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OFFICE OF CHIEF COUNSEL
GLYNCO, GEORGIA

LEGAL DIVISION

HANDBOOK

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Foreword

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The mission of the Federal Law Enforcement Training Centers (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 Chief Counsel, 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 Attorney-Advisors 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, courtroom 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 related Legal Updates.

In this spirit, we offer our *Handbook*. The 2015 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:

https://www.fletc.gov/legal-resources

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 federal circuit court and Supreme Court case summaries covering a variety of topics of interest for law enforcement officers.

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No one but the FLETC Legal Division will have access to your email address, and you will receive mailings from no one except the FLETC Legal Division.

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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1.1 Introduction

This chapter examines the sources and scope of the authority and jurisdiction of federal land management law enforcement. The chapter addresses both territorial and subject matter jurisdiction. The chapter also examines jurisdictional issues related to selected offenses that involve federal land management agencies.

1.2 Sources of Authority and Jurisdiction

The basic source and foundation 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 (2012). If a law passed by Congress changes many individual statutory provisions scattered throughout the U.S. Code, 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 congressional statutes authorize specific federal agencies to adopt regulations to implement the agency's statutory

authority and responsibilities. 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 (2012).

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

1.3 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 broad general subject matter jurisdiction over all federal criminal offenses, while others have limited subject matter jurisdiction over certain offenses only.

1.4 Territorial Jurisdiction

The concept of territorial jurisdiction has three components or ramifications 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 ["agency-specific territorial jurisdiction"].

1.4.1 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 to itself 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 explained 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.

(a) 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.

(b) 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.

(c) 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:

1. 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. §§ 3371-3378 (2012) (Lacey Act); 18 U.S.C. § 3 (2012) (Accessory After the Fact); 18 U.S.C. § 201 (2012) (Bribery of Public Officials and Witnesses); 18 U.S.C. § 371 (2012) (Conspiracy); and 18 U.S.C. § 641 (2012) (Embezzlement and Theft of Public Money, Property or Records).

2. Statutes and Regulations 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 (2012) (Hunting, Fishing, Trapping; Disturbance or Injury on Wildlife Refuges); 18 U.S.C. § 1852 (2012) (Cutting or Removing or Transporting Timber on Public Lands of United States); 18 U.S.C. § 1853 (2012) (Cutting or Injuring Trees on Land Reserved or Purchased by the United States or Upon Any Indian Reservation); and 18 U.S.C. § 1854 (2012) (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 (2012) (Trespassing and Vandalism); and 36 C.F.R. § 4.23 (2012) (Operating a Motor Vehicle Under the Influence of Alcohol or Drugs). If an offense specifies that the crime must be committed in a certain type of federal land and the crime was not committed in that type of federal land, that offense is not triable in federal court.

1.4.2 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 (2012) 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 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.

1.4.3 Agency-Specific Territorial Jurisdiction

The third category of territorial jurisdiction is agency- specific territorial jurisdiction. Some criminal statutes specifically prohibit crimes on certain federal lands. For example 18 U.S.C. § 41 (2012) prohibits unauthorized hunting in wildlife refuges. As discussed below in the section concerning the Code of Federal Regulations [C.F.R.], Congress can also pass enabling legislation to authorize an agency to adopt regulations concerning the land it controls. If, and only if, Congress passes 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. §§ 1, 1a-6 (2012).

- 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. §§ 551, 559, 559c, 559d (2012).

- 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) (2012).

- The Bureau of Reclamation has jurisdiction over offenses that occur within a Reclamation project or on Reclamation lands. 43 U.S.C. § 373b (2012).

- 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) (2012).

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

1.5 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. For example, Tennessee Valley Authority (TVA) officers are empowered to "maintain law and order and protect persons and property" "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." They are also authorized to arrest persons fleeing TVA lands or facilities. 16 U.S.C. § 831c-3 (b) and (c) (2012).

1.5.1 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) (2012).

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 (2012). 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.

1.5.2 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 can permit Forest Service personnel to assist other federal agencies pursuant to appropriate agreements. 16 U.S.C. § 559g (2012).

1.5.3 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.

1.5.4 Assimilative Crimes Act - 18 U.S.C. § 13 (2012)

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

1. The United States has exclusive or concurrent Jurisdiction;

2. There is no federal law covering the conduct; and

3. 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.

1.5.5 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 the officer is working to determine whether state peace officer status exists. 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.

1.5.6 Cross-Designation as State or Local Officer

Officers 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.

1.5.7 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." Officers must know the law of the particular state in which they are working to determine whether citizen's arrest or detention authority exists. 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.

1.6 The Code of Federal Regulations (CFR)

1.6.1 Enabling Legislation

Unless 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) (2012).

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 (2012).

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 rulemaking 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 maximum punishment for violation, regardless of the punishment under the state law.

1.7 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.

1.7.1 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 (2012. 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) (2012). 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.

1.7.2 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 – 1544 (2012). 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 NMFS 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) (2012)).

1.7.3 Marine Mammal Protection Act (MMPA) of 1972

The MMPA prohibits, with certain exceptions, the taking 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. §§ 1361 - 1389 (2012). 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) (2012)). 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) (2012)).

1.7.4 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 – 470mm (2012). 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) (2012)). The Indian Arts and Crafts Act (18 U.S.C. §§ 1158, 1159 (2012)) criminalizes counterfeiting the Indian Arts and Crafts Board trademark (18 U.S.C. § 1158 (2012)) and falsely representing or suggesting that goods are an Indian product (18 U.S.C. § 1159 (2012)). 25 U.S.C. § 305d (2012) 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."

1.7.5 Bald Eagle Protection Act of 1940

This law protects the bald eagle (the national emblem) and the golden eagle by prohibiting, except under certain conditions, the taking, possession and commerce of such birds. Rewards are provided for information leading to arrest and conviction for violation of the Act. 16 U.S.C. §§ 668-668d (2012). 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 (2012)) and the Migratory Bird Treaty Act of 1918 (MBTA) (16 U.S.C. §§ 703-712 (2012)). The Department of the Interior has the primary responsibility for enforcement of this act. Enforcement authority may be delegated also to state fish and wildlife authorities, but notably not to other federal agencies. 16 U.S.C. § 668b (2012).

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.

1.8 Administrative Inspection Authority

If authorized by statute or regulation, federal agencies 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.

1.8.1 36 C.F.R. § 3.4 (2012) 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 lifesaving 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 junk yards are commercial premises of a highly-regulated industry. In Burger, the three requirements were described as follows:

1. There must be a substantial governmental interest.

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

3. 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 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. However, 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.

NOTES

Chapter Two

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2.1 Introduction – Conspiracy

The crime of conspiracy was created because of the inherent dangers that are created 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 another or others to violate the law, those persons are less likely to change their minds. When just one individual makes a solitary decision to violate the law, that individual is more likely to reassess his or her decision or simply change their mind. Often their conscience gets the best of them and they have a change of heart. However, when there are two or more individuals involved, they reinforce each other, thus there is generally little likelihood that they will change their mind or reassess their decision. Once a conspiracy is formed, there is the danger it will spin out of control, as members of the conspiracy recruit others to join their enterprise, and thus it becomes more dangerous and difficult to immobilize. For these reasons, the identification and targeting of multi-defendant criminal enterprises is essential to successful law enforcement.

Conspiracy statutes can be used to great advantage by criminal investigators. Some of the advantages include the ability to investigate beyond the first layer of the criminal enterprise, while allowing a jury to see the big picture behind a given criminal act. It also enables investigators to be proactive and even prevent substantive offenses, while still being able to charge felony criminal conduct. Disadvantages to conspiracy charges are highlighted by time-consuming investigations and difficulties dealing with witnesses, who are often co-conspirators. 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 who come together to strengthen a criminal enterprise. This chapter provides a basic working knowledge of conspiracy law.

2.2 The Statute: Title 18 U.S.C. § 371

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, which states:

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

2.2.1 The Elements

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

1. Two or more persons;
2. Intentionally;
3. Agree;
4. To violate federal law or defraud the United States;
5. Commit an overt act in furtherance of the agreement.

Once these elements have been met, the crime of conspiracy is complete. It is important to note, once any co-conspirator commits an overt act in furtherance of the agreement, all co-conspirators may be prosecuted for conspiracy whether or not they know about the overt act, or even if they take no further steps to accomplish their ultimate goal.

(a) 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 conspire with himself or 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 as well.

Co-conspirators need not meet and 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 to the conspiracy involved at all times, the conspiracy continues, even if the members change and the original members have withdrawn and are no longer involved in the conspiracy.

(b) Knowledge and Intent

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

(1) 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.

(2) 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.

(c) 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 is committed by a co-conspirator. 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 helps to establish a defendant's willing participation. However, mere presence at the scene is by itself not enough to establish an agreement. An individual can be present with others that are known to be co-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. 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 or 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.

(d) 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 be (1) an offense against the United States or (2) must involve defrauding the United States. If neither the objective nor the means to accomplish the objective violate federal law or defraud the United States, a prosecution under § 371 is not possible. 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.

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 complete the moment the first overt act in furtherance of the agreement is committed by a co-conspirator.

(e) The Overt Act

Once an agreement has been made, one of the conspirators must commit an "overt act" in furtherance of the agreement to complete the crime of conspiracy. 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 offense of conspiracy. An overt act is any act done for the purpose of advancing or helping the conspiracy. 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 to the agreement, including those who join the conspiracy after it has begun. The overt act must be committed by a member of the conspiracy and must occur after the agreement. The government may not rely on acts committed before the agreement to complete the conspiracy.

The overt act need not be a criminal act. 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 (the bank robbery) is actually committed, that offense may be used as the overt act necessary to complete the conspiracy. Thus, 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.

2.3 The Law of Conspiracy

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

2.3.1 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 (offenses committed that 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 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. Thus, if there is a conspiracy to rob a bank and the bank is ultimately robbed, the offense of conspiracy to rob the bank and bank robbery can both be charged.

2.3.2 Pinkerton Theory of Vicarious Liability

Conspirators are criminally responsible for the reasonably foreseeable acts of any co-conspirator that are committed while they are members of the conspiracy and that are 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 co-conspirator 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. The lesson regarding conspiracy that most criminals learn the hard way is that they must choose their co-conspirators wisely, because the reasonably foreseeable act of a co-conspirator is the act of all, when the act is committed in furtherance of the agreement.

2.3.3 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, but 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.

