the suspect is in a public or private area.

1. *Felonies*

When an officer has probable cause to believe that a suspect located in a public place has committed a felony offense, he or she may make a warrantless arrest of that person. This presumes, of course, that you are authorized by statute or otherwise to do so. If the person for whom you have probable cause is located inside a residence, you must have consent or an exigent circumstance to enter the residence to make an arrest without a warrant.

2. *Misdemeanors*

If an officer has probable cause to believe that an individual has committed a misdemeanor offense in his or her presence, the officer may arrest the offender. An officer has probable cause to believe a misdemeanor is taking place "in your presence" when the facts and circumstances as observed by the officer through his or her senses are sufficient to warrant

an officer of reasonable caution to believe that an offense is occurring.

Neither the Constitution nor the Supreme Court mandates that a misdemeanor offense occur "in an officer's presence." for an arrest to be authorized. However, the "presence" requirement has been incorporated into the vast majority of statutes that provide federal law enforcement officers with arrest authority. If the misdemeanor crime does not occur in your presence, a warrantless arrest is typically not statutorily authorized.

As with a felony, lawful entry into a person's home to make a warrantless arrest for a misdemeanor requires either consent or an exigent circumstance.[3]

XI. Title 18 U.S.C. § 3109[4] (The "Knock-and-Announce Statute")

Title 18 U.S.C. § 3109 is commonly referred to as the "knock-and-announce statute." It places specific requirements upon federal law enforcement officers when executing warrants in dwellings. The statute requires more than simply knocking and announcing. Although the Fourth Amendment does not specifically require such an action, the Supreme Court has held the knock-and-announce statute to be part of the Fourth Amendment's reasonableness requirement. The statute requires that before the government executes a search or arrest warrant in a residence, it must first announce its authority and purpose.

A. The Statute

Titled "Breaking Doors or Windows for Entry or Exit," the statute provides as follows:

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[3] The exigent circumstance of "hot pursuit," discussed in section XIX.A., is only available when pursuing a suspect who is believed to have committed a "serious crime." While some misdemeanors may qualify, the hot pursuit exigency is most often limited to use in felony pursuits.

[4] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The plain language of the statute appears to limit its application to the execution of search warrants. But, case law has made the statute equally applicable to the execution of arrest warrants.

B. The Primary Purposes of the Statute

The requirement to knock-and-announce has three primary purposes: (1) to reduce the potential for violence to both the officers and the occupants of the house; (2) to prevent, or at least reduce, the needless destruction of private property; and (3) to recognize an individual's right of privacy in his or her home.

C. A "Breaking" Under the Statute

Although the phrase "break open" implies some use of force, force is not the only manner in which the government can violate § 3109. Section 3109 essentially prohibits an unannounced intrusion into a dwelling. "Break open" includes:

- Breaking down a door;
- Forcing open a chain lock on a partially open door;
- Opening a locked door by use of a passkey; or
- Opening a closed but unlocked door.

D. Requirements Under the Statute

Under the knock-and-announce statute, three requirements must be met before you may lawfully use force to

"break open" some part of a house when executing a search or arrest warrant.

1. The Government Must First "Knock"

Section 3109 actually contains no explicit "knock" requirement, and instead only requires the government to give notice of its "authority and purpose." Nevertheless, the practice of physically knocking on the door is preferred by federal courts. An actual physical knocking is only one manner in which the government can give notice of its presence. Other methods include placing a phone call to the residence, utilizing a bullhorn, or utilizing a police loudspeaker or public address system.

2. Announcement of Authority and Purpose

In addition to providing notice, § 3109 requires that the government announce its authority and purpose for being there. No special words are necessary to satisfy this requirement. Announcing the title of the agency, such as "Office of the Inspector General," is overly complex and difficult for people to understand. Instead, simply announce, "Police with an arrest (or search) warrant, open the door!" The focus of the "knock and announce" rule is not on what sanctioned words are spoken by the officers, or whether the officers rang the doorbell, but rather on how the words and other actions of the government will be perceived by the occupant. The test is whether those inside should have been alerted that the government wanted entry to execute a warrant.

3. The Officers Must Be Refused or Denied Admittance

The final requirement under § 3109 is that the officers be refused or denied admittance. Once the officers have been refused or denied admittance, they can use force to "break" into the residence and execute the warrant. While the refusal or denial of admittance is sometimes done explicitly, more often it is inferred from the circumstances. Some of the most common circumstances indicating a refusal of admittance are:

- *Silence*. A refusal to comply with an officer's order to "open up" can be inferred from silence. This is only true in situations where a "reasonable" period of time has passed after your command. Unfortunately, neither the Supreme Court nor any other federal court has come up with a definitive timeframe that you must wait before entering a residence after knocking and announcing. Instead, rulings on what constitutes a "reasonable" amount of time are very fact intensive, with every situation having to be considered on a case-by-case basis. The facts known to the officers are what count in judging reasonable waiting times for purposes of § 3109. Factors that courts have considered in making this determination include: (1) the time of day; (2) the size and physical layout of the residence; (3) the nature of the crime at which the warrant is directed; (4) any evidence indicating guilt of the suspect; (5) the time it would take to begin destroying evidence once knock-and-announce is performed; and (6) any other observations supporting a forced entry, such as defensive measures taken by the residents of the premises.

- *Sounds of Flight by the Occupants.*

- *Seeing or Hearing Evidence Being Destroyed*. For example, the sounds of a toilet flushing.

- *The Nature of the Evidence Sought.* How quickly could the occupants destroy the items the officers are looking for?

- *Verbal Refusal*. For example, the occupant yells "go away!"

- *Gunfire From Inside the Residence*.

E. Exigent Circumstances and the Statute

The Fourth Amendment does not require the government to comply with § 3109 in all instances prior to using force to enter a residence. Instead, the statute has an "exigent circumstances" exception, which allows officers to dispense with the knock-and- announce requirement in certain situations. To lawfully use force to enter a residence without complying with knock-and-announce" requirements, officers must have a reasonable suspicion, under the particular circumstances, that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. The primary exigent circumstances that would allow officers to dispense with the requirements of § 3109 are:

- *Danger to Officers or Third Parties.* Reasonable suspicion exists to believe that knocking and announcing could result in danger to law enforcement officers or third parties.

- *Destruction of Evidence.* Reasonable suspicion exists that knocking and announcing would result in the destruction of evidence.

- *Useless Gesture.* Knocking and announcing would be a "useless gesture" when the suspect is already aware of a law enforcement presence.

- *Hot Pursuit.* Officers are not required to pause at the front door of a residence to "knock and announce" their presence when they are in "hot pursuit" of a suspect.

- *Ruses or Decoys.* In the detection of many types of crime, the government is entitled to use decoys and conceal the identity of its agents. For that reason, an entry obtained without force by ruse or deception is not a violation of section 3109. If an attempted entry by ruse fails, the knock-and-

announce rule continues to apply to a later forcible entry.

F. Ordinary Violations of the Statute Do Not Lead to Suppression of Evidence

The common law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one and a command of the Fourth Amendment. *Hudson v. Michigan*. Not every Fourth Amendment violation, however, triggers the exclusionary rule. Ordinary violations of knock-and-announce alone will not result in the application of the exclusionary rule, because officers with a warrant inevitably would have entered the residence and discovered the evidence inside. Suppression of that evidence, therefore, would have a high societal cost and little deterrent effect. Of course, it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. They are still required to comply with the § 3109, and remain susceptible to civil liability and administrative discipline for violations.

G. "No-Knock" Warrants

In the right circumstances, officers may request a "no-knock" warrant, which dispenses with the requirements to knock and announce before entry. "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time." *Richards v. Wisconsin*. When the government anticipates exigent circumstances before searching, ask for pre-search judicial approval to enter without knocking. The issuance of a warrant with a no-knock provision potentially insulates the government against the subsequent finding that exigent circumstances did not exist.

The facts that justify a no-knock warrant are the same as those needed to justify an on-site decision to dispense with the knock-and-announce requirement. There should be reasonable grounds that an exigency exists or will arise instantly upon

knocking, or that knocking would be futile. A judge's decision to refuse authorization of a no-knock entry does not preclude officers, when executing a warrant, from concluding that it would be reasonable to enter without knocking and announcing. You may still make that decision at the scene.

When the government obtains a no-knock warrant, it does not have to reaffirm the circumstances at the scene. The government is not permitted, however, to disregard reliable information *clearly negating* the existence of exigent circumstances when it actually received such information before the execution of the warrant. Under such circumstances, the government must reevaluate its plan to forcibly enter without knocking and announcing.

XII. Protective Sweeps

A. What is a "Protective Sweep?"

A "protective sweep" is a quick and limited search of a premises incident to an arrest, which is conducted to protect the safety of officers and others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.

B. Scope of a Protective Sweep

1. Areas to be Searched

A "protective sweep" is not a full search of a dwelling. Officers may only "sweep" those spaces where an individual might be found. For example, a search inside a medicine cabinet is outside the scope of a permissible protective sweep because persons could not reasonably hide inside a medicine cabinet.

Incriminating evidence found during a lawful protective sweep may be seized under the plain view doctrine. This discovery of evidence does not, however, justify a subsequent warrantless search of the residence for additional evidence.

Officers may use the incriminating evidence to obtain a search warrant for the premises.

2. *Timing of the Sweep*

The Supreme Court has ruled that a protective sweep may last "no longer than it takes to complete the arrest and depart the premises." *Maryland v. Buie*. Although there is no bright-line rule on how long a protective sweep may last, they are generally measured in minutes. The longer officers take to complete a protective sweep, the more likely a court will find the sweep excessive. For example, a protective sweep was upheld when the special response team opened doors only to areas large enough to harbor a person; there was no evidence that the officers opened drawers or that the sweep of the house was over extensive; and the sweep was short, lasting only about a minute. A two-hour protective sweep was held unlawful because it appeared to be a fishing expedition for evidence and because it greatly exceeded the permissible scope. Protective sweeps lasting as little as thirty minutes have been held unlawful.

C. Two Kinds of Protective Sweeps

The Supreme Court has identified two types of protective sweeps. The first, which requires no articulable suspicion, involves looking in closets and other people-sized places immediately adjoining the place of arrest from which an attack could be immediately launched. The second, which requires reasonable suspicion, allows a greater intrusion into the premises.

1. *"Automatic" Protective Sweeps*

Officers armed with an arrest warrant (or a search warrant for a person to be arrested) may enter the premises and search for the arrestee in any area that could conceal a person. Once the arrestee is located and the arrest is made, "as a precautionary matter and without probable cause or reasonable suspicion, [officers may] look in closets and other spaces

immediately adjoining the place of arrest from which an attack could be immediately launched." Buie (italics added). Although the limited search is for people, any evidence or contraband found in plain view may be seized.

2. *"Extended" Protective Sweeps*

In *Buie*, the Supreme Court held that if officers wish to sweep *beyond* the area immediately adjacent to the place of arrest, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."

Facts establishing a reasonable suspicion that another, dangerous person is present at the scene include an occupant's demeanor, suggestive utterances or actions by an occupant, noises indicating that additional persons are present at the residence, and cars in the driveway registered to criminal associates of the suspect. An agency policy mandating an automatic sweep of the entire premises during every arrest – regardless of the circumstances -- is invalid under the Fourth Amendment. Such a policy cannot justify a suspicionless extended sweep.

D. "Protective Sweeps" When the Arrest Occurs Outside the Home

There is no bright-line rule that prohibits officers from performing protective sweeps of premises when an arrest occurs outside of that building. Instead, as with an extended "protective sweep," the officers must have reasonable suspicion to believe a third party who poses a danger to officers is inside the home. If facts supporting that reasonable suspicion exist, it does not matter whether the arrest occurred inside or outside the residence. A bullet fired at an arresting officer standing outside a window is as deadly as one that is shot from one room to another.

XIII. Searches Incident to Arrest

It has long been recognized that conducting a search incident to a lawful arrest is a reasonable search under the Fourth Amendment and a valid exception to the warrant requirement.

A. Rationales for the Rule

In *Chimel v. California*, the Supreme Court outlined three distinct reasons for permitting searches incident to arrest: (1) to discover weapons; (2) to prevent the destruction or concealment of evidence; and (3) to discover any means of escape.

Officers do not have to specifically believe that the arrestee possesses evidence, weapons, or a means of escape on his person before a search incident to that arrest is justified. The fact that the individual has been lawfully arrested automatically enables the officers to conduct a search of that person.

B. Requirements for a Search Incident to Arrest

A search incident to arrest may only be conducted when three requirements have been met. First, there must be a lawful custodial arrest. This requires both probable cause that the arrestee has committed a crime and an actual arrest. A search incident to arrest may not be conducted in a situation where an actual custodial arrest does not take place. For example, officers may not conduct a search incident to arrest in a *Terry*-type situation. A search incident to arrest is more intrusive than a frisk for weapons. A search incident to arrest is not authorized when an individual receives only a citation for an offense, such as a traffic violation, even if the individual could have been taken into custody. *Knowles v. Iowa*.

The second requirement for a lawful search incident to arrest is that the search must be "substantially contemporaneous" with the arrest. *New York v. Belton*. The exact meaning of this phrase is open to interpretation, but it generally means that a search incident to arrest must be

conducted at about the same time as the arrest. A search too remote in time or place from the arrest cannot be justified as incident to the arrest. "Substantially contemporaneous" is determined in light of the Fourth Amendment's general reasonableness requirement, taking into consideration all of the circumstances surrounding the search. While a search conducted 10 minutes after an arrest might be valid, a search 30 to 45 minutes after the arrest might not.

The contemporaneous requirement does not have a major effect on the ability to search the suspect's body (suspects are often searched at the scene, and again later as part of jail security measures). But it becomes a critical issue for searching the area surrounding the suspect, or searching through items that may have been within the suspect's control, such as bags or cell phone call logs. These items must be searched at the time of arrest in order to be valid.

There is a third requirement that the area to be searched has to be currently accessible, at least in some measure, by the arrestee. If the arrestee has been removed from the area of the search, the justification for finding weapons or destructible evidence is gone. *Arizona v. Gant* ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.") Some courts may even consider a well-secured arrestee (handcuffed, with multiple officers present) to lack access to the surrounding area. At a minimum, officers should avoid performing a search incident to arrest once the suspect has been removed from the area.

In limited circumstances, the search may take place before the actual arrest occurs. "Where the formal arrest follow[s] quickly on the heels of the … search of [the defendant's] person," it is not "particularly important that the search preceded the arrest rather than vice versa." *Rawlings v. Kentucky*. In such cases, none of the evidence found during the pre-arrest search may be used as probable cause for the arrest.

C. The Scope of a Search Incident to Arrest

The permissible scope of a search incident to arrest varies depending on the context of the arrest.

1. The Person of the Arrestee

When an officer makes a custodial arrest of an individual, he or she is entitled to search the arrestee's person. In the case of a lawful, custodial arrest, a full search of the person is reasonable under the Fourth Amendment and a valid exception to the warrant requirement. The officer may search for weapons, evidence, and any means of escape. Any evidence found on the arrestee -- even if unrelated to the basis of the arrest -- may be seized.

2. The Area within the Arrestee's "Immediate Control"

In addition to the person of the arrestee, the officer is also entitled to search any area within the suspect's immediate control. This includes any containers within the arrestee's immediate control at the time of the arrest, such as a wallet, backpack, briefcase, or luggage. The phrase "immediate control" means the area from within which the arrestee might gain possession of a weapon or destructible evidence.

Whether an area is within an arrestee's immediate control is determined on a case-by-case basis, and should take into consideration a variety of factors, including: (a) the distance between the arrestee and the place to be searched; (b) whether the arrestee was handcuffed or otherwise restrained; (c) whether the officers were in a position to block the arrested person's access to the area in question; (d) the ease with which the arrested person could access the area; and (e) the number of law enforcement officers present at the scene.

The reference point for the area within the arrestee's immediate control is the location of the person at the time of the search, not where the person may later be moved. Generally,

this should also be the location of the arrest, absent some extenuating circumstance. Once removed from that location, the right to conduct a search incident to arrest of that area is generally lost (but not for the suspect's body).

This rule does not allow officers to move the arrestee from one place to another within the house for the purpose of justifying a search incident to arrest of a different area. The arrestee can be moved from a room as needed for safety and control reasons, or perhaps to obtain clothing, but this does not justify a search of the new location. The officer may accompany the arrestee, of course, and seize evidence observed in plain view during the relocation. Should the arrestee need to obtain clothing items, or perhaps be placed on a couch, the item or area could be checked prior to allowing the subject access. Note that an arrest outside of a home will not justify a search incident to arrest inside of the residence itself.

3. Vehicles and Search Incident to Arrest

The rule that allows officers to search the area within the immediate control of an arrested suspect also applies to vehicles. Custodial arrest of an occupant of the vehicle is required before a search incident to the arrest of the vehicle is permitted. There is no search incident to citation. There is no requirement that the occupant arrested be the owner or driver of the vehicle. The term "occupant" could include someone located outside the vehicle at the time of the arrest, so long as the person arrested is a "recent occupant" of the vehicle. *Thornton v. United States*.

As with other searches incident to arrest, the purpose is to search for potential weapons and evidence that could be destroyed. This includes the entire passenger compartment of the vehicle, along with containers in that part of the car. As stated above, however, when "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search… the rule does not apply." *Arizona v. Gant*. A "container" is any object capable of holding another object, and includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger

compartment, as well as luggage, boxes, bags, clothing, and the like. While this definition does not expressly address "locked" containers, several federal circuits have held that locked containers are within the scope of a lawful search incident to arrest. The inaccessible trunk of a vehicle, however, is not within the immediate control of an arrestee and cannot be searched incident to arrest.

The Supreme Court also created a second rule that applies just to vehicles, in that the Court allows a search incident to arrest even when the standard *Chimel* rule does not. So there are two possible situations when the passenger compartment of a vehicle can be searched incident to arrest.

The first situation exists when the arrestee is close to the vehicle and can readily access the passenger compartment. This will be fairly rare in practice, as safety and good sense dictate controlling the defendant early, often by securing him in handcuffs and taking him away from the car. But where circumstances dictate that he remains nearby, not fully secured, a search incident to arrest can be done. For example, with just one officer present, even a handcuffed suspect could conceivably access the interior. But, when there are multiple officers present, or once the suspect is secured in the back of a patrol car, the search will not be allowed. A suspect should not be intentionally detained next to the vehicle for the sole purpose of justifying this type of search.

If the suspect is no longer in a position to access the car, there is a second situation in which a vehicle can be searched incident to arrest. This occurs when it is reasonable to believe the vehicle contains evidence of the crime. This only applies to the crime of arrest, and not other conceivable crimes the defendant may have committed. For example, if the arrest is for passing counterfeit currency, it is reasonable to think the vehicle contains evidence of that crime (additional notes, etc.). If, however, the arrest was for driving on a suspended license, no additional evidence would be found within the car, and a search incident to arrest would not be justified this way.

If neither of these rules applies, the search incident to arrest cannot be done, but this does not stop an officer from applying other exceptions to the Fourth Amendment warrant requirement. For example, if there was a reasonable suspicion that an individual still close enough to access the car was armed and dangerous, a frisk could still be conducted of the passenger compartment. And, where there is probable cause to believe the car contains evidence of a crime, it could be searched based on the *Carroll* doctrine. Finally, if the vehicle is being lawfully impounded, officers may conduct an inventory if the standards for that type of search are met.

XIV. Issuance of Federal Search Warrants

The rules delineating who may issue federal search warrants are a mix of statutes and federal case law.

A. Who May Request a Federal Search Warrant?

Rule 41(d)(2)(A) of the Federal Rules of Criminal Procedure provides that federal search warrants may be requested by (a) federal law enforcement officers, or (b) an attorney for the government.

"Federal law enforcement officer" is defined as a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant. Officers are required to obtain the concurrence of the United States Attorney's Office before applying for a search warrant. Specifically, 28 CFR § 60.1 provides "that only in the very rare and emergent case is the law enforcement officer permitted to seek a search warrant without the concurrence of the appropriate U.S. Attorney's office."

An "attorney for the government" is defined in Rule 1(b)(1), and includes Assistant United States Attorneys.

B. Who May Issue a Federal Search Warrant?

Rules 1 and 41 of the Federal Rules of Criminal Procedure authorize the following individuals to issue federal search warrants:

- United States Magistrate Judges (Rule 41(b));
- United States District Court Judges (Rule 1(c));
- United States Circuit Court of Appeals Judge (Rule 1(c));
- United State Supreme Court Justice (Rule 1(c));

  and

- State Court Judges who are of a "court of record." State judges were included in Rule 41 because they are far more plentiful than the small corps of federal magistrates. Whether a State court judge is of a "court of record" is determined by State law. The one essential feature necessary to constitute a court of record is that a permanent record of the proceedings of the court must be made and kept.

C. Jurisdictional Requirements

Various statutory provisions also outline jurisdictional limits on the issuance of federal search warrants. As a starting point, a federal judge, if "neutral and detached," can issue a search warrant to search a person or property located within a district in which the judge is otherwise empowered to act. Thus, a United States Magistrate or District Judge assigned to the Southern District of Georgia can authorize a search of a home in the Southern District of Georgia, but not in the Northern District of Georgia. Sometimes, however, as outlined below, a federal judge can authorize a search conducted outside "his" district as well.

- *Within the District.* Pursuant to Rule 41(b)(1), federal search warrants may be issued by federal judges, or a judge from a State court of record, "to search for and seize a person or property located within the district."
- *Outside the District.* Pursuant to Rule 41(b)(2), "a magistrate judge with authority in the district has

authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed."

- *Terrorism Investigations*. Pursuant to Rule 41(b)(3), "a magistrate judge - in an investigation of domestic terrorism or international terrorism - having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district."

- *Stored Wire or Electronic Communications.* Pursuant to 18 U.S.C. § 2703(a) and (b), you may obtain federal search warrants for the contents of wire or electronic communications (email and its attachments) held in temporary storage by either an electronic communications service or remote computing service from "a court with jurisdiction over the offense under investigation." This means that officers may obtain a federal search warrant from a federal judge who has jurisdiction over the offense in question, although not necessarily the place to be searched. For example, this provision would allow the government to obtain a search warrant from a magistrate judge in the Southern District of Georgia for e-mails temporarily stored on the server of an Internet Service Provider in California.[5]

- *Tracking Devices.* Pursuant to Federal Rule of Criminal Procedure 41(b)(4), "a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device

[5] This nationwide provision does not apply to data that do not qualify as "stored electronic communications." Seizure of ordinary data requires a warrant in every district in which that data may be located.

> to track the movement of a person or property located within the district, outside the district, or both."

D. The "Neutral and Detached" Requirement

The primary reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime. For that reason, any judge who issues a federal search warrant must be "neutral and detached." This means that the judge issuing the search warrant should have no personal stake in the outcome of the investigation.

For example, a judge may not issue the search warrant and also participate in the search. The "neutral and detached" magistrate requirement was violated when the issuing authority was the State Attorney General who was actively in charge of the investigation and later was chief prosecutor at the trial. Similarly, a warrant issued by the District Attorney does not meet the requirements of neutrality and detachment. Finally, when the issuing magistrate has a financial interest in the issuance of search warrants, the magistrate is not "neutral and detached."

XV. The Components of an Affidavit for a Search Warrant

The decision to proceed by search warrant is a drastic one, and must be carefully circumscribed so as to prevent unauthorized invasions of the sanctity of a person's home and the privacies of life. General warrants are prohibited by the Fourth Amendment. The problem posed by the general warrant is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. As noted by the Supreme Court:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. *Maryland v. Garrison*.

To comply with the Fourth Amendment, every search warrant must particularly describe: (1) the place to be searched, and (2) the person or things to be seized.

A. Establishing a Nexus

A search warrant affidavit must establish a nexus (or connection) between the evidence being sought and the location being searched. An affidavit must provide facts that demonstrate probable cause that a piece of evidence (e.g., drugs) is located in the place to be searched (e.g., the defendant's home).

There are several specific factors used to determine whether the "nexus" requirement has been satisfied. These factors include: (a) direct observations by law enforcement officers; (b) the nature of the crime; (c) the nature of the items sought; (d) the opportunity for concealment; and (e) the normal inferences as to where a criminal would hide evidence. For example, many courts have determined that if an individual deals drugs, evidence is likely to be found in the dealer's home. These courts rely upon the fact that evidence associated with drug dealing (e.g., drugs, paraphernalia, records, etc.) must be stored somewhere, and that a drug dealer's home provides the most logical and safe place for the dealer to conceal those items.

B. The Information Establishing Probable Cause Cannot Be "Stale"

In an affidavit for a search warrant, the officer must establish probable cause to believe the evidence sought is

currently located at the place to be searched. (An exception exists for anticipatory warrants; see Part C.) When the information is outdated, it is said to be "stale." Probable cause cannot be established based on stale information. There is no "bright-line" rule to establish at what point information becomes stale. Instead, courts consider the following factors:

- *Age of the Information.* The age of the information alone, however, will not automatically determine whether the information is stale.

- *Whether the Criminal Activity is Continuing.* Older information may still support probable cause when the criminal activity being investigating is ongoing (e.g., a large-scale fraud scheme).

- *The Type of Evidence Sought in the Search.* Older information may still support probable cause when the evidence sought is of the sort that a suspect would reasonably keep for longer periods of time.

- *The Nature of the Location to be Searched.* Older information may still support probable cause when the place to be searched is owned by the suspect.

C. Anticipatory Search Warrants

An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. *United States v. Grubbs*. When judges issue an anticipatory search warrant, they are not deciding there is probable cause at the time they sign the warrant, but that probable cause will exist upon the occurrence of an identifiable "triggering event." In many cases, the triggering event is a controlled delivery of drugs or other contraband by law enforcement officers. The government must specifically describe the triggering event in the affidavit, and it must be something other than the mere passage of time. Officers may not execute an anticipatory warrant unless and until the triggering event specified in the affidavit occurs.

D. Particularity and the Place to be Searched

Under the Fourth Amendment, the affidavit must particularly describe the place to be searched. In providing this description, the officers should be as technically accurate as possible. However, 100% technical accuracy is not required. Instead, "practical" accuracy determines whether the affidavit adequately describes the place to be searched. The description of the place to be searched must be such that the officer with a search warrant can, with ***reasonable effort***, ascertain and identify the place intended. This means the place to be searched should be described with enough particularity that any law enforcement officer executing the warrant could reasonably know what location was intended. The test is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched. Thus, an affidavit that contains a technically wrong address (e.g., "187" versus "178") will not automatically invalidate a search warrant, so long as the remainder of the description is sufficiently particular to allow law enforcement officers executing the warrant to ascertain and identify the place intended to be searched.

1. Particularity and Residences

The description of a place, such as a home, may vary depending on such factors as whether the house is in a rural or urban setting. When describing a home, officers should state the nature of the dwelling (e.g., house, mobile home, etc.), along with the complete address, including street number, street name, town and state. They should also describe the appearance of the property, such as the number of stories, its color, house signs and their locations, and the type of construction (e.g., brick, wood, etc.). Where the residence is part of a multi-unit structure such as an apartment complex, the officers should include the unit number or apartment number.

2. *Particularity and Persons*

When describing a person, the officers should state the person's name (including any known aliases), age, sex, race, eye color, hair color, weight, height, and any distinguishing marks such as tattoos or scars. If the officers have information as to where the person can be found, they should include it as well.

3. *Particularity and Vehicles*

When describing a vehicle, the officers should include the name of the owner, the make and model and year, color, license number, vehicle identification number, any unique markings, and where the vehicle can be found.

E. Particularity and the Persons or Things to be Seized

The Fourth Amendment requires that a warrant particularly describe "the person or thing to be seized." There are three distinct rationales underlying this particularity requirement. First, it limits the discretion of officers executing the warrant. Second, it informs the subject of the search what items the officers are entitled to take. Third, it defines the legally permissible scope of the search.

The degree of specificity required depends on the circumstances of the case and the type of items being sought. For example, a very specific description of the items is required when books or some other items that may be protected by the First Amendment right to free speech are sought. There is much more latitude when particularly describing contraband, such as drugs. This type of criminal evidence makes a precise description very difficult. The practical import of this difference is that, in a drug warrant, generic descriptions such as "drug paraphernalia" or "drug monies" are generally acceptable. Similarly, child pornography warrants can describe the items as "child pornography," "sexual conduct between adults and minors," or as material "depicting minors engaged in sexually explicit activity."

Warrants for stolen property require a more particular description, especially when the items to be seized are of a common nature, such as jewelry.

F. Types of Items That Can Be Seized

Rule 41(c) provides that a warrant may be issued for any of the following: (a) evidence of a crime; (b) contraband; (c) fruits of crime, or other items illegally possessed; (d) property designed for use, intended for use, or used in committing a crime; or (e) a person to be arrested or a person who is unlawfully restrained. Each item that the officer wishes to seize must fall into one, but may fall into more than one, of the above categories. As a practical example, photographs depicting child pornography are evidence of a crime, contraband, fruits of a crime, or other items illegally possessed.

When officers execute a search warrant, the general rule is that they may seize only those items that are particularly described in the warrant. The plain view doctrine, discussed above in section VIII, provides an exception to this general rule. When officers have a search warrant for specified objects, and in the course of the search come across some other article of incriminating character, they may seize it. *Horton v. California*. For instance, if officers have a warrant to search for 27" television sets, they can look in those areas where 27" television sets could be hidden. If, when searching those areas, they come across an item that they immediately recognize as incriminating (*e.g.*, a controlled substance on the floor of a bedroom closet), they may seize it based upon the plain view doctrine. Remember, however, that the plain view doctrine does not expand the scope of a search warrant. Discovery of a controlled substance on the floor of the bedroom closet does not, without further judicial approval, allow the officers to broaden their search to include all areas that could contain controlled substances. You are simply allowed to seize the controlled substance and continue searching areas that could conceal a 27" television set. The items the officers saw that are outside the scope of the warrant may be used to establish probable cause for an additional search warrant.