2.3.4 Withdrawal from a Conspiracy

Just as the law recognizes that individuals may join a conspiracy after it begins, the law also recognizes that conspirators 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 conspirator 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, which means the burden is on the defendant to prove that he has withdrawn.

If a conspirator validly withdraws from a conspiracy, the statute of limitations (explained below) on the conspiracy charge for that person 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 a conspiracy charge.

2.3.5 Statute of Limitations - 18 U.S.C. § 3282

The statute of limitations for 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.

2.3.6 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 committed in furtherance of the conspiracy 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.

2.4 Introduction – Parties to Criminal Offenses

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 officers. All of these persons are known as "parties" to the offense.

2.5 Aiding and Abetting - 18 U.S.C. § 2(A)

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, by itself, create criminal liability as 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.

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. The offense that was committed can be a felony or a misdemeanor.

2.6 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.

2.7 Accessory After The Fact - 18 U.S.C. § 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, providing false or misleading statements to law enforcement officers in an effort to assist a principal in evading arrest, trial or punishment, may be used to prove the offense. Thus, when a family member lies to an officer about the whereabouts of a sibling who is involved in a theft of

government property in order 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.

There is a distinct difference in punishment between aiding and abetting and accessory after the fact offenses. An aider and abettor is punished for the offense he aids or abets. However, when an individual is convicted for 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.

2.8 Misprision of Felony - 18 U.S.C. § 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.
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. Officers should collect all the facts and let the Assistant United States Attorney make the charging decision.

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Constitutional Law

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3.1 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 reserved 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.

3.2 Framing the Constitution of the United States

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 federal government. The people are bound by the laws of the federal government and the federal

government is bound by the provisions and principles of the Constitution.

The Constitution is the source of all federal law. Our federal 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.

3.3 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.

3.3.1 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.

3.3.2 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.

3.3.3 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. All inferior courts are created by an act of Congress. The Supreme Court has the power to declare laws unconstitutional and is the final authority on matters of constitutional interpretation.

3.3.4 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.

3.4 The Constitution and the Bill of Rights

The Constitution provides many safeguards through the checks and balances system against an excessively strong and potentially abusive central government. However, many scholars speculate 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.

3.4.1 First Amendment

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.

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.

(a) 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.

(b) 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:

1. 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 found below).

2. Advocating Imminent Lawless Action

Historically, the people have not only criticized the United States, but some have 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.

3. 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 such as law enforcement officers. 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 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.

4. 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.

5. 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.

6. 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.

(c) 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 Centers (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. 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 obtain 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.

3.4.2 Fourth Amendment

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.

The Fourth Amendment prohibits unreasonable government searches and seizures. These protections 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 the U.S.

Government 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; or when the government trespasses on private property with the intent to obtain information. The Fourth Amendment does not regulate searches by private citizens. To be reasonable under the Fourth Amendment, government officers may be required to get a warrant supported by probable cause.

3.4.3 Fifth Amendment

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.

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

(a) 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. 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:

1. Dual Sovereignty

One who commits a single act, which violates the laws of two sovereigns (state and federal), 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 court.

2. 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.

3. *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.

4. 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.

(b) 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.

(c) Grand Jury Indictment

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

(d) 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.

3.4.4 Sixth Amendment

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 defence.

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

(a) 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.

(b) 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.

(c) Compulsory Process

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

(d) Assistance of Counsel

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

(e) 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.

(f) 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.

3.4.5 Eighth Amendment

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

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.).

3.4.6 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.

3.5 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.

The remainder of this chapter focuses and expands on First Amendment issues of particular interest to Land Management Students.

3.6 Controlling Speech Under the First Amendment

3.6.1 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 below. Rights of expression are greatest in public forums as these are the places where the people have traditionally exercised their First Amendment rights.

3.6.2 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, the First Amendment 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 officer violates the First Amendment. If a state law enforcement officer does so, he or she 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.

3.6.3 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. 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.

The First Amendment protects 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. 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.

3.6.4 Government Restrictions

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

(a) Content-Based Restrictions

The government may not approve of 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 recipient. 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. 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 government can control the crowd to avert violence, the restriction is not narrowly drawn, and the court is likely to strike the restriction down.

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

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

(b) Content-Neutral Restrictions in Public Forums

The second reason the government may attempt to restrict expression has nothing to do with the speaker's message. Content-neutral restrictions seek to avoid some evil that is

unconnected to the speaker's 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 Centers (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 traditionally include public streets, sidewalks, and parks.

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 obtain a permit that restricts 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.

3.6.5 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 the cross was burned 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).

3.6.6 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.

(a) 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:

- Law enforcement officers had probable cause to arrest the defendant for fighting words after the defendant faced the victims from a short distance and 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. In addition to these facts, the court also considered that the night before the defendant had brandished a knife toward the victims, which increased the chance for violence. Even though the victims exercised restraint, the court found that a reasonable onlooker could have believed 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

As stated above, the fighting words doctrine is at its narrowest, if it exists at all, with respect to by speech directed at public officials such as law enforcement officers. Officers are expected to exercise a higher degree of restraint than the average citizen. Americans have a constitutional right to criticize their government and government officials. 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 from actual interference with law enforcement activities. A U.S. Park Service ranger was in the process of making an arrest, when the defendant , who was an onlooker, yelled statements of police brutality, "f--- this, f--- that, and this is f---ked." After the ranger told the defendant to back up, 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.

(b) 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…." The statute 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--."

- The 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."

(c) Advocating Imminent Lawless Action

Historically, some 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 Afghanistan violates international law. Unless U.S.troops are pulled out of Afghanistan, we are going to come back and give President Obama 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 Afghanistan, a demonstrator yells, "There's no way you're going to make me go. If they try to send me, the first guy I'll shoot will be Barack Obama." 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.

(d) 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" is unprotected speech. Likewise, joking with a flight attendant on an airline and saying, "I've got a bomb" is unprotected speech. 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.

(e) Obscenity

The Supreme Court defined obscenity as "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.

Chapter Four

Courtroom Evidence

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4.1 Introduction to Courtroom Evidence

Evidence is the backbone of every criminal prosecution. Unless evidence is properly collected, preserved, and presented, it 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, law enforcement officers (LEO) must have a general appreciation of some fundamentals of the Federal Rules of Evidence.

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 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.

4.1.1 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 that can actually be touched or seen. 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_____).

Demonstrative. Demonstrative evidence consists of items that

demonstrate or illustrate something to the jury such as models, charts, and graphic aids.

4.1.2 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 admitted and the jury may consider it in deciding the verdict. Such evidence is often described as having been received in evidence. If the court sustains the objection, the evidence is not admitted and the jury may not consider it. Such evidence is often described as being inadmissible or suppressed. The judge applies the Federal Rules of Evidence (FRE) in deciding whether to admit evidence.

4.1.3 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. With the exception of privileges, the FRE do not limit the evidence judges may use in deciding whether to issue search warrants or arrest warrants.

4.2 The Procedural Stages of a Criminal Trial

4.2.1 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.

4.2.2 Voir Dire

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

4.2.3 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.

4.2.4 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.

4.2.5 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.

4.2.6 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.

4.2.7 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.

4.2.8 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.

4.2.9 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.

4.2.10 Post-Trial Proceedings

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

4.3 Relevant Evidence

4.3.1 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.

4.3.2 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.

4.4 Direct and Circumstantial Evidence

Direct evidence tends to prove a fact directly and without the need to draw an inference or a conclusion about what the evidence implies or suggests may also be true or false. 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.

In spite of some common beliefs, 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.

4.5 Lay (And Expert) Witness Testimony

(Not all programs are responsible for the material in this section. Students should check their 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 law enforcement 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:

4.5.1 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."

4.5.2 Voice

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

4.5.3 Emotional Condition

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

4.5.4 Not Requiring Scientific or Technical Knowledge

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

4.6 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.

4.6.1 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 prosecuting 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.

4.6.2 Factors that Affect Witness Credibility

(a) 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.

(b) 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.

(c) 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.

(d) Contradiction

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

(e) 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.

(f) 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. As discussed in the Handbook Chapter "Federal Court Procedures," the prosecution may be required to notify the defense counsel about incidents

involving an LEO's dishonesty.

(g) Prior Convictions to Show Untruthfulness (FRE 609)

A prior conviction can be used to impeach any witness (including the defendant, subject to special limitations discussed below) who testifies. A prior arrest cannot be used to impeach any witness (including the defendant) who testifies. The concept behind permitting prior convictions into 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 is referred to as 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.[1] 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, though the AUSA should be informed about any juvenile adjudications.

4.7 Privileges

(Not all programs are responsible for the material in this section. Students should check their 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

[1] 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."

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.

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 fully and candidly to their lawyers than to reveal attorney-client discussions.

4.7.1 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.

4.7.2 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.

4.7.3 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.

4.7.4 The Federal Privileges

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

- The 5th Amendment privilege against self-incrimination. See Chapter 12 in this Handbook, Legal Issues in Interrogations and Interviews, for a detailed analysis of this privilege.

- The attorney-client privilege.

- The husband-wife privileges.

- The psychotherapist-patient privilege.

- The government-informant privilege.

- The clergy-communicant privilege.

4.7.5 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[2]; and (4) parent-child.

4.7.6 The Attorney-Client Privilege

The privilege covers communications, written or oral, between an attorney and a 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 legal advice.

For the privilege to exist: (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, certain 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,

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

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. These principles often apply to the other kind of privileges discussed as well.

4.7.7 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.

HUSBAND-WIFE PRIVILEGES

- **Testimonial Privilege**
- **Marital Communication**

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 spouses 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.

4.7.8 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.

4.7.9 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.

4.7.10 The Government-Informant Privilege

In the other privileges examined so far, the privileged information is what the person holding the privilege communicated. The government-informant privilege is different in two respects: (a) communication is not privileged, but the identity of the informant and information that would reveal the informant's identity is, and (b) the holder of the privilege is not the person who made the communication, but the government. 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.

4.8 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.

4.8.1 Laying a Foundation

The party 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.

4.8.2 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.

4.8.3 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 new entry is made each time the evidence changes custody when someone gives the evidence to someone else. 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.

4.8.4 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 fingerprints, 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.

4.8.5 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.

- Omitted or 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).

- Combining separate pieces of evidence found in different places into a single collection of evidence.

4.9 Foundations: Business Records and Public Documents

(Not all programs are responsible for the material in this section. Students should check their course syllabus.)

4.9.1 The Best Evidence Rule (FREs 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.

(a) 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.

(b) "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. LEO 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 contains over objection by counsel. If the original

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.

4.9.2 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.

(a) 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. LEO do not have to personally obtain these records by hand.

(b) 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).

4.9.3 Hearsay and Public Records and Documents and Business Records

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.

4.10 Hearsay

(Not all programs are responsible for the material in this section. Students should check their course syllabus.)

4.10.1 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 (c) the out-of-court statement is offered for the truth of the matter asserted in the statement.

4.10.2 Hearsay Examples

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

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

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

4.10.3 Applicability of the Hearsay Rule

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

4.10.4 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.

4.10.5 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.

4.10.6 "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 "the victim told me that Joe shot him" to prove Joe shot the victim, 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 the victim.

4.10.7 Non-Hearsay

(a) 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.

(b) 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.

4.10.8 Confrontation of Witnesses

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 by, for example, showing that an exception to the hearsay rule applies, it must still be able to produce its witnesses. LEOs taking witness statements must document how to track those witnesses down for trial.

4.11 Exceptions to the Hearsay Rule

(Not all programs are responsible for the material in this section. Students should check their course syllabus.)

If an exception to the hearsay rule applies, the statement is admissible. There are many hearsay exceptions, and this text will examine only two of them. When taking a statement that might be hearsay, the 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.

4.11.1 "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.

4.11.2 Statements Regarding Medical Diagnosis/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.

4.12 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. Officers 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 this 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 opposite party. 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, the LEO should obtain the item so it will be available at trial to refresh the witness' memory. 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.

4.13 Authenticating Digital Evidence From Computers

(Not all programs are responsible for the material in this section. Students should check their course syllabus.)

4.13.1 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.

4.13.2 Evidentiary Issues and Authenticating "Digital 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.

4.13.3 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 is a substantial step in proving 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. The defense is afforded an opportunity to inquire into the accuracy of those records.

4.13.4 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.[3]

4.13.5 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

[3] 805 F. Supp. 1513, 1517 (D. Haw. 1992).

the document is a statement of the defendant, it is excluded from the definition of hearsay.) The LEO 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.

Chapter Five

Courtroom Testimony

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5.1 Introduction to Courtroom Testimony

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 by the court in a bench trial. In many criminal trials, the law enforcement officer is the key witness in the government's case. Since a witness' credibility is crucial to obtaining convictions, it is imperative that law enforcement officers are familiar with traits and characteristics that can both favorably and adversely impact their credibility at trial.

5.2 Stages of a Criminal Trial

In some programs, Courtroom Testimony includes an EPO on stages of a criminal trial. (students should check their syllabus.) If the student's program has this EPO, the material is located in Section 4.2 of the Courtroom Evidence chapter of the Handbook.

5.3 Effective Witness Characteristics

5.3.1 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.

5.3.2 Characteristics That Jurors Expect of Witnesses

(a) Tell the Truth

The most important testimonial characteristic of a witness at any trial or hearing is to tell the truth. There is no substitute for telling the truth. A witness' 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.

(b) 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.

(c) Treat the Jury, Judge and Counsel with Respect

Witnesses should treat the jury, counsel and the judge with absolute respect. They should not show deference to either the government or defense. Witnesses should provide both the prosecutor and the defense attorney with the same courtesies that they themselves would want to receive.

(d) 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 inure to the benefit the defendant by fogging the memory of the witness. To counter this natural tendency, witnesses should thoroughly review their notes, reports, case file, etc., that are associated with the case. Even visiting the crime scene may prove to be helpful. Reviewing physical evidence can help as well. Furthermore, it is perfectly permissible for witnesses to review their testimony with the prosecutor and actually practice answering questions from the witness stand. As the old adage goes, proper prior preparation prevents poor performance.

(e) Be Properly Attired

A witnesses' credibility can be adversely affected by his or her choice of clothing, jewelry as well as by personal grooming habits. A common sense axiom is to dress for success. Wearing a suit or coat and tie with minimal tasteful jewelry is the order of the day. Clothing that is clean, pressed and conservative in appearance is appropriate for court appearances. Officers are making non-verbal statements in the way they dress. It is important to make the right statement.

Most federal courts have court rules indicating what is or is not appropriate attire for witnesses. Furthermore, court rules will identify those items that are not permitted in court. Some federal judges have a penchant for ensuring that witnesses learn lessons the hard way via contempt proceedings. This is especially true with respect to carrying weapons, cell phones, pagers, noise making jewelry, etc. Most judges have little patience for law enforcement officers who are less than professional in their appearance.

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 the witness' area of operations), it is not a fashion statement a witness wants to make in court. This type of jewelry is not acceptable when testifying.

(f) Demeanor Counts

Juries and judges consider witness demeanor in evaluating credibility (believability). How one approaches the witness stand, looks while taking the oath and one's posture while sitting in the witness chair can all have an effect on whether the jury or judge will believe the witness. A firm, convincing "Yes, I do" in response to the oath makes a positive first impression. Witnesses should make a conscious effort to avoid sending unwanted messages through nonverbal communications. For example, slouching in the witness chair or rolling of the eyes in response to a defense counsel question is readily understood to be an attempt to ridicule. It is not the act of a professional – don't do it.

(g) 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?" Since an individual's life and liberty is at stake, witnesses should not provide the defense attorney with the opportunity to imply that

they believe the matter to be less than serious. Be professional at all times.

(h) Avoid a "Bad Attitude"

A clever, superior, or cocky attitude turns people off. Answering clearly, succinctly, accurately, and professionally makes your 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 and "superior than thou" attitudes.

(i) 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 while testifying, a witness should inform the prosecutor at the earliest opportunity.

5.4 Essential Law Enforcement Testimonial Skills

5.4.1 Manner of Answers

Professional demeanor and the manner in which a witness responds to questions are important. They help ensure that the jury or judge is convinced of the truth of the testimony. Officers should conduct themselves in a professional manner at all times and be as forthright as possible in their testimony.

5.4.2 Skills That Make Law Enforcement Officer Testimony Convincing

(a) Listen and Answer

Witnesses should listen carefully to the questions asked and think about their responses before responding. While answers

should not be rushed, long delays before answering simple questions can lead the jury to question one's credibility. Use common sense to answer questions in a thoughtful, professional, and forthright manner.

(b) Give Audible Responses

Court reporters take down verbatim testimony. Witnesses that nod their head to answer a question cannot be recorded by the court reporter. Speak so that the court reporter can record the response. Similarly, if using gestures by holding hands apart to provide a visual portrayal of size and say, "It was this big," only the comment will be recorded. Witnesses must provide an audible response that matches the size they are conveying with their hands ("It was about 14 inches long.") Witnesses should speak clearly, intelligibly, and loudly enough so they will be heard and understood throughout the courtroom. Monotone presentations are far less effective than presentations which 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 only record testimony.

(c) Do Not Volunteer Information

Witnesses should answer the question that is asked, and should not add information that is not requested. Witnesses should not allow subsequent silence by counsel to lead them to believe more information is required. This is a common tactic used to get witnesses to offer information that was not requested. The general rule when testifying is to address the question asked and then wait for the next question.

(d) Wait for Rulings on Objections

The witness must stop speaking when counsel objects to a question. Allow the judge to rule on the objection. If an objection has been overruled, and the witness has forgotten the question, he or she should ask counsel to repeat the question. If the judge sustains the objection, the witness must say

nothing further on that subject. Simply wait for the next question.

(e) Prosecutorial Assistance

When asked a question that a witness does not like, he or she should not look to the prosecutor or others for help. If defense counsel's question is improper, the prosecutor will object. At times, there may be tactical reasons that the prosecutor may want the witness to answer questions that are objectionable. If a witness does not understand the question or the question is unclear, he or she can ask that the question be repeated or rephrased.

(f) Speaking to the Judge

Unless the judge speaks directly to a witness, the witness should not address questions or concerns to the judge. If the judge does address a witness directly, it is appropriate to respond by using the term "Your Honor." Do not use the term "Judge." Address requests to repeat, clarify, or rephrase questions to the counsel who asked the question. Address requests to refer to witness notes or reports while testifying to the examining counsel as well.

(g) Avoid "Cop Talk"

Avoid using legal phrases or law enforcement 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. Officers should simply explain in everyday language what they did. If a specific police term is used, then the witness should provide a definition or explanation as to what it means. Do not assume the jury or judge understands the terminology you are using.

(h) Just the Facts

Witnesses may testify only about matters that are within their

personal knowledge. They can testify to what they observed, heard, smelled, tasted, touched, as well as provide an opinion based on a rationally based perception. They should not try to testify as to what others observed. Let others testify to what they observed. Witnesses should not offer an opinion unless specifically asked for the opinion. Witnesses must have a basis of knowledge based on facts to provide an opinion.

(i) "I Don't Know"

"I do not know" means that the witness 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.

(j) "I Don't Recall"

This answer implies the witness once knew the information, but at the moment cannot recall it. If true, it is acceptable to say it. This answer is not a truthful one if the witness remembers, but just did not want to answer the question that is asked.

(k) Positive and Definitive Answers

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

(l) Memorized Testimony

Witnesses should not memorize reports so that they can provide a verbatim response. Memorized testimony is suspect and is generally not believable.

(m) Speak to the Audience

Witnesses should make eye contact with those to whom they are addressing. Maintaining eye contact with those being

addressed is an intangible human attribute that provides a measure of respect to the recipient. By maintaining eye contact with the jury, the witness provides deference to the jury, while simultaneously establishing credibility. Although eye contact is important, witnesses will have to measure the amount of eye contact provided to counsel. At trial, when a jury is present, the most important group of people in the court that require one's direct attention is the jury. Since the jury is the fact finder who makes life altering decisions concerning the defendant based on the facts provided, the witness should address the jury and not counsel. This will require the witness to look at the jury while answering questions of counsel. It is not necessary to spend 100% of the time looking at the jury, because not every answer will warrant that type of effort. However, for important aspects of testimony witnesses should always address the jury.

5.5 Using Statements and Reports When Testifying

Except for some expert witnesses and other limited circumstances, witnesses cannot testify from their reports or notes. Officers should check with the prosecutor about whether to bring reports or notes to the witness stand. Generally, opposing counsel will object if a witness tries to bring something to the witness stand. Officers can provide notes/reports/etc. to the prosecutor prior to trial. The court can allow a witness to refer to them during testimony if the prosecutor can lay an appropriate evidentiary foundation during trial.

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.