G. False or Misleading Statements in the Affidavit

Before a search (or arrest) warrant is issued, the Fourth Amendment requires a truthful factual showing in the affidavit used to establish probable cause. In *Franks v. Delaware* the Supreme Court addressed the issue of whether a false statement by a government affiant invalidates a search or arrest warrant.

If the court determines by a preponderance of the evidence that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included in the warrant affidavit, and if the false statement is necessary to the finding of probable cause, the false material is set aside. If the affidavit's remaining content does not establish probable cause, the search warrant is invalid and the fruits of the search are excluded.

XVI. Telephonic Search Warrants

A judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances. In such circumstances, Rule 41(d)(3), titled "Requesting a Warrant By Telephonic or Other Means," outlines the procedural rules for obtaining telephonic search warrants. Subsection (A) of the rule provides that:

> A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

A. Purpose of Rule 41(d)(3)

The purpose of Rule 41(d)(3) is to encourage federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches.

B. Telephonic Warrants and Exigent Circumstances

The time necessary to obtain a traditional warrant is relevant to determine whether circumstances are exigent.

Telephonic warrants typically take less time. Courts also consider the amount of time necessary to obtain a warrant by telephone in determining whether exigent circumstances exist. Exigent circumstances exist only when the critical nature of the circumstances clearly prevented the effective use of any warrant procedure. In sum, when an exigency is already occurring, no search warrant is required. When officers have time to use traditional procedures to obtain a search warrant, these traditional procedures must be used. But in between, when an exigency is looming or impending, there is not enough time to use the traditional process to obtain a warrant, but there is enough time to obtain a warrant telephonically, the telephonic search warrant procedure must be used. Officers cannot merely do nothing, let the situation develop until the exigency occurs, and then claim there was no time left to get a search warrant.

Failing to make a good faith attempt to obtain a telephonic warrant or to present evidence showing that a telephonic warrant was unavailable ordinarily requires suppression.

C. Who Can Issue Telephonic Warrants?

Unlike traditional federal search warrants issued pursuant to Rule 41, a state court judge may not issue a telephonic search warrant. Telephonic search warrants must be issued by federal judges.

D. Procedural Requirements

Rules 41(d)(3) and 41(e)(3) set out a variety of procedural requirements that must be met to obtain and execute a telephonic search warrant. There are actually two warrants involved in a telephonic warrant request: The "original" warrant, completed by the magistrate judge, and a "duplicate original warrant," completed by the law enforcement officer involved.

1. Prepare the "Duplicate Original Warrant"

First, the officer must prepare a "proposed duplicate original warrant." The duplicate original warrant must be in

writing, although there is no requirement that the affidavit be in writing.

2. Read It Verbatim or Transmit it by Reliable Electronic Means

Second, the officer must read or otherwise transmit the contents of that document verbatim to the magistrate judge. This means that the officer may, if the option is available, transmit the duplicate original warrant to the magistrate judge by e-mail or facsimile.

3. Preparation of "Original" Warrant

If the officer read the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. Of course, the magistrate judge may modify the original warrant. In that case, the judge will direct the officer to modify the proposed duplicate original warrant accordingly.

If the officer sent the proposed duplicate original warrant to the judge by reliable electronic means, that transmission may serve as the original warrant. A judge who chooses to modify the warrant must transmit the modified warrant back to the officer by reliable electronic means or direct the officer to modify the proposed duplicate original warrant accordingly.

4. The Warrants Are Signed

Next, upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the officer to sign the judge's name on the duplicate original warrant.

5. Time of Execution Must Be Entered on the "Duplicate Original Warrant"

The officer must enter the exact date and time it is executed.

E. Recording and Certification Requirements

In addition to the requirements listed above, recording and certification requirements must be met.

1. Oath or Affirmation

Upon learning that an officer is requesting a telephone warrant, the magistrate judge must place the officer under oath, which is administered at the inception of the call.

2. A Verbatim Record of the Conversation

The magistrate judge must make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing."

3. Certification of the Recording

The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy by signature, and file a copy of the record and the transcription with the clerk. The purpose of transcribing the taped conversation and certifying the transcription is to give reviewing courts an accurate account of the facts originally presented to the magistrate which resulted in the issuance of a search warrant.

XVII. Executing Search Warrants

There are both statutory and case law rules that guide the government in the execution of a search warrant. Some of the more common rules are listed below.

A. Who May Execute a Federal Search Warrant

Rule 41(e)(1) provides that a search warrant must be issued "to an officer authorized to execute it." Title 18 U.S.C. § 3105[6] determines who qualifies as an authorized officer.

[6] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

It is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant.

State and local law enforcement officers may assist federal officers in the execution of federal search warrants. These officers may be "cross-designated" as federal law enforcement officers, but are not required to be, so long as a federal law enforcement officer is directing the execution of the search warrant. Issues can arise, however, when non-federal law enforcement officers assist in the execution of a federal search warrant.

Private citizens may also lawfully assist federal officers in the execution of a federal search warrant when three general requirements are met. First, the private citizen's role must be to aid the government's efforts. Private citizens cannot be present during the execution of a search warrant solely to further their own goals. Second, the government must be in need of assistance from the private citizen. This may occur, for example, when officers execute a search warrant for computers. Computer technicians are often needed to ensure data is not lost during the seizure of the computer. Third, private citizens are limited to doing only those things that the government is entitled to do.

B. When May a Federal Search Warrant Be Executed?

A federal search warrant must command the officer to execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time. The term "daytime" means the hours between 6:00 a.m. and 10:00

p.m. according to local time. To "execute" the warrant means to make initial entry. After the initial entry, officers may remain on the premises as long as reasonably necessary to complete the search.

Nighttime execution of a search warrant is also permissible but the government must specifically request it. The judge will approve the request if there is reasonable cause to believe a nighttime search is necessary based on the likelihood of danger to the officers or destruction of evidence.

Title 21 U.S.C. § 879[7] provides that "a search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States Magistrate Judge issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." Such cases require no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time.

Finally, Rule 41(e)(2)(A) provides that a search warrant must be served within one of two possible periods of time. First, the rule provides for service "within a specified time." Thus, the search warrant itself may specify when service is required. Second, if no specified time period for the search is contained in the warrant itself, the warrant must be served within a period "no longer than 14 days" from the date of issuance.

If these timing requirements are met, a premises warrant can be executed even if the suspect or other occupants are not present.

Tracking warrants that authorize installation of a tracking device "must command the officer to complete any installation authorized by the warrant within a specified time no

[7] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

longer than 10 calendar days" from the date the warrant is issued. Installation must be performed in the daytime, "unless the judge for good cause expressly authorizes installation at another time." Rule 41(e)(2)(C)(i)-(ii).

C. Use of Force in Executing a Federal Search Warrant

The facts of each individual case determine whether officers may lawfully handcuff the occupants of the premises while executing a search warrant. Whether that force was reasonable is determined by looking at the "totality of the circumstances." Among the factors considered by the courts in making this determination are: (a) the severity of the crime; (b) whether the suspect poses an immediate threat to the safety of the officers or others; (c) whether the suspect is actively resisting or attempting to evade arrest by flight; (d) the number of individuals the officers confronted; (e) whether the physical force applied was of such an extent as to lead to injury; and (f) whether the suspect was elderly, a child, or suffering from illness or medical disability. See further discussion in Subsection G below.

D. Presenting the Warrant Prior to Beginning the Search

The general rule is that officers are not required to present a copy of the search warrant to the occupant prior to beginning the search. However, where the circumstances permit, the best practice is to first provide a copy of the warrant to the occupant. A copy of the warrant does not necessarily include a copy of the affidavit. At least one federal circuit court of appeals (the Ninth) requires this course of action where no justifiable reason exists that would excuse it.

E. Answering the Telephone While Executing a Search Warrant

Officers may answer a ringing telephone without violating the Fourth Amendment if they are lawfully on the premises executing a search warrant. Any incriminating evidence acquired from those telephone calls is not subject to

suppression on grounds of constitutionally protected privacy concerns.

F. Temporary Seizure of Weapons

When, during the execution of a search warrant, officers find a dangerous weapon (such as a handgun) that is not listed in the warrant and is not obviously contraband or evidence, they may temporarily seize it for safety reasons. If the weapon is not contraband or evidence of crime, the weapon should be safely returned to its owner upon his release from the scene or at the conclusion of the warrant execution.

G. Detaining the Occupants of a Premises During the Execution of a Federal Search Warrant (The "Summers Doctrine")

A search warrant for *contraband* carries with it the limited authority to detain the occupants of the premises until a proper search is completed. *Michigan v. Summers*. This is sometimes referred to as the "*Summers* Doctrine." Contraband generally includes items that are unlawful to possess, such as controlled substances, illegal firearms, and stolen property.

There are three distinct justifications for the detention of occupants during the execution of a contraband search warrant. First, there is a legitimate law enforcement interest in preventing flight in the event illegally possessed items are found. If contraband is found at the scene, there is a significant likelihood that one or more occupants of the premises will be arrested. It makes sense, therefore, to retain control of those persons until such a determination is made. Second, there is a societal interest in minimizing the risk of harm to the officers who are serving the search warrant. This is accomplished when the officers are able to exercise unquestioned control of the situation. Third, the occupants of the premises may assist in the orderly completion of the search. Their self-interest may induce them to open locked doors or locked containers to avoid a use of force that might not only damage property, but may also delay completion of the search.

For the "*Summers* Doctrine" to apply, the occupant must be in or around the residence when the search warrant is being executed. When an individual approaches and attempts to enter a residence where a search warrant is being executed, *Summers* may provide a justification for detaining that person. The same rule applies to persons seen leaving the premises as officers are about to execute the warrant. While there is no bright-line geographic limit, the farther a person is from the premises to be searched, the less likely the detention will be upheld under the "*Summers* Doctrine."

Warrants for "mere evidence," such as documents evincing tax fraud, do not fall squarely within the "*Summers* Doctrine." During the execution of non-contraband warrants, officers may detain occupants of the premises for a reasonable period of time. This would include the time required to identify the occupants and determine their relationship to the premises and the investigation at hand. Once officers have determined that an occupant is not needed for the orderly execution of the warrant and poses no threat of harm if released, they should ordinarily release that person.

As stated in Subsection C above, officers may use reasonable force to conduct lawful detentions during the execution of any premises search warrant. Using handcuffs or other restraints is not automatically justified, however, simply because a *detention* is authorized. Rather, using restraints is a use of force that must be supported by the totality of the circumstances. In *Muehler v. Mena* police had a premises search warrant for weapons and evidence of gang membership that related to a recent drive-by shooting. While executing the warrant, police found Mena, who was not a suspect, asleep in one of the bedrooms. Mena was handcuffed and detained in the garage with other occupants for two to three hours while agents conducted the search. Notably, the occupants of the residence outnumbered the officers assigned to supervise them. Relying on the dangerous nature of the crime under investigation, the items sought in the warrant, and the number of persons found on the premises, the Supreme Court held that both the length of Mena's detention and the use of handcuffs were justified.

H. Frisking and Searching Persons on the Premises

Officers are not justified in automatically "frisking" every person located on the premises during the execution of a search warrant. Instead, as with any frisk for weapons, officers must be able to explain the facts that gave them reasonable suspicion to believe the person frisked was presently armed and dangerous. "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized search is taking place." *Ybarra v. Illinois*.

A premises search warrant does not authorize the government to search any person located on the premises at the time the warrant is executed. Consistent with the *Summers* Doctrine, individuals located on the premises may be briefly detained. When the facts justify it, a frisk of some or all of those persons may be permissible. The single fact that the government has a premises search warrant does not authorize a full search of persons on the premises. Of course, if an individual present during the search is listed in the warrant, officers may search that person.

I. Permissible Search Locations on a Premises

In *United States v. Ross* the Supreme Court discussed the scope of a search conducted pursuant to a premises search warrant:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, the warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.

1. Premises, Outbuildings, and Curtilage

Officers may search all buildings and other structures within the curtilage, even if not specifically referenced in the search warrant. The best practice, however, is to list all known outbuildings or significant structures in the search warrant.

2. Vehicles Located on the Curtilage

Pursuant to the premises warrant, officers may search those vehicles located on the curtilage of the property that are or appear to be owned by or under the control and dominion of the premises owner/occupier, even if not specifically listed in the search warrant. The vehicle must be parked on the curtilage of the home where the warrant is being served. The best practice is to specifically list the owner's known vehicles in the search warrant. Some circuits, such as the Fifth and Seventh Circuits, allow a search of vehicles within the curtilage that are not owned or controlled by the premises owner, but that have some other logical connection to the premises. Vehicles that may *not* be searched in *any* jurisdiction are those that are incidentally present, such as a delivery vehicle.

3. Containers

Generally, officers may search any container located within the premises that is capable of holding the property that is the subject of the warrant. However, if the container belongs to a person who is only visiting the premises, special concerns arise. In addressing this issue, the federal courts have taken two different approaches.

The first focuses on the relationship between the visitor and the premises being searched. Under this approach, the stronger the relationship is between the visitor and the premises being searched, the more likely an officer may search the visitor's personal possessions. The officer may search the property of an overnight guest of the homeowner. On the other hand, an individual who was simply a casual visitor to the home would likely not have a significant enough connection with the property to justify a search of the individual's

belongings. The officer may not search the personal possessions of a dinner guest or a commercial visitor (e.g., appliance repairman) pursuant to the warrant.

The second approach focuses on the physical possession or location of the item in question. Under this approach, the officer may not search an item that is in the physical possession of the visitor. In that circumstance, the container is an extension of the person and clearly outside the scope of a premises search warrant. The officer may search an item not in the physical possession of the visitor because it falls outside the scope of a "personal" search.

J. Damage or Destruction of Property During the Search

When officers execute search warrants, they may occasionally damage or destroy property in order to conduct a complete and thorough search. The damage or destruction of an individual's property during the execution of a search warrant does not automatically violate the Fourth Amendment. However, such damage or destruction will constitute an unreasonable search and seizure if the destruction was not reasonably necessary to the execution of the warrant.

K. Preparing an Inventory

Rule 41(f)(1)(B) outlines the requirements for completion of an inventory following the execution of a search warrant. Specifically, the Rule provides that "[a]n officer present during the execution of the warrant must prepare and verify an inventory of any property seized." Further, the officer who prepares the inventory "must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken." If either another officer or the person whose property is being seized "is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person."

L. A Copy of the Warrant and the Inventory Must Be Provided

Rule 41(f)(1)(C) requires that an officer provide a copy of the warrant and the inventory following completion of the search. Specifically, the Rule provides that "the officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or leave a copy of the warrant and receipt at the place where the officer took the property." This does not necessarily include the affidavit.

M. Return of the Warrant

Rule 41(e)(2) requires that a search warrant "designate the magistrate judge to whom it must be returned." Rule 41(f)(1)(D) requires that "the officer executing the warrant must promptly return it - together with a copy of the inventory - to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant." Rule 41(f)(3) states, however, that "[u]pon the government's request, a magistrate judge – or if authorized by Rule 41(b), a judge of a state court of record – may delay any notice required by this rule if the delay is authorized by statute." Examples of statutes that permit delayed notice are Rule 41(f)(2)(C) (warrants for electronic tracking devices), and 18 U.S.C. § 3103a(b) ("sneak and peek" or "covert entry" warrants).

XVIII. The "*Carroll* Doctrine" (Mobile Conveyance Exception)

First established by the Supreme Court in the 1925 case of *Carroll v. United States*, the "*Carroll* Doctrine" provides that if officers have probable cause to believe that a mobile conveyance located in a public place has evidence of a crime or contraband located within it, they may search it without first obtaining a warrant.

A. Rationales for the Rule

There are two separate and distinct rationales underlying the mobile conveyance exception to the warrant requirement. First, the inherent mobility of vehicles typically makes it impracticable to require a warrant to search, in that the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. Second, while the original case focus was on a vehicle's inherent mobility, recent cases have focused on an individual's reduced expectation of privacy in a vehicle to support a warrantless search based on probable cause. *Pennsylvania v. Labron.*

B. Prerequisites for a Search Under the "*Carroll* Doctrine"

There are two requirements for a lawful search under the mobile conveyance exception. First, there must be probable cause to believe that evidence of a crime or contraband is located within the vehicle. This means that before conducting a warrantless search of a vehicle, officers must have sufficient facts available to obtain a warrant from a magistrate judge. Under the "*Carroll* Doctrine," however, the requirement to obtain the warrant is excused.

Officers may establish probable cause to search a vehicle in a variety of ways. For example, they may be able to establish probable cause based on a tip provided by a reliable confidential informant. They may establish probable cause through their personal observation of evidence or contraband in open view inside a vehicle. The "plain smell" corollary to the plain view doctrine may also allow officers to establish probable cause to search a vehicle based upon their sense of smell.

The second requirement for a valid search under the mobile conveyance exception is that the vehicle be "readily mobile" at the time the officers encounter it. "Readily mobile" means the vehicle reasonably appears to be operational, or appears as though it will be operational with minor effort or repair. A vehicle stuck in the mud, for instance, is inherently

mobile even though the driver cannot drive it away immediately. On the other hand, a vehicle that will obviously remain immobile for a long time – such as a car up on blocks – should be treated as a stationary container, rather than a mobile conveyance.

There is no requirement that a mobile conveyance actually be moving or even occupied at the time of the search. The "*Carroll* Doctrine" will still apply as long as the probable cause and mobile conveyance prerequisites are met.

C. There is No "Exigency" Required to Conduct a Search Under the "*Carroll* Doctrine"

There is no "exigency" required to conduct a warrantless vehicle search; all that is required is a mobile conveyance and probable cause. Even if the government had the opportunity to obtain a warrant and failed to do so, the search will still be valid if the two requirements discussed above are present.

D. The Timing of a Search Under the "*Carroll* Doctrine"

Once the officers have probable cause to search a readily mobile vehicle, they may either conduct the search immediately or later at another location. There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. The justification to conduct such a warrantless search does not vanish once the car has been secured. "*Carroll* Doctrine" searches are lawful regardless of the likelihood that the car will be driven away, or that its contents will be tampered with during the period required for you to obtain a warrant.

Even though the courts have given the government wide latitude in deciding when to conduct a vehicle search, officers are still required to act "reasonably" and may not indefinitely retain possession of a vehicle and its contents before completing a vehicle search. If, for example, officers knew they would not be searching a car for two weeks after seizing it, a search warrant should be obtained to support the search.

E. The Scope of a Search Under the "*Carroll* Doctrine"

In *United States v. Ross* the Supreme Court defined the permissible scope of a search conducted pursuant to the mobile conveyance exception: "We hold that the scope of the warrantless search authorized by [the mobile conveyance] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents that may conceal the object of the search*." If a search warrant could authorize the officers to search for an item in a particular location, such as the passenger compartment or trunk of the vehicle, they may search there without a warrant under the mobile conveyance exception to the warrant requirement.

Probable cause to search does not automatically entitle the government to search every part of a vehicle. Scope of search applies to warrantless searches just as it does to searches authorized by a warrant. Any search based upon probable cause is necessarily limited by the nature of the object being sought. If officers have probable cause to believe that a vehicle contains a full-size shotgun, they may not lawfully look inside the glove compartment during the search.

Officers are generally not required to have a "particularized" suspicion that evidence (*e.g.,* drugs) is located in the trunk before they may lawfully search that area. For example, if drugs (or drug paraphernalia) are found in the passenger compartment of a vehicle, they may typically search the trunk for additional drugs. This is true even if the drugs found in the passenger compartment are small, "personal use" amounts.

If officers have probable cause to search the entire vehicle and discover a closed container during the search, they may search the container, whether locked or unlocked, if what they are seeking could be concealed inside of it. The scope of a warrantless search of an automobile is not defined by the nature of the container in which contraband is hidden. Rather, it is defined by the items the officers are searching for and the

place in which there is probable cause to believe they may be found.

If the government has probable cause to believe a specific container inside a vehicle contains evidence of a crime or contraband, officers may stop and search the vehicle to retrieve that container. Once retrieved, they may search the container without a warrant under the vehicle exception. *California v. Acevedo*. Importantly, the probable cause relating to the specific container does not support a general search of other areas of the vehicle (*e.g.,* the glove compartment). If the officers wish to extend their search to the entire vehicle, they must have some additional justification to do so, such as additional probable cause gained after the stop, consent, or a search incident to arrest.

Finally, the mobile conveyance exception has been extended to include a passenger's belongings. When officers have probable cause to search a car, they may search passengers' belongings found in the car that are capable of concealing the object of the search. *Wyoming v. Houghton*.

XIX. Searches Based on Exigent Circumstances

It is a well-established rule of law that searches conducted without warrants are presumptively unreasonable, subject to only a few limited exceptions. A warrantless search based upon an exigent circumstance is one such exception. Exigent circumstances exist when a reasonable person would believe that, based on the available facts, an immediate entry or search is necessary to prevent the escape of a suspect, the destruction of evidence, or the death or injury of a person. Exigent circumstances can apply to persons, dwellings, and vehicles.

The government always has the burden of proving a lawful search. For this exception to the warrant requirement, the government must prove both the existence of probable cause and the exigent circumstance. Factors considered by courts in determining whether exigent circumstances exist

include: (a) the gravity or violent nature of the offense with which the suspect is to be charged; (b) a reasonable belief that the suspect is armed; (c) probable cause to believe the suspect committed the crime; (d) strong reason to believe the suspect is in the premises being entered; (e) the likelihood that a delay could cause the escape of the suspect or the destruction of essential evidence; and (f) the safety of the officers or the public jeopardized by delay.

The scope of a warrantless search is "strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona* and *Terry v. Ohio*. Once the exigent circumstances that justified the warrantless search no longer exist, the right to conduct a warrantless search also ends.

A number of situations are covered under the definition of exigent circumstances. Below are the three types of exigent circumstances officers are likely to encounter.

A. Hot Pursuit

The parameters of the hot pursuit exception were established by the Supreme Court in *Warden v. Hayden* and *United States v. Santana*. In general, the following requirements must exist for hot pursuit to be a lawful exigent circumstance:

- *Probable Cause to Arrest.* Probable cause must exist to arrest the suspect.

- *Serious Crime.* The warrantless entry into the home must be for a "serious" crime. The more serious the crime, the more likely that the warrantless entry to affect the arrest will be upheld. "[I]t is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Welsh v. Wisconsin*.

- *Immediate or Continuous Pursuit.* There must be an "immediate or continuous" pursuit of the suspect. This does not require that the officers actually

observe the suspect commit the crime, nor does it require the officers to actually see the suspect flee from the scene of the crime.

- *From a Public Place*. "Hot pursuit" occurs when a suspect enters an area of REP from a public place. A suspect may not defeat an arrest which has been set in motion in a public place by escaping to a private place.

- *Probable Cause to Believe That the Suspect is in the Residence*. Officers must have probable cause to believe the suspect is inside. Probable cause may be based on their own observations or on information provided by reliable sources.

B. Destruction or Removal of Evidence

A second common exigent circumstance involves the actual or potential destruction or removal of evidence. This exception allows officers to make a warrantless search of an area or item when they have sufficient facts that would lead a reasonable person to believe that evidence is being, or will be, destroyed or removed in the time it would take the officers to obtain a search warrant. The test is an objective one, focusing on what a reasonable person in the officers' position would believe based on the facts available to them at the time.

An example of when the potential destruction of evidence may allow a warrantless entry and search is when an occupant of a home, upon seeing law enforcement officers standing on her porch, hurriedly begins to pour illegal drugs down a drain. Another example is the warrantless drawing of blood from a DUI suspect arrested at 1 a.m. Were the blood not drawn and evidence (alcohol content) preserved, the body itself would destroy much of the evidence before a warrant could be obtained.

The federal circuit courts of appeal differ in what they require for a lawful warrantless search to prevent destruction of

evidence. The majority rule, (followed in the Sixth, Eighth, and D.C. Circuit Courts of Appeal), holds that a warrantless search to prevent the destruction or removal of evidence is justified if the government can prove two factors: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent.

In contrast, the Tenth Circuit Court of Appeals has announced a four-part test to determine whether the imminent destruction of evidence will justify a warrantless entry: (1) any entry should be made pursuant to clear evidence of probable cause; (2) a warrantless entry is available only for serious crimes and in circumstances where the destruction of evidence is likely; (3) the entry must be limited in scope to the minimum intrusion necessary; and (4) the entry must be supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

C. Emergency Scene

The need to protect or preserve life typically justifies actions that would otherwise violate the Fourth Amendment. Numerous state and federal cases have recognized that the Fourth Amendment does not bar the government from making warrantless entries and searches when it reasonably believe that a person within is in need of immediate aid.

Examples of "emergency" situations in which courts found exigent circumstances include: (a) a report of a woman and child in danger in a crack house; (b) a report that a victim had been stabbed; (c) an explosion in an apartment; (d) a report that children had open access to controlled substances; (e) the need to render medical aid to a defendant who had been shot by the police; (f) reports of gunshots from inside a residence; (g) activation of a burglar alarm; (h) finding a blood puddle on the driveway with a trail of blood leading into the home; and (i) the existence of a methamphetamine lab.

A valid emergency scene search must usually meet two requirements: (1) officers must have objectively reasonable

grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; and (2) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.[8] The term "probable cause" in this context is different from how that term is typically used. Probable cause generally means facts exist that would lead a reasonable person to believe that evidence of a crime will be discovered. But in the context of an emergency scene situation, the term "probable cause" means facts exist that would lead a reasonable person to believe that a person is in some type of danger.

As with any lawful warrantless search, officers may seize any evidence that is in plain view during the course of their legitimate emergency activities. For instance, firefighters responding to a call may seize evidence of arson that is in plain view.

Finally, there is no "murder scene" or "crime scene" exception to the Fourth Amendment. Officers may enter an emergency scene without a warrant to tend to victims and locate suspects, but once those things are done, the emergency is over. When the emergency ends, so does an officer's right to be present in the location without a warrant. If the officers stay behind and "process the scene" without obtaining a warrant or valid consent, the evidence they gather will probably not be admissible in court. In three separate cases, the Supreme Court has rejected attempts at creating a "crime scene" exception. In *Mincey v. Arizona* the Court declined "to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." Later, in *Thompson v. Louisiana* the Court found a "murder scene" exception "inconsistent with the Fourth and Fourteenth Amendments." Lastly, in *Flippo v. West Virginia* the Court reiterated its earlier

[8] A previous requirement that the search not be primarily motivated by the intent to arrest and seize evidence was eliminated by *Brigham City v. Stuart*.

rejections of a "'murder scene exception' to the Warrant Clause of the Fourth Amendment."

XX. Consent Searches

"It is … well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*. When the government obtains valid consent to search a given area or object, neither reasonable suspicion, nor probable cause, is required. In situations where officers have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence. Consent may be expressly sought from and given by a suspect (*e.g.,* "Do you mind if we search your vehicle?").

A. The Requirements for a Consent Search

There are two requirements for a consent search to be valid: (1) the consent must be voluntarily given, and (2) the consent must be given by an individual with either actual or apparent authority over the place to be searched.

1. Voluntariness

The Fourth Amendment requires that consent not be coerced by force or threat, either explicit or implicit. Any consent provided must be given voluntarily, and not as a result of duress or coercion. Courts look at the totality of the circumstances surrounding a grant of consent, analyzing all the circumstances to determine whether it was voluntarily granted or coerced. Factors a court will consider in deciding whether consent was given voluntarily include:

- The age, education, and intelligence of the individual granting consent;
- The individual's knowledge of the right to refuse to give consent;

- The length of the individual's detention;
- The repeated and prolonged nature of any questioning that occurred;
- Whether the consent was given in writing;
- The use of physical punishment, such as the deprivation of food or sleep;
- Whether the individual cooperated in the search, such as by assisting law enforcement officers in opening a locked container;
- Whether the individual was in custody at the time the consent was given;
- The presence of coercive police procedures, such as displaying weapons or using force;
- The individual's past experience in dealing with law enforcement officers;
- Whether the individual was under the influence of any drugs or alcohol;
- Whether the individual was notified of his *Miranda* rights or told that he had a right to refuse to consent—while the law does not require that either statement be given, one who consents after being so informed will have a very difficult time challenging the voluntariness of his consent;
- Whether the police made promises or misrepresentations to the individual in order to obtain the consent;
- The location where the consent was given (i.e., was it given on a public street or in the confines of a police station);

- Whether the individual was told a search warrant could be obtained; and

- Whether there were repeated requests for consent made to the individual.

Acquiescence to a law enforcement officer's show of authority is not voluntary consent. Consent will not be valid if it is given after an officer falsely asserts an independent right to make the search. For example, consent given only after the officer asserted that he had a warrant is not truly voluntary in that he was "announcing in effect that the [individual] has no right to resist the search." *Bumper v. North Carolina*. The government has the burden of proving that the consent was voluntarily given, and it is not enough to show mere acquiescence to a claim of lawful authority.

Consent may be inferred from a suspect's words or actions. For example, after knocking on a person's door and, when the person answers, an officer asks for permission to enter the residence. Without saying anything, the person steps back and clears a path for the officer to enter the home. In this case, the person's actions have given the officer consent to enter the home, even though no words were spoken.