One's memory can be "refreshed" if a witness forgets while testifying. 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 will then testify from memory. The report or item that was used to refresh memory is neither read nor given to the jury. It is used for the sole purpose of allow the witness to jog their memory. Notes, reports, statements or other writings or things that are used to refresh a witness' memory will be made available to opposing counsel immediately after the witness testifies. Normally, opposing counsel uses them for the purpose of impeachment.

Non-law enforcement officer witnesses may testify at trial, and they too may need their memories refreshed. Officers should be prepared to obtain the item used to refresh a non-law enforcement officer witness' memory so it will be available at trial. 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 Assistant United States Attorney need to refresh the witness' memory.

5.6 Impeachment during Cross-Examination

5.6.1 Direct Examination, Cross-Examination and Impeachment

(a) 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.") Generally, 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 allow the witness to explain in their own words what happened.

(b) 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. During 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 such as "What happened," counsel could ask "Isn't it true Officer 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 witness' acts appear to be unseemly, crude, self-serving, unprofessional and even criminal. Be mindful this type of question can be asked, and respond to it in a professional manner.

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 presently armed and dangerous and that my safety was in jeopardy, 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. A frisk is a limited search for the sole purpose of locating weapons that could harm me. I performed these duties in a professional manner. I performed them in accordance with what the law allows me to do. I performed them based on the facts known to me at that time that indicated that my safety was jeopardized, because of what she had done. If you so desire, I would be more than happy to explain the facts that led me to believe that your client was presently armed and dangerous."

(c) 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 during the impeachment process, the witness' professionalism and integrity are attacked. Regardless of counsel's method, officers must always ensure that they tell the truth. Regardless of what happens, remain professional at all times.

(d) Redirect Examination

It is hard for witnesses (especially law enforcement officers) to limit themselves to a "yes" or "no" answer and then be denied the opportunity to explain their answers. An 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 the witness to explain testimony during cross-examination.

5.6.2 Law Enforcement Officers and Cross-Examination

Officers are trained to, and survive by, being in control of the scene and the situation. Testifying in court and especially on cross-examination can be frustrating for officers, because they are in an environment controlled by lawyers. To be properly prepared, officers must learn how cross-examination techniques work. Officers must trust their prosecutor on redirect examination will provide them the opportunity to clear up confusion caused by defense questions during cross-examination.

5.6.3 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 and be professional in the process of doing so.

(a) 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 the witness does not know the answer, does not recall the answer, or the question is a compound question (two questions combined as 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, the witness may also answer each part of the compound question separately.

(b) 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.

(c) The Badgered Witness

Defense counsels know that if a witness, especially a law enforcement officer, becomes angry on the witness stand, two things can happen. First, the officer focuses on anger and not the facts of the case, thereby becoming distracted. Second, the officer can appear to be biased which is perceived by the jury as lacking the ability to objectively deal with the issues. 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 officers to remain professional at all times.

(d) 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 look at the witness and not say anything after the witness has answered, which suggests to the witness that he or she should keep talking. Remain silent in the face of this tactic and wait for the next question.

(e) Pre-Trial Discussions with the Prosecutor

There is nothing improper with having discussed or even rehearsed testimony before trial. Rehearsing testimony is 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.

(f) 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, the witness should respond by saying, "As I stated earlier…" – when responding, do not sound sarcastic. Always remain professional.

(g) 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 the witness was both the arresting officer and the officer that conducted the search, the answer to the question is easy. But if the witness arrested the defendant and a partner searched the defendant, it is incumbent upon the witness to respond correctly. At trial, witnesses quite often fail to recognize that there are two questions being asked as one. If a witness does not recognize

that there are two questions, he or she is playing directly into the defense counsel's hands for subsequent impeachment.

(h) 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's tempo. Witnesses should speak at their own pace when providing truthful and accurate answers. The witness controls the pace of the testimony, not opposing counsel. The witness is not obligated to follow the defense counsels questioning tempo.

(i) Admitting Mistakes

"Have you ever made a mistake?" The answer will of course be "Yes." Do not be afraid to admit mistakes. 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.

(j) 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.

(k) Friendly Defense Counsel

The defense attorney may appear friendly to witnesses during cross examination. This may lull the witness into 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, the witness will often do the same. This technique is called mirroring. As a result, the witness may not speak up, the jurors may not hear the testimony, and as a result, the testimony will be less effective.

(l) Twisting Prior Testimony

The defense attorney may restate a witness' 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 portray the prior testimony accurately and in many cases, may intentionally misstate the testimony. If prior testimony has been misstated, it is incumbent on the witness to say so.

(m) 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. A witness should not be intimidated into admitting an error, declaring another officer "wrong," or losing confidence in command of the facts. Just tell the truth!

(n) 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. A witness should review prior statements (preliminary hearings, grand jury testimony, motions hearings), and listen carefully to all prior statements to determine if the current testimony is truly different.

(o) 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. Mistakes are inadvertent, not intentional deceptions.

(p) 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.

5.7 Subjects Not to be Volunteered When Testifying

5.7.1 Prior Criminal History

Unless specifically directed by the Court (or by the counsel based upon the judge's ruling), do not volunteer or offer the defendant's prior criminal history. The admissibility of a defendant's criminal history is subject to strict admissibility rules best left to the prosecutor to guide the witness by specific questions that require precise responses.

5.7.2 Issues Involving Constitutional Rights

Commenting in front of a jury about a defendant's decision to exercise his constitutional right to remain silent or request counsel is grounds for a mistrial. A suspect questioned by law enforcement in a custodial setting has the constitutional right to remain silent and have counsel present during questioning. Furthermore, a defendant can exercise a constitutional right to simply not talk to the police when not in custody. Commenting on the fact that a defendant exercised a constitutional right is inherently prejudicial and is a recognized basis for a mistrial or reversal of a conviction.

If asked at trial about what happened when the defendant was arrested or booked, the witness should testify about what he or she did (i.e., "I processed the defendants and turned them over to the jail") without mentioning their *Miranda* warnings. Because this is a problematic area, when in doubt, do not mention specific *Miranda* warnings, the defendant's invocation of the right to silence or invocation of the right to counsel. Wait for specific questions to be asked as to the defendant's invocation of rights.

5.7.3 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 for specific limited purposes, no witness should 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 the witness is specifically asked about evidence that has been suppressed, do not mention it. Wait for specific questions from counsel before addressing evidence that has been suppressed.

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.

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NOTES

Criminal Law

6.1 Introduction to Criminal Law

The subject of criminal law is very broad. By studying selected federal laws presented in this course, the student will learn 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 class. 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: 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.

6.1.1 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, in 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) against the perpetrator for the harm incurred by the assault.

6.1.2 Elements of Criminal Statutes

On a few occasions, this text may refer to the “common law.” Officers 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 criminal laws in the United States are found in written statutes (statutory law). To substantiate criminal charges that actually go to trial, each element of the offense must be established to a probable cause threshold. Probable cause can be defined as facts and circumstances that would lead a reasonably prudent person to believe that a criminal offense has probably taken place and the person charged with that offense probably committed it. To obtain a conviction at trial, each element of the offense must be proven beyond a reasonable doubt.

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, action is not required for all crimes. For example, a parent could be criminally charged with child abuse for not acting to care for his or her child. Failure 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 a prohibited act (or failed to perform an act) that caused the proscribed social harm.

There are two kinds of criminal intent (state of mind) offenses – general intent offenses and specific intent 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 must be proven is that the act was done willfully, deliberately, or intentionally and that it was not an accident or a misadventure. 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 broken nose, it does not matter that the resulting harm of a broken nose was not intended. All the

government must prove is the defendant intended to perform the act that resulted in harm.

A specific intent offense requires proof of a particular mental state. A specific intent offense requires proof that the perpetrator desired 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, the elements of burglary generally consist of a breaking and entering in the nighttime with the intent to commit a felony therein. Thus, for specific intent offenses (offenses that contain these special specific intent terms), the government must prove beyond a reasonable doubt the statutory act (or failure to act), as well as the perpetrator's specific intent. Thus for burglary, the government would have to prove beyond a reasonable doubt that the defendant broke end entered, in the night time, and at the time of the breaking and entering the defendant had the intent to commit a felony.

Intent, which is a state of mind, can be difficult to prove. The suspect's admissions, confessions and statements to others are the best and most compelling ways to prove 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 at the time of the killing the person who took the human life did so with malice aforethought.

Title 21 U.S.C. § 844 is a general intent offense. The statute 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 that contains a controlled substance, he would in fact "intentionally possess" the purse and its contents. 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 officer 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, the government does not have to prove why someone committed the crime. Hate crimes and terrorism statutes are exceptions to this rule. To obtain a conviction for a hate crime, the government must prove that the act was committed because of the special status (sex, age or race) of the victim. For terrorism, the government must prove violence against civilians for the purpose of advancing political or religious agendas.

6.1.3 Felonies and Misdemeanors

All criminal statutes must penalize the performance of the act (or failure to act). Without penalties, the criminal system would have no meaning. These penalties can include fines, incarceration and death. The range of potential penalties is generally 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 and 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.)

6.1.4 Attempts

An attempt to commit a crime is a crime. To prove an attempt to commit a crime, the government must show the defendant's intent to commit the 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. Something less than a completed transaction supports an attempt, provided there is a substantial step toward completion of the crime.

6.1.5 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. Under these circumstances, 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 federal jurisdiction property provides only the United

States Government with criminal justice authority (jurisdiction) over the area. All policing, investigating, and prosecuting of offenses 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 wherein the property is located have criminal jurisdiction over the area. Both the United States and the state authorities can police, investigate and prosecute offenses 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. 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 for those federal offenses.

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 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

Sub Part A - Assault

6.2 The Law of Assault and Battery

At common law, there were two basic kinds of assault, an assault by offer and an assault by attempted battery. An assault by offer is any willful threat to inflict injury upon another person with the apparent present ability and intent to do so. The assault by offer puts the victim in apprehension of immediate bodily harm. For example, an assault by offer is committed when John, while waving a baseball bat, approaches Bob and tells him that he is going to pulverize him. It is reasonable for Bob to apprehend 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 potential intended harm. A present apparent ability and intent to inflict bodily harm must actually exist and the victim must be aware of it. 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 assault by attempted battery is an unsuccessful battery. If John tries to punch Bob, but misses him, John has committed an assault by attempted battery. 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. Chargeable offenses include being punched, poked and spit upon.

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.

6.3 Assaulting Federal Officers or Employees

Title 18 U.S.C. § 111 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 official duties, or on account of something that person did while performing official duties. The first section of § 111 protects current federal employees (and those assisting them) when (1) they are assaulted while performing their job, or (2) if not currently performing their job (off duty), they are assaulted because of something they did while performing their job. The second section of § 111 protects former federal employees (and those who assisted them) when assaulted because of something they did when they were a federal employee performing official duties.

6.4 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 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.

6.5 "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 an officer's job more difficult, but it does not by itself amount to an assault. Mere passive resistance is not sufficient for a conviction under § 111.

6.6 "Engaged in or on Account 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 husband. The husband punches the officer, because of the officer's earlier arrest of his wife. The husband can 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. The suspect, after his release from prison, locates and assaults the former federal officer because he is still angry at having been arrested, tried and convicted. 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.

6.7 Penalty

When the defendant's conduct amounts to only simple assault (no touching), it is a misdemeanor. The maximum penalty for misdemeanor 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 from cases including 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.

Subpart B - Bribery

6.8 Introduction - Title 18 U.S.C. § 201

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, while performing official duties.

6.9 Public Officials

It is a crime to corruptly give, offer or promise, a public official (or person who has been selected to be 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 (or person who has been selected to be 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.

As an example, 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 evidence. Furthermore, it is an offense for the agent to offer to destroy the evidence for five thousand dollars.

6.10 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.

For example, 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.

6.11 Directly or Indirectly

In the previous examples, 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 officer's spouse, in exchange for the officer 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 officer's children.

6.12 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 officer an all-expense paid trip to Hawaii in exchange for the officer destroying a piece of evidence in a criminal case.

6.13 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.

6.14 Gratuities

Pursuant to 18 U.S.C. § 201, a gratuity is an offense that 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 a federal law enforcement officer may or may not be authorized to receive; every agency has a designated ethics official that will provide guidance.

Sub Part C - Federal Firearms Violations

6.15 Introduction

All law enforcement officers face the possibility of encountering firearms on the job. This course is an introduction to selected federal firearms laws. It 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. Officers should acquaint themselves with state and local firearms laws in their 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, this observation of a weapon would create a reasonable suspicion to justify an investigative stop and a frisk for weapons.

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

6.16.1 Definition of "Firearm"

Firearms are weapons that will expel, or are designed to expel or may be readily converted to 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.

6.16.2 Prohibited Persons

Federal law prohibits certain persons from possessing a firearm or ammunition. Since the Constitution does not provide Congress with an express enumerated power pertaining to the regulation of firearms, Congress has to rely upon some other

enumerated power. The constitutional anchor upon which the firearms statutes are based is the commerce clause. At trial, the government must prove a connection ("nexus") between the each firearm offense and interstate commerce.

Federal law prohibits the following persons from knowingly possessing firearms or ammunition that have a nexus to interstate commerce:

(a) Convicted Felons - 18 U.S.C. § 922(g)(1)

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 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)(A). Furthermore, pardons are exceptions to the convicted felon firearms possession rule, unless the pardon expressly states that weapon possession is still prohibited.

(b) Fugitives From Justice - 18 U.S.C § 922 (g)(2)

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).

(c) Drug Users/ Addicts - 18 U.S.C. § 922(g)(3)

Unlawful users of drugs or those addicted to a controlled substance.

(d) Persons Adjudicated Mentally Defective – 18 U.S.C. § 922(g)(4)

Any person who has been adjudicated by a court as mentally defective or who has been committed by a court to a mental institution cannot possess a firearm.

Note that the person must have been "adjudicated" mentally defective or "committed" to a mental institution. Adjudicated means a court has made the decision. Voluntary outpatient treatment or counseling does not qualify a person for this prohibition.

(e) Illegal Aliens - 18 U.S.C. § 922 (g)(5)

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.

(f) Persons With Dishonorable Discharges – 18 U.S.C. § 922 (g)(6)

Any person who was discharged from the Armed Forces under dishonorable conditions.

(g) Renounced U.S. Citizenship - 18 U.S.C. § 922 (g)(7)

Anyone person who has renounced their United States citizenship.

(h) Domestic Relations Restraining Orders – 18 U.S.C. § 922 (g)(8)

Any person who is subject to a court order restraining them from harassing, stalking, or threatening an intimate partner, or

child of such intimate partner.

(i) Misdemeanor Crimes of Domestic Violence – 18 U.S.C. § 922 (g)(9)

Any person 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 disqualify a person from the 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).

6.16.3 Pardon or Expungement 18 U.S.C. § 921 (a)(20)(B)

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)(B) and 18 U.S.C. § 921 (a)(33)(B)(ii).

6.17 Enhanced Mandatory Penalties

6.17.1 Introduction

Title 18 U.S.C. § 924(c)(1)(A) 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. Discharging a firearm includes an accidental discharge. Any person subject to these enhanced penalties is not eigible 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.

6.17.2 Definitions - 18 U.S.C. § 16

(a) Federal Crime of Violence

The term "federal crime of violence" means a federal offense that is a felony, and:

1. Has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

2. 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.

(b) 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.

6.17.3 Enhanced Mandatory Penalties

(a) 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.

(b) 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.

(c) Firearm Discharged

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

6.18 Possession of Firearms in Federal Facilities

Under Title 18 U.S.C. § 930, it is unlawful to knowingly possess or cause to be presented a firearm or "other dangerous weapon" in 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 officers an automatic right to carry weapons into federal facilities. For example, most federal courts require officers to check your weapons and not bring them into court.

6.19 Weapons Requiring Registration

6.19.1 Introduction

Weapons listed in 26 U.S.C. § 5845(a) must be registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in order to be legally possessed. 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.

6.19.2 Procedure

If an officer encounters or reasonably suspects that a weapon must be registered, the following procedures are recommended:

(a) Is Registration Required

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

(b) Is the Weapon Is Registered

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

6.19.3 Weapons Requiring Registration - 26 U.S.C. § 5845

(a) Short-Barrel 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.

(b) Short-Barrel 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.

(c) Machine Guns

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.

(d) Silencer/Muffler

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

(e) Destructive Devices

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 destructive devices include: rocket launchers, mortars, land mines, claymore mines and hand grenades.

6.20 Tracing a Firearm through the ATF

6.20.1 Introduction

The ATF National Tracing Center handles about 350,000 firearm trace requests annually. Tracing a firearm may assist an investigation in any number of ways. The main reason for tracing firearms is to link criminally used weapons 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.

6.20.2 Information Required to Trace a Firearm

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

(a) Make (manufacturer): For example, a "Colt," "Taurus," or "Sturm Ruger."

(b) Model: For example, a "Detective Special" or "Model 26."

(c) Serial Number: For example, "33419."

(d) Caliber/Gauge: For example, ".38 Caliber."

6.20.3 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.

Notes

Sub Part D - Federal Drug Offenses

6.21 Introduction

Due to pervasive substance abuse in our society, it is imperative that law enforcement officers have a working knowledge of common 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.

6.22 Controlled Substances

Knowing or intentional possession, or knowing or intentional possession with intent to distribute (transfer), a controlled substance 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. Be mindful, that there are circumstances where possession of controlled substances can be lawful. Examples include officers possess drugs as a result of a lawful search incident to arrest, a physician who administers the drug for medical purposes, or a researcher who possesses the drug for testing.

6.22.1 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, must be alleged in the charging document, and must be proven beyond a reasonable doubt.

6.22.2 Possession

Pursuant to 21 U.S.C. § 844, 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. A person with a valid prescription from a physician or who has received a controlled substance from a 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.

Knowing or intentional possession of a controlled substance, are elements of the 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.

Possession is the ability to control the substance. Knowing or intentional 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.

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.

6.22.3 Distribution

Title 21 U.S.C. § 841(a) makes it unlawful for any person to knowingly or intentionally: "(1) manufacture, 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 knowing or intentional 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 these offenses.

6.22.4 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. Generally, possession of "user amounts" is a misdemeanor; forfeitures/civil penalties can be imposed.

Sub Part E - The Entrapment Defense

6.23 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. Government officers 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.

6.24 Overview of How the Entrapment Defense Works

Entrapment is an affirmative defense. To substantiate the defense, the evidence must establish sufficient facts from which a reasonable jury could find the government induced an innocent person to commit a criminal offense. 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 tried in a judge alone trial.

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 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.

6.25 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.

6.25.1 Government Inducement

Entrapment occurs when the criminal activity is induced by government officers. Inducement by law enforcement officers may take many forms including requesting, asking, suggesting, overbearing persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based upon need, sympathy, or friendship.

(a) Permitted Inducements

Some inducements are unlikely to tempt a law-abiding person to commit a crime. Some inducements are so innocuous that courts generally approve their use. Examples include: use of decoys ('robo' deer – decoys 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 manufacturing).

(b) 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:

1. Threats against the well-being of the target's family.
2. Extreme appeals to the sympathy or emotions

of the solicited target.

3. Offers of unreasonable amounts of money to an impoverished or financially desperate target.

4. Continuous pressure such as repeated phone calls, visits or requests; repeated insistence, badgering.

5. Violent demonstrations, for example, threats regarding loss of job, or custody of children.

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 for the sole purpose of indicting him for receiving counterfeit currency with the intent to pass it as genuine, the government's actions violate due process.

6.25.2 Predisposition

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 to include:

(a) Statements made by the defendant before, during, and after the inducement.

(b) Character and reputation.

(c) Motive for committing the crime.

(d) Eagerness or ready acceptance of the government's

suggestion.

(e) Possession of contraband for sale on his premises.

(f) Prior convictions or criminal activity of the same or similar nature evidencing intent, motive or knowledge.

(g) Acceptance of an offer to supply the last essential ingredient to manufacture drugs.

6.25.3 Examples of Predisposition

(a) 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, as the defendants were predisposed.

(b) Previously Formed Intent

The defendant 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 – the defendant was predisposed.

(c) A Ready Response to a Criminal Offer

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

6.25.4 Examples of NO Predisposition

(a) 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 and begging for help by the agent, the nurse relents and provides a small amount of the drug.

(b) Threats

A government informant tells a government officer 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.

(c) Excessive Amounts of Money

An officer knows that a businessman is having serious money problems in running his business. The officer offers the businessman $75 million to smuggle a small amount of illegal weapons into the country. After a few requests, the businessman agrees to smuggle the weapons.