2. Actual or Apparent Authority

The second requirement is that the consent must be given by an individual with either actual or apparent authority over the place to be searched. Actual authority comes "from the individual whose property is searched." *Illinois v. Rodriguez*. A third-party "who possesses common authority over or other sufficient relationship to the … effects sought to be inspected" has actual authority to consent to a search. *United States v. Matlock*. Common authority is not determined solely by who owns the property. Rather, it is based on mutual use of the property by persons generally having joint access or control. Any of the joint users has the authority to consent, and the others have assumed the risk that one of them might permit the shared area or item to be searched.

The consent of one party who has authority over the place to be searched, however, is not valid if another party with authority is present and expressly refuses to give consent for the search. Officers are not required to attempt to locate any or all of those who might have authority over the premises to determine whether they are willing to consent to search. However, they may not isolate or remove the potentially non-consenting party just to avoid a possible objection to the search. *Georgia v. Randolph*.

Officers may also obtain valid consent from an individual who has apparent authority over the place or item to be searched. This typically occurs when an officer conducts a warrantless search based upon the consent of a third-party who the officer, at the time of the search, reasonably -- but mistakenly -- believe possesses common authority over the object. If the officer's belief is reasonable considering all of the facts available at the time the search is conducted, the search will still be valid, despite the fact that the consenting party lacked actual authority to give consent.

B. <u>The Scope of a Consent Search</u>

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*. In answering this question, courts look at not only the words used by both the officer and the person, but also the overall context in which the exchange took place. For example, in a situation involving a consent search of a vehicle, a general grant of permission to "search the car" allows an examination of the entire vehicle, to include any containers or compartments within the vehicle that could hold the item(s) sought.

It is typically unreasonable, however, to believe that an individual who has given a general consent to search is consenting to the damage or destruction of the property. Officers should seek additional, express permission to search a locked container (e.g., a locked briefcase) and proceed only if

consent is granted. To support the reasonableness of any such search, the officer should refrain from damaging or destroying the container in the process of opening it.

An individual may limit the scope of any consent by saying something like, "You may search here but not there." The government must honor such a limitation. An individual may also revoke consent. When consent is revoked, the government is required to stop searching, unless another exception to the Fourth Amendment's warrant requirement (*e.g.,* probable cause to search a vehicle) is present.

C. Third-Party Consent Situations

The types of third party consent situations that officers may confront are limitless. The following are some of the most frequently occurring ones.

*1. Husband - Wife Situation*s

Absent an affirmative showing that the consenting spouse has no access to the property searched, the courts generally hold that either spouse may consent to search all of the couple's property. Several federal circuits have held that a spouse's consent may be effective even after he or she leaves the marital home. As discussed above, however, the consent of one party who has authority over the place to be searched, however, is not valid if another party with authority is present and expressly refuses to give consent for the search. *Georgia v. Randolph.*

2. Parent - Child Situations

Consent in parent-child situations can be divided into cases in which the child is a minor, and those where the child is eighteen years or older.

In cases where the child is a minor, a parent can almost always consent to a search of the child's belongings or living area, such as the bedroom.

Circuit courts have addressed the issue of whether a minor child may consent to the search of a parent's home or property. Assuming that the child has authority over the area to be searched, these circuits hold that the fact that the child is a minor does not, *per se*, bar a finding of actual authority to grant third-party consent to search. A child's minority is simply a factor in determining the voluntariness of the consent. Consent from a child as young as nine has been found valid. Officers should exercise caution and obtain additional guidance from the appropriate legal advisor in any situation involving the consent of a minor.

When an adult child still lives in the parent's home, the issue of parental consent is more complicated. In determining whether a parent may consent to a search of an adult child's living areas, courts have focused on two distinct questions.

First, does the adult child pay rent to live in the home? Where rent is being paid, courts typically treat the situation as a landlord-tenant relationship rather than a parent-child relationship. Second, has the adult child taken any steps to deny the parents access or use of the property or living area in question? Examples of this include the installation of locks on a bedroom door, or an explicit or implicit agreement between the parties that the parents will not access the area. The more steps the adult child has taken to deny parents access, the more likely those parents will be unable to consent to a search of the child's property or living area within the parents' home.

3. Roommate Situations

An individual who shares a residence with another person assumes the risk that the other person might consent to a search of all common areas of the residence, as well as all areas to which the other person has access. However, one roommate may not generally give consent to search the personal property or exclusive spaces (*e.g.,* bedroom) of the other.

XXI. Inventory

An inventory occurs when law enforcement officers go through a car or other container, locate and identify its contents, and secure the contents if necessary. An inventory is a well-defined exception to the warrant requirement of the Fourth Amendment. Once an item (e.g., a vehicle) has been lawfully impounded by law enforcement officers, an inventory may be conducted if it is done "reasonably." *South Dakota v. Opperman*. Inventories are routine, non-criminal procedures which do not require probable cause or a warrant. An inventory must not be a ruse for a general rummaging in order to discover incriminating evidence. Rather, the policy or practice governing inventories should be designed to produce a list of personal property found in the vehicle. An inventory is invalid when conducted in bad faith or for the sole purpose of investigation.

Criminal evidence found during a lawfully conducted inventory may be seized under the plain view seizure doctrine and may provide probable cause for a warrant or for a more thorough search under an exception such as the "*Carroll* doctrine."

A. Justifications for Inventories

The Supreme Court has recognized three justifications for allowing the inventory of lawfully impounded property without first obtaining a warrant. First, law enforcement must protect the owner's property while it remains in government custody. Second, an inventory protects the officers against claims or disputes over damaged, lost or stolen property. And third, an inventory is necessary to protect the officers from potential dangers that the property may pose.

B. Requirements for Inventory

To conduct a lawful inventory, two requirements must be met. First, officers must have lawfully come into the possession of the property being inventoried. Second, the officers must conduct the inventory pursuant to a standardized policy.

1. *Lawful Impoundment*

An inventory will not be valid if the property searched is not lawfully in the custody of the law enforcement officers who perform the inventory. The impoundment of an individual's property must be based upon either: (a) probable cause, such as a violation of local and state motor vehicle laws (e.g., multiple parking violations), or (b) law enforcement's "community caretaking" function.

2. *Standardized Policy*

Valid inventories can only be conducted if the government agency has a standardized policy governing how inventories are to be conducted, and the officers know and follow the policy. Standardized policies promote the underlying rationale for the inventory exception to the Fourth Amendment warrant rule by removing officer discretion to determine the scope of the inventory. This absence of discretion ensures that inventories will not be used as a purposeful and general means of discovering criminal evidence.

While there must be a standardized inventory policy, several courts have upheld unwritten policies based upon testimony regarding standard practices within an agency. Nonetheless, the best way for law enforcement agencies to avoid potential legal challenges to inventories is to reduce their standardized inventory policy to writing. Law enforcement agencies may establish their own standardized policies, so long as they are reasonably constructed to accomplish the goals of inventories and are conducted in good faith.

C. Scope of Inventories

The scope of an inventory is defined by the standardized inventory policy of the particular agency involved. As a general rule, inventories may not extend any further than is reasonably necessary to discover valuables or other items for safekeeping. For example, when conducting an inventory of a vehicle, officers would not be justified in looking inside the heater ducts, the

door panels, the gas tank, or the spare tire. Valuables are not normally kept in such locations.

Officers may conduct an inventory of passenger compartments, including the glove compartment, since it is a customary place for documents of ownership and registration as well as a place for the temporary storage of valuables. Inventories of the trunk have also been found valid. Officers may conduct an inventory of containers, locked or unlocked, so long as the standardized inventory policy permits. Excessive or unnecessary destruction of property in the course of an inventory may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression. When a trunk is locked, officers should use keys or other tools to enter it in order to comply with the Fourth Amendment. Finally, a valid inventory may include the engine compartment of a vehicle.

D. Location of an Inventory

Although inventory searches typically occur at an agency station or an impoundment facility, rather than at the time of the arrest, the Fourth Amendment does not require that the government conduct inventory searches at any particular location. Officers may conduct an inventory search on-site, before impounded property is removed.

XXII. Administrative Searches

The Supreme Court has allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. Generally termed "inspections," these types of administrative searches can include inspecting both personal and real property. Administrative searches must be conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as a part of a criminal investigation to secure evidence of a crime. The regulatory scheme must have a properly defined scope and limit the discretion of the officers conducting the search. An inspection

cannot be used as a subterfuge to avoid Fourth Amendment requirements in order to obtain criminal evidence.

Criminal evidence discovered during the course of a valid administrative search may be seized under the plain view doctrine and may be used to establish probable cause to obtain a criminal search warrant.

A. Sobriety Checkpoints

The use of highway sobriety checkpoints does not violate the Fourth Amendment. *Michigan Dep't of State Police v. Sitz*. In reaching this conclusion, the Supreme Court found that a state's interest in preventing accidents caused by drunk drivers outweighed the minimal intrusion upon drivers who are temporarily stopped.

B. Driver's License and Registration Checkpoints

In *Delaware v. Prouse* the Supreme Court suggested that a *Sitz* type roadblock to verify drivers' licenses and vehicle registrations would be permissible. Several federal circuits have since expressly approved them.

C. Information-Gathering Checkpoints

"[S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion." *Illinois v. Lidster*. Such is the case where the checkpoint is set up to gather information regarding a previous crime. In *Lidster*, police set up a checkpoint in the area of a fatal accident one week after it occurred. The police were trying to find motorists who may have been witnesses to the accident. The Supreme Court upheld the checkpoint. No individualized suspicion is necessary when the stop's primary law enforcement purpose is ***not*** to determine whether a vehicle's occupants are committing a crime, but to ask them, as members of the public, for help in providing information about a crime in all likelihood committed by others.

D. Checkpoints for General Crime Control Purposes

The Supreme Court has never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. In *City of Indianapolis v. Edmond* police set up a checkpoint to discover drugs. The Supreme Court determined that because the primary purpose of the checkpoint was to advance "the general interest in crime control," the checkpoint was unlawful. Individualized suspicion is required when police employ a checkpoint primarily for the ordinary enterprise of investigating crimes.

E. Administrative Inspections of Businesses

Inspections of businesses, such as those in the food and drug industry, are relatively commonplace. These businesses are subject to inspection for a variety of reasons, including ensuring compliance with fire, health, and safety regulations. Generally speaking, these types of administrative searches must be conducted pursuant to "administrative" warrants.

For an administrative warrant, probable cause in the criminal law sense is not required. Instead, courts will look to see if a "valid public interest" justifies the inspection. If it does, then there is probable cause to issue a warrant for a limited administrative inspection. This probable cause may be based on specific evidence of an existing violation or on reasonable legislative or administrative standards for conducting an inspection. There must be a regulatory scheme that authorizes any administrative search. This means that legislative, administrative, or judicially prescribed standards for conducting an inspection must exist before there is probable cause to issue an administrative warrant.

Officers should seek consent to conduct an administrative search before seeking an administrative search warrant. As a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, warrants should normally be sought only after entry is refused.

Special rules apply when the administrative inspection is conducted on the premises of what the law terms a "closely regulated" industry. Firearms and alcohol industries are among the most "closely regulated" industries. These types of business establishments may ordinarily be inspected without an administrative warrant.

There are two justifications for allowing warrantless administrative searches of closely regulated industries. First, if an administrative inspection is to be effective and serve as a credible deterrent, then unannounced, even frequent, inspections are essential. Requiring an administrative search warrant for inspections of closely regulated industries could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible. Second, the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy.

Warrantless searches of closely regulated industries must still be reasonable and may not be used as a pretext for gathering criminal evidence.

F. Security Checkpoints at Sensitive Government Facilities and Airports

Security screening at sensitive government facilities and airports generally consists of using magnetometers, explosives detectors, and x-ray machines to examine individuals and their containers. The use of both magnetometers and x-ray machines to scan individuals and their belongings constitutes a search implicating the Fourth Amendment. These searches are evaluated by courts in light of the presumption that searches conducted without a warrant are presumed to be unreasonable unless they fall within one of the recognized exceptions to the warrant requirement.

1. Searches at Security Checkpoints

Security screening searches at facilities such as airports, military bases, courthouses, and other sensitive government

facilities fall within the class of administrative searches that are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime. The government has a substantial interest in preventing the introduction of dangerous material onto airplanes and into sensitive government facilities, thus, searches of those who present themselves for entry into those areas are reasonable when carried out in accordance with a regulatory scheme.

2. Searches Before and After Security Checkpoints

Different standards apply to searches conducted at designated security checkpoints as opposed to those conducted in other areas of airports or sensitive government facilities. In airports, for instance, persons who have not attempted to access the secure terminal are not subject to an administrative search. Intrusions into their REP at that point must be supported by some other Fourth Amendment justification, like a *Terry* frisk. The same applies at a federal courthouse or a military base. People cannot be compelled to undergo an administrative search prior to presenting themselves for entry into the facility. If they choose to enter the area, however, they must pass through the security checkpoint. The administrative search at the checkpoint must be no more intrusive than necessary to accomplish the agency's regulatory purpose. Once people have successfully passed through the checkpoint, the administrative search is over and the exception no longer applies. A warrant or other Fourth Amendment exception will be required to justify any further intrusions.

3. The Point of No Return

Individuals wishing to fly on an airplane or enter a sensitive government facility are required to participate in the security screening process. Those not willing to undergo security screening have the option of choosing not to travel by aircraft or not to enter the government facility. In fact, administrative screening searches are valid only if they

recognize the right of a person to avoid a search by electing not to enter the security checkpoint area.

While an individual has the right to avoid a search by choosing not to enter a secure area, that right is not without limits. Someone who begins the security screening process no longer has the right to avoid a search by electing to turn back. A rule allowing someone to leave without a search after an inconclusive x-ray scan would encourage terrorism by providing a secure exit whenever detection was likely. Also, a security screening agent has a duty to ferret out firearms and explosive devices carried by persons seeking entry. This duty could not be fulfilled if the agent was prohibited from conducting a visual inspection and limited hand search after an inconclusive x-ray scan. Thus, one who chooses to avoid a search must elect not to enter the controlled area *before* placing baggage on the x-ray machine's conveyor belt or walking through the magnetometer.

G. Border Searches

Border protection is a core task of the nations whose geographic limits are defined by them. The government has a very strong interest in repelling invasion, intercepting dangerous persons and contraband, collecting duties, and preventing the entry of diseases. Courts generally find that this compelling government interest greatly outweighs an individual's reduced expectation of privacy when crossing a border. Government intrusions at the border are likely to be deemed reasonable in a broad variety of circumstances. Because of the breadth of border search authority, the power to conduct border searches is restricted to certain categories of federal law enforcement officers.

Federal courts have focused on two factors in analyzing the reasonableness of such intrusions: (1) the category of the intrusion, and (2) the geographic limits of the government's border authority.

1. *Categories of Intrusions*

Border intrusions are categorized into two types: routine and non-routine. The reasonableness standard of the search depends upon the category of the search. Those standards apply regardless of the direction of travel. In other words, searches of travelers leaving the nation are subject to the same standards that apply to searches of arriving travelers.

(a) Routine border search

i. Scope

The scope of a routine border search is determined, at least in part, by the traveler's own reduced expectation of privacy when crossing a border. Travelers arriving at a border checkpoint expect to: (1) be briefly detained; (2) have their vehicles and luggage opened and visually searched; and (3) be asked to remove their topcoats and empty their pockets. Although the following required actions are slightly more intrusive, they are still within the scope of a routine border search: (1) remove shoes; (2) empty the contents of wallets or purses; and (3) lift shirts or skirts.

ii. Basis

Properly designated officers may conduct a border search even when they have no suspicion that the traveler is violating the law. Agency policies may set some restrictions on those officers to conduct such searches and choose which travelers to search. Violating those restrictions may expose the officers to disciplinary action, but will not usually result in suppression of any evidence found.

(b) Non-routine border search

i. Scope

The scope of a non-routine border search is also determined at least in part, by the traveler's own expectations. Some inspections are a customary part of crossing an

international border. Others are very intrusive and therefore non-routine. A full strip search, an X-ray examination of the body, a demand to remove an artificial leg and a body cavity search are examples of non-routine border searches. Certain detailed searches of vehicles and other belongings may also be non-routine. Detailed disassembly and partial destruction of personal effects and drilling holes in car bodies are non-routine border searches. Finally, lengthy detentions of persons – those lasting hours rather than minutes -- often are considered non-routine seizures of the individual.

ii. Basis

At a minimum, officers must have reasonable suspicion of a violation for non-routine border searches and seizures. Some courts have required more. In one case, a court order founded on reasonable suspicion was required before a person could be involuntarily x-rayed. In another case a court order founded on reasonable suspicion was required to be obtained within 48 hours before a suspected drug-containing balloon swallower could be detained any longer. Body cavity searches can only be conducted by medical personnel, and a court has defined the reasonable suspicion needed to justify such a search as requiring a "clear indication" or a "plain suggestion" that the cavity was being used to conceal contraband. Sealed letters which apparently contain only correspondence cannot be opened without consent or a search warrant.

2. Geographic limits of the border

Border search authority can be lawfully asserted only when there is some connection, or "nexus," to the border. Border searches can lawfully be conducted in three areas: (a) the actual border; (b) the functional equivalent of the border; and (c) the extended border. Persons and objects do not have to be intercepted within inches of the border, and border stations do not have to directly abut the border. But mere entry of a person or object into the United States does not mean that that authority to conduct a border search persists no matter where and when that person or object is discovered by law enforcement.

(a) The actual border

A border search can be conducted at the actual land border between the United States and Canada or Mexico. Determining the nation's sea borders over water is more complex. The air border extends above the surface from the nation's land and sea borders.

(b) The functional equivalent of the border

Stopping vessels on the ocean, or aircraft in midair, is difficult if not impossible. It is more practical to wait until the ship has docked or the aircraft has landed. Sometimes seaports and airports receiving international shipments and passengers are many miles inland from the nation's actual borders. For example, ships departing Singapore may first dock in Philadelphia (well inland on the Delaware River), and flights leaving Paris may first touch American soil in Kansas City. In such situations, the Philadelphia dock and the Kansas City airport are considered the functional equivalent of the border. If the following requirements are met, properly designated officers may lawfully conduct border searches at these functional equivalents of the border:

i. Persons and objects entering the country

Properly designated officers may stop and search persons and objects entering the United States if the following conditions exist:

- The officers is reasonably certain that a nexus exists between the person or object and either a border-crossing by them or contact by them with something that has itself crossed the border;

- The officer is reasonably certain that no material change has occurred to the object or person since this nexus has formed;

and

- The officer stops and/or searches at the first practical detention point after the nexus has formed.

ii. Persons and objects leaving the country

Properly designated officers may stop and search persons and objects leaving the United States if the following conditions exist:

- The officer is reasonably certain that a nexus will arise between the person or object and either a border-crossing by them or contact by them with something that will itself cross the border;

- The officer is reasonably certain that no material change will occur to the object or person before this nexus has formed;

and

- The officer stops and/or searches at the last practical detention point before the nexus has formed.

iii. Other applications of the functional equivalent of the border concept

This concept has been held to apply to searches and seizures at places other than international airports and seaports. For example, imported items may be stored temporarily in a bonded warehouse before legally entering the United States. Searches of persons exiting those facilities have been upheld as border searches when the requirements pertinent to the functional equivalent of the border have been met. Other situations in which the concept has been held to apply include those involving foreign mail, persons who have access to bonded shipments, and, in very limited circumstances, foreign merchandise held in a Foreign Trade Zone for purposes other than those listed in the Foreign Trade Zone Act of 1934.

(c) The extended border

Even if the border or its functional equivalent has been crossed some time before, certain federal officers can conduct a border search if they can articulate reasonable suspicion that criminal activity is afoot. Properly designated officers still cannot assert extended border search authority unless:

- The officer is reasonably certain that a nexus exists between the person or object and either a border-crossing by them or contact by them with something that has itself crossed the border;

- The officer is reasonably certain that no material change has occurred to the object or person since this nexus has formed;

  and

- The officer had reasonable suspicion that criminal activity will be uncovered by the stop or search.

Extended border search authority is sometimes relied upon when officers follow smugglers from the border to their in-country rendezvous point, to catch other members of the smuggling conspiracy waiting there.

Chapter Ten

Government Workplace Searches[1]

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I. Introduction

There are a variety of reasons why a government supervisor might look in a government employee's workplace. A supervisor might wish to locate a needed file or document, discover whether the employee is misusing government property such as a government-owned computer, or look for evidence of a crime such as using the internet to download child pornography.

[1] "Warrantless Workplace Searches of Government Employees" complete with case cites is available on the Legal Division website (www.fletc.gov/legal) at Downloads, Articles, and FAQs / Articles / Research by Subject / Fourth Amendment.

Is it a "search" under the Fourth Amendment when a government supervisor looks in an employee's workplace? Does the government employee have a reasonable expectation of privacy (REP) in the office, desk, computer, and/or filing cabinet? If REP exists, what standards must a supervisor follow to lawfully conduct a warrantless search of those areas? Is probable cause required, or is a search permitted on some lesser standard of suspicion? While the Supreme Court addressed some of these questions in *O'Connor v. Ortega*[2], it has fallen to lower courts to address many others.

As a government supervisor, when considering the search of a government employee's workplace, consider using this two-part analysis to simplify the process. First, determine whether the employee has REP in the area or item to be searched. Second, if REP does exist, determine if a search would be reasonable under the totality of the circumstances. Before turning to those issues, however, it is necessary to first define exactly what is meant by the term "workplace."

II. Defining the "Workplace"

"Workplace" as defined in *O'Connor* includes those areas and items that are related to work and are generally within the employer's control, including offices, desks, filing cabinets, computers, and government vehicles. However, not everything found within the business address can be considered part of the workplace. As a general rule, a government employee has REP in personal belongings, such as closed personal luggage, a handbag, or a briefcase, even when in the "workplace." A public employee's private property may be considered a part of the workplace when the employee is using the personally-owned property as part of the workplace.

In the Seventh Circuit Court of Appeals case of *Gossmeyer v. McDonald*, Gossmeyer was employed by the Illinois Department of Children and Family Services (DCFS) as a Child Protective Investigator. Her position required her to

[2] This case is briefed in the companion book, *Legal Division Reference Book.*

investigate instances of child neglect and abuse, and to photograph evidence for use in court proceedings. Because of a lack of storage space, Gossmeyer, at her own expense, purchased two storage cabinets in which she kept photographs, photographic equipment, files, documents, and other various items. In response to a tip that Gossmeyer had pornographic pictures in these cabinets, IG agents conducted a warrantless search of Gossmeyer's office, storage cabinets, and desk. Gossmeyer asserted that the storage cabinets she had personally bought were not part of the "workplace." The court refused to find an expectation of privacy in the cabinets simply because Gossmeyer bought them herself. As noted by the court: "The cabinets were not personal containers which just happened to be in the workplace; they were containers purchased by Gossmeyer primarily for the storage of work-related materials. … These items were part of the 'workplace,' not part of Gossmeyer's personal domain."

III. Is It a "Search" Under the Fourth Amendment?

Under the Fourth Amendment, a "search" occurs when the "government" intrudes upon an individual's REP. Two concepts about this definition are important in the government workplace search context. First, the term "government" does not apply only to law enforcement. Instead, the Fourth Amendment acts as a restraint on the entire government. The Supreme Court has never limited the Fourth Amendment's prohibition on unreasonable searches and seizures to operations conducted by law enforcement. If an employee has a reasonable expectation of privacy in his workplace, then an intrusion into that area qualifies as a "search" even when the government acts simply as employer. Second, "motive" is not a component of the definition of "search." An intrusion into a workplace REP is a "search" even when it is not a quest for criminal evidence.

A. Does REP Exist?

As with all Fourth Amendment analysis, the first step is to determine whether the government employee has REP in that

area or item. REP exists when (1) an individual exhibits an actual expectation of privacy, and (2) that expectation is one that society is prepared to recognize as being objectively reasonable. *Katz v. United States*[3]. This analysis must be specific to the area or item to be searched. REP may exist in a desk drawer, a file cabinet, or a computer even though there is no REP in the office itself. If there is no REP, a workplace intrusion is not controlled by the Fourth Amendment, regardless of its nature and scope.

Government employees can, and often do, establish REP in all or part of their government offices, desks, computers, and filing cabinets. A cursory glance into any government office will show that individual government employees typically expect some form of privacy based on the intermingling of their personal and professional lives (e.g., pictures of kids on desks and diplomas on walls). However, a government employee's REP is limited by the operational realities of the workplace. Whether an employee has REP must be addressed on a case-by-case basis.

REP does not turn on the nature of the property interest in the searched area or item, but instead on the reasonableness of the employee's privacy expectation. Government ownership of the property to be searched (e.g., a government-owned computer assigned to a government employee) is an important consideration; but does not, standing alone, mean that there is no REP. Courts consider a variety of factors when determining whether a government employee has REP in the workplace. Among the most important are the following:

1. Prior Notice to the Employee (Legitimate Regulation)

Prior notice, such as signs, personnel policies, and computer banners, advising government employees that their employer has retained rights to access or inspection, can eliminate REP in the workplace. Conversely, the absence of

[3] This case is briefed in the companion book, *Legal Division Reference Book.*

such notice is a factor supporting REP. In the Fourth Circuit Court of Appeals case of *United States v. Simons*, Simons worked for the Foreign Bureau of Information Services (FBIS), a division of the Central Intelligence Agency. FBIS had an Internet usage policy that (1) specifically prohibited accessing unlawful material, (2) prohibited use of the Internet for anything other than official business, and (3) noted that FBIS would "periodically audit, inspect, and/or monitor the user's Internet access as deemed appropriate." When a keyword search indicated that Simons had been visiting numerous illicit web sites from his government computer, multiple searches of his hard drive were conducted from a remote location, which resulted in the discovery of child pornography. The court held that in light of the FBIS Internet policy Simons did not have a legitimate expectation of privacy in the record or fruits of his Internet use. Through its language, this policy placed employees on notice that they could not reasonably expect that their Internet activity would be private.

In the Seventh Circuit Court of Appeals case of *Muick v. Glenayre Electronics*, the court noted that it was possible to have REP in employer-owned equipment furnished to an employee for use in the workplace. For example, if the employer equips the employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, he can assume that the contents of the safe are private. Muick was employed by Glenayre at the time of his arrest for receiving and possessing child pornography on the laptop computer furnished to him by Glenayre. Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees. This notice destroyed any REP that Muick might have had. As stated by the court:

> The laptops were Glenayre's property and it could attach whatever conditions to their use it wanted. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection

> is so far from being unreasonable that the failure to do so might well be thought irresponsible.

Likewise, a departmental policy which provides, in part, that "all departmental vehicles (to include all enclosed containers) shall be subject to search and inspection …at anytime, day or night" can defeat a claim of REP in a government vehicle.

2. Common Practices and Procedures

Even in the absence of written policies and procedures, actual office practices and procedures may eliminate REP in the workplace. An employer who actually conducts searches or inspections dispels in advance any expectations of privacy. Conversely, even when written policies and procedures exist, failure to implement them may permit a government employee to establish REP in an area where one would otherwise not exist. For example, in the Third Circuit Court of Appeals case of *United States v. Speights*, Speights was a police officer who retained a locker at his police headquarters, secured by both a personal lock and a lock that had been issued by the department. There were no regulations that addressed the issue of personal locks on the police lockers, nor was there any regulation or notice that the lockers could be searched. There was also no regulation as to what a police officer might keep in the locker. Upon receiving information that Speights had a sawed-off shotgun in his locker, supervisors opened the locker with a master key (for the police-issued lock) and bolt cutters (for Speights' personal lock). They recovered a sawed-off shotgun during the search, and Speights was later convicted of illegally possessing the weapon. The court held that in the absence of regulations, Speights had REP in the locker that could be defeated only if the police department had a practice of opening lockers with private locks without the consent of the user. While there had been scattered instances of inspections of the lockers for cleanliness (3-4 in 12 years), there was insufficient evidence to conclude that the police department practice negated Speights' REP.

Other federal courts in analogous cases have reached similar conclusions. The search of a locker maintained by an employee of the United States Mint was upheld because, among other things, the locker was "regularly inspected by the Mint security guards for sanitation purposes." No reasonable expectation of privacy could be expected in an office or credenza due to "extremely tight security procedures," to include frequent scheduled and random searches by security guards. In each of these cases, the courts relied on specific regulations and practices in finding that an expectation of privacy was not reasonable.

3. Openness and Accessibility

There is no REP in areas that are, by their very nature, "open" and "public." REP may exist in a private space (such as a desk) within an otherwise public space (such as a government building). REP in an item or area is more likely to exist when that item or area is given over to an employee's exclusive use. Locking office doors and the use of passwords to restrict an employer's access to computer files is evidence of the employee's subjective expectation of privacy.

The more accessible the item or area is to others, the less likely that REP exists. Offices that are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits may be so open to fellow employees or the public that no expectation of privacy is reasonable. Nevertheless, the fact that others may be permitted access to an employee's office, desk, computer, or filing cabinet does not, by itself, automatically destroy REP. Privacy does not require solitude. The existence of a master key, or an employee's failure to consistently shut and lock an office door, does not automatically sacrifice any expectation of privacy in that area.