6.26 Conclusion

Law enforcement officers who induce individuals to commit crimes should be prepared to refute an entrapment defense with facts demonstrating the defendant's predisposition. Detailed reports documenting the defendant's statements and actions greatly enhance the government's ability to negate the defense. However, the Supreme Court has indicated outrageous government conduct, which orchestrates a criminal offense, can be a bar to prosecution, even if the defendant is predisposed. Therefore, proper investigation planning, to include monitoring and controlling informants to ensure fair treatment, is essential.

NOTES

Sub Part F - False Statements

6.27 Elements

In order to successfully prosecute a defendant for violating 18 U.S.C. § 1001, the following elements must be proven beyond a reasonable doubt:

1. The defendant,
2. Regarding certain federal matters;
3. Knowingly and willfully;
4. Made a false material statement, or;
5. Concealed or covered up a material fact, or;
6. Made or used a document containing a false material statement.

6.27.1 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 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:

(a) Judicial Proceedings

Section (a) of the Act does not apply to a party or to a 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.

(b) 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. Federal courts have upheld convictions under this section for individuals who have made false material statements involving various state awarded contracts that are federally funded.

6.27.2 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.

6.27.3 Materiality

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 denies he is guilty of the crime which he knows he committed. However, the Supreme Court now holds § 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, as 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. Consequently, when a suspect lies to an investigator by responding "No" to a question that asks if the suspect committed the offense, and the government can prove that the suspect did in fact commit the offense, the suspect can be prosecuted for a § 1001 violation.

NOTES

Sub Part G - Theft, Embezzlement, and Conversion

6.28 Introduction

Title 18 U.S.C. § 641, 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, theft by embezzlement, theft by conversion, and theft by receiving stolen property of the United States government or any department or agency thereof.

6.29 Terms of the Statute

For purposes of the statute, "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 property stolen, embezzled, converted, or received is more than $1,000, the offense is a felony, which is punishable by 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. Value of the government property taken must be alleged in the charging document and proved beyond a reasonable doubt at trial.

6.30 Theft

Section 641 codifies the common law crime of larceny (theft). "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.

6.30.1 Elements

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

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

6.30.2 Example

A defendant takes a vehicle that belongs to the United States government and paints the vehicle a different color, 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. The fact that the vehicle is repainted evidences his intent to keep it for his own use and enjoyment, thus depriving the government of the use and benefit of the vehicle.

A defendant "steals" property when he or she takes and carries away property belonging to another (the government) with the intent to deprive the owner (the government) 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 at trial 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.

6.31 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.

6.31.1 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:

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

6.31.2 Example

A federal postal employee is responsible for selling stamps to the public. At the end of the work day when the employee is

obligated to deposit the days cash receipts into the government account, the employee pockets 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 (the money was received in exchange for the stamps that were sold); the employee pocketed the money, thus depriving the United States of the use of the money taken; and the employee intentionally appropriated the money to his/her 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 (rightful possession); there is no fraud or crime committed in the original obtaining of the property. It is only after the property has been lawfully entrusted to him or her that the defendant deprives the owner of the use of the property taken (wrongful taking). 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. Property or money can be embezzled.

6.32 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. Conversion deprives the government of the benefit and use of the property.

6.32.1 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:

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

Again, if the crime is alleged to have been a felony, the government must also prove that the value of the property converted was over $1,000.

6.32.2 Example

Typically conversion is tied to misuse of government vehicles for personal reasons. For 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 the use and benefit of its property.

6.33 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 property knows that it has been stolen, embezzled or converted, 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).

6.33.1 Elements

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

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

6.33.2 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 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.

Remember, all four types of theft set forth in the statute apply to government property to include property made under contract for the United States.

NOTES

Sub Part H - Federal Fraud Statutes

6.34 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 it also posed significant challenges. 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 could they be properly prosecuted once apprehended? If personal items stolen in one state were transported across state lines for sale in another state, which state'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, Clause 2 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 (Article I, Section 8, Clause 2) 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 use of the mails.

6.35 Mail Fraud - 18 U.S.C. § 1341

6.35.1 Elements

The statute requires proof of the following elements:

1. Any person who;
2. Intentionally;
3. Devises a fraudulent scheme, and;
4. Uses or causes the mails to be used; (postal service or private/commercial interstate carrier)
5. In furtherance or in support of the scheme.

6.35.2 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 adversely affecting one's property rights by dishonest methods or schemes. It usually involves injury to, or loss of, property resulting from the use of deceit, trickery, chicanery or overreaching.

6.35.3 Application of the Mail Fraud Statute

(a) In General

Each use of the mail or an interstate carrier (such as United Parcel Service or Federal Express) in furtherance of a scheme to defraud 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. The defendant's mailing of the order form would be chargeable as one count of mail fraud. The mailing of the goods by the victimized seller to the defendant would constitute a second count of mail fraud

under § 1341. There is no requirement the defendant intends, or even knows, the mail will be used. In fact, the defendant may take deliberate steps to avoid using the mail and still violate the statute, as it is sufficient that the use of the mail was reasonably foreseeable. Thus, a defendant who hand-delivers a fraudulent claim to his insurance agent can be prosecuted under the mail fraud statute if the insurance agent mails the claim to the home office for processing. Though the defendant intended to avoid use of the mail by hand delivering the claim, the mailing of his claim by the agent was reasonably foreseeable. Furthermore, a defendant can be criminally liable for a mailing which he or she did not personally place in the mail, and which by itself does not contain a false representation. It is sufficient under the statute that the defendant caused the mail to be used and that the mailing was in furtherance of the overall scheme to defraud. 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 mailing involved the use of the U.S. Mail. Thus, a victim's check mailed from Manhattan, N.Y. to the defendant in Brooklyn, N.Y., can be charged as one count of mail fraud.

Remember, the same principles apply if the defendant uses an interstate carrier.

(b) "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 to complete the fraudulent scheme.

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 subsequent bills mailed to the authorized holder of the credit card for payment and the checks mailed to pay those bills cannot be

charged as mail fraud. The bills and payments occurred after the fraudulent scheme was completed. 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.

6.35.4 Examples 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 using 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.

(a) 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.

(b) 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.

(c) 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 it for another item 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.

(d) 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.

(e) 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.

(f) 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.

6.36 Wire Fraud - 18 U.S.C. § 1343

6.36.1 Elements

The statute requires proof of the following elements:

1. Any person who;
2. Intentionally;
3. Devises a fraudulent scheme, and;
4. Uses or causes an interstate wire transmission to be used;
5. In furtherance or support of the scheme.

6.36.2 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 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. Furthermore, wire fraud also applies to

fraudulent schemes involving foreign commerce.

6.37 The National Stolen Property Act - 18 U.S.C. § 2314

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.

6.37.1 Paragraph One – 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:

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

6.37.2 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 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.

6.37.3 Paragraph Two – 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:

1. Transportation of or inducement of a person to travel in interstate or foreign commerce;
2. For the purpose of defrauding that person of money or property valued at $5000 or more.

6.37.4 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 the victim to travel in an effort to defraud the victim. 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 if the neighbor does invest, but only upon his return home when he hands his funds to the con artist. The key to travel fraud is the interstate travel of the victim.

(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.

6.37.5 Paragraph Three - 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:

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

6.37.6 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 (See 18 U.S.C. § 2311 for the statutory definition of securities). 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.

(d) 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 direct evidence of the defendant's own statements and/or through circumstantial evidence of his participation in the scheme to transport or negotiate the securities.

(e) 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.

6.38 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. Remember, interstate transportation of stolen property offenses also apply to foreign commerce as well.

Chapter Seven

Electronic Law and Evidence

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7.1 Introduction to Electronic Law and Evidence

Electronic surveillance methods have taken on an increased importance because criminals are making more use of technology. This chapter gives the student 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.

7.2 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

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

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. 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, officers may use evidence obtained through electronic surveillance if they first obtain a court order authorized under the statute.

[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."

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.)

7.3 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 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 officers 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.

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

When is a T III Order Required?	
Oral communications Real time interception. Of an REP communication With a device (No REP, not Title III)	Wire and electronic communications Real time interception. Of a communication. (Doesn't matter whether there is REP)
A device is other than the human ear. Consent of one party, no Title III required.	

7.4 How to Obtain a Title III Court Order

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

7.4.1 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).

7.4.2 Enumerated Crimes Requirement?

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

(a) Wire or Oral Communications

To intercept wire or oral communications, officers 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.

(b) Electronic Communications

When an officer seeks to intercept electronic communications, he or she must have probable cause that any federal felony is being committed. 18 U.S.C. § 2516(3).

7.4.3 Authorization to Apply for a Title III Court Order

Before an officer submits 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 the 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.

(a) 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.

(b) 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.

7.4.4 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:

(a) 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).

(b) 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. 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.)

(c) 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 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.

(d) 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).

(e) 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 an agency for use in a Title III application.

(f) 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.

(g) 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]

7.4.5 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.

[4] Note that 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 overt entry.

Title III Court Order Application Authorization and Approval Process		
Oral and wire communications	Electronic communications (other than digital display pagers)	Digital display pagers
Agent with Probable Cause	Same	Same
An offense listed in 18 U.S.C. § 2516(1)	Any federal felony	Any federal felony
DOJ approval of application	DOJ approval of application	AUSA can approve application
District or Appellate Court judge can issue (Not a magistrate)	Same	Same

7.5 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").

7.5.1 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.

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.

7.5.2 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. Officers must become familiar, however, with the particular requirements of their agency regarding this issue.

(a) 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.

(b) 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.

7.5.3 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.

(a) Device Located on the Person

Officers 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.

(b) 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, officers need to consider two important issues. First, does the government 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 the operational plan is to install the device within the REP of a non-consenting person, the government will need a court order to do so.

Second, will the consenting party be absent at any time when the officers will be monitoring the device? If a consenting party is present when conversations are intercepted with that device, no further order is necessary. If the government intercepts a non-consenting person's statements made in the absence of a consenting party, however, that would require a Title III order.

7.5.4 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.

7.6 Electronic Tracking Devices

7.6.1 Applicable Law

Title 18 U.S.C. § 3117 regulates 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 law enforcement officers 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. 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. Accordingly, one must make a Fourth Amendment analysis in order to determine if a warrant will be required to either install or monitor a tracking device. In order to determine if a warrant is required, the law enforcement officer must first determine whether the installation or monitoring of a tracking device constitutes a "search" under the Fourth Amendment.

In 2012, the Supreme Court issued a landmark decision that redefined what constitutes a "search" under the Fourth Amendment. In U.S. v. Jones, the Supreme Court retained the Katz definition of a search (with its focus on "privacy"), but also reinstated the traditional definition of a search based on a trespass to a specifically enumerated area of protection. While this case is more fully discussed in the Fourth Amendment chapter, it is important to mention here because of the significant impact it had on the installation and monitoring of tracking devices.

7.6.2 The "Trespass" Definition of Search

As a result of Jones, there are two ways for government action to trigger the Fourth Amendment as a result of conducting a "search." The Katz definition of search is still valid, so a government intrusion into an area where a person has a reasonable expectation of privacy for the purpose of gathering information will still trigger Fourth Amendment protection.[5] But the Court in Jones also added a companion definition for a Fourth Amendment "search." A physical intrusion by the government into a "constitutionally protected area" for the purpose of gathering information also constitutes a search under the Fourth Amendment.[6] The constitutionally protected areas are "people, papers, houses, and effects."

Applying this new definition of a Fourth Amendment search significantly changes the calculus for the installation and monitoring of tracking devices. If the Fourth Amendment is triggered in either the installation or monitoring of a tracking device (or both), then a warrant is required.

In order for the installation of a tracking device to constitute a Jones search, it must also be monitored. Therefore, under a Jones analysis the tracking device must be both installed and monitored in order to trigger Fourth Amendment protection. This is because Jones required both a physical trespass coupled with the purpose of gathering information. Under a Jones search analysis as applied to GPS tracking devices on vehicles, the installation is where the physical intrusion takes place and the monitoring provides the requisite intent to gather information.

In determining whether the installation of the tracking device constitutes a physical intrusion into a constitutionally protected area, there are two questions that must be answered. First, is the area intruded upon a "person, paper, house, or effect?" In

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[5] For the purposes of this text, we will refer to this type of search as a "Katz search."

[6] For the purposes of this text, we will refer to this type of search as a "Jones search."

other words, is it a constitutionally protected area as set out in the Fourth Amendment? If the answer is "no," then there is no Jones search under the calculus. If the answer is "yes," then the officer must answer the second question: Does the person who is raising the issue have "possession" of the object to which the tracking device was affixed at the time it was affixed?

In order to satisfy the "physical intrusion" requirement under Jones, the physical occupation of the private property must take place at a time after the complainant has acquired a possessory right in the property. If the tracking device is affixed to a constitutionally protected "effect" like an automobile before the complainant takes possession of the object, then there is no requisite physical intrusion under the Jones analysis, which means it will not constitute a "search" under this analysis.

7.6.3 The "Privacy" Definition of Search

The Supreme Court made it clear in Jones that the trespass definition of search supplemented the existing definition of a search under Katz. Therefore, even if the installation and monitoring of a tracking device does not constitute a Jones search under the "trespass" analysis, it may nonetheless trigger Fourth Amendment protection if either the installation or the monitoring constitutes a Katz search.

In Katz, the Supreme Court defined a search as a government intrusion into an area where a person has a reasonable expectation of privacy (REP). Under the Katz definition of search either the installation or the monitoring of a tracking device can trigger a Fourth Amendment protection. Accordingly, when applying the Katz analysis to determine if a warrant is required, the officer must do a separate REP analysis for both the installation and the monitoring of the tracking device.

(a) Installation of an Electronic Tracking Device

In deciding whether an electronic tracking device was legally installed, the courts utilize a Fourth Amendment analysis

focusing on whether installation of the device constitutes a search. As explained above, there are two ways to have a "search" under the Fourth Amendment.

(b) Vehicles

When determining whether the installation of a tracking device triggers Fourth Amendment protection, the first question is: Did the installation occur while the suspect had a possessory right to the vehicle? If the installation occurs before the suspect acquires the right to use the vehicle, then there is no trespass and there is no search under the "trespass" analysis. For example, assume there is a confidential informant named Bob and Bob owns a nice car that is often admired by Tim. Federal agents believe Tim is involved in activity that violates federal criminal law and they want to track him. The federal agents get Bob's consent to install a tracking device in Bob's car, and Bob agrees to loan his car to Tim without telling Tim the tracking device is in the car. This would not constitute a Jones search since the installation occurred before Tim acquired a possessory right to the vehicle.

In the example above, there was no "search" under Jones trespass theory because the physical intrusion occurred before the suspect (Tim) acquired the right to possess the vehicle. However, the "privacy" rule of Katz still applies to the tracking of the vehicle.

If the installation of the tracking device occurs after the suspect acquires the right to use the vehicle, as in Jones, then there is another prong that must be met in order to have a "search" under Jones "trespass" theory: the tracking device has to be monitored. The physical intrusion (installation of the tracking device) into the constitutionally protected area (the vehicle) must be coupled with purpose of gathering information (actually monitoring the movement of the vehicle) in order to trigger Fourth Amendment protection. In other words, the installation of a tracking device alone does not constitute a Jones search. In addition to the installation, the tracking device must also be monitored to create a Jones search.

(c) Other Types of Property

The same two search analyses apply to tracking other types of property as well. First, is there a physical intrusion by the government into a constitutionally protected area for the purposes of gathering information? Second, is there a government intrusion into an area where a person has a reasonable expectation of privacy for the purposes of gathering information? If the answer is "yes" to either question, then the government action is a "search" under the Fourth Amendment and the law enforcement officer must obtain a warrant.

As with a vehicle, in order for tracking to constitute a search under the "trespass" rule in Jones, there must be both a physical intrusion (installation) into a constitutionally protected area (persons, papers, houses, and effects) and monitoring of the tracking device. The installation of a tracking device into one of these areas alone will not constitute a search. The installation must be combined with the gathering of information in order to constitute a search.

Again, the physical intrusion must occur while the suspect has a right of possession in the object being tracked. If the installation of the tracking device occurs before the subject acquires a possessory interest in the property, then there is no physical intrusion under the Jones analysis and, accordingly, there is no search.

7.6.4 Monitoring of an Electronic Tracking Device

As explained in the preceding section, it is possible to have a situation in which a warrant was not needed to install a tracking device. This can occur in either a Jones search or a Katz search.

In a Jones search, where the tracking device is installed on an "effect" and is then monitored, the law enforcement officer will need to obtain a warrant for both the installation and monitoring of the tracking device. In a Jones search the installation and monitoring issues are not separate because it

takes both to constitute a search under the Jones "trespass" theory. Accordingly, if the tracking device is installed in a non-functioning mode (either turned off or malfunctioning) then it would not constitute a Jones search because the device is not being monitored and is therefore not providing information to the government.

If the installation of the device occurs before the suspect acquires a possessory interest in the item being tracked, then the Jones search analysis is not applicable … but the Fourth Amendment could still be triggered under Katz as a result of the subsequent monitoring of the whereabouts of the object. In this type of situation the rule in Katz is applicable. If a person has a reasonable expectation of privacy from observation in the area in which the object is being tracked, then a warrant will be required to track the object. If there is no REP in the area in which the object is being tracked, then no warrant will be required.

(a) 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 a vehicle, an officer 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 government. For this reason, a defendant has no reasonable expectation that his movements on a public thoroughfare will not be observed. U.S. v. Knotts.

(b) 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 an officer 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 the officer's 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.

7.6.5 The "Sotomayor Concurrence"

Even though this section accurately reflects the current state of the law regarding tracking under the Katz analysis, it is important to note the uncertain future of 24/7 tracking of a suspect for an extended period of time without a warrant.

In the concurring opinion of Jones written by Justice Alito (in which three other justices joined), Justice Alito would have held the actions of the government in Jones to be a search because the extended 24/7 tracking violated Jones' REP in such extended monitoring. In other words, four of the nine justices believed that at some point a person develops REP in their movement in public places when they are being continuously tracked. Although Justice Alito did not state exactly when this line would be crossed and a warrant would be required, he stated that the line "was surely crossed before the 4-week mark." Again, this was the minority opinion and therefore did not establish a rule of law.

However, in a concurring opinion, Justice Sotomayor extolled the virtues of Justice Alito's analysis before adopting Justice Scalia's majority opinion. In her concurring opinion, Justice Sotomayor made it very clear if a case that involved extended 24/7 tracking being decided under Katz was presented to her,

she would most likely adopt Justice Alito's analysis. Presuming Justice Alito and the other three justices who joined in his opinion did not change their minds, there would be a majority on the court who would hold 24/7 tracking for a period of weeks in public areas would unreasonably intrude into the suspect's REP and require a warrant at some point before the four week point.

The current law allows for the continuous warrantless tracking of a vehicle in public places if the installation of the tracking device occurs before the suspect acquires possession of the object being tracked. However, due to the plain language of the concurring opinion in Jones by Justice Sotomayor, it seems obvious that future opinions from the court may change this practice.

7.6.6 Warrants to Install and Monitor Tracking Devices

Rule 41[7] 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.

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, and

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.

[7] Federal Rules of Criminal Procedure 41(e)(2)(B) and 41(f)(2) specifically address warrants for tracking devices.

(The time will not exceed 45 days. Extensions for not more than 45 days may be granted for good cause shown.)

- 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.

7.6.7 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 their 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 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.

7.7 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.

7.7.1 Definitions and Purposes

(a) Pen Registers

A "pen register" captures all numbers that are being dialed out from a specific telephone line (allowing the interceptor to learn what numbers a suspect is calling from that 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.[8]

[8] The U.S. Code definition of a pen register is a "device which records or decodes dialing, routing, addressing, or signaling information transmitted by

(b) Trap and Trace Devices

"Trap and trace" devices capture all numbers that are coming into a specified telephone line, and allows the interceptor 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.[9]

7.7.2 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."

7.7.3 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, or United States Circuit Court of Appeals. Third, the

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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).

[9] 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).

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.

7.8 Video-Only Surveillance in an REP Area

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, officers must obtain either a search warrant or consent. For example, if they wish to install a video camera in a public location but do so such that they will record activities in the target's curtilage or other private place, the government 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. 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.

7.9 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:

- What type of information is being sought from the ISP?
- What type of legal document is necessary to require the ISP to disclose the type of information being sought?

7.9.1 Classifying the Information Being Sought

There are three types of information the government may wish to obtain from an ISP: (1) Basic subscriber information; (2) transactional records; and (3) the contents of stored communications.

(a) 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."

(b) 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).

(c) 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,"[10] 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.

7.9.2 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.[11] 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, officers may always use a more stringent method to access information that could have been obtained with a "lesser" form of process. For example, the government may obtain a search warrant to compel the production of certain information, even if a § 2703(d) court order or subpoena would suffice.

(a) 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.