The Second Circuit Court of Appeals case of *Leventhal v. Knapek* illustrates how the realities of the workplace can result in a finding that REP ***does*** exist. Leventhal had a private tax preparation business. In running the business, he violated

agency policy by impermissibly loading unauthorized software on his government computer. He committed a second violation when he improperly used agency computer equipment to print private tax returns. A warrantless search of his computer in response to an anonymous tip uncovered the unauthorized software. After disciplinary actions were completed, Leventhal filed suit alleging the warrantless search of his computer was a Fourth Amendment violation. In finding that he had REP in the computer, the court noted:

> Leventhal occupied a private office with a door. He had exclusive use of the desk, filing cabinet, and computer in his office. Leventhal did not share use of his computer with other employees in the Accounting Bureau nor was there evidence that visitors or the public had access to his computer.

While support personnel may have had access to Leventhal's computer at all times, "there was no evidence that these searches were frequent, widespread, or extensive enough to constitute an atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable."

4. The Position of the Employee

REP is less likely for jobs with high security requirements. REP is less likely in industries that are subjected to pervasive regulation to ensure the safety and fitness of its employees. REP is less likely in certain forms of public employment even with respect to personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Law enforcement is in this special category. The government has the power to regulate the conduct of its police officers even when the conduct involves the exercise of a constitutionally protected right. While law enforcement officers do not lose their Constitutional rights, there is a substantial public interest in ensuring the appearance and actuality of police integrity. This interest in police integrity may justify some intrusions on the privacy of

police officers which the Fourth Amendment would not otherwise tolerate.

5. Waiver of Rights / Consent

Government employees may actually waive their expectation of privacy as a precondition of receiving a certain benefit from their employer such as lockers, government vehicles, or computers. Employees are often required to sign forms acknowledging inspection and search policies, waiving any objections, and consenting to those policies. In the Sixth Circuit Court of Appeals case of *American Postal Workers Union v. United States Postal Service*, postal employees were eligible to receive personal lockers at their postal facility. Before being allowed to do so, however, each employee had to sign a waiver that noted the locker was "subject to inspection at any time by authorized personnel." The administrative manual of the Postal Services noted that all property provided by the Postal Service was "at all times subject to examination and inspection by duly authorized postal officials in the discharge of their official duties." Finally, the collective bargaining agreement for these employees "provided for random inspection of lockers under specified circumstances." In light of the clearly expressed provisions permitting random and unannounced locker inspections under the conditions described above, there was no REP in the lockers.

REP exists in the workplace when the employee has a subjective expectation of privacy that is objectively reasonable, based on the totality of the circumstances (especially those discussed above).

IV. If REP Does Exist, Is an Intrusion Reasonable?

Even though there is a strong preference that searches be performed pursuant to warrants, courts have recognized that in certain special situations the requirement to obtain a warrant is impractical. Such is the case with public employers who find themselves in a somewhat unique position. On the one hand is

the obligation to follow the mandates of the Fourth Amendment; on the other is the responsibility for ensuring the efficient and proper operation of the department or agency. In cases involving searches conducted by a government supervisor, courts balance the invasion of the employees' REP against the government's need for supervision, control, and the efficient operation of the workplace. As noted by the Supreme Court in *O'Connor*:

> Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is away from the office. Or … employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance. In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.

For public employers, there is an exception to the probable cause and warrant requirements. In *O'Connor*, the Supreme Court outlined two basic categories of workplace searches: (1) searches for work-related purposes (either non-investigatory or for the purpose of investigating workplace misconduct), and (2) searches for evidence of criminal violations. Special needs, beyond the normal need for law enforcement, make the probable cause requirement impracticable for legitimate work-related, non-investigatory intrusions as well as for investigations of work-related misconduct. Even though not a component of the definition of "search," motive is an essential factor in determining the reasonableness of a government workplace intrusion.

A. Searches for Work-Related Purposes

For the probable cause and warrant exception to apply, the search must be work-related. This element limits the exception to circumstances in which government supervisors who conduct the search act in their capacity as employers, rather than law enforcers. Work-related intrusions by public employers are justified by the need for the efficient and proper operation of the workplace. Work-related searches typically fall within one of two similar, but distinct, circumstances.

1. Non-investigatory purpose

A warrantless search of a government employee's workplace may be conducted for a work-related, non-investigatory purpose, such as retrieving a needed file. Operational efficiency would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file, a piece of office correspondence, a book, or a compact disk. For this reason, public employers must be given wide latitude to enter employee offices for work-related, non-investigatory reasons.

2. Work-related misconduct investigations

A warrantless search of an employee's workspace may be performed during an investigation into allegations of work-related misconduct, such as improper computer usage. As noted by the Supreme Court in *O'Connor*:

> Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. ... In our view, therefore, a probable cause requirement for

> searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

3. "Reasonable" intrusions

In either of the above situations, the search must be "reasonable" based on the totality of the circumstances. Generally, a government supervisor's search of an employee's REP is reasonable when the measures used are reasonably related to the objectives of the search and not excessively intrusive in light of its purpose. Under this standard, the search must meet two requirements: the search must be: (1) justified at its inception, and (2) permissible in scope. This is the equivalent of the "reasonable suspicion" standard outlined by the Supreme Court in *Terry v. Ohio*[4].

(a) Justified at the Inception

A warrantless search of an employee's REP for a non-investigatory, work-related purpose, such as to retrieve a needed file, will be "justified at its inception" when the supervisor reasonably believes that the sought object is located there. A search of a government employee's REP for evidence of work-related misconduct will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence of such misconduct. A supervisor must have an articulable reason (or reasons) for believing that work-related materials or evidence of work-related misconduct are located in the place to be searched.

(b) Permissible In Scope

A search is "permissible in scope" when the measures used are reasonably related to the objectives of the search and

[4] This case is briefed in the companion book, *Legal Division Reference Book.*

not excessively intrusive in light of the nature of the misconduct. This means that the search is limited to only those areas where the item sought is reasonably expected to be located. For example, it is reasonable to look in a desk drawer for a highlighter. It is not "permissible in scope" to boot up the computer when looking for a highlighter.

(c) Plain View Seizures

The plain view doctrine allows seizure of evidence discovered while lawfully inside an REP area. There are three requirements for a permissible plain view seizure of evidence. First, you must lawfully be in a position to observe the item; second, the incriminating nature of the item must be immediately apparent; and third, you must have a lawful right of access to the object itself.

Criminal evidence discovered during a government workplace search for a work-related purpose will be admissible as a plain view seizure so long as the search meets the criteria discussed above.

B. Searches for Evidence of Criminal Violations

Although in *O'Connor* the Supreme Court specifically declined to, several lower courts have addressed the appropriate standard for searches when an employee is being investigated for criminal misconduct that does not violate some workforce policy. They have found that the rationale for the lesser burden *O'Connor* places on public employers is not applicable in a purely criminal investigation. Where the sole motivation behind a workplace search is to uncover evidence of criminal wrongdoing, the appropriate standard is probable cause.

The line between a work-related search and a search for criminal evidence may be clear in theory, but is often blurry in fact. This is especially true when the personnel conducting the search are members of an agency or department that is undeniably in the business of investigating the violation of the criminal laws. The mere involvement of law enforcement personnel will not automatically convert a work-related search

into a criminal investigation. An agent's dual role as an investigator of workplace misfeasance and criminal activity does not invalidate the otherwise legitimate work-related workplace search. On the other hand, when a supervisor's role is no longer that of a manager of an office but that of a criminal investigator for the government and when the purpose is no longer to preserve efficiency in the office but to prepare a criminal prosecution against the employee, searches and seizures by the supervisor or by other government agents are governed by the Fourth Amendment admonition that a warrant be obtained in the absence of exigent circumstances. In determining whether the investigation is criminal in nature, the proper focus is not on the positions or capabilities of the persons conducting the search, but rather on the reason for the search itself. Factors considered by courts in making this determination include whether a criminal investigation has been opened, whether a workforce policy was violated, and the position of the individual who conducted the search.

C. "Dual-Purpose" Searches

There are situations in which a government employee's misconduct might also be criminal. For example, a government employee may be receiving and downloading child pornography on a government computer for personal use. This conduct would constitute a violation of workforce policy rules on appropriate government computer/Internet usage and is clearly criminal in nature. In such a situation, a public employer has two purposes in conducting a search: (1) to uncover evidence of the administrative violation, and (2) to uncover potential criminal evidence.

When a government supervisor receives information that an activity is occurring that violates both workforce regulations and criminal statutes, what standard must be followed when searching the employee's workplace? Because of the work-related misconduct that is occurring, will the lesser standard of *O'Connor* suffice? Or, because of the criminal nature of the allegations, must the traditional probable cause and warrant requirements be met? The courts have adopted fairly generous

interpretations of *O'Connor* when confronted with mixed-motive searches.

Even assuming that the dominant purpose of the warrantless search is to acquire evidence of criminal activity, the search remains within the *O'Connor* exception to the probable cause and warrant requirement. The government does not lose the capacity and interests of an employer - its special need for the efficient and proper operation of the workplace - merely because the evidence obtained is also evidence of a crime.

NOTES

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I. Introduction

Law enforcement work is dangerous. Contact with the public is constant, often confrontational and charged with emotion. Within this context, you are responsible for preventing and investigating crimes that may include violations of "civil rights." Further, the Constitution and federal laws protect against the unjustified infringement of those civil rights by law enforcement officers themselves.

You must perform your duties in accordance with the Constitution and federal law. You may be both civilly and criminally liable for violations of civil rights if you discharge your duties unreasonably, recklessly, or indiscriminately, or exceed the scope of your employment and authority.

A. Civil Rights

"Civil rights" are guaranteed to individuals by the Constitution and protected by federal law. Constitutionally enumerated civil rights include, but are not limited to, the First Amendment's freedom of speech, freedom of religion, and freedom of assembly; the Fourth Amendment's protection against unreasonable searches and seizures; the Fifth Amendment's right of due process and the protection against self incrimination; and the Eighth Amendment's protection against cruel and unusual punishment. Federal statutes add to

the list of civil rights, including rights established in the areas of education, employment, voting, and access to public facilities and accommodations.

B. Civil Liability

1. Definition of a Tort

The civil liability of a federal law enforcement officer is predominantly an issue of state tort law. Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. The remedy can involve money damages or an injunction. An injunction is an order from a court that prohibits someone from doing something.

2. Torts Versus Crimes

Torts differ from crimes in many respects, primarily in the interests affected by each and in the remedies afforded by each. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. As such, a federal criminal prosecution is captioned as "United States v. Defendant." A tort, on the other hand, is a civil action commenced and maintained by the injured person. A civil lawsuit is captioned as "Plaintiff (the injured party) v. Defendant (the wrongdoer)."

The intent of a criminal prosecution is to protect and vindicate the interests of the public as a whole by punishing offenders, removing them from society (incarceration), reforming them, and deterring others from committing similar acts. The penalty upon conviction of a crime is a fine, imprisonment, and sometimes death. Criminal law is not primarily concerned with compensating the victim, although restitution and victim assistance programs may accomplish this end. Tort actions are intended to compensate the victim for the damage suffered, at the expense of the wrongdoer. A defendant who loses a lawsuit may be required to pay money damages (usually the amount

that will compensate the victim, but, in certain cases, punitive damages may be awarded). Torts are private matters that are not usually a concern of the government or the public (unless, of course, the government is a party).

Both criminal prosecutions and civil lawsuits require the proof of "elements." In a criminal prosecution, the government must present evidence that proves each and every element of each offense charged beyond a reasonable doubt. In a civil action, the plaintiff must prove each and every element of each tort alleged by a preponderance of the evidence.

Although there are significant differences between crimes and torts, the remedies are not mutually exclusive. The same act or conduct can be the subject of both criminal prosecution and civil suit.

II. Federal Criminal Remedies

Congress passed criminal statutes designed to punish those who violate the civil rights of others.

A. Title 18 U.S.C. § 241[1], Conspiracy Against Rights

This statute allows the federal government to prosecute anyone, including federal, state, and local law enforcement officers, who conspire to violate a person's civil rights. It reads, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

[1] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

> If two or more persons go in disguise on the highway, or on the property of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured…

The statute provides penalties, including fines, imprisonment, and in certain instances, death.

There are two distinct crimes under this statute.

1. Elements of Crime One

The elements of the first crime are:

- A conspiracy
- To injure, oppress, threaten or intimidate
- Any person
- In the exercise or enjoyment of any Constitutional or federal civil right

The conspiracy under this statute is an agreement between two or more persons to injure, oppress, threaten, or intimidate any person in the exercise of a constitutional or federally guaranteed right. Section 241 differs from 18 U.S.C. § 371, the general federal conspiracy statute, by not requiring an overt act; that is, an act in furtherance of the conspiracy. Under § 241, the agreement by two or more persons, coupled with the specific intent to violate a person's civil rights, is sufficient to establish the crime. "Any person" should be taken literally and includes citizens, visitors, legal and even illegal aliens.

2. Elements of Crime Two

The elements of the second crime are:

- Two or more persons go in disguise on the highway or property of another

- To prevent or hinder
- Any person
- In the exercise or enjoyment of any Constitutional or federal civil right

The historical context of this law is apparent. It was specifically designed to deal with the activities of the Ku Klux Klan. The crime is a felony, punishable by up to death.

B. Title 18 U.S.C. § 242[2], Deprivation of Rights Under Color of Law

This statute empowers the federal government to prosecute federal, state, and local law enforcement officers and other public officials who, under the mantel of their official authority ("color of law"), intentionally violate the civil rights of prisoners, suspects, or other persons. It reads, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be ….

The statute provides penalties including fines, imprisonment, and in certain instances, death.

[2] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

1. Elements

The elements of this crime are:

- An activity "under color of law"
- With the specific intent (willfully)
- To deprive any person
- Of any Constitutional or federal civil right

2. "Under Color of Law"

"Under color of law" necessarily involves actions on the part of a law enforcement officer or public official, but not everything done by a law enforcement officer is done "under color of law." If status as a law enforcement officer did not materially facilitate the wrong committed, the officer is deemed to have acted in a purely private capacity, and will not be criminally liable under this statute.

Certainly, when an officer does an act of a general law enforcement nature, such as make an arrest, conduct a search, etc., the officer will be considered to have acted "under color of law." Whether the officer was in uniform or "on duty" are important, but not controlling factors in determining whether an officer was acting under color of law. Law enforcement officers can act "under color of law" even while off duty and out of uniform.

"Under color of law" is a broader legal concept than "within the scope of employment." Misuse of power, possessed by virtue of law and made possible only because the wrongdoer is clothed with the authority of law, is action taken "under color of law." Even if the law enforcement officer does not purport to have acted in the line of duty, and even if the conduct clearly violates the law or agency policy, it will still be treated as "under color" of his authority if his status as a law enforcement officer materially facilitated the wrong. An officer may not remove, literally or figuratively, the badge or mantel of authority by

disavowing it, and thereby avoid prosecution under this statute. Therefore, an officer can act outside the scope of employment and even contrary to law, policy and practice and still be determined to have acted "under color of law."

Private persons can act "under color of law" if they act in concert and jointly engage with law enforcement in the violation of civil rights.

3. "Specific Intent (Willfully)"

It is not enough that the officer intended to do the act that resulted in the deprivation of a constitutional or federal civil right. To convict an officer of violating § 242, the government must prove the officer possessed specific intent to deprive a person of a civil right. There must be the specific intent to punish or prevent the exercise of a constitutionally guaranteed right.

"Willfully" implies not merely the conscious purpose to do wrong, but intent to deprive a person of a right which has been made specific either by the terms of the Constitution or federal law, or by court decisions interpreting them. Requisite intent can be established by all attendant circumstances.

III. Federal Civil Remedies - Constitutional Torts

In addition to criminal prosecution, tort actions against the federal government and its employees and agents can generally be classified as constitutional torts (based on a violation of rights found in the United States Constitution) or as state law torts (principles of civil liability that exist under the laws of the states).

Constitutional tort claims may be asserted against a law enforcement officer under two separate, but related, bases.

A. Title 42 U.S.C. § 1983[3] (Civil Action For Deprivation of Rights)

Title 42 U.S.C. § 1983 reads, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute provides a civil cause of action against *state and local* law enforcement officers who, acting under color of law, deprive an individual of any civil right. It is not a criminal statute, but a civil one that permits state and local law enforcement officers to be civilly sued in federal court for civil rights violations.

In order to establish a civil lawsuit claim under § 1983, the following elements must be proven by a preponderance of the evidence:

- An act
- Under color of law of a state, territory or the District of Columbia
- Depriving any person (a citizen or other person within United States jurisdiction)
- Of rights, privileges, or immunities secured by the Constitution or federal laws

[3] This statute can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Statutes."

"Under color of law" is the same principle as discussed regarding § 242. However, by its express language, this statute applies only to state and local law enforcement and does not apply to federal officers and agents.

No specific intent to violate a Constitutional or federal civil right is required. The plaintiff must only prove intent to do the act which results in the deprivation of civil rights. It must be a volitional act and not accidental or the result of misadventure.

The result of an action under this statute may be judgment for actual (compensatory) damages, punitive damages, attorney's fees, and/or injunction.

B. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*

Until the 1971 Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[4], a person whose civil rights were violated by a federal officer or agent was unable to sue a federal agent in federal court. 42 U.S.C. § 1983 was not available since by its language, it applied only to civil rights violations committed by state and local officials.

In the *Bivens* case, Mr. Bivens alleged that agents from the Federal Bureau of Narcotics (now the Drug Enforcement Administration) arrested him and searched his apartment without a warrant and that his arrest was made without probable cause. Mr. Bivens filed a civil suit against the federal agents in federal court. Bivens argued that the federal agents violated his Fourth Amendment Constitutional right to be safe in his own home from unreasonable searches and seizures.

Eventually, *Bivens* reached the Supreme Court on the issue of whether federal agents may be sued in federal court for

[4] Cases named in this chapter without a case cite are briefed in the companion book, *Legal Division Reference Book*.

violations of Constitutionally protected rights. The Supreme Court decided the alleged behavior, if true, constitutes a federal Constitutional wrong which should be determined by a federal court rather than a state court. The Supreme Court also stated that since there was no remedy in state law for wrongdoing committed by federal agents, the Court should create such a remedy. Based upon the *Bivens* decision, federal agents are now subject to civil suits alleging intentional civil rights violations.

In *Bivens*, the Supreme Court in essence created an analogy to 42 U.S.C. § 1983 under which federal officers and agents may be sued in civil court for violating a person's Constitutional rights. It is commonly called a "*Bivens* Action." The Supreme Court has limited *Bivens* actions to only certain Constitutional violations. Specifically, the Supreme Court has held that only violations of rights protected by the Fourth Amendment, Fifth Amendment (Due Process), or Eighth Amendment (Cruel and Unusual Punishment) can serve as the basis for a *Bivens* lawsuit to recover damages.

IV. Common Incidents of Civil Liability under *Bivens* and the Defense of Qualified Immunity

The following are the most common types of Constitutional torts alleged against federal officers under *Bivens*.

A. Unlawful Arrests and Searches Without Probable Cause

In *Bivens*, the Supreme Court held that federal law enforcement officers are civilly liable for violations of the Fourth Amendment. Thus, when a federal law enforcement officer makes an arrest without probable cause or unlawfully conducts a search, a *Bivens* suit can be filed against the officer.

In determining whether a *Bivens* suit for an unlawful warrantless arrest is proper, the courts must determine whether a reasonable officer could have believed the arrest to be

lawful, in light of clearly established law and the information the arresting officers possessed. Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had "arguable" probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a reasonable, prudent, cautious officer in believing that the person arrested had committed or was committing an offense. Where "arguable" probable cause exists, law enforcement officers who reasonably but mistakenly conclude that probable cause is present are entitled to qualified immunity.

The same standard applies in unlawful search cases. In search cases, it is likewise inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. The relevant question is whether a reasonable officer could have believed the search to be lawful, in light of clearly established law and the information known by the searching officer. An officer's subjective beliefs about the search are irrelevant.

B. Knowingly Submitting a False or Misleading Affidavit For Search or Arrest Warrants

In *Franks v. Delaware* the Supreme Court held that a law enforcement officer violates the Fourth Amendment if, in order to obtain a search warrant, he perjures himself or testifies in reckless disregard of the truth. It is clearly established that the Fourth Amendment requires a truthful, factual showing sufficient to constitute probable cause. Specifically, the Court noted that:

> Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

> In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is not sufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

A *Franks* violation can also occur when law enforcement officers obtain a warrant through the intentional or reckless omission of material facts.

Although the *Franks* standard was developed in the criminal context, it also defines the scope of qualified immunity in civil rights actions, including *Bivens* suits.

When the information in an affidavit is reasonably believed to be true or appropriately accepted as true by the law enforcement officer, a *Bivens* civil lawsuit may not be properly brought. However, an affidavit that contains information the officer knew to be false or would have known was false had the officer not recklessly disregarded the truth violates the Fourth Amendment. In such circumstances, a *Bivens* suit may be properly brought, because the law enforcement officer cannot be said to have acted in an objectively reasonable manner. Qualified immunity will not be granted.

C. Fourth Amendment Excessive Force Claims

In *Graham v. Connor* the Supreme Court established the proper framework for analyzing an individual's claim that a law enforcement officer used excessive force. The Supreme Court has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it.

The issue in cases involving claims of excessive force is whether the arresting officer's actions were "objectively

reasonable" in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent or motivation. This "reasonableness" analysis must be judged from the perspective of a reasonable officer on the scene, and not with the 20/20 vision of hindsight.

D. Failure to Intervene When Excessive Force is Used

An individual has the right under the Fourth Amendment to be free from the excessive use of force by law enforcement officers. A law enforcement officer has an affirmative duty to intercede on the behalf of a person whose constitutional rights are being violated in his presence by other officers. Accordingly, a federal law enforcement officer may, in certain circumstances, be sued under *Bivens* for failing to intervene to protect a victim from another officer's unlawful use of excessive force. One who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.

It is not necessary that an officer actually participate in the excessive use of force to be held liable. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for his inaction. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers when that officer observes or has reason to know: (1) that excessive force is being used; or (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official. Thus, if a law enforcement officer fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer can be held liable under *Bivens*.

There must have been a realistic opportunity to intervene to prevent the harm from occurring. In order for the officer to be liable, the excessive force must be of sufficient duration to allow the officer to intervene. If so, the officer who stands by without trying to assist the victim becomes a "tacit collaborator."

While most of the cases that recognize this cause of action involve state officials being sued under § 1983, the general trend in the appellate courts is to incorporate § 1983 law into *Bivens* suits. Since the remedial purposes of *Bivens* and § 1983 are essentially the same, appellate courts have generally looked to the principles established in the case law construing § 1983 when deciding cases brought under *Bivens*.

E. Immunity For Constitutional Violations

1. Sovereign Immunity

Sovereign (governmental) immunity has its common law roots in England under the theory that "the King can do no wrong." This theory was an outgrowth of the divine rights of kings, and, in effect, prevented any and all lawsuits against the Crown.

When the individual sovereign was replaced by the modern state, this principle was adopted to provide that a suit against a ruling government without its consent was inconsistent with the very idea of supreme executive power. In the United States, public policy and necessity dictate that the United States as sovereign is immune from suit unless it consents to be sued. The terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.

2. Absolute Immunity

"Absolute immunity" avoids personal civil liability. It is conferred because of the status or position of the favored defendant. Officials, such as legislators in their legislative functions, judges in their judicial functions, and certain executive branch officials (the President, executive officer engaged in adjudicative functions, and prosecutors), whose special functions or constitutional status requires complete protection from suit, may assert the defense of absolute immunity.

3. *Qualified Immunity*

Qualified immunity is immunity from civil suit and entitles an officer to avoid standing trial or face the burdens associated with civil litigation. This type of immunity applies to law enforcement officers. When a law enforcement officer is sued for a constitutional tort, the officer may be entitled to qualified immunity. Qualified immunity (sometimes called "good faith" immunity) is an affirmative defense that can protect the officer from individual civil liability. It must be raised by the defendant (officer). Qualified immunity shields government officials from personal liability for civil damages provided: (1) they act reasonably and in good faith; and (2) their conduct does not violate clearly established statutory or constitutional rights of which a reasonable law enforcement officer would have known.

The cases of *Hanlon v. Berger* and *Wilson v. Layne* illustrate the concept of "qualified immunity." In both of these cases, the plaintiffs sued federal agents under *Bivens*, alleging violations of the Fourth Amendment when the agents brought the media along during the service of an arrest warrant and a search warrant. In *Wilson*, federal marshals took a newspaper reporter and photographer along when they attempted to serve an arrest warrant at the home of the suspect's parents. In *Hanlon*, federal Fish and Wildlife Service agents took CNN along when they served a search warrant at the Berger ranch. Both followed established agency ride-along policies.

The Supreme Court had two questions to decide. First, was there a Constitutional violation? The Supreme Court held that police violate the Fourth Amendment rights of homeowners by bringing members of the media or other third parties into homes during the execution of a warrant, when the presence of the third parties in the home is not in aid of the warrant's execution. In other words, these federal agents had committed a Constitutional tort.

Second, if a violation was shown, were the agents entitled to qualified immunity? In assessing whether a law enforcement

officer is protected by qualified immunity, the test to be applied is one of "objective reasonableness." The Supreme Court held that the agents acted reasonably and in good faith, relying on their established policy for media "ride-alongs" and the fact that media ride-alongs were a widespread practice.

In assessing whether the right that was allegedly violated was "clearly established," the Court said that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The Court held that it was reasonable for these agents to have believed that bringing the media along during the execution of an arrest or search warrant (even in a home) was lawful. As such, the right was not clearly established. Therefore, the agents were entitled to qualified immunity.

In sum, when the defense of qualified immunity is applicable in a lawsuit alleging a constitutional tort, officers will not be held personally liable as long as their actions are reasonable in light of current law.

V. Civil Liability Under State Tort Principles

As stated previously, tort actions against the federal government and its employees and agents can generally be classified as constitutional torts (based on a violation of rights found in the United States Constitution) or as state law torts (principles of civil liability that exist under the laws of the states). The traditional state law torts applicable to federal law enforcement officers are: (1) negligent torts; and (2) intentional torts (such as battery, assault, and false imprisonment).

A. Negligent Torts

For federal law enforcement officers, negligence is the most frequently occurring of the state law torts due the operation of government motor vehicles. The elements of an

action for negligence are: Duty; Breach of Duty; Causation; and Damages.

1. Duty

Generally, there is no affirmative duty to act. That is, the law does not usually require that people intercede, even in situations in which they could prevent property damage, injury, or loss of life at no risk to themselves. Failure to intercede will not create civil liability for death or injury or property damage. There are, however, exceptions to this general rule. For example, there is an affirmative duty to act when the plaintiff's peril results from the defendant's own negligence. In this case, the defendant is expected to intercede to aid the plaintiff.

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

In the law enforcement context, the general rule is that there is no right to basic public services and no affirmative duty on law enforcement to act when members of the general public are imperiled. There are, however, exceptions to this general rule. Special relationships can exist between a person and law enforcement creating an affirmative duty to act, such as when the police promise to protect the target of a threat (i.e., the Witness Protection Program), or when they assure a caller that they are responding to their request for assistance. Failure to do so can result in civil liability when reliance on those specific promises of protection causes the person to forego steps to protect themselves.

A special relationship will also exist when law enforcement officers have someone in their custody. Once the government takes a person into its custody, the law imposes a duty to assume some responsibility for the person's safety and general well-being. For example, federal officers were found to be liable when, while walking a disabled and intoxicated

arrestee up a ramp and into the police station, the arrestee tripped and fell striking her head. As a result, the arrestee suffered a fracture and other injuries. The Court said that the arrestee would not have fallen were it not for the officers' negligence. The officers had a duty to assist the arrestee in walking to ensure that she did not fall since the arrestee's hands were cuffed behind her back. The officers breached that duty by failing to hold on to her securely to prevent her stumbling and by failing to break her fall.

Acting when not required to do so may create civil liability when there would otherwise be none. When there is no affirmative duty to act, one who gratuitously acts for the benefit of another assumes a duty to act like an ordinary, prudent, reasonable person. The actor may be civilly liable for injuries or property damage suffered by the person they are trying to aid. In response to such liability exposure, many states have enacted "Good Samaritan" statutes. These statutes are designed to encourage medical professionals to intervene to save lives and prevent serious injury when they would otherwise have no legal duty to do so. These laws protect licensed doctors, nurses, paramedics, EMTs, and similarly trained and skilled persons from civil liability when they voluntarily render emergency treatment. They are still liable, however, for gross negligence.

2. Breach of Duty

Breach of duty is proven by showing that the defendant failed to meet the applicable standard of care. What is the applicable standard of care? For those to whom the defendant owes or has assumed a duty, the basic standard of care required is that of an objective "reasonable person." A fundamental question in a negligence action is, "What would a reasonable person have done under the same or similar circumstances?"

Sometimes, however, special standards will apply requiring a person to exercise care beyond that which would be expected of an ordinary "reasonable person." For example, professionals are required to possess and exercise the

knowledge and skill of a member of their profession in good standing and to use such superior judgment, skill, and knowledge as they may actually possess. For law enforcement officers and agents, for acts of a law enforcement nature within the scope of their duties, the fundamental question becomes, "What would a reasonable law enforcement officer or agent have done under the same or similar circumstances?"

A breach of duty can be shown by proving that:

- The care exercised was below the standard of care established by custom or usage;
- A violation of a pertinent statute such as a violation of statutory rules of the road by a federal employee in driving a motor vehicle in the course of employment; or
- A violation of agency policies and practices.

3. Causation

The defendant's act that breached the duty of care must be the cause of plaintiff's damages.

4. Damages

The plaintiff must suffer some form of damage. In civil suits, the plaintiff may recover for the personal injury or property damage caused by defendant's breach of duty. The recovery is generally compensatory, designed to make the injured party whole by reimbursing actual expenses and providing for pain and suffering and permanent injury and damage. It may also include attorney's fees and costs of litigation. In intentional torts, it may also include punitive damages designed to punish the wrongdoer and deter future similar conduct.

B. Intentional Torts

The elements of an intentional tort are similar to those of a negligent tort except that the act that causes the damages must be willful and intentional.

Intentional torts can be against a person, or against property. Among the most common intentional torts in each category are the following:

1. Intentional Torts to the Person

- **Battery** - a harmful or offensive contact with the plaintiff's person by the defendant.

- **Assault** - a reasonable apprehension in the plaintiff of an immediate harmful or offensive contact with his person by the defendant.

- **False Imprisonment** - the defendant's confining or restraining the plaintiff to a bounded area; in certain cases confining the plaintiff's personal property may give rise to a suit alleging false imprisonment.

- **False Arrest** - a special category of false imprisonment involving the invalid use of the defendant's legal authority to confine the plaintiff.

- **Intentional Infliction of Emotional Distress** - the infliction of emotional distress on the plaintiff by a defendant who has engaged in extreme and outrageous conduct.

2. Intentional Torts to Property

- **Trespass (damage) to Land** (real property)

- **Trespass (damage) to Chattels** (personal property)

- **Conversion** (personal property) (theft)

VI. The Federal Tort Claims Act (FTCA)

In 1946, Congress enacted the Federal Tort Claims Act (FTCA). This act makes the United States liable under the local law of the place where the tort occurs for the negligent or wrongful acts or omissions of federal employees within the scope of their employment in the same manner and to the same extent as a private individual under like circumstances.

The purposes of the FTCA are two-fold: (1) to provide persons injured by the torts of federal employees with an appropriate remedy against the United States (a waiver of sovereign immunity) ; and (2) to protect federal employees from personal liability for torts committed within the scope of their employment (absolute immunity).

Under the FTCA, a "federal agency" includes the executive departments, the judicial and legislative branches, the military departments, and corporations primarily acting as instrumentalities or agencies of the United States, but expressly excludes any contractor with the United States.

Under the FTCA, an "employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty, and persons acting on behalf of a federal agency in an official capacity.

A. Negligent Torts

The FTCA covers lawsuits for negligent or wrongful acts or omissions of federal employees within the scope of their employment that cause injury, loss of property, personal injury or death. This remedy against the United States is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim. In those cases where the federal government has waived its sovereign immunity from torts, a tort action against the United States is the sole remedy available to a plaintiff. A suit against the individual federal employee personally is precluded.

In effect, the United States has partially waived sovereign immunity. The United States has consented to be liable in the same manner and to the same extent as a private individual under like circumstances while reserving the right to any other defense to which it is entitled.

B. Intentional Torts

The FTCA specifically does not apply to intentional torts committed by federal employees who are not law enforcement officers. However, intentional torts such as assault, battery, false imprisonment, false arrest, and malicious prosecution are common allegations against law enforcement officers. As a result, the Act was amended to provide additional protection for federal "investigative and law enforcement officers."

The term "investigative or law enforcement officer" means any officer of the United States who is empowered by law to: (1) execute searches; or (2) seize evidence, or (3) make arrests for violations of federal law. Any one or more of these criteria will qualify. The FTCA now provides that if the act was that of an investigative or law enforcement officer, the government will permit itself to be sued with respect to assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.

C. Scope of Employment

"Scope of employment" is defined by determining whether the employee was performing the employer's (federal government) business at the time of the occurrence. All the facts and circumstances surrounding the incident are considered to make this determination. Factors such as the employee's job description and any agency policies promulgated through directives and general orders must also be taken into account.

"Scope of employment" can be limited in a number of different ways. Law enforcement officers for some agencies and departments have broad authority to investigate and arrest

anywhere for any federal crime. Others are limited to certain federal offenses or certain defined geographical areas. Exceeding these limitations can mean that the law enforcement officer is outside the scope of employment.

Generally, federal law enforcement officers who intervene in purely state and local criminal offenses are outside the scope of employment. There is no affirmative duty to intervene and, therefore, no civil liability for failure to do so. However, intervention in state and local incidents can create liability for both the individual federal law enforcement officer and the agency or department when there would otherwise be none. Even though states may grant varying degrees, up to full, of peace officer status to federal law enforcement officers, many agency and department policies prohibit officers and agents from getting directly involved in state and local incidents.

1. The Federal "Good Samaritan" Act

Due to the vague nature of "scope of employment" and the reluctance of many federal agents and officers to become involved in state criminal violations for fear of being outside their scope of employment, Congress enacted the "Federal Law Enforcement Officers' Good Samaritan Act." It applies only to law enforcement officers as defined in 5 U.S.C. § 8401(17).

Not every federal law enforcement officer is covered, but for those that are, the Act provides that they are within the scope of employment when taking reasonable action, including the use of force: (1) to protect an individual in the presence of an officer from a crime of violence; or (2) to provide immediate assistance to individuals who have suffered or who are threatened with bodily harm; or (3) to prevent the escape of any individual whom the officer reasonably believes to have committed in the presence of the officer a crime of violence.

In essence the Act extends the federal scope of employment to non-federal crimes of violence being committed in the federal officer's presence. It does not expand federal arrest authority. But, because this law is still relatively new,

the contours of its protections are not clearly defined. Does it obligate the Department of Justice to provide legal counsel to the federal officer or agent? Does it mandate that the United States indemnify the officer or agent for any damages should the claim be successful? There are no clear answers. There remains a real risk that intervening in purely state and local incidents will be outside the scope of employment and outside the purview of the FTCA, exposing the individual officer or agent to personal, civil liability.

2. Scope of Employment and Government Vehicles

Another common scope of employment issue involves the use of government vehicles. When is the use of a government vehicle considered outside the scope of employment? Agency or department policies and procedures generally outline authorized and prohibited uses. State law often defines scope of employment in the use of government vehicles in terms of "official business" and "personal frolic." State laws vary over how much of a deviation (both in purpose and distance) is required to put the use outside the scope of employment.

A law enforcement officer found to have used a government vehicle outside the scope of employment will not be protected by the FTCA and will, therefore, be personally liable for the injury and damages caused. Therefore, KNOW, UNDERSTAND, AND FOLLOW pertinent agency policies and procedures. Once the facts are determined, the law of the state where the alleged injury occurred is applied to decide whether the employee was "within the scope of employment."

3. Certification That Employee Was Acting Within the Scope of Employment

When presented with a claim, the agency makes the initial decision on scope of employment. If the agency refuses to certify that the employee was acting within the scope of employment, the employee may request the Attorney General to so certify. Upon certification by the Attorney General that the defendant employee was acting within the scope of employment at the time of the incident on which the claim is based, the

United States will be substituted as the party defendant. If the Attorney General refuses to certify scope of employment, the employee may petition the U.S. District Court to find and certify that the employee was acting within the scope of employment.

D. Initiating a Civil Lawsuit under the FTCA

Before initiating a civil lawsuit against the government, a claimant must first exhaust administrative remedies. The agency may deny the claim or negotiate settlement of the claim within certain limits. Acceptance by a claimant of a settlement is final and conclusive, and constitutes a complete release of any claim against the United States and the employee of the government whose act or omission gave rise to the claim. The claimant may file suit only after the claim has been administratively denied or the claimant has refused the Government's final offer of settlement.

The United States District Court has exclusive jurisdiction over civil actions on FTCA claims against the United States. Furthermore, the trial in District Court will be without a jury.

A tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency within two years of the date of the injury or damage. Suit may be filed beyond that two year limit so long as it is within six months of the date of the final denial of the claim by the agency to which it was presented.

The absolute immunity afforded federal employees under the FTCA against personal liability for torts does not apply in a Bivens action alleging a constitutional tort. Constitutional torts are never within the scope of employment. Instead, the federal officer will likely rely upon qualified immunity regarding a constitutional tort claim.

E. Defenses

There are several common defenses available to every defendant to the extent that the defenses are recognized in the state where the tort occurred.

1. To Negligent Torts

- **Assumption of Risk** - If a plaintiff has voluntarily placed himself or herself in a position of harm, knowing the dangers involved, the defendant will not be responsible for the subsequent injury to plaintiff. Plaintiff has assumed the risk of such injury.

- **Contributory/Comparative Negligence** - If the plaintiff has been negligent, and that negligence is a cause of the plaintiff's damages, then, depending on the law of the state where the incident occurred, the plaintiff may be prevented from recovering anything against the defendant or may have the recovery apportioned according to the degree of culpability of each.

2. To Intentional Torts

- **Consent** - Knowing and voluntary consent by plaintiff will bar recovery against defendant. However, defendant's actions must stay within the bounds (scope) of the consent.

- **Self-Defense and Defense of Others** - Reasonable force may be used to defend against harmful or offensive bodily contact. "Reasonable force" is a fact intensive concept. The general rule is that only such minimal force as is necessary to prevent the harm is allowed.

- **Necessity** - A defendant who acts to prevent a threatened injury from some force of nature, or other cause, independent of the defendant is acting under necessity. Such a defendant may not be liable for a lesser harm committed to prevent or avoid a greater harm.

NOTES

Chapter Twelve

Searching and Seizing Computers and Other Electronic Devices

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I. Introduction

The Fourth Amendment requires that all searches must be reasonable and that any search based upon a search warrant be based upon sworn facts showing probable cause to search a particular place or to seize a person or thing. Searches of computers and other electronic devices must therefore be in compliance with the Fourth Amendment's requirements.

A warrant to search a computer must demonstrate probable cause that evidence of a crime is stored on the particular computer to be searched. In executing a computer search warrant, you must take reasonable steps to confine your search to the scope of the search authorized by the warrant and to avoid searching for items or information not within that scope; however, while doing so, if you observe evidence that is immediately apparent to you is evidence of another crime, you may seize it under your plain view authority.

Searching a computer without a warrant is legally permissible in one of three situations: (1) when the search is conducted by a private (non-governmental) entity; (2) when government conduct does not intrude into an area where an individual has a "reasonable expectation of privacy" (REP); or (3) when a recognized exception to the warrant requirement exists.

II. Private Searches

The Fourth Amendment does not apply to a search conducted by a private person who is not acting as an agent of the government or with the participation or encouragement of a government official. For example, when a computer owner takes his computer to a private repair facility for servicing and incriminating evidence is found on the computer by the repair person, the Fourth Amendment does not apply because there was no intrusion into a REP area.

When searching without a warrant after a private search has occurred, you must limit your investigative search to the precise scope of the private search. Even though it was obtained without a warrant, the evidence within that scope may be

properly used by you to obtain a warrant for a further search of that computer. Moreover, you may temporarily seize that computer while you are actively seeking a search warrant. Of course, you could also conduct a warrantless search of that computer if a valid exception to the warrant requirement applies.

III. Reasonable Expectation of Privacy in Computers

A. Generally

There is a two-prong test for REP as to any place to be searched: first, whether the individual exhibited a personal, or subjective, expectation of privacy as to the place or thing to be searched; and, second, whether that expectation is one society is prepared to recognize as objectively reasonable. REP does not exist unless both prongs of the test are met.

In computer search cases, the question is whether an individual enjoys a reasonable expectation of privacy in electronic information stored on computers, smart phones, thumb drives, and other electronic storage media. If the answer is "yes," then you ordinarily must obtain a warrant before accessing the information. In analyzing the issue of REP, some courts have compared computers to closed containers such as filing cabinets.

To be sure, the Fourth Amendment generally prohibits you from accessing and viewing information stored in a computer without a warrant if, in the same situation, you would be prohibited from opening a closed container and examining the contents. That said, however, a few courts have recently begun veering away from that concept noting that a computer, given its design and purpose, very likely contains vast quantities of personal data. Thus, those courts have to varying degrees required the government to insure that it takes reasonable steps to insure that the execution of a computer search remains within the scope of the search authorized by the underlying search warrant.

B. Losing REP in a Computer

Although individuals generally have a reasonable expectation of privacy in their computers, circumstances may eliminate that expectation. Some of these circumstances are outlined below.

1. Exposure to the Public

In the landmark case of *Katz v. United States*[1], the Supreme Court made clear that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." When individuals make information on a computer openly available, they lose any expectation of privacy in that information. For example, this may occur when a person leaves data that is not encrypted or password protected on a computer that is accessible to others, or where one makes his computer files available to others via peer-to-peer software.

2. Stolen Computers

A thief has no REP in the contents of a computer he has stolen, including content that the thief has added to the stolen computer. This also applies to a computer that was obtained through fraud – such as a purchase with a stolen credit card; however, the rightful owner or possessor of the stolen computer generally retains REP in the contents.

3. Third Party Possession

The courts have repeatedly held that one who divulges information to a third party, even with the subjective expectation that the information will remain private, does not retain control over that information once it has been provided to the third-party. Rather, he assumes the risk that the third party will divulge the information to others.

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[1] Cases named in this chapter without a case cite are briefed in the companion book, *Legal Division Reference Book.*

IV. Exceptions to the Warrant Requirement

Warrantless searches that fall within an established exception to the warrant requirement do not violate the Fourth Amendment. Below are some of the common exceptions to the warrant requirement as they apply to searches of computers.

A. Consent

If a person gives valid consent to search, a warrant is not required.

1. Requirements

There are two requirements for a consent search to be valid. First, the consent must be voluntary and not the result of coercion. If a defendant later challenges the voluntariness of his consent, for example, in a motion to suppress, the government carries the burden of proving that consent was voluntary.

Second, the consent must be also given by an individual who possesses either actual or apparent authority over the computer to be searched. Do parents, roommates, friends, or others have the authority to consent to a search of another person's computer files? Generally, the answer to that question depends upon whether the owner of the computer has afforded the consenting person shared access to those computer files.

2. Scope of a consent search

Assuming voluntary consent by a person with authority to give it, the next issue is the scope of the consent that was given. For example, when a target consents to the search of his "computer," does the consent authorize you to search devices attached to the computer (such as a thumb drive or a portable USB hard drive) or media (such as CDs or DVDs) located near the computer?

The scope of a consent search is defined by the terms and plain meaning of the consent given. An individual may limit the scope of any consent. If so, the scope of a consent search may not exceed, either in duration or physical scope, the limits of the consent given. Additionally, where consent has been granted, it may also be revoked. If that happens, you must immediately stop searching unless another Fourth Amendment exception applies. Of course, any incriminating evidence that you discovered before the consent was revoked may be used to demonstrate probable cause in support of a search warrant.

Does consent to search a location or item implicitly include consent to access computer memory or electronic storage devices encountered during the search? Courts look to whether the particular circumstances of the request for consent implicitly or explicitly limited the scope of the search to a particular type, scope, or duration. Be especially careful about relying on consent as the basis for a search when consent was obtained for one reason or type of evidence, but you then want to conduct a search for a different reason or type of evidence. Because the decisions evaluating the scope of consent to search computers have sometimes reached unpredictable results, you must indicate the scope of the search explicitly when obtaining a suspect's consent to search a computer.

While consent to search "a computer" would ordinarily include the active memory and internal hard drives of the computer case or body, it does not necessarily include storage media such as CDs, DVDs, thumb drives, portable hard drives, floppy diskettes and other media. Caution is best here; the consent obtained should specifically include these items if you want to search them.

3. Third party consent

It is common for several people to own or use the same computer equipment. Generally speaking, if any of those people give permission to search for data, you may rely on that consent. In such cases, all users have assumed the risk that a co-user might discover everything in the computer, and might

also permit law enforcement to search this "common area" as well. A private third party may consent to a search of property under the third party's joint access or control. This rule often requires you to inquire into the third party's rights of access before conducting a consent search, and to draw lines between those areas that fall within the third party's shared or common authority and those areas outside the third party's control.

Prior to the Supreme Court's holding in *Georgia v. Randolph* in 2006, consent by an owner or resident of a dwelling was sufficient to justify a warrantless search the dwelling even if another occupant objected. *Randolph* reversed that line of cases and held that the refusal of a physically present co-owner or resident to permit the warrantless search of the dwelling would invalidate that search as to the non-consenting party. No federal court has yet expanded the rationale in *Randolph* to invalidate a consent search of a computer in the home when the wife gave consent but the husband – who was also present – objected to the search. Indeed, at least one Circuit Court has specifically declined to expand the holding of *Randolph* to personal property, in particular, a computer.[2] Therefore, you should seek local legal advice before conducting a warrantless computer search in these circumstances.

The presence of encrypted or password protected data will, in most cases, indicate the absence of common authority to consent to a search by co-users who do not know the password or possess the encryption key. Conversely, if the suspect has given the co-user the password or encryption key, then the co-user probably has the requisite common authority to consent to a search of the files.[3]

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[2] *United States v. King*, 604 F.3d 125 (3d Cir. 2010).

[3] The District Court of Vermont has held that, when it has lawfully seized a computer containing encrypted files, the government may compel the owner of that computer, via grand jury subpoena, to disclose the decryption key for those files without violating the owner's Fifth Amendment right against self-incrimination. *In re Grand Jury Subpoena (Boucher)* 2009 U.S. Dist. LEXIS 13006 (D.Vt February 19, 2009).

4. *Implied consent and network banners*

The Fourth Amendment prohibits all "unreasonable searches and seizures" by a government employer or supervisor of a place where an employee of that government agency has a legitimate expectation of privacy. A legitimate expectation of privacy may exist as to the employee's office, desk, filing cabinets, and computer. The Supreme Court has recognized, however, that office practices, procedures, or regulations may reduce or narrow an employee's legitimate privacy expectations. *O'Connor v. Ortega*.

For example, computer users may waive their rights to privacy as a condition of using a computer or the system to which the computer is connected. This often occurs through the use of written employment policies and/or network "banners." Banners are written notices that greet users before they log on to a computer or computer network. These notices will typically reflect that the owner of the computer and/or network to which the computer is connected may, as it deems appropriate, audit, inspect, and/or monitor employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages. This policy places the employees on notice that they may not reasonably expect that their use of the agency computer would be private.

Alternatively, it may be said that a government agency's banner policy results in the employee's implied consent to the search by his employer of otherwise private areas in his office. Some courts have proven reluctant to apply the implied consent doctrine absent evidence that the suspect actually knew of the search and voluntarily consented to it at the time the search occurred. Other courts have held that the banner language was sufficient to permit intrusions only for network administrator housekeeping but not for general law enforcement purposes.

In any event, the best practice for a criminal investigator is always to consult with an AUSA before relying on a banner search.

B. Exigent Circumstances

Under the "exigent circumstances" exception to the warrant requirement, you may search without a warrant if the circumstances "would cause a reasonable person to believe that entry...was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. Alfonso*. In determining whether exigent circumstances exist, consider: (1) the degree of urgency involved, (2) the amount of time necessary to obtain a warrant, (3) whether the evidence is about to be removed or destroyed, (4) the possibility of danger at the site, (5) information indicating the possessors of the contraband know the police are on their trail, and (6) the ready destructibility of the contraband.

Exigent circumstances often arise in computer cases because electronic data may be easily altered, concealed, or destroyed. This can happen in a matter of seconds as the result of manual or pre-programmed computer commands or physical mutilation, as well as from excess humidity, temperature, or magnetic fields created, for example, by passing a strong magnet over a hard drive.

The exigent circumstances exception does not allow you to search or seize beyond what is necessary to prevent the destruction of the evidence. When the exigency ends, the right to conduct a warrantless search based on that exigency ends as well. In short, the need to prevent the destruction of evidence does not authorize you to search without a warrant once the likelihood of such destruction has ended. Accordingly, the seizure of computer hardware to prevent the destruction of information it contains will not ordinarily support a subsequent search of that information without a warrant. Once steps have been taken to prevent destruction of the evidence, you must quickly move to obtain a warrant unless valid consent to search is obtained.

C. Plain View

Evidence of a crime may be seized without a warrant under the plain view exception to the warrant requirement. To rely on this exception, you must be in a lawful position to observe and access the evidence, and its incriminating character must be immediately apparent. *Horton v. California.*

The plain view exception does not allow you to engage in a search for which you do not have independent authority, such as consent or a search warrant. Rather, while you are engaged in an otherwise lawful search, plain view allows you to seize evidence of another crime when the incriminating nature of that evidence is immediately apparent to you.

In computer cases, this means that you may not rely on the plain view exception to open a closed computer file, look into a floppy diskette lying in the open, or search a computer because incriminating evidence has been seen. The contents of a file that must be opened to be viewed are not in "plain view." For example, if you walk by a computer in a public place and see data on a suspect's computer monitor that constitutes probable cause evidence of a crime, you may immediately seize that computer to prevent the destruction of the data. Thereafter, if you wish to conduct a further search of that computer, you will need a warrant or consent to do so; however, what was seen on the monitor may be used to establish probable cause.

It would seem logical, therefore, to conclude that the plain view rule would also apply to a search of a computer pursuant to a warrant and the discovery of evidence outside the scope of the warrant. For example, while executing a search warrant to look for evidence of fraud, an agent opens a computer file that turns out to be an image of child pornography.[4] This image would be admissible because the agent was lawfully searching

[4] Because suspects can conceal evidence by changing the file name or changing file extensions to make, for example, an image file appears to be a word processing document, agents are usually not restricted to looking for specific types of files or files with specific names.

the computer pursuant to a warrant. Moreover, if, while continuing the search for evidence of the fraud pursuant to the search warrant, the agent discovers more child pornography, those images would also be admissible. On the other hand, if the agent decides to redirect his efforts towards finding more child pornography, the plain view exception would not apply because he would have ventured outside the scope of the initial search warrant. To do so lawfully, the agent must first obtain a search warrant related to his search for child pornography.

While the foregoing is the law in nearly all of the federal circuits, a recent Ninth Circuit decision suggests that Court will not apply the plain view doctrine as broadly to computer searches as it may to other searches. In *U.S. v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (*CDT*), while searching the defendant's computers for records of steroid testing results as to certain athletes named in a search warrant for such records, the government opened and read the results of the testing of other athletes not named in the search warrant. The government argued that, under the plain view doctrine, its agents were allowed to view any records stored on the target computer where records included within the scope of the search warrant could be located. The Court rejected that argument saying that, given the large amount of innocent data routinely stored on a computer by its owners or users, the government should be required to obtain from the Magistrate Judge advance approval of its search protocols in computer search cases. This would include the use an objective third party to conduct a first review of computer files to identify those which are covered by the search warrant and to segregate those files from review by government agents. In subsequent rehearings by the Ninth Circuit in *CDT*, the court has softened that ruling somewhat to make it discretionary rather than mandatory procedure for establishing the proper scope of a search warrant.

Other Circuits that have tackled this issue have declined to follow the *CDT* court's analysis. For example, in *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010), the Seventh Circuit, in the context of a video voyeurism case, expressly declined to follow the Ninth Circuit's decision in the *CDT* case. The Mann court approved the government's use of software to

identify and isolate all photographic files on the suspect's computer and to display those files in a thumbnail format to allow the agents to determine which of them were within the scope of the search warrant. The same court declined to uphold the government's use of another feature of that software that identified child pornography through the use of hashing algorithms, since the search for child pornography was beyond the scope of the underlying search warrant.

Five other circuit courts have rejected the argument that the Fourth Amendment requires that computer search warrants contain search protocols. *See United States v. Mann,* 592 F.3d 779, 785-86 (7th Cir. 2010); *United States v. Cartier,* 543 F.3d 442, 447-48 (8th Cir. 2008); *United States v. Khanani,* 502 F.3d 1281, 1290-91 (11th Cir. 2007); *United States v. Brooks,* 427 F.3d 1246, 1251-53 (10th Cir. 2005); *United States v. Upham,* 168 F.3d 532, 537 (1st Cir. 1999) ("The warrant process is primarily concerned with identifying what may be searched or seized—not how"); *United States v. Himmelreich,* 265 Fed. Appx. 100 (3d Cir. 2008) (unpublished).

Unless and until the Supreme Court provides guidance on this issue, the best and recommended rule is that an agent should articulate the scope of those things for which search authority is sought as broadly as the probable cause evidence will allow, but always with the maximum particularity. During the execution of a computer search warrant if you find evidence of a crime that is arguably outside the scope of the warrant, you may seize it under your plain view authority. If you have not yet concluded the search reasonably permitted by the search warrant, you may, of course, continue that search. If, however, your intent is in any way to expand your search to include evidence of the criminal activity beyond the scope of the search warrant, you must obtain a separate search warrant. In doing so, you may, of course, use the newly discovered evidence. The best practice, however, would be to suspend the original search, unless to do so would in some way compromise your originally-authorized search, and then re-commence searching once you have obtained the additional search authority.

D. Search Incident to Arrest

A search conducted incident to a lawful custodial arrest is a well-recognized exception to the warrant requirement. Such searches have been acknowledged by the U.S. Supreme Court as reasonable and permissible without a warrant because of: (1) the need to disarm the suspect to take him into custody, and (2) the need to preserve evidence for later use at trial. *Chimel v. California*, 395 U.S. 752 (1969). The permissible scope of a search incident to arrest (SIA) includes a search of the person and the areas under the person's immediate control for weapons, means of escape, and evidence of a crime.

A search incident to arrest may only be conducted when two requirements have been met. First, there must have been a lawful custodial arrest. A search incident to arrest may not be conducted if an actual arrest does not take place. The second requirement is that the search be substantially contemporaneous with the underlying arrest.

Over the past several years, the courts have been confronted with the issue of whether the scope of search incident to arrest authority includes the warrantless review of data stored on electronic devices in an arrestee's possession at the time of arrest. For example, while recognizing that an individual has a REP in the contents of his electronic pager, Courts have consistently allowed electronic pagers to be searched incident to lawful arrest. These decisions are based primarily on two factors. First, because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. Second, merely turning off the power or touching a button can destroy the contents of some pagers, creating a potential for destruction of evidence. For both of these reasons, several courts have upheld the authority of law enforcement officers, under the SIA exception to the search warrant requirement, to search or retrieve information from an arrestee's pager in order to prevent its destruction as evidence.

Some courts have applied that same rationale to cell phones discovered during a search incident to arrest, i.e., that

they may be searched for data that the phone already contains to include incoming and outgoing text messages and phone logs. Those Courts have distinguished data that is stored on the cell phone at the time of its seizure, which data may be searched, from that which is merely accessible from the cell phone (such as voice mail), which may not be searched under search incident to arrest authority. E.g., *United States v. Finley,* 477 F.2d 250 (5th Cir. 2007); *United States v. Young*, 278 Fed. Appx. 242, 245-46 (4th Cir. 2008)(per curiam); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); *United States v. Pineda-Areola,* 2010 U.S. App. LEXIS 7685 (7th Cir. April 6, 2010).

Some lower (i.e., district) courts in other circuits have declined to follow this reasoning, however, and have held that searches of cell phones following the arrest of the phone's owner require probable cause and a warrant. See, e.g., *United States v. Park,* 2007 U.S. Dist. LEXIS 40596 (NDCA May 23, 2007); *United States v. Wall,* 2008 U.S. Dist. LEXIS 103058 (SDFL December 22, 2008). See also, *United States v. Quintana,* 594 F. Supp. 2d 1291, 1301 (M.D.FL 2009); *United States v. McGhee*, 2009 U.S. Dist. LEXIS 62427 (D. NE, July 21, 2009); *United States v. Lasalle,* 2007 U.S. Dist. LEXIS 34233 (D.HI 2007).

The Supreme Court has not yet considered whether SIA authority extends to cell phones or other electronic storage devices. By analogy, it can be argued that you should be able to search devices such as electronic organizers, thumb drives, and Personal Digital Assistants/smart phones when they are in the possession of some whom you have lawfully arrested. There is yet no direct case law to support that proposition, but courts have suggested that while a search through a pager, or perhaps a cell phone, may be reasonable incident to an arrest, a time-consuming search through a computer or other device with a large data capacity presents a different case and is unreasonable.

The best practice in contemplating whether to examine the contents of electronic devices, including cell phones, seized under your SIA authority is, first, to consult your AUSA before doing so; second, if probable cause can be demonstrated that

the seized device contains evidence of a crime, obtain a search warrant rather than rely on search incident to arrest authority.

E. Inventory Searches

Inventory searches are a well-recognized exception to the warrant requirement. Evidence found during a lawfully conducted inventory search may be used against the defendant in a later trial. There are three justifications for allowing an inventory of lawfully impounded property without first obtaining a warrant: first, to protect the owner's property while it remains in police custody; second, to protect against claims or disputes over lost or stolen property; and third, to protect law enforcement from potential dangers that may be located within the property.

There are two requirements for conducting a valid inventory search. First, the inventory must not be a ruse to uncover evidence of a crime. Second, a valid inventory must also be conducted in accordance with a standardized inventory policy aimed at accomplishing the non-investigatory purposes of inventory searches.

Neither the Supreme Court nor any of the Federal Circuit Courts have issued opinions concerning whether the data stored on a cell phone may be inventoried. The U.S. District Courts that have tackled the issue have all held that, while a cell phone may be seized incident to arrest and should certainly be a part of any inventory of property seized from an arrestee, an inventory of the digital contents of a cell phone is not a valid inventory search because it does not serve any of the approved purposes of a stationhouse inventory. To do so, therefore, will require either consent or independent probable cause that the cell phone contains evidence of a crime and a search warrant based on that probable cause.

V. Preparing Warrants to Search and/or Seize Computers

Searches that target computers and data are potentially somewhat different from traditional searches. In most searches, you are looking for a particular physical item in a

particular location. Because computer files consist of units of digital information, known as "bytes," that can be stored in any digital medium and instantly moved or deleted, you may not always know precisely where particular computer files are stored or in what form. The data may be on the computer being searched, but electronically hidden from view. The filenames and suffixes may be anything the suspect wants them to be. The data may be instantly erased, modified, or transmitted to a confederate or remote storage devices. The same data may exist in identical form in many different places. Court cases recognize that computer records are extremely susceptible to tampering, concealment, and destruction.

A. The Need for Pre-Search Information

It is always critical for the criminal investigator to have as much advanced knowledge as possible about an area in which a search warrant is to be executed. This applies equally, if not more so, to computer searches. At a minimum, prior to executing your search warrant, you should attempt to determine:

- What types of computers and operating systems is your suspect using?
- What types of software does the suspect use?
- Is the computer connected to a network? If so, where is the computer network server located?
- Can the computer or data storage device be searched safely and effectively on-site, or must the computer be moved to another location to conduct the search?
- Is the execution of the computer search warrant likely to have an adverse impact on the operation of a legitimate business, for example, the search of a computer at a doctor's office where patient health records are likely stored?

Gathering this information may involve an interview of the system administrator of the targeted network, of others who are familiar with the network, or possibly of a whistleblower or cooperating individual. This might be done in an undercover capacity. On-site visits (often undercover) may also reveal important information about the hardware involved.

B. The Particularity Requirement as to Where to Search and For What

The Fourth Amendment does not permit general exploratory searches, but requires that the place to be searched and things to be seized be described with "particularity." This requirement applies equally to searches of computers and the data contained on them.

1. The "Independent Component Doctrine"

You must be particular about where to look for data. Each component to be searched must be viewed independently and there must be probable cause to search each component. For example, to say that you want to search or seize a "computer" can be both too broad and too narrow, and it rarely meets the Fourth Amendment particularity requirement.

Data is often the real objective of a computer search. Much data is not stored on the computer itself or the hard drive in the computer, but on removable media such as diskettes, flash memory devices such as thumb drives, memory chips, zip drives, CDs/DVDs, and the like. In recent years, external USB (Universal Serial Bus) and fire wire external hard drives have become very affordable, reliable, and an excellent choice for storing, moving, protecting and concealing data.

Peripheral components, such as routers, printers, and scanners, often have small memory chips that may be a good source of evidence. Similarly, you may wish to seize a keyboard, monitor, cables or other devices during your search. If so, each item must be independently listed and its seizure justified.

Other items to search for would include computer manuals so officers and forensic examiners know how to circumvent encryption and/or passwords; original software and manuals; and notes and journals that might contain passwords, encryption keys, e-mail addresses, Internet URLs (addresses), and indexes of storage media.

2. Identifying the Objects of the Search

In most computer or data searches, the primary objective of the search is the data and not the computer and its attendant components. In order to seize data, you must articulate probable cause that the data exists, and describe what that data is. You cannot simply request permission to seize "all records" from an operating business unless there is probable cause to believe that the criminal activity under investigation pervades the entire business. Instead, you must include limiting phrases in the description of the files that can modify and limit the "all records" search to that for which probable cause exists.

For example, you may specify the crime under investigation, the target of the investigation if known, and the time frame of the records involved. In addition, instead of just saying "all records showing bank transactions between x and y," agents should say "all records in *any form* ..." to ensure the affidavit and warrant includes not only paper, but electronic records as well. Other suggested computer search warrant language is in the Additional Resources Section of this Handbook.

On occasion seizing only the actual computers – and not the data – may be the objective of the search. That would be the case, for example, when searching for stolen computers (contraband or fruits of a crime). That might also apply to a computer used in the commission of a crime (instrumentalities) such as when a computer was used to prepare a letter or spreadsheet or to send an e-mail. "Hardware only" searches are uncommon because a computer involved in a crime was probably used to create, receive, transmit, or otherwise

manipulate data. In such a case, not only is seizing of the computer important, but searching the data is as well.

C. Justifying Off-Site Searches

In many, if not most, computer searches, you will want to remove the computer from the location listed in the search warrant and conduct your search and forensic analysis of its contents at a different location. If so, you must ask for and justify an off-site search in your search warrant affidavit and ensure that your search warrant includes the court's approval to do so. This requirement exists because seizing a computer can effectively close down a business, disable a computer network, or deny innocent persons the ability to conduct daily activities. It is important that you consider such factors and include sufficient information in your search warrant application to justify seizure of a computer for later, off-site forensic examination.

In some instances, the desired data may be obtained at the location where the media or computer is found. When this is possible, the computer system and the peripheral devices do not have to be taken from the scene to be searched.

As the use of computers and the sophistication and complexity of computer systems increases, it has become less likely that safe and meaningful on-scene computer searches can be conducted; therefore, off-site searches of computers are increasingly becoming the norm. As mentioned above, however, you must articulate in your search warrant affidavit facts and information to justify the removal and off-site search of computers, devices, or computer media. Some of the justifications are:

- **Must search to determine media contents.** You may often be unable to determine what storage media contains by looking at just the container; each container (hard drive, floppy disk, CD or other media) must be examined.

- **Time required.** It may take days or weeks to find the specific information described in the warrant because computer storage devices can contain extraordinary amounts of information. Searching on scene may be more intrusive because of the time officers would have to remain on the premises.

- **Labeling, intentional mislabeling, and hiding data.** Even if you know specific information about the files you seek, the data may be mislabeled, encrypted, stored in hidden directories, or embedded in "slack space" that a simple file listing will not reveal. Images can be hidden in all manner of files, and it may take special skills and equipment to find it.

- **Availability of necessary tools.** On-site tools may not be sophisticated enough to defeat security and encryption measures.

- **Proper environment.** The lack of a controlled and clean environment to conduct the search.

- **Lack of On-Site Technical Expertise.** Attempting to search files on-site may risk damaging the evidence itself in some cases. Off-site searches also may be necessary if there is reason to believe that the computer has been "booby trapped" with a self-destruct feature.

- **Preserving the Evidence.** In an on-site search, the target or confederates could momentarily access the computer to delete or destroy data. This is especially true if the computer is attached to a network (even wirelessly) because a command to the computer to be searched might be sent from any computer on the network.

- **Safety of the Officers and Preserving Law Enforcement Techniques and Methods.** A lengthy search in the target's home or business may unnecessarily expose you to risk.

If removal of computers, devices and media has not been addressed in the affidavit, and it is determined that an off-site search is necessary, you should seize the items and not search them until a new search warrant has been obtained justifying the removal of the items.

D. Identifying the Need for Multiple Search Warrants

Increasingly, computer users choose to store their data on an Internet-connected computer (server) that can be located anywhere in the world. From a business efficiency viewpoint, this makes good sense as people can retrieve data no matter where they are provided they can access the Internet. From a criminal's point of view, storing data on a server makes finding that data harder for law enforcement and permits the criminal to constantly move that data at will.

F.R.Cr.P. 41(b)[5] states that a magistrate judge located in one judicial district may issue a search warrant for "a search of property … within the district," or "a search of property . . . outside the district if the property … is within the district when the warrant is sought but might move outside the district before the warrant is executed." If there is reason to believe that a network search will retrieve data (*not* stored e-mails as addressed below) that is stored in multiple locations, you must obtain a warrant in each affected district.

A different rule exists in the case of "stored electronic communications." Stored electronic communications are e-mails that are stored temporarily on the servers of companies that provide e-mail services (e.g. AOL, Yahoo, Hotmail, Google) where the storage is incidental to the transmission of the e-

[5] This Rule can be found in its entirety in the companion book, *Legal Division Reference Book*, in the segment entitled "Selected Federal Rules of Criminal Procedure."

mail. For stored electronic communications, 18 U.S.C. § 2703 eliminates the need to obtain multiple warrants. A nationwide warrant for stored e-mails can be issued "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation ...."

If a suspect in a criminal investigation in the Eastern District of Virginia has stored electronic communications on internet servers in California and Texas, a federal judge in the Eastern District of Virginia could issue a search warrant for the stored e-mails in California and Texas so long as the issuing judge had jurisdiction over the suspected offense.

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

VI. Executing Warrants to Search and/or Seize Computers

A. Technical Assistance During Execution of a Search Warrant

A computer forensics expert is essential not only to the operational planning for executing the warrant, but also to the execution of the warrant. Accordingly, you should give strong consideration to having a technical expert accompany the search team or, at a minimum, be available on immediate call. Such person might very well be a sworn criminal investigator; however, Title 18 U.S.C. § 3105 also permits non-law enforcement officers to aid in the execution of a warrant. That statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

The best practice for a criminal investigator is to specify in the search warrant application the need for a computer forensics expert (especially if your expert is not a sworn officer) to be a part of the search team and, if possible, to name the person who will assist in the execution of the warrant. In short, except in all but the simplest cases, consult a forensics expert in planning the search, obtaining the warrant, and executing the search.

B. Knock and Announce

The "knock and announce" statute set forth at 18 U.S.C. § 3109 provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This statute applies to all searches of residences, including when the objectives of the search include computers and data.

The rule is not absolute, however. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Supreme Court held that a law enforcement officer who executes a search warrant may dispense with the knock-and-announce requirement if he or she has -

> a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or

> that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

By knocking and announcing one's official presence and authority, a law enforcement officer may provide a criminal target with the opportunity to conceal or destroy electronic evidence. Technically adept suspects may "hot wire" their computers with software that, with a few keystrokes by the owner or operator, may quickly delete or obliterate evidence. In many cases, this may involve a "hard deletion" rendering the data unrecoverable. Even merely turning off the computer may result in the destruction, alteration or encryption of data that the user was working on at the time of the shut down.

It is therefore essential that you acquire as much information as possible in advance of your search about your criminal suspect and the computer hardware and software that will be the subject of your search. When you have reason to believe that knocking and announcing your presence would result in the destruction of any evidence being sought, would be dangerous, or would be futile, you should request a no-knock warrant from the magistrate judge. Even if a no-knock warrant is not obtained, the knock-and-announce statute does not prevent you from conducting a no-knock search, if, upon arrival at the search location, you develop reasonable suspicion that evidence will be destroyed. In *Richards*, the Supreme Court made clear that "the reasonableness of the officers' decision [to dispense with the knock-and-announce rule] . . . must be evaluated as of the time they entered" the area to be searched. Accordingly, you may exercise independent judgment and decide to conduct a no-knock search when executing the search, even if you do not have a no-knock warrant.

For example, while approaching a residence with a warrant to search for data, you develop reasonable suspicion that your presence has been detected and that a person or persons inside will destroy (delete) the data. Such facts may excuse compliance with the knock and announce statute. If you do so, be prepared to articulate the basis for your decision to dispense with the knock and announce rule.

C. Time Frames Governing Retention of Seized Computers

The forensic examination of the contents of a computer that has been lawfully seized pursuant to a search warrant may take months to complete because computers can store enormous amounts of data. Neither the Federal Rules of Criminal Procedure nor the Fourth Amendment imposes any specific limitation on the time period for such forensic examination to be completed. Under FRCP 41(e)(2)(B), a search warrant may authorize not only the seizure of electronic storage media or the seizure and copying of electronically stored information, but also a later review of the media or information consistent with the warrant. Thus, any court-imposed time limitation as to the execution of the warrant refers to the seizure or on-site copying of the media or information, but not to any later off-site copying or review.

Ordinarily, then, unless otherwise ordered by the Court, you may retain a seized computer and examine its contents in a careful and deliberate manner without legal restrictions, subject only to Rule 41(g)'s provision that a "person aggrieved" by the seizure of property may bring a motion for the return of that property. If the targeted computer serves as storage of data necessary to operate a legitimate business, medical facility, or the like, the agent should be prepared to copy the data from the targeted computer, rather than resorting to seizure and retention of that computer, if the latter action would unnecessarily inhibit the operation of the underlying enterprise.

VII. Authentication of Information Contained on Computers

Refer to the Courtroom Evidence Handbook Chapter Four that has a section specifically addressing this issue.

NOTES

Chapter Thirteen

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I. Introduction

As a law enforcement officer, your questioning of suspects will often yield critical evidence for their criminal prosecution. It is important that you abide by Constitutional standards so that a defendant's statements will be admissible at trial. Whether a full confession, or a simple admission to specific facts, certain rules may apply that must be followed to ensure the statements can be used as evidence.

II. Voluntary Statements

A. Voluntariness

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."

For a confession or admission of a suspect to be used against him at his criminal trial, it must be freely and voluntarily given. It must not come by any sort of threats or violence. It also cannot be obtained by any direct or implied promises, such as for special treatment or a reduced sentence. A person must not be compelled or induced to incriminate himself. A statement can be suppressed if a court determines it was involuntarily given.

This voluntariness requirement comes from the Constitution's rule against compelled self-incrimination, as well as notions of due process. The issue is "whether a defendant's will was overborne" by the police-created circumstances that led up to the statement. If a suspect's confession is not voluntarily made- that is, not the product of his free choice- it cannot be used against him.

The analysis of the admissibility of a statement takes into consideration the "totality of all the surrounding circumstances" under which it was made. Extreme examples of constitutional violations that led to involuntary statements include a confession that was obtained as a result of a brutal beating, and a statement obtained after a police physician gave the suspect a drug with truth-serum properties.

B. Interrogations

Courts look closely at interrogations to ensure the voluntariness of statements. The court examines the factual circumstances surrounding a confession, making it important for you to document all relevant factors. Factors that can impact the voluntariness of a statement include the suspect's age, education, and intelligence; the length of detention; repeated and prolonged questioning; impairment by drugs or alcohol; psychological problems; current physical condition; experience with the criminal justice system; and the advisement of constitutional rights.

The Supreme Court has stated that "coercive police activity" must be present in order to find that a confession is

involuntary. Without some coercion by the government, there is no constitutional issue. The Fifth Amendment does not apply to pressure or coercion by private (non-government) actors.

Acceptable law enforcement interrogation practices can include: promising a suspect that his cooperation will be brought to the attention of the prosecutor, confronting a suspect with evidence of his guilt, or encouraging him to tell the truth through emotional appeals. Truthful comments are acceptable, such as letting the defendant know the potential jail time he faces if convicted. While it is important not to state that prosecutors or judges *will*, in fact, be more lenient, you can tell a suspect that his cooperation will be shared with those that can influence his fate.

Trickery and deception may be used during an interrogation as long as a suspect's will is not overborne by such tactics. Telling the suspect his prints are on the murder weapon, even when they are not, is permitted (but be aware of the suspect's mental capacity, as those who function below normal levels may be too easily influenced by authority figures). In *Frazier v. Cupp*[1] the officer questioning the defendant told him, falsely, that his accomplice had confessed. The defendant then gave a full confession. The police misrepresentation did not make the defendant's confession involuntary.

C. Involuntary Confessions

Trickery and deception may be permissible, but can go too far, especially when combined with other questionable interrogation tactics. In *Spano v. New York*, 360 U.S. 315 (1959), a suspect in a killing was a foreign-born man, age 25, with no previous criminal history or experience with official interrogation. He had only six months of high school education and a history of emotional instability. The defendant was questioned by officials for nearly eight straight hours before he confessed. The defendant repeatedly refused to answer

[1] Cases named in this chapter without a case cite are briefed in the companion book, *Legal Division Reference Book*.

questions. During the interrogation, the police used a "childhood friend" of the defendant who had become a police officer. This officer told the suspect that the situation had gotten the officer in trouble and that his job was in jeopardy. The officer played up the terrible effect this would have on his family. At almost sunrise, police obtained the final pieces of the defendant's confession.

The Court held that the confession was involuntary. They determined that it was obtained in violation of the suspect's rights because his will was overborne by official pressure, fatigue, and sympathy created through deception.

More obvious examples of involuntary confessions include public employees threatened with losing their jobs if they do not cooperate and make a statement. In another case, a woman was advised that she would have her kids taken from her if she did not confess. Such methods of gaining confessions are the very thing the courts have found to be in violation of the Fifth Amendment.

Useful methods of avoiding challenges to an interrogation might include giving significant breaks during longer questioning. It may be good to delay interviews of highly intoxicated individuals. With juveniles or the mentally impaired, more time might be spent explaining the Miranda rights. It might also be wise to minimize the use of leading questions when dealing with such suspects.

D. Incriminating Statements

The protections of the self-incrimination clause apply only to testimonial evidence that may incriminate the suspect. This includes words and gestures that convey information that could be used against the individual in a criminal case. If the suspect is asked, "Where are your narcotics," and he then points at his backpack, that would be considered testimonial. If the response was determined to be involuntary, it would be suppressed just like a verbal statement would. Of course, if the answer to a question would not incriminate the speaker, then

the privilege against self-incrimination does not apply. A mere witness to a crime can be required to answer questions posed by a grand jury, for example.

Non-testimonial evidence is not covered by this clause, including voice samples and hand-writing samples. Because they do not convey information about the case, and are only used for identification purposes, they are not testimonial.

III. Fifth Amendment *Miranda* Warnings

A. Generally

The Supreme Court created a rule specifically for custody situations because of the additional pressures that a suspect may face to incriminate himself. In *Miranda v. Arizona*, the Court said that statements from custodial interrogation of a defendant cannot be used at trial unless police protect his rights by advising him of his specific rights and obtaining his voluntary waiver of those rights. Failure to follow this "procedural safeguard," even for statements that are otherwise voluntary, can lead to suppression. Therefore, prior to custodial questioning, a suspect must be advised of the following:

- He has the right to remain silent;
- That any statement he does make may be used as evidence against him;
- That he has a right to consult with an attorney and to have the attorney present during questioning; and
- That if he cannot afford an attorney, one will be appointed to represent him prior to questioning.

After the warnings are given, an individual may waive these rights and agree to answer questions or make a statement, if he does so voluntarily, knowingly, and intelligently. Only then can his statement be admitted against him.

The Court's concern was that the potential coercion of a custodial interrogation might lead to involuntary statements. In a custodial interrogation, the police have the capacity to dominate the scene to such an extent that the risks of coercion and intimidation are unreasonably high. Therefore, the *Miranda* Court created these four warnings to protect the rights of the suspect.

B. *Miranda* Warnings – When Required

Miranda applies only when there is both custody and interrogation by known law enforcement authorities. The combination of these things creates the police-dominated atmosphere that concerned the Supreme Court. Should one of these factors be absent, however, then the situation is not one that requires *Miranda* warnings.

1. Known Law Enforcement Officer

Miranda only applies to questioning by *known* officers (as perceived by the suspect), whether in or out of uniform. Unlike a typical police interview, though, questions by undercover officers do not require *Miranda* warnings. In *Illinois v. Perkins* an undercover law enforcement officer posing as an inmate was not required to give *Miranda* warnings to an incarcerated suspect before asking questions that could bring about an incriminating answer. Without a known officer present, there is not that same "police-dominated atmosphere" that could compel a response.

2. Interrogation

Interrogation is the act of asking investigative types of questions where the answer could incriminate the suspect. It does not include such things as requesting consent to search a person or car, as these seek only permission and not testimony that could be used against the suspect. Interrogation under the *Miranda* rule includes not only actual investigative questioning, but also any functional equivalent of questioning. In *Rhode Island v. Innis* the Supreme Court said that *Miranda* applies

whenever a person in custody is subjected to interrogation, i.e., either express questioning or its functional equivalent. The functional equivalent of interrogation means words or actions by law enforcement that the officer should know are likely to elicit an incriminating response from the suspect. For example, police engaging in a lengthy monologue in the presence of an in-custody suspect about the evidence in the case might be considered an interrogation.

Spontaneous or volunteered statements are not considered the product of "interrogation" for *Miranda* purposes. For example, a defendant is arrested for a minor crime and during the ride to the police station blurts out, "I stabbed her." The defendant is voluntarily making a statement without being questioned by the police. Therefore, *Miranda* warnings are not required. In some cases, *Miranda* warnings are not required if police asked a follow-up question to clarify the spontaneous statement. For example, the officer then asks, "Who?" and the suspect responds, "Cathy." These statements may be admissible against the defendant, but the better practice is to give the *Miranda* warnings before asking any investigative question.

Not all communications with a suspect are affected by *Miranda*. Dialogue with a defendant during physical sobriety tests, for example, is not interrogation (the officer is not seeking testimony from the individual about his crimes). Likewise, asking a suspect for consent to search, or requesting personal information (name, address, etc.) when booking him, are not considered the sort of interrogation that requires *Miranda* warnings.

3. Custody

Custody requiring *Miranda* warnings exists when law enforcement officers arrest or otherwise deprive a person of his freedom of action in a significant way. Courts will consider a suspect to be "in custody" whenever there is a restraint on his freedom of movement to the degree associated with a formal arrest, even when there is no arrest. *California v. Beheler*. For

example, *Miranda* warnings were required when police officers arrived at a suspect's home at 4:00 a.m., entered his bedroom, and began questioning him. In such circumstances, a suspect might easily believe himself to be under arrest.

While both a "seizure" in the Fourth Amendment sense and "custody" in the *Miranda* sense involve the restraint of a person's freedom to walk away from the police, the critical difference is that *Miranda* "custody" arises only if the restraint on freedom is to the degree associated with formal arrest. A Fourth Amendment seizure does not necessarily render a person "in custody" for purposes of Fifth Amendment *Miranda*. This is most evident with a *Terry* stop. Generally, officers are not required to advise a suspect of the *Miranda* warnings to question him during an investigative detention, even though he is not free to leave.

The decision on whether to give *Miranda* warnings when no formal arrest has occurred is not always clear, but usually it is not required. If you create a situation that would appear truly arrest-like to a reasonable person, however, *Miranda* warnings should be given to avoid the risk of losing the statement.

If police wish to question a juvenile about a crime, then they must consider his age in determining whether or not he is in custody. The Supreme Court has held that a 13 year old seventh grade student who was not under arrest but who was questioned about a break-in by police in a conference room at his school was in custody for purposes of *Miranda*. The relevant inquiry is whether a reasonable person *of that age* would feel as though he is under arrest given all of the circumstances of the interrogation even if an adult might not.

In situations that verge on being custodial, courts are less likely to require *Miranda* procedures if any of the following are true: the suspect was informed that he is not under arrest; the suspect was informed that he is free to leave at anytime; or there was no physical restraint that could cause a reasonable person to perceive that he is under arrest. The following

situations have generally been held not to be custody for *Miranda* purposes:

- *Traffic Stops.* Routine traffic stops are not custodial and therefore do not require *Miranda* warnings.

- *Terry Investigative Stops.* Generally, like traffic stops, *Terry* stops do not require warnings because they are not considered to be custodial.

- *Search Warrants.* In general, detaining the occupant of a home during the execution of a search warrant is not considered custodial for *Miranda* purposes. Still, if agents closely guard an individual during the operation, a court may consider it to be custodial, even if it would not be considered an arrest under the Fourth Amendment.

- *Police Station Questioning.* Non-custodial questioning may take place in a police station even when the questioned person is one whom the police suspect. In *Oregon v. Mathiason*, *Miranda* warnings were not required because the defendant was not subjected to "custodial interrogation" when he voluntarily came to the police station and gave a statement. The defendant was immediately informed that he was not under arrest. A non-custodial situation is not converted to a *Miranda* situation simply because the questioning takes place in a "coercive environment."

- *Intent to Arrest.* An unexpressed or unarticulated future intent to arrest does not create *Miranda* custody. The relevant inquiry is how a reasonable person in the suspect's position would have understood his situation. In *Stansbury v. California*, the Supreme Court said that an officer's undisclosed belief that the person he interrogates is a suspect is irrelevant to whether he is in custody. The need to give *Miranda* warnings arises only

when there is a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest.

- *Incarcerated Persons.* Individuals who are serving prison sentences are not necessarily in "custody" for *Miranda* purposes. Some type of additional restraint must be imposed on an inmate to transform the interview into a "custodial interrogation."

The *Miranda* rules apply so long as the suspect remains in custody. Once he is released (e.g., on personal bond after an initial appearance), there is no longer custody, and, therefore, no Fifth Amendment *Miranda* situation. There may, however, be Sixth Amendment concerns that could affect an interrogation, as addressed below.

IV. Identifying a Valid *Miranda* Waiver

A. Generally

Once an individual taken into custody has been given the proper *Miranda* warnings, there is one more requirement before any interrogation may proceed. Prior to questioning, the suspect must make a *voluntary*, *knowing* and *intelligent* waiver of his rights under *Miranda*.

1. Voluntary

For a waiver to be valid, a suspect must voluntarily give up his *Miranda* rights. It must be the product of a free and deliberate choice, without any intimidation, coercion, or deception. Just as a suspect should not be pushed into making a confession, he must also not be pushed into waiving the rights provided by *Miranda*. The waiver must be voluntary, and any statements after the waiver must also be voluntary (getting a valid waiver, by itself, does not guarantee the voluntariness of the statement).

2. *Intelligent and Knowing*

The waiver must also be intelligent and knowing. It should be made with a full awareness of both the right being waived and the consequences of waiving it. For the waiver to be considered knowing, a suspect should be given the complete *Miranda* warnings, start to finish.

Failure to give complete *Miranda* warnings (and obtain a waiver) will make any statements obtained from custodial interrogation inadmissible at trial. Therefore, officers should advise suspects of their *Miranda* warnings by reading the warnings directly from a *Miranda* rights card or agency form, if possible, to avoid errors and ensure full compliance.

When deciding if a waiver is intelligent, the courts will consider the suspect's education, understanding, age, familiarity with the criminal justice system, physical and mental condition, drug or alcohol problems, and language barriers.

Trickery or deception should never be used when advising a suspect of the *Miranda* warnings or when obtaining a *Miranda* rights waiver. Any evidence that the defendant was threatened, tricked, or pushed into a waiver will cause the courts to find the rights were not voluntarily waived. Deception can still be employed, however, *after* a valid waiver, as a tactic for obtaining statements.

3. *Affirmative Waiver*

Courts will look to see if the suspect made an affirmative waiver of his *Miranda* rights. Specific evidence of the intent to waive must be demonstrated. Generally, neither the suspect's silence, nor his subsequent confession, will alone cause the courts to presume there is a waiver. However, the lack of a clearly expressed and unambiguous assertion of rights, coupled with an uncoerced statement by the suspect, may allow the courts to find that the giving of the statement was an implicit waiver of rights. While an express waiver from the suspect is not necessarily required, the best and most prudent police

practice would be to obtain an express waiver before proceeding with questioning.

B. Form of Waiver

Miranda does not require police to advise a suspect that he can stop answering questions at any time, nor remind him of that fact after a waiver is obtained. Also, police are not required to tell a suspect what the topics of the interrogation will be.

If a suspect waives the *Miranda* rights orally, but refuses to sign the waiver form, it is still a valid waiver. A suspect could also agree to give only an oral statement, but not a written statement. He can even waive only as to certain questions, but not others.

C. Stale Warnings

As noted above, once rights are waived, there is no need to remind the defendant of those rights. The mere passage of time does not make a *Miranda* warning invalid. Some factors courts will consider, however, in determining whether a time lapse made *Miranda* warnings too "stale" to be valid are: (1) the amount of time between the last *Miranda* warnings and the suspect's statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the suspect's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the suspect's statement; and (5) whether the statement from a later interrogation differed significantly from other statements which had been made directly after *Miranda* warnings.

When there is a time-lapse during the interrogation process, it is usually good procedure to re-advise a suspect of the *Miranda* rights and again obtain a waiver prior to resuming interrogation. If not, at the very least, the officer should re-confirm that the suspect still understands his rights and wishes to continue with the interrogation.

D. Correcting *Miranda* Violations

1. Unintentional Violations

What happens in a situation where a suspect makes a statement after an unintentional violation of *Miranda*, such as when an officer simply forgets to read the warnings? In *Oregon v. Elstad*, the Court said that giving *Miranda* warnings to a suspect who previously gave an unwarned (but voluntary) statement is enough to overcome the problem. Therefore, if more statements are made or repeated after *Miranda* warnings are given and a voluntary waiver obtained, they will be admissible at trial. In general, the courts will only exclude those statements given before the warnings and waiver.

2. Intentional Violations

In contrast, in *Missouri v. Seibert*, the Court held that when officers intentionally question without *Miranda* warnings as a tactic to gain a confession, it effectively threatens *Miranda's* purpose. Here, there was an unwarned confession, followed by a statement made after *Miranda* warnings. Neither one could be used against the defendant because of the officers' efforts to get around the rule.

E. Exceptions to *Miranda*

1. Public Safety Exception

When an officer asks a suspect in custody a question prompted by a concern for public safety, and not to obtain an incriminating response, *Miranda* warnings are not required. This principle is well-illustrated in *New York v. Quarles*. Officers learned that a suspect who was believed to be armed ran into a grocery store. The suspect was arrested, and it was discovered he was wearing an empty holster. The officer asked where the gun was, and the suspect revealed the location. His statement was admitted into evidence even though it was not preceded by *Miranda* warnings. It was only after securing the loaded revolver and giving the *Miranda* warnings that the officer

continued with investigatory questions about the ownership and place of purchase of the gun.

The "public safety" exception has been extended to cover officers' questions necessary to secure their own safety or the safety of the suspect. A pre-*Miranda* question, "Do you have any guns or sharp objects on you?" is permissible under the public safety exception. Courts have even applied the "public safety" exception to situations where a suspect has received his *Miranda* warnings and invoked his right to counsel.

2. Routine Booking Questions

The "routine booking question" exception to *Miranda* allows questioning to secure biographical data necessary to complete booking or pretrial services. This includes questions related to physical appearance (e.g., actual hair color), personal history, and place of residence. The questions are for record-keeping purposes only and not designed to obtain incriminating statements. *Pennsylvania v. Muniz*.

V. After *Miranda* Rights are Invoked

A. Generally

There are two separate rights under *Miranda* that a suspect can assert when subjected to custodial interrogation. A suspect can assert the right to remain silent by saying that he does not want to talk, or a suspect can assert the right to counsel by saying that he wants an attorney.

If a defendant asserts either right, the general rule is that the questioning must stop. However, *Miranda* does not require you to inform a suspect that an attorney is trying to contact him, and you do not have to allow any access to the attorney during processing.

Sometimes, a suspect may attempt to invoke his rights under *Miranda* before he even faces custodial interrogation. Trying to invoke these rights in anticipation of some future

custodial interrogation does not work. Unless the interrogation is fairly imminent, courts will generally not consider the suspect's rights to be invoked. Therefore, the *Miranda* advisement could be read, and a waiver obtained, prior to when questioning actually begins.

When a suspect does properly invoke, the procedure to follow differs in some respects, depending on the right asserted. If the suspect asserts both rights, the procedure regarding the right to counsel will take precedence.

1. Right to Silence

If a suspect asserts the right to silence, questioning must immediately stop, but officers may later attempt to re-approach the suspect after a reasonable "cooling off" period. In *Michigan v. Mosley*, police gave full *Miranda* warnings to the defendant and began to question him. When the defendant asserted his right to silence, the police suspended the questioning for more than two hours. They then re-approached the defendant to begin a new line of questioning. The defendant was given *Miranda* warnings again, and he waived his rights before this second interrogation started. The Court found this to be an acceptable practice, and the statements could be used at trial. Subsequent interrogations after waiting an appropriate time can be about the same crime or a different crime.

2. Right to Counsel

When a suspect invokes his right to an attorney, he cannot be subjected to further custodial interrogation unless he himself re-initiates the contact, or counsel is actually present. In *Edwards v. Arizona*, the defendant asserted his right to counsel, but the police returned the next morning to confront him. After being read *Miranda* warnings again, the defendant this time waived his rights and made incriminating statements. Since the defendant had exercised his right to have counsel the day before, his waiver of that right the next day was not valid. If a suspect indicates that he wishes to have an attorney, the interrogation must cease. Police may not try to approach and question him again without his attorney being present.

The prohibition on police re-approaching a suspect who has previously invoked his *Miranda* right to counsel exists for as long as the suspect remains in custody. In *Maryland v. Shatzer*, the Court announced the rule that a break in the suspect's custody of 14 days or more ends the prohibition. As an example of the rule's application, consider a suspect who has invoked his *Miranda* right to counsel and is released. If he is out of custody for 14 days or more before being taken back into *Miranda* custody, you would not be prohibited from re-approaching him for questioning and obtaining a valid waiver of his right to counsel. If the break in custody has been less than 14 days, however, the prohibition would remain.

B. Not Offense Specific

When a suspect invokes the right to counsel or silence, interrogation about *any other crimes* must also stop. Neither the same nor different law enforcement authorities may question the suspect about the same or a different offense. In *Arizona v. Roberson*, the Court said it did not matter that the officer who conducted a second interrogation was not aware that the suspect had already made a request for counsel. Assertion of the right to counsel applies to any and all crimes and to questions by any known law enforcement officer. This means that prior to interrogating any custodial suspect, you should determine whether any other officers have attempted to question him and whether he invoked his rights, and then proceed accordingly.

C. Suspect Re-initiates Contact

Interrogation may be resumed after a suspect asserts his right to counsel when the suspect re-initiates the communication. While officers cannot re-approach the suspect, questioning can begin if it is the subject that approaches the officer. Remember that a valid waiver must be obtained prior to any interrogation.

In *Oregon v. Bradshaw*, a defendant's statements were properly obtained when the suspect "initiated" further conversation about his case. After having asserted his right to

counsel, he later asked an officer, "Well, what is going to happen to me now?" Officers then read him *Miranda* warnings, and he made a valid waiver of his rights.

Inquiries or statements by a suspect that simply relate to routine incidents of the custodial relationship will not "initiate" a conversation. For example, asking for a glass of water or a cigarette are not inquiries or statements about the case.

Likewise, once a defendant asserts his right to silence, he may be questioned if he re-initiates contact with the police. For example, a defendant in FBI custody explicitly told the agents that he did not want to talk. His request was honored. The defendant then initiated a discussion with the agents by inquiring about the arrest of other persons. The agents informed the defendant that his co-defendant was under arrest. At that point the defendant then said, "Let's talk." The agents then resumed questioning the defendant. The Court held that the defendant voluntarily and knowingly waived his right to silence.

D. Ambiguous Requests

For statements from custodial interrogation to be admissible, there must be a clear waiver of the *Miranda* rights. An unclear request for an attorney made at the time warnings are given cannot be seen as either an invocation or a waiver. However, if a suspect seems to change his mind about wanting an attorney *after* a valid waiver, his desire to have counsel must be clear enough that a reasonable police officer would recognize it as an actual request. If the statement is not clear and definite, you are not required to stop questioning the suspect. For example, in *Davis v. United States*, the Supreme Court said that the statement, "maybe I should talk to a lawyer," was ambiguous and not an actual request for an attorney.

When a suspect makes an ambiguous request, it is good police practice to clarify whether or not the suspect actually wants an attorney. There is no rule, however, *requiring* clarifying questions to be asked. Therefore, you do not have to stop questioning the suspect.

VI. Self-Incrimination Outside of Custodial Interrogation

A person may assert the Fifth Amendment privilege against compelled self-incrimination in any proceeding, whether civil, criminal, administrative, investigatory or adjudicatory. The privilege permits an individual to refuse to make any disclosures that he reasonably believes could be used against him in a criminal prosecution or that could lead to other evidence that might be so used. Despite the applicability of the privilege against self-incrimination to all such situations, no *Miranda* warnings need be given unless there is "custody" involved.

A. Subpoenas to Testify

When a witness is needed to appear at trial, grand jury, or another proceeding, he may be issued a subpoena. Before being questioned, the witness does not have to be given *Miranda* warnings because he is not in custody. If the witness believes he has a Fifth Amendment privilege and believes he should not be ordered to testify, he may ask a court to quash (cancel) the subpoena. Alternatively, he may assert the privilege based on individual questions asked of him at the proceeding. If it is determined he has no Fifth Amendment privilege, the witness will be required by the court to testify, or face punishment for contempt.

B. Immunity

Remember that the Fifth Amendment provides that no person may be compelled to be a witness against himself in *a criminal case*. If the possibility of a criminal prosecution using that testimony is removed, then the Fifth Amendment does not apply.

Immunity is a government tool for securing testimony that otherwise would be protected by the Fifth Amendment. If immunity is granted, the witness can then be compelled to answer, or be held in contempt if he refuses, even though he may be required to admit to criminal activity. There are two kinds of immunity.

1. *Use Immunity*

"Use immunity" prohibits the government from using any compelled testimony, as well as evidence derived directly or indirectly from that testimony, against the immunized witness. However, a grant of "use immunity" does not prohibit the government from prosecuting the witness. As its name implies, "use immunity" only means the government cannot use the compelled testimony against the person who was compelled to give it.

If the government decides to prosecute a person who testified under a grant of "use immunity," the prosecution must show that the evidence it proposes to use is derived from a source entirely independent of the defendant's compelled testimony. For example, the government may use evidence it obtained against the defendant *before* the defendant testified under "use immunity".

2. *Transactional Immunity*

"Transactional immunity" gives the witness full immunity from prosecution for the crime involved. As such, it provides the witness considerably broader protection than does the Fifth Amendment privilege.

C. No Right to Commit Perjury

Even when a witness is granted immunity, that witness cannot commit perjury in the course of his testimony. If the witness commits perjury, he can be prosecuted for it.

D. Documents Pursuant to Subpoenas

In general, requiring the production of a document – even one that is incriminating – is not subject to the privilege against self-incrimination on the basis of its contents. Although the contents may not be privileged, the act of producing a document may be. Compliance with a subpoena can be seen as an implicit admission the papers exist, are controlled by the holder, and are authentic. It also indicates the holder's belief

5th and 6th Amendments

that the papers are those described in the subpoena. These implications can be both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. Therefore, when the act of producing documents has these implications, the privilege applies and production may be refused. *United States v. Doe (Doe I).*

E. "Collective Entities"

The Fifth Amendment privilege applies only to natural individuals. Corporations and other collective entities are not protected by the Fifth Amendment. Therefore, the production of subpoenaed corporate records is not privileged and cannot be refused on Fifth Amendment grounds.

A record custodian's act is legally the act of the corporation, not the individual. While a custodian of corporate records may not resist a subpoena on the ground that the act of production would incriminate him personally, the Government cannot use the fact that the custodian provided the documents as evidence against the custodian.

F. Third Parties

One does not have a Fifth Amendment privilege to prevent the production of business and tax records in the possession of another person, such as an accountant. Because the Fifth Amendment privilege is a personal one, it adheres to the person, not to information that may incriminate him. Therefore, the accountant cannot assert a Fifth Amendment privilege to refuse production of client documents that might incriminate his client.

G. Internal Government Investigations

The government may not threaten to fire a government employee in order to obtain incriminating testimony and then use that evidence against the employee to get a conviction. Likewise, a government employee may not be terminated from government employment only for invoking and refusing to waive

his Fifth Amendment privilege against self-incrimination. *Garrity v. New Jersey*.

However, the government can require a government employee to answer questions specifically, directly, and narrowly related to the performance of his official duties if the employer adequately informs the employee: (1) that the employee is subject to discharge for not answering; and (2) that the employee's answers and their fruits cannot be used against him in a criminal case. *Kalkines v. United States*.

H. Deportation Proceedings or Foreign Prosecutions

Given the civil character of a deportation proceeding, the risk that testimony might subject a person to deportation is not sufficient reason to assert the Fifth Amendment privilege. However, if a person could demonstrate that any testimony he might give in a deportation investigation could be used in a domestic criminal proceeding, he would be entitled to invoke the privilege. Generally, the privilege cannot be invoked simply because the witness faces potential foreign prosecution.

VII. The Sixth Amendment Right to Counsel

A. Generally

The Sixth Amendment to the Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence." The purpose of the Sixth Amendment right to counsel is to ensure that anyone accused of a crime by the government will receive fair treatment in the judicial process and at trial. The opportunity for an accused to consult with and be represented by counsel when defending against a criminal charge is considered a basic requirement of fairness in our judicial process. It gives the defendant an opportunity to have defense counsel act as a buffer when forced to directly confront his skillful adversary – the government and its agents.

An individual's Sixth Amendment right to counsel attaches when the government has formally accused him with a crime, thereby initiating the adversarial process. It is not limited to custodial interrogation by known law enforcement officers, the way *Miranda* rights are under the Fifth Amendment. It applies to any "critical stage" of his prosecution.

B. Critical Stages

1. Interrogation

Once the Sixth Amendment right to counsel has attached, the defendant must be afforded the right to have counsel present during every "critical stage" of the criminal proceedings. Critical stages include all court-related proceedings. More importantly for law enforcement officers, any interrogation, custodial or not, is considered a critical stage. All attempts by law enforcement to elicit information from the defendant about the charged crime would be included. Because these are Constitutional rights, courts may apply the exclusionary rule for any violations.

2. Line-ups

Live identification procedures thrust the accused into a direct confrontation with his adversary. As a consequence, the courts consider line-ups to be a critical stage in the proceedings.

Whenever the defendant is placed in a line-up for identification for a charged offense, and the right to counsel has attached, the defendant must be afforded the opportunity to have his counsel present during the line-up. Any such line-up that includes the defendant must then be conducted with defense counsel present, unless the defendant waives that right. The validity of any waiver will be determined by the totality of the circumstances under which it was made. Violations of this right can have an adverse affect on later in-court identifications by a witness.

Identification through a photo array that includes the accused does not involve a confrontation, and therefore is not considered a critical stage of the adversarial proceedings. The defendant thus has no Sixth Amendment right to the presence of counsel when photo arrays are used.

C. Attachment

The protections of the Sixth Amendment right to counsel are not available to suspects until they have been formally accused or charged by the government with a crime. In the federal judicial system, formal criminal charges are initiated against a defendant by one of the following means:

- an Indictment returned by a federal grand jury;
- an Information filed by a federal prosecutor; or
- an Initial Appearance of the defendant after arrest.

Whenever the *earliest* of these events occurs in a case, the adversarial proceeding has begun, and the defendant's right to have counsel present at all critical stages has then attached.

D. Offense Specific

In the prior sections, it was noted that *Miranda* rights are not offense specific; that is, they apply to any custodial interrogation by law enforcement, regardless of the offense for which the suspect is being held. By contrast, the Sixth Amendment right to counsel is offense specific. Because the Sixth Amendment right applies only when adversarial proceedings are initiated, the right attaches only as to the charged offense(s).

However, the accused may be questioned about other, uncharged offenses, since the right has not attached as to those crimes. In *Texas v. Cobb*, the defendant committed a double murder while in the process of burglarizing a house. The defendant was formally charged with burglary, retained counsel, and was out on bond when he was arrested again, this

time for the murders. The Court said that the Sixth Amendment right to counsel did not bar police from interrogating the defendant about the murders, despite the fact that they arose from the same incident. A defendant's statements regarding offenses for which the Sixth Amendment right to counsel has not attached are admissible, even if the right has already attached for other pending charges.

E. Waiver and Invocation

1. Waiver

Once the right to counsel has attached, the government may not attempt to elicit information from the accused without first advising him of his right to have counsel, and then obtaining a voluntary, intelligent waiver. Although Sixth Amendment rights differ from the Fifth Amendment *Miranda* rights, the Supreme Court held that the same warnings can be used to get a waiver of either of these rights. There is no requirement to inform the accused that he has been charged, or as to the nature of the charge. Note, however, that a suspect's waiver of the *Miranda* right to counsel while in custody is not a waiver of his Sixth Amendment right to counsel, unless the Sixth Amendment right had already attached at the time he waived.

2. Undercover Agents and Informants

Unlike a *Miranda* situation, once the Sixth Amendment right has attached, the government can no longer use an undercover officer or confidential informant to question, or otherwise elicit information, from a defendant about the charged crime. This form of government questioning is still considered a critical stage requiring a proper waiver. However, covert agents who merely listen to the defendant, without actively eliciting the information, or who discuss *other* crimes, do not violate the right. The undercover operative must be careful not to discuss the charged crime with the accused, because even absent any actual questions, it could be seen as an attempt to elicit information.

3. *Invoking the Right*

The Sixth Amendment does not prohibit an officer from interrogating a defendant about charged offenses, so long as the officer either: (1) advises the defendant of his Sixth Amendment right to have counsel present and obtains a waiver from him, or (2) permits the defendant's attorney to be present during the interrogation. The defendant may choose to invoke his right to counsel, and/or the court may appoint an attorney to represent him on the charged offenses. The effect of a defendant's invocation of the right to counsel will depend upon his custodial status.

As noted in the discussion of the *Miranda* rules, a defendant **in custody** who invokes his right to counsel may not be re-approached by a known law enforcement officer to question him about any charged or uncharged offense without his counsel being present. The *Miranda* rules cease to apply once a suspect is released from custody. Since the Sixth Amendment right to counsel attached when the defendant was charged, that right would continue to apply to an officer's attempt to question the defendant who is not in custody concerning the pending charged offenses.

Unlike the *Miranda* rule however, a defendant's prior request for an attorney will not automatically prevent you from approaching or initiating contact with a defendant **who is not in custody** to attempt to obtain a waiver of the Sixth Amendment right to counsel. In cases where you seek to question a defendant about a charged offense after he has been previously appointed counsel [or requested an attorney in other settings (court proceedings, line-ups, etc.)], you may still approach the defendant. If the defendant voluntarily waives his Sixth Amendment right to counsel after warnings, questioning can proceed without counsel being present. However, if the defendant affirmatively requests counsel for the questioning, do not question the defendant without counsel being present. Re-approaching the defendant in such circumstances may be deemed to be badgering and call to question the voluntariness of any waiver or statement obtained thereafter. On the other

hand, if the invoking defendant initiates the contact with you, a valid waiver will permit you to question the defendant about the pending charged offenses without counsel being present. (But see the McDade Amendment in Section F below for possible ethical issues involved in speaking with persons known to be represented by an attorney.)

F. The McDade Amendment

A federal statute, 18 U.S.C. § 530B, commonly referred to as the "McDade Amendment", subjects federal prosecutors to the general ethical obligations of the members of the legal profession while in performance of their federal duties. Included in the common ethical rules that apply to attorneys are: (1) a "no contact rule" that bars communications by a lawyer with a person represented by another lawyer in a matter that concerns the representation, and (2) a rule that can hold a government attorney responsible for the actions of others (such as federal investigators) they direct, which would violate an ethical rule if done by the attorney.

As a result of the interplay of these rules, a prosecutor may be reluctant to make contact, or to direct federal agents to make contact, with any witness or suspect known to be represented by an attorney in the matter under investigation. When the ethical obligation applies, the prosecutor may insist that agents make the contact only if the witness/suspect's counsel is present or otherwise permits the contact. Unlike a constitutional right, this ethical requirement cannot be waived by the represented person, even where he initiates the contact.

Violation of the "no contact" ethical requirement could subject the prosecutor to discipline by state bar authorities - even in situations when it was actually the investigator that made the contact. As non-attorneys, investigators cannot be subjected to such discipline themselves. Due to the concerns involved, however, investigators should consult with the prosecutor assigned to the case prior to making any investigative contacts with a party that is believed to be represented by an attorney.

VIII. Fifth Amendment Due Process and Identification Procedures

A. Generally

Eyewitness identification evidence, an important law enforcement tool, is affected by the due process clause of the Fifth Amendment. Under the due process clause, pretrial identification evidence can be suppressed if the court finds that the procedures used were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mistaken identification." If the line-up is impermissibly suggestive, officers will not be allowed to tell the jury which person the witness identified during the line-up. The witness may not even be allowed to identify the accused as he sits in the courtroom if there is a genuine question about whether the witness' memory of his physical appearance comes from the suggestive line-up, or from the events of the actual crime.

B. Types of Identification Procedures

Generally, there are three types of procedures used by law enforcement officers to determine if a witness or victim can identify the perpetrator of a crime:

- *Line-ups.* The witness views a number of actual potential suspects in an attempt to identify the perpetrator of a crime.

- *Photo Displays/Arrays.* The witness views a number of photographs of persons in an attempt to identify the perpetrator of a crime.
- *Show-Ups.* The witness, in a direct one-on-one showing of an actual person, attempts to identify the perpetrator of a crime.

1. Line-ups

A suspect cannot invoke his Fifth Amendment privilege against self-incrimination to refuse to participate in a line-up

since it is "non-testimonial" in nature. However, the due process clause guarantees an accused that the procedures used in a line-up will be fair. A line-up can be unduly suggestive if the defendant matches a witness' description and the other line-up participants obviously do not (e.g., the defendant is 6'0" tall, and the other participants are all 5'6" or less). Similarly, a line-up in which the suspect is the only participant wearing the distinctive clothing described by the victim substantially increases the dangers of misidentification. While a line-up of "clones" is not required, these examples of unduly suggestive line-ups would likely violate the suspect's due process rights.

2. Photo Arrays/Displays

To determine whether a photo display is impermissibly suggestive under the due process clause, a number of factors may be relevant, including the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves.

(a) Size of the Array

When a relatively low number of photographs are used in an array, minor differences such as background color can make a picture stand out and can act to repeatedly draw a witness' eyes to that picture. Common sense dictates that slight irregularities are more likely to "jump out" at a witness reviewing a single sheet of paper with only six photographs on it than at a witness reviewing a large mug book containing hundreds of photographs. The lower the number of photographs used in a photo array, the closer the array must be scrutinized for suggestive irregularities. Generally, using six photographs in an array has been upheld by the courts.

(b) Manner of Presentation

Improper presentation of photographs may sometimes cause witnesses to err in identifying criminals. Examples of presentations that may increase the risk of misidentification include: (1) repetitive showing of suspect's photo; (2) emphasizing a photo; (3) displaying photos of several

individuals, but where the suspect's image keeps repeating or is in some way emphasized; (4) indicating to a witness that police have other evidence that one of the persons pictured committed the crime; (5) telling a witness to assume the suspect is in the array; (6) using a suspect's photo that is a different color than the others in the array; (7) the attention-drawing or suggestive details of the photographs themselves.

3. Show-ups

The practice of showing a suspect directly to a witness for the purpose of identification, and not as part of a line-up, has been widely condemned. Nevertheless, show-ups can be proper and not overly suggestive under certain circumstances.

Show-ups that occur shortly after a crime are permissible. Show-ups performed immediately after a crime are a reasonable way to further fair and effective law-enforcement as they allow identification before the suspect has altered his appearance, and while the witness' memory is fresh. This may help lead to the quick release of innocent persons. In some cases, such as where a victim is hospitalized, show-ups may be the only viable option, and courts have allowed this.

Chapter Fourteen

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I. Introduction

Perhaps no issue can impact on the personal and professional career of a law enforcement officer more than a lawsuit alleging excessive use of force.

A. Non-Deadly Force and Reasonableness

Most officers will use non-deadly force far more frequently than they will use deadly force. The constitutional standard for using any force, whether deadly or not, is the Fourth Amendment standard of "objective reasonableness." In *Graham v. Connor*[1], the Supreme Court made clear that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it. The Court recognized that the test of

[1] Cases named in this chapter without a case cite are briefed in the companion book, *Legal Division Reference Book*.

reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, so proper application requires careful attention to the facts and circumstances of each particular case.

B. No "Perfect Answer" When Using Force

The Supreme Court explained in *Graham* what standard courts should use to determine if the use of force was reasonable:

> Based on a totality of circumstances . . . the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight[.] . . . As in other Fourth Amendment contexts, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to the officer's underlying intent or motivation....
>
> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

C. Factors to Consider in Determining Whether Excessive Force was Used

In *Graham*, the Supreme Court emphasized four key factors that courts will examine when determining what level of force is justified in a use of force encounter:

- Severity of the crime.
- Whether the suspect is an immediate threat to the safety of the officer or others. (This is the most important single factor.)
- Whether the suspect is actively resisting arrest, or
- Is attempting to evade arrest by flight.

Since *Graham*, courts have used additional factors to determine whether use of force is reasonable in a particular case, including:

- The number of suspects and officers involved.
- The size, age, and condition of the officer and suspect.
- The duration of the action.
- Whether the force applied resulted in injury.
- Previous violent history of the suspect, known by the officer at the time.
- The use of alcohol or drugs by the suspect.
- The suspect's mental or psychiatric history, known by the officer at the time.
- The presence of innocent bystanders.
- The availability of other weapons (sprays, batons, tasers).

D. Handcuffing and Pointing Weapons during *Terry* Stops

1. *Using Handcuffs Does Not Automatically Convert a Seizure into an Arrest*

Because the facts may justify freezing a potentially dangerous situation for purposes of safety, using handcuffs may be reasonable during a *Terry* stop. Handcuffing a suspect does not transform a *Terry* stop into a full custodial arrest, provided the use of handcuffs is reasonably necessary to assure the safety of officers or bystanders. Handcuffing can be a reasonable attempt to restrain a suspect as long as the officer can articulate a reasonable factual justification for the restraint.

For instance, pointing a firearm at and handcuffing a suspect can be reasonable when a suspect matches the description of an armed and dangerous suspect. In *United States v. Vargas*, 369 F. 3d 98 (2d Cir. 2004) officers had reliable information that Vargas was carrying a weapon. Vargas had demonstrated his unwillingness to cooperate by fleeing from the police when first contacted and continuing to struggle with one of the officers after he was stopped. Immediately upon intercepting Vargas, the officer placed him in handcuffs and conducted a pat-down search for weapons, which revealed a concealed firearm. The court held that the level of force used was reasonable under the circumstances, and that Vargas was not arrested until the discovery of the firearm.

2. *Pointing a Weapon at a Suspect Does Not Automatically Convert a Seizure into an Arrest*

As with the use of handcuffs, there is no rule that pointing guns at people constitutes an arrest. Instead, the use of guns in connection with a stop is permissible when officers reasonably believe such action is necessary for their protection. Courts have held that intrusive and aggressive police conduct is not an arrest when it is a reasonable response to legitimate safety concerns on the part of the investigating officers. *United States v. Miles*, 247 F.3d 1009 (9th Cir. 2001).

3. *"Officer Safety" as a Reason for a Particular Use of Force*

Simply stating that a particular use of force, such as handcuffing, pointing a weapon, or using a baton or chemical spray on a suspect, was done for "officer safety" is not sufficient. "Officer safety" is the conclusion that you reach when presented with facts that lead you to believe that your safety is a concern, or is in jeopardy. You must be able to articulate specific facts, since these facts will be used to judge your particular use of force. For example:

I handcuffed and frisked the suspect because he had a bulge in his jacket pocket and he would not keep his hand out of that pocket after being told to do so.

NOT

I handcuffed and frisked the suspect for "officer safety."

II. The Use of Deadly Force

A. Definitions

The following definitions are useful in explaining the rules regarding "deadly force."

1. *Deadly Force*

"Deadly force" is defined as that force which is reasonably likely to cause death or serious physical injury.

2. *Serious Physical Injury*

Typically, "serious physical injury" is defined as any bodily injury which involves: (1) a substantial risk of death; or (2) extreme physical pain; or (3) protracted and obvious

disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

B. Use of Deadly Force – Objective Reasonableness

As stated above, all claims made against law enforcement for using excessive force—deadly or not—are analyzed under the Fourth Amendment's "objective reasonableness" standard. Whether or not an officer's actions constitute deadly force, all that matters is whether the officer's actions were objectively reasonable. This determination depends upon the underlying facts and circumstances of each particular case.

In *Scott v. Harris*, the Supreme Court decided a case involving a high speed vehicle pursuit. A deputy chased a vehicle for speeding (73 mph in a 55 mph zone) at speeds approaching 90 mph down mostly two-lane roads with other vehicular traffic present. Six minutes and nearly ten miles after the chase started, a deputy received permission to stop the pursuit by using a precision Intervention Technique ("PIT"). However, the deputy concluded that the suspect vehicle was traveling too fast, so instead he applied his push bumper to the rear of the suspect's vehicle. As a result, the suspect lost control of his car, which left the roadway, ran down an embankment, overturned and crashed. The suspect was rendered a quadriplegic. He filed a civil rights lawsuit alleging the officer used excessive force under the Fourth Amendment.

On appeal, the Supreme Court said that a Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied. The Supreme Court noted that the police cruiser's videotape showed the following facts: the suspect's vehicle was racing down narrow, two-lane roads in the dead of night at speeds that were shockingly fast. The suspect swerved around more than a dozen other cars, crossed the double-yellow line, and forced cars traveling in both directions to their respective shoulders to avoid being hit. The suspect's vehicle ran multiple red lights and traveled for a considerable time in the center left-turn-only lane. The Court noted that the

suspect's driving put the police officers and innocent bystanders alike at great risk of serious injury. The Court looked not only at the number of lives at risk, but also the relative culpability of the suspect in relation to the innocent public. The Court said that it was the suspect, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice to the deputy: use deadly force against the suspect to stop the risk of serious bodily injury or death he posed to the public or do nothing and take the risk that the suspect would injure or kill an innocent party.

Based on the totality of the facts and circumstances, the Supreme Court ruled the car chase that the fleeing motorist initiated posed a substantial and immediate risk of serious physical injury to others. As such, the deputy's attempt to terminate the chase by forcing the motorist off the road was objectively reasonable and therefore the deputy was entitled to summary judgment based upon qualified immunity, which resulted in the dismissal of the lawsuit against him.

In *Tennessee v. Garner*, the Supreme Court announced one set of constitutional requirements regarding deadly force. The Court held that, under the Fourth Amendment, an officer may <u>not</u> use deadly force to prevent the escape of an unarmed and non-dangerous fleeing suspect. By way of example only, the Court then laid out one set of circumstances under which police officers might constitutionally employ deadly force to prevent the escape of a fleeing dangerous suspect. Specifically, the Court noted:

> Where the officer has <u>probable cause</u> to believe that the suspect poses a <u>threat of serious physical harm</u>, either <u>to the officer or to others</u>, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if

> necessary to prevent escape, and, where feasible, some warning has been given. (emphasis added)

In *Scott*, the Supreme Court said that the necessity to act described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others."

For example, a police officer responds to a bank holdup. The officer looks inside the bank and sees a masked individual standing with his arm extended toward several people who have their arms raised above their heads. However, due to an obstruction, the officer is unable to see if the masked man has an object in his hand. Thereafter, the suspect runs out of the bank carrying a bag in his hand. The officer twice calls out, "Halt, police," to the fleeing suspect. The fleeing suspect disregards the verbal warnings and instead continues to flee. The officer shoots the fleeing suspect.

The officer's actions were objectively reasonable under the circumstances. Under the totality of the information possessed by the officer when deadly force was used, the officer had probable cause to believe that the suspect posed a threat of serious physical harm to himself and to others. *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988).

C. Other Aspects of Objective Reasonableness

Objective reasonableness can involve many factors. Below are general insights concerning the use of deadly force.

1. No Need to "Fear for Your Life" Before Using Deadly Force

Objective reasonableness does not require that officers be in "fear for their life" before using deadly force. For example, snipers may justifiably shoot a hostage taker from a distance without any subjective fear of harm.

2. *Warning Shots Are Not Explicitly Prohibited*

Objective reasonableness does not explicitly prohibit the use of warning shots. However, the use of warning shots is often regulated by agency policy. For example, the Department of Homeland Security Policy on the Use of Deadly Force generally prohibits warning shots with an exception that allows warning shots by the Secret Service exercising protective responsibilities and the Coast Guard (shot across the bow).

3. *The Offense Can Be a Felony or Misdemeanor*

Whether or not an offense is a felony or misdemeanor is not determinative as to whether an officer can use deadly force. The focus as to what force is appropriate is on the threat of violence to the officer or others. An officer may encounter violent misdemeanor assaults involving weapons, as well as non-violent felonies like financial fraud that may well require the use of deadly force.

4. *Verbal Warnings Are Not Always Required Before Deadly Force Can Be Used*

If feasible to do so, giving a warning before using deadly force will help justify the reasonableness of the force used. A warning is not required before every use of deadly force, and nothing mandates that the warning be verbal.

5. *No Need to Exhaust All Lesser Forms of Force before Using Deadly Force*

An officer is not required to exhaust all lesser forms of force before resorting to deadly force. However, even when deadly force is authorized, you can always use a lesser amount of force.

6. *No Duty to Retreat before Using Deadly Force*

Some states have imposed a "duty to retreat" on private citizens before permitting those citizens to use deadly force. However, law enforcement officers are under no legal duty to

retreat before using deadly force. Of course, there is no rule preventing officers from retreating should they consider it best to do so. There may be sound tactical reasons for disengaging and retreating to cover.

[Chart removed for compliance with Section 508 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (d).]

D. Examples

The following cases illustrate basic principles regarding the use of deadly force.

1. Officer Shoots Unarmed, Handcuffed Suspect Who is Running Towards Him and Who the Officer Reasonably Believed Was Armed

In *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir.), *cert. denied*[2], 513 U.S. 1018 (1994), two arrested suspects were sitting in a break room with an officer (Smith) awaiting transport to jail. Both arrestees were handcuffed in the front of their bodies. Unfortunately, a magistrate on the scene that night had left a firearm unattended in an adjoining office while taking a restroom break. When one of the arrestees jumped up and bolted into the office where the gun was located, Smith ran from the break room yelling, "The man has got a gun!" several times. The other arrestee (McLenagan) followed Smith out of the room in an attempt to avoid the perceived danger. Because he was handcuffed, McLenagan was crouched over while he ran. Smith, still yelling, "The man has got a gun," ran past another officer (Karnes), who was escorting a detainee down the

[2] *Cert. denied* means that the Supreme Court refused to consider an appeal of the lower court's decision.

main hallway toward the front door, away from the break room. Karnes immediately drew his gun, wheeled and saw McLenagan almost upon him; Karnes could not see whether McLenagan had a gun in his hands. Karnes fired one shot, wounding McLenagan.

The court held that Karnes acted reasonably and dismissed the civil lawsuit. The court noted they would not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others. Here, Karnes had a credible warning that an imminent danger existed based upon Smith's statements. Also, Karnes had no ability to provide a verbal warning to McLenagan because, when he turned and drew his weapon, McLenagan, in full flight, was virtually upon him. For all Karnes knew, the hesitation involved in giving a warning could readily cause such a warning to be his last. Finally, the court found it would not be wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him. In other words, it was not necessary for Karnes to actually see the weapon in McLenagan's hands before he resorted to deadly force.

2. *Officer Shoots a Fleeing, Dangerous Subject Armed with a Knife*

In *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir.), *cert. denied*, 510 U.S. 946 (1993), an officer (Fuhr) was chasing an assault suspect (Krueger) who was thought to be an escapee from a halfway house, high on drugs, and armed with a knife. Fuhr repeatedly ordered Krueger to "freeze" during the chase. As he got within 3-4 yards of Krueger, Fuhr observed him reach into his waistband and retrieve a knife. Believing Krueger was preparing to turn to attack him with the knife, Fuhr shot him in the back, killing him with one round to the base of the skull.

The court held that Fuhr acted reasonably in using deadly force. First, because he received information that Krueger was intoxicated, had a knife, and was fleeing an

assault, Fuhr reasonably believed he was dealing with an armed and dangerous suspect. Second, because there was probable cause to believe that Krueger posed a threat of serious physical harm and had previously committed an assault, the use of deadly force was necessary to prevent Krueger's escape. And third, while Fuhr did not give a verbal warning immediately preceding the shooting, he had given warnings throughout the course of the pursuit.

3. Officer Shoots Unarmed Suspected Robber Who Reached into His Coat

In *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988), two officers pulled over two men in a vehicle who were suspected of an armed robbery. Both officers had their weapons drawn as they approached the vehicle. The suspects raised their hands only after being told to do so three times by the officers. As one of the officers (Berry) approached the vehicle, he observed the driver make a quick movement with his hand into his coat as if he was going to reach for a weapon. The officer shot, killing the suspect (Sherrod) instantly.

During the civil lawsuit that followed, the plaintiff (Sherrod's family) was allowed to present evidence that, following the shooting, a search of the suspect indicated he was unarmed at the time he was shot. The jury returned a verdict against Berry, who appealed. In reversing the jury verdict and remanding the case for a new trial, the appellate court reiterated that knowledge of facts and circumstances gained after the fact (that the suspect was unarmed) had no place in the trial court's or jury's analysis of the reasonableness of the officer's judgment. By admitting this evidence, the judge allowed the jurors to possess more information than Berry possessed when he made the crucial decision. This was improper. An officer's liability must be determined exclusively upon an examination and weighing of the information the officer possessed immediately prior to and at the very moment he fired the fatal shot. In sum, the court held that, when an officer believes that a suspect's actions places the officer, the officer's partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer may reasonably use deadly force.

4. *Officer Shoots Suspect Who Attacked His Partner with a Magnetic Key Holder*

In *Lowery v. Stovall*, 92 F.3d 219, (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997), an officer (Redd) made a routine traffic stop and placed the suspect (Lowery) in the front seat of the patrol car while he wrote the ticket. A second officer (Stovall) was in the back seat. At a certain point, Lowery pulled an object out of his pocket and cut Redd on the face. When Redd yelled "knife," Stovall attempted to stop the attack. Lowery started to climb over the seat and swung the object at Stovall. Stovall blocked Lowery's arm, drew his firearm and shot Lowery in the head. After the incident, officers determined that the object was a magnetic key holder, not a knife.

The use of deadly force in this case was reasonable. The court noted that, upon seeing Lowery attack Redd and hearing Redd yell that Lowery had a knife, Stovall had probable cause to believe that Lowery posed a threat of serious harm to Redd. Accordingly, Stovall acted as a reasonable officer would have in his situation.

5. *Officer Shoots an Unarmed, Fleeing Burglar*

In *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993), a suspect (Ellis) broke into a pharmacy by knocking a hole through an adjoining building with a sledgehammer. In so doing, he tripped the burglar alarm. An officer (Wynalda) responded and observed Ellis walking away carrying a jacket and a mesh bag. Wynalda twice ordered Ellis to halt. Unexpectedly, Ellis threw his jacket and bag towards Wynalda, backed away, turned, and started to run away. The lightweight bag (4-5 pounds) hit Wynalda on the shoulder and then fell harmlessly to the ground. As Ellis ran away, Wynalda shot him once in the lower back.

The district court dismissed the lawsuit, but the circuit court reversed, finding there remained questions as to whether the use of deadly force in this situation was reasonable. First, Wynalda had no particular reason to believe Ellis was armed.

Second, while the tossing of the lightweight bag was risky and startling, it was not the equivalent of menacing Wynalda with a weapon. As noted by the court:

> If Wynalda feared that the bag might be heavy and might knock the gun from his hand or provide an opportunity for Ellis to draw a concealed weapon, he would have been justified in firing at that moment, but not after the lightweight bag fell to the ground without injuring him and Ellis had turned and run. In other words, if Wynalda had shot Ellis while Ellis was throwing the bag at him, that would have been permissible as the action of a reasonable officer facing a dangerous felon. Even if he shot Ellis after the bag had hit him but while he was still disoriented and off-balance, his action could be reasonable, because he would not know, for example, if Ellis was going to attack him or was reaching for a weapon. In this case, however, Wynalda was struck by the lightweight bag and then observed Ellis back away, turn and run. He could see and understand the situation; he bore no injury; Ellis presented no immediate threat and was not apparently armed. Even the bag he may have used as a weapon had been abandoned at the officer's feet.

Third, when an officer faces a situation in which he could justifiably shoot, he does not retain with impunity the right to shoot at any time thereafter. Although Wynalda could have shot Ellis during their physical encounter, since a reasonable officer may have felt threatened, Wynalda had no reasonable fear of Ellis after he backed away and ran. If Ellis had threatened the officer with a weapon and then run off with the weapon, a reasonable officer in Wynalda's place could believe that Ellis created a danger to the community. However, here, Ellis tossed a lightweight bag up toward Wynalda and then ran away, without even that makeshift weapon to endanger anyone. While Ellis' actions may seem foolish to the reasonable officer, they do not give rise to a reasonable belief that Ellis presented a threat of serious harm to Wynalda or others.

E. Agency Policy Restrictions

The Fourth Amendment sets a minimum standard for the use of deadly force. Agency policies on use of force often intentionally restrict what would otherwise be permitted under the Constitution. Thus, it is possible to lawfully use deadly force in accordance with Constitutional standards, yet still violate agency policy. Policy violations may result in administrative discipline. However, while agency policies are relevant to the analysis of constitutionally excessive use of force claims, they do not automatically establish civil liability. The courts will use the standard of objective reasonableness to decide if an officer violated a suspect's constitutional rights.

III. Striking Instruments and Chemical Sprays

A. Striking Instruments – Generally

Within the context of this course, the term "striking instruments" refers to those items within your possession that might be used to strike a blow against a subject. Generally, this would include flashlights and expandable batons.

B. The Rules Outlined in Graham Apply

As with any other use of force, an officer's use of a striking instrument must be objectively reasonable based upon the totality of the circumstances known to officer at the time of the incident. Whether the use of force was objectively reasonable requires the consideration of such factors as the severity of the crime, whether the suspect is an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

C. Gratuitous Blows

Gratuitous and completely unnecessary acts of violence by the police during a seizure violate the Fourth Amendment. Once a suspect has been restrained and is no longer resisting, any gratuitous blows to the suspect would generally be

unreasonable and violate the Fourth Amendment. "It is one thing to use force in subduing a potentially dangerous or violent suspect, and quite another to proceed to gratuitously beat him." Just because a certain degree of force to restrain a suspect may have been justified earlier in an encounter does not mean that such force still is justified once the suspect has been restrained.

D. Examples

The following cases illustrate basic principles regarding the use of striking instruments, such as flashlights and expandable batons.

1. Officer Strikes Handcuffed Suspect in the Mouth with His Nightstick

In *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985), officers Geil and Downs arrived and arrested a woman (Lewis) for causing a disturbance. In an attempt to prevent his mother from being taken to jail, Lewis' son approached an officer with an iron rake. After Downs drew his weapon and ordered him to drop the rake three times, the son did so. The son was then handcuffed and arrested. While being led to the police car, without justification Geil struck the son in the mouth with his nightstick, inflicting an injury to his mouth that ultimately required several stitches.

The court determined Geil had used excessive force in striking the son in the mouth with his nightstick after having subdued and handcuffed him. "The unprovoked and unnecessary striking of a handcuffed citizen in the mouth with a nightstick is clearly excessive. Because there was simply no reason for this type of conduct the striking could only be deemed malicious."

2. Officer Strikes Non-Resisting Suspect in Stomach with Flashlight

In *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), officers performed a *Terry* stop on Mr. Dixon and his wife.

When Dixon was asked to put his hands on the van so a frisk could be performed, he complied. During the frisk, one officer (Richer) kicked Dixon in the instep, causing him intense pain. Dixon responded to this act by stating, "Is that f——g necessary?" No weapons were found during this frisk. When a second officer arrived, Dixon was again ordered to put his hands against the van for a frisk, and again he complied. At that point, the officers began to pat him down again. Without warning, one of them kicked Mr. Dixon again, so forcefully that he started to fall. As Mr. Dixon fell, Richer hit him in the stomach with a metal flashlight. Once on the ground, the deputies got on top of him and began to beat and choke him.

The court noted that when Dixon was kicked (the second time), struck with a flashlight, and then choked and beaten, he had already been frisked, had his hands up against the van with his back to the officers, and was not making any aggressive moves or threats. While it is reasonable to frisk a detainee suspected of carrying a weapon, it is not reasonable to hit him in the stomach with a flashlight, or choke and beat him, solely on the basis of that suspicion.

3. Officer Strikes Armed Robbery Suspect with Flashlight during Arrest

In *Kellough v. Bertrand*, 22 F. Supp. 2d 602 (S.D. Tex. 1998), officers performed a traffic stop on an individual (Kellough) who matched the description of an armed robbery suspect in an area where the suspect was believed to be. Upon exiting the vehicle, Kellough was ordered to lay face-down on the road. Kellough did not comply immediately and began to ask what he had done. Officers then took him to the ground and handcuffed him. Kellough alleged that one of the officers, Bertrand, struck him in the arm with a flashlight during this portion of the stop. Kellough was not the robbery suspect, and a grand jury failed to indict him on charges of resisting arrest and retaliation.

The court dismissed Kellough's claim of excessive force. The court noted that, even accepting as true Kellough's

allegation that he exited his vehicle in a non-threatening manner, his refusal to follow the officers' instructions to go to the ground would probably justify a reasonable officer's decision, in light of the circumstances, to employ some force to take him to the ground. While the court found the allegation regarding the use of the flashlight to be "troubling," Kellough had acknowledged that none of the officers struck him or employed any force whatsoever after he was handcuffed. Thus, assessing the situation from the perspective of a reasonable officer on the scene, it did not appear to the court that any of the actions identified by Kellough were excessive.

4. *Officers Strike Suspect Resisting Arrest with Flashlight and Nightstick*

In *Cotton v. Busic*, 793 F. Supp. 191 (S.D. Ind. 1992), the suspect (Cotton) went on a rampage one night by throwing rocks and creating a disturbance to which two police officers were summoned. Cotton and the officers then engaged in a scuffle which left Cotton with serious bumps and bruises and no left eye. Generally, Cotton was acting in an enraged, aggressive and threatening manner on the night that he was confronted by the officers. Cotton was armed with two hunks of concrete which he initially refused to put down when requested to do so by the officers. When the officers tried to arrest Cotton, a scuffle ensued. A witness testified that Cotton was the aggressor, that Cotton got one of the officers in a "bear hug," and that Cotton was "strong as hell." Once the officers got Cotton to the ground, he continued to struggle and resist the officers even while he was on the ground. The officers struck Cotton with both flashlights and nightsticks to make him comply. In the civil suit that followed, the jury returned a verdict in favor of the officers on the excessive force claim. Cotton asked the judge to overturn the jury's verdict. In upholding the jury's verdict, the court stated:

> The officers struck Cotton with a flashlight and a nightstick - brutal stuff - but the evidence is strong that it was a brutal encounter. Nor can this Court conclude that the force used was excessive because

of the combination of the sad reality that Bobby Cotton's eye socket was exploded and the fortunate circumstance that the officers were not seriously hurt. A police officer need not suffer brutalizing injury before he inflicts it; rather, the restraint on an officer's use of force is that it must be reasonable under the circumstances.

E. Chemical Sprays – Generally

The term "chemical spray" typically refers to pepper spray (Oleoresin Capsicum). However, the rules outlined below will likely apply to all other chemical sprays that may be used by law enforcement personnel. By way of definition, oleoresin capsicum (pepper gas) is an aerosol spray made from an oily extract of the capsicum pepper plant. When inhaled, it induces coughing, a gagging sensation, and an inability to vocalize. It is a less powerful version of the irritant gases marketed under the trade name Mace, and its use is authorized under standard police protocol in less threatening instances than those in which the use of Mace is sanctioned.

1. When Chemical Sprays are Generally Considered to be Excessive

The unreasonable use of chemical sprays may constitute excessive force. The analysis for use of chemical sprays as force is essentially the same as that for the use of more traditional forms of physical control. Reasonableness is determined by the totality of the circumstances, including the arrestee's conduct and the officer's reasonable perception of the scenario. While every use of force must be measured against the particular circumstances of a given situation, some general rules regarding the use of chemical sprays can be outlined. Courts have consistently concluded that using chemical sprays is excessive force in the following types of cases:

(a) The Crime is a Minor Infraction

Generally, more force is appropriate for a more serious offense, and less force is appropriate for a less serious one.

"Severity of the crime at issue" was one of the factors noted by the Court in *Graham*. For example, the use of a chemical spray is more likely to be excessive when an arrest involves a minor infraction like a seat belt violation.

(b) The Arrestee Surrenders, is Secured, and is Not Acting Violently

Graham noted that a court should consider whether the suspect is actively resisting arrest or attempting to evade arrest by flight. In one case, the use of a chemical spray against protesters was excessive, in part because the officers already had control over the protestors. It would have been clear to any reasonable officer that it was unnecessary to use pepper spray to bring them under control. The use of a chemical spray may be reasonable as a general policy to bring an arrestee under control. But, in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of a chemical spray, or a refusal without cause to alleviate its harmful effects, constitutes excessive force. The use of a chemical spray would be unreasonable if no assault occurred, and the suspect is not acting in a threatening or violent manner.

(c) There is No Threat to the Officers or Anyone Else

Graham emphasized that courts should consider whether the suspect posed an immediate threat to the safety of the officers or others. This is the most important single element of the four factors outlined in *Graham*.

2. When Chemical Sprays are Generally Considered to be Reasonable

Courts have consistently concluded that using chemical sprays is reasonable in the following types of cases:

(a) The Suspect was Resisting Arrest

When a suspect is actively resisting arrest, a chemical spray may be a reasonable tool to obtain compliance. In fact,

chemical sprays are often a very reasonable alternative to escalating a physical struggle with an arrestee. If an armed officer physically confronts an individual resisting arrest, any number of unforeseen contingencies (such as the officer losing his firearm) could occur. As a means of imposing force, chemical spray is generally of limited intrusiveness. It is designed to disable a suspect without causing permanent physical injury.

(b) The Suspect was Refusing Police Requests

When a suspect is refusing lawful police commands, such as requests to get in a patrol car or to go to the hospital, it may be reasonable to employ a chemical spray to obtain compliance.

(c) The Suspect Was Trying to Swallow Evidence

There is no constitutional right to destroy or hide evidence. Over the years, the courts have considered whether an officer's use of force to obtain evidence from a suspect was appropriate. Many cases have found searches of a suspect's person reasonable despite the fact that the evidence was obtained from the suspect's mouth or other orifice. In one case, a court found the use of a chemical spray to prevent the suspect from swallowing crack cocaine to be reasonable under the circumstances.

F. Examples

The following cases illustrate basic principles regarding the use of chemical sprays.

1. Use of Chemical Spray Reasonable

(a) Officer Uses Pepper Spray Against Handcuffed Suspect Who Was Struggling During an Arrest

In *Griffin v. City of Clanton*, 932 F. Supp. 1359 (M.D. Ala. 1996), officers made a traffic stop of the suspect (Griffin). During the investigation, it appeared to the officers that Griffin

was intoxicated. Griffin fled the scene of a traffic stop and was found shortly thereafter banging on the backdoor of a house that belonged to his aunt. Upon seeing the officers' approach, Griffin ran inside the house. The officers chased him inside, cornered him in the living room, and began to struggle with him. Ultimately, the suspect was handcuffed and lying face down on the floor, still struggling, with two officers on top of him. Another officer (Bearden) entered the house, did not see that Griffin was handcuffed, and believed that pepper spray was necessary to subdue him. The officer waited for an opportunity to spray Griffin without hitting any officers, and then sprayed him in the face.

Griffin claimed the use of pepper spray (among other things) was excessive under these circumstances. The court disagreed and dismissed the lawsuit. First, Griffin had already fled from the officers twice - once from the scene of the traffic stop and once when he ran inside the home. Second, the officers believed Griffin was intoxicated. This was good cause to believe that Griffin would continue to resist arrest - as proved to be the case - when he was confronted inside the house. Third, when Bearden arrived on the scene, it was chaotic. He could not see that Griffin had been handcuffed. And, while Bearden sprayed the OC directly into Griffin's face, he had a legitimate reason for so doing. Specifically, had Bearden diffused the spray more generally, he would have risked disabling the other officers, and Griffin might have had the opportunity to flee once again or to inflict harm upon an officer or himself.

(b) Officer Uses Pepper Spray Against Unarmed Man Refusing to Go to Hospital

In *Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997), the suspect (Monday) had a long history of drug and alcohol abuse, as well as depression. Physically, he was approximately 6'0" tall and weighed over 300 pounds. After receiving a call from a mental health counselor that Monday was ingesting pills (Xanax) and drinking alcohol in a suicide attempt, police arrived to investigate. After finding that over 20 of Monday's pills were missing, the officers insisted he go to the hospital to be

examined, but he refused. After approximately 20 minutes, Oullette informed Monday that if he did not go to the hospital, he would be sprayed with pepper spray. Monday continued to refuse, instead remaining seated and drinking a bottled beer. At that point, Oullette administered a single spray of pepper spray.

In affirming the district court's judgment in favor of Oullette, the court found Oullette's use of pepper spray permissible based on the suspect's refusal to go to the hospital. Here, Oullette warned Monday that if he did not agree to go to the hospital, he would be sprayed. After many minutes of fruitless discussion, that's exactly what happened. According to the court, Oullette's decision to act on his warning (to spray Monday), rather than risk injury and further delay through a physical confrontation with a large and intoxicated person, did not constitute excessive force. While Monday was neither verbally nor physically abusive to the officers, numerous factors supported Oullette's decision to resort to pepper spray: (1) Monday's size; (2) the fact he had been drinking; (3) the fact he still was drinking from a bottle; and (4) Monday's adamant refusal to go to the hospital. Further, resorting to physical force rather than pepper spray would have raised additional problems for the officers. In view of Monday's size, his drinking and the beer bottle in his hand, Oullette chose to use pepper spray, which his department permitted him to do in his discretion.

(c) Officer Uses Pepper Spray to Prevent a Suspect From Swallowing Evidence

In *United States v. Holloway*, 906 F. Supp. 1437 (D. Kan. 1995), the suspect (Holloway) was handcuffed and detained during the execution of a search warrant for drugs. When Holloway failed to respond audibly to several questions, officers became suspicious he had something in his mouth. Although Holloway was ordered to spit out whatever he had in his mouth, he refused to do so. The officers then sprayed CAPSTUN into Holloway's face, causing him to disgorge a quantity of cocaine base from his mouth.

Holloway moved to suppress the evidence obtained from his mouth, claiming he had been the victim of excessive force. The court refused, noting initially that there is no constitutional right to destroy or secret evidence. In this case, the use of CAPSTUN was reasonable, because (1) Holloway was only sprayed once, and (2) the physical force used in restraining Holloway and obtaining the contents of his mouth was reasonable under the totality of circumstances. Officers were not required to simply wait to let nature take its course.

2. Use of Chemical Spray Unreasonable

(a) Officer Uses Pepper Spray Against Verbally Abusive Suspect Who is Handcuffed and Secured in Rear of Patrol Vehicle

In *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), an officer (Stanfield) arrested Vinyard for "disorderly conduct and obstruction," both minor offenses. Vinyard was handcuffed and placed in the back of the patrol vehicle for the ride to the jail, approximately 4 miles away. The vehicle had a plexiglass screen that separated the front and back seats. During the ride, Vinyard and Stanfield got into a verbal altercation, with Vinyard "screaming" at the officer. At a secluded place, Stanfield pulled the vehicle over, got out, and opened the back door where Vinyard was seated. He then pulled Vinyard's head back by her hair and sprayed her in the face with two to three bursts of pepper spray. At all times during this incident, Vinyard was handcuffed and located in the back seat of the vehicle. Further, Vinyard was 5'3" tall and weighed 130 pounds, while Stanfield was 6'0" and weighed over 200 pounds.

The circuit court found it abundantly clear that Stanfield's use of the pepper spray against Vinyard was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*. Relying on the four factors outlined in Graham, the court noted the following: First, the crimes for which Vinyard was arrested were of minor severity. Second, Vinyard posed no threat, immediate or otherwise, to Stanfield or anyone else, because (a) she was handcuffed, (b)

she was secured in the back of the patrol vehicle, and (c) there was a glass partition separating her from Stanfield. Finally, and for many of the same reasons noted above, there was no evidence that Vinyard resisted arrest or attempted to flee.

(b) Officer Uses Pepper Spray on Unarmed Woman

In *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001), Park and her husband inadvertently tripped the alarm of a store they had entered mistakenly believing it was open. They immediately called 911 to report what had occurred, and waited for officers to arrive. Upon arrival, the officers checked the store and found nothing to indicate a forced entry. When Mr. Park sought to return home to turn off a stove that had been left burning, he was handcuffed and detained by the officers. When Mrs. Park observed this, she began approaching her husband, but was stopped by one of the officers, who twisted Mrs. Park's arm behind her back, threw her up against the building, and handcuffed her. He sprayed her twice in the eyes from close range. Neither Mr. Park nor Mrs. Park was charged with any crime.

The circuit court found it difficult to imagine the unarmed Mrs. Park as a threat to the officers or the public. The irresponsible use of pepper spray twice from close range on the unarmed Mrs. Park was indeed excessive.

IV. Qualified Immunity

A. Defining Qualified Immunity

Qualified immunity is immunity from civil suit and entitles an officer to avoid standing trial or face the burdens associated with civil litigation. When a law enforcement officer is civilly sued for using excessive force during the seizure of a person, the officer may assert "qualified immunity." If successful, the lawsuit against the officer is dismissed.

B. The Rationale Behind Qualified Immunity

The rationale behind qualified immunity for police officers is two-fold: (1) to permit officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages, and (2) to allow the public to recover damages when officers unreasonably violate a person's constitutional or federal legal rights. The doctrine of qualified immunity is designed to protect all but the plainly incompetent or those who knowingly violate the law.

C. When Officers are Entitled to Qualified Immunity

Law enforcement officers are entitled to qualified immunity when their actions do not violate a clearly established statutory or constitutional right that a reasonable officer would have known existed. Stated differently, when law enforcement officers reasonably, albeit mistakenly, violate a person's constitutional rights, they - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.

D. The Nature of Qualified Immunity

Qualified immunity is an affirmative defense. It must be raised by the officer. It is an individual defense. It protects the officer in an individual capacity and not the government entity employing the officer. The standard is "objective reasonableness." The officer's subjective state of mind is irrelevant. Although this type of immunity is sometimes referred to as "good faith" immunity, the officer's subjective intent is irrelevant. The objective facts known to the officer at the time will determine the reasonableness of any action.

E. Analyzing Claims of Qualified Immunity

In deciding whether to grant qualified immunity, courts use a two-part analysis.

1. Did a Constitutional Violation Occur?

The court must determine whether, under the plaintiff's version of the facts, a constitutional violation occurred. If no violation has occurred, there is no basis for the lawsuit, and it is dismissed.

2. Was the Right "Clearly Established?"

If the evidence shows that the plaintiff's Constitutional rights were violated, the court must then consider whether the rights violated were "clearly established" at the time of the violation. In addressing what is meant by the phrase "clearly established," the Supreme Court in *Wilson v. Layne*, 526 U.S. 603 (1999) has stated:

> "Clearly established" for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.
>
> If the law was not clearly established at the time an action occurred, an officer could not be reasonably expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

If a Constitutional right was violated, but the right was not clearly established at the time, the officer is entitled to qualified immunity from suit.

In *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Supreme Court held that either prong of the qualified immunity analysis may be addressed first. The judges of the district courts and the courts of appeals are permitted to exercise their

sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. So, now, either of the two questions may be asked first.

F. Reasonable Mistakes Can be Made

Qualified immunity can apply if a mistaken belief is reasonable. A right is not clearly established if, based on the circumstances, a reasonable officer could have believed that the conduct was within the bounds of appropriate police responses. Officers can have reasonable, but mistaken beliefs as to what the law requires and still be entitled to qualified immunity. Likewise, officers can have reasonable but mistaken beliefs as to the facts justifying a use of force and still be entitled to qualified immunity.

G. Examples

The following cases illustrate reasonable but mistaken beliefs that entitled the individual officers to qualified immunity from the civil lawsuit.

1. Reasonable but Mistaken Belief as to What the Law Requires

The case of *Garner v. Memphis Police Department*, 600 F.2d 52 (6th Cir. 1979) was part of the litigation that eventually resulted in the landmark decision of *Tennessee v. Garner*. During the litigation, the officer was granted qualified immunity by the district court because he had reasonably relied on the state statute that authorized his use of deadly force. (This state statute was later declared unconstitutional in part by the Supreme Court). The circuit court agreed, holding that an individual officer has a qualified immunity from liability for constitutional claims based on the good faith performance of duties in accordance with statutory or administrative authority.

2. *Reasonable But Mistaken Belief as to the Facts Justifying a Use of Force*

In *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), a police officer (Rizzo) involved in a narcotics "sting" operation identified himself and ordered a suspect (Slattery) to raise his hands at least twice. Slattery failed to respond, turned his head slowly and looked at Rizzo who then yelled "police officer, get your hands up now." Slattery's hand was partially closed around an object. Slattery again turned his head slowly towards Rizzo and turned away. Rizzo again ordered Slattery to put his hands up. Slattery then turned his entire upper body towards Rizzo. Rizzo could not see Slattery's left hand. Believing Slattery was coming at him with a weapon, Rizzo shot him in the face. The object in Slattery's hand was a beer bottle. The circuit court held that Rizzo was entitled to qualified immunity because a reasonable officer could have had probable cause to believe Slattery posed a deadly threat, and therefore deadly force was authorized.

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