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[10] 18 U.S.C. § 2510(17).

[11] It is important to note that two circuit court decisions have significantly weakened the Stored Communications Act (SCA). In United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) the Sixth Circuit ruled that the contents of any stored communications could only be obtained with a warrant. In U.S. v. Davis (11th Cir. 2014) the Eleventh Circuit ruled that stored cell tower location data could only be obtained with a warrant. Congress is expected to revise the SCA to codify these two decisions.

(b) Transactional Records – Court Order

To obtain "transactional records," the government must, at a minimum, use a court order issued pursuant to 18 U.S.C. § 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, the government 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.

(c) Contents – Search Warrant

The government 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.

To require an ISP to disclose the contents of a wire or electronic communication, the officer must obtain a search warrant. 18 U.S.C. § 2703(a). When using a search warrant, the officer is not required to give prior notice to the customer or subscriber. Further, the officer 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."

7.9.3 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 officer'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) 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.

7.9.4 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.

Chapter Eight

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NOTES

8.1 Federal Court Procedures - Introduction

This chapter discusses how the federal courts operate, focusing on the law enforcement officer's 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), 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.

8.2 Trial Courts, Appellate Courts, and Judicial Districts

8.2.1 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 party 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.

8.2.2 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 – the Virgin Islands, Guam, and the Northern Mariana Islands) has at least one judicial district. 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.

Officers must know district boundaries because many functions

can be performed only in a certain district. For example, officers 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 constitutional right to be tried in the state and district where the crime allegedly occurred.

8.3 The Federal Courts

8.3.1 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. Officers should familiarize themselves with the local rules when arriving in a new district.

8.3.2 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.

8.3.3 Classification of Offenses

Type Offense (18 U.S.C. § 3559)	Maximum Possible Confinement If Convicted
Felony	More than one year or death. (When the death penalty is possible, the offense is also known as a "capital offense."
Class A Misdemeanor	One year or less, but more than 6 months.
Class B Misdemeanor	6 months or less, but more than 30 days
Class C Misdemeanor	30 days or less, but more than 5 days
Infraction	5 days or less

Class B Misdemeanors, Class C Misdemeanors, and Infractions are collectively known as **Petty Offenses**.

8.3.4 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.

8.3.5 U.S. Magistrate Courts

Every district has one or more magistrate judges who are appointed by the District Court judges. Officers 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, an officer would take an arrested felon 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.

8.3.6 Review of Jurisdiction to Try Federal Criminal Cases

Type Offense	Where the case will be tried
Felony	District court.
Class A Misdemeanor	Magistrate court if the defendant consents. If no consent, in district court.
Petty Offenses (Class B and C Misdemeanors and Infractions)	Magistrate court.

8.3.7 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 (usually eight years). The district court judges may re-appoint a magistrate judge for one or more successive terms.

8.4 An Introduction to Court Documents

Officers 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.

8.4.1 Criminal Complaint

Law enforcement officers will prepare criminal complaints. A criminal complaint states a charge along with facts establishing probable cause that the crime was committed and that 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 making 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 an officer has probable cause a suspect committed an offense, the officer may prepare a criminal complaint and obtain an arrest warrant. (Instead of an arrest warrant, the officer may elect to obtain a summons.) With probable cause, an officer may also arrest a suspect without obtaining an arrest warrant. In that case, the officer will prepare a criminal complaint after the arrest but before taking the arrested person before a judge.

8.4.2 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.

8.4.3 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.

8.4.4 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.

8.4.5 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.

8.4.6 "Tickets"

A citation or violation notice is similar to a traffic ticket and is issued by an officer.

8.5 The Initial Appearance (Rule 5)

8.5.1 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.

8.5.2 Methods of Bringing a Defendant Before a Magistrate Judge

(a) Warrantless Arrest

Officers typically make warrantless arrests when they have probable cause that the defendant committed a felony offense or when a misdemeanor was committed in their presence. Since the defendant has the right to know of the charges for which he has been arrested, the officer must prepare a criminal complaint after the defendant is arrested and before taking the defendant to the initial appearance. (Felony and misdemeanor arrest authority is covered in the Fourth Amendment section of this handbook).

(b) Arrest with a Warrant

Officers may obtain arrest warrants in several ways.

1. With a Criminal Complaint

The officer prepares a criminal complaint, swears to it before a magistrate judge and requests an arrest warrant.

2. 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.

3. With an Information

If the AUSA has filed an information, an officer may obtain an arrest warrant by presenting the information to a judge and requesting a warrant.

(c) Appearance on a Summons

Instead of obtaining an arrest warrant with a criminal complaint, indictment or information, officers may obtain a summons. The summons will direct the defendant to appear in court for an initial appearance without being arrested.

8.5.3 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. Federal law enforcement officers should avoid using state or local judges to issue federal warrants or conduct federal proceedings except in exigent circumstances and only after first coordinating with your AUSA. 18 U.S.C. § 3041.

8.6 The Officer's Responsibility upon Arrest - The Initial Appearance

After an arrest but before the initial appearance, the officer must 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, the officer must prepare a criminal complaint.

8.6.1 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 may 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 that delay would be deemed necessary, and any statements made could probably 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 can be seen by a court 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 the officer should ordinarily have the defendant in court for an initial appearance the next time the Magistrate Judge holds court following the defendant's arrest. The officer 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, the officer 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.

8.6.2 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.

8.6.3 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.

8.6.4 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 with 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:

(a) 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 the government believes that detention is warranted, the officer should 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 the officer.

(b) 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 attorneys for both sides are prepared to proceed, or

- Temporarily detain the defendant until the detention hearing can be held.

(c) 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 restrictions; medical evaluation and treatment requirements; bail; limited custody when the defendant is not at work; and "tethering" by electronically monitoring the defendant's location.

8.6.5 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.

8.6.6 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 or 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.

8.6.7 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 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.

8.7 Arrests Outside the District Where the Crime was Committed

If the defendant is arrested in the district where the crime occurred, the officer 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.

8.7.1 Initial Appearance Options

When the defendant is arrested 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. The officer may take the defendant to a district that meets the following criteria:

1. The district in which the defendant was arrested, or

2. 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 arrest.

8.7.2 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 the officer 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.

8.8 Diplomats, Foreign Nationals, Members of Congress, and Juveniles

8.8.1 Diplomats

(a) 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.

(b) Verifying the Status of Diplomats

There are many levels of diplomatic immunity; this chapter will only discuss those with full diplomatic immunity. When encountering suspects who claim diplomatic immunity, officers should 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, officers should verify the claimed status of every person by calling the Department of State at the Diplomatic Security Command Center (DSCC) at **571/345-3146**. DSCC will respond with diplomatic status and degree of immunity.

If the State Department does not verify the person's diplomatic status, the officer may treat the person as any other suspect.

(c) 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, their vehicle, or personal belongings unless necessary for officer safety.

(d) Traffic Incidents Involving Diplomats

Law enforcement officers can 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) the officer 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, officers should contact supervisors 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, the officer must use common sense to secure the car keys or perhaps block the car so the diplomat cannot drive it. The officer 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. The officer should notify a superior and the diplomat's embassy, and offer protection to the potential victim of an assault. If the diplomat presents a threat of injury to the officer or another, use reasonable force to prevent injury. However, the officer still may not arrest.

The officer should 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, the officer may not enter these places without permission from the foreign nation.

8.8.2 Foreign Nationals[1]- 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.

(a) Arrests/Detentions – Advising of Right to Consular Notification

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 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

[1] The Legal Divison thanks the U.S. Department of State Bureau of Consular Affairs for submitting the following material for this chapter.

individual, is relevant to the consular notification decision; the only triggering factor is arrest or detention of a non-U.S. citizen.

1. 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: the officer 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.

2. 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," the officer 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.

(b) 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.

(c) 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.

(d) 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*.

(e) 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*.

8.8.3 Arresting Members of Congress

(a) 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.

(b) 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, officers should investigate and document the breach of the peace and then submit findings to superiors. No arrest should be made unless authorized by superiors in consultation with the U.S. Attorney's Office.

8.8.4 Arresting Juveniles

A juvenile is a person who is under the age of 18. There are special procedures that must be followed when arresting a juvenile:

- Immediately advise the juvenile of their Miranda rights in words that a juvenile can understand even if there is no intention 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 the juvenile's legal rights under Miranda. (It is the officer's 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, the government must allow it), and

- Take the juvenile forthwith before a United States magistrate judge. ("Forthwith" requires more speed than "without unnecessary delay"), and

- Do not make a media release. The government 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. (See 18 USC §§ 5031-5038.)

The officer may and should investigate the case as any other. If the juvenile understands and waives his Miranda rights, the officer 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 an officer intends or expects to arrest a juvenile, he or she should attempt to obtain the approval and guidance of the AUSA before the arrest.

8.9 Preliminary Hearings and Arraignments

8.9.1 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.

(a) 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. The officer 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 testimony at a later proceeding.

(b) 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 a person is arrested in a district other than where the crime occurred and the initial appearance is held in the district of arrest, the defendant 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, the government may realize the defendant may be in possession of evidence at a particular time and wish to take advantage of a search incident to arrest.

8.9.2 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; and (3) 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.

8.10 The Grand Jury

8.10.1 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. 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 of a 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 officers 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.

8.10.2 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 additional months. When the grand jury sits, there must be a minimum of 16 grand jurors present.

8.10.3 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 compelled to testify, but that is rarely done because immunized testimony cannot be used against the target at a later date.

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-officer 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). Grand jury witnesses must be accurate in their testimony because they may and likely will be cross-examined concerning any conflicts between 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.

8.10.4 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. Officers may also be involved in cases with indictments being sought in several districts. By having an indictment sealed, the government may coordinate multiple arrests to avoid tipping off defendants. Rule 6(e)(4).

8.10.5 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.

8.11 Grand Jury Subpoenas

8.11.1 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 an officer's reach. Consider the following situations about how officers often collect evidence and in parenthesis, the limitations faced.

- The officer may seek consent to search. (But the person may refuse consent.)

- A witness may agree to an interview. (But an officer cannot force a person to submit to an interview.)

- An officer may request a search warrant. (But there may

not be probable cause for the warrant.)

- An officer 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, the officer should consider whether a grand jury subpoena would meet the needs of the government. 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; (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.

8.11.2 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.

8.11.3 Service of Subpoenas

While the Rules specifically provide for service by U.S. Marshals, officers may, and often will, serve subpoenas in their 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.

8.11.4 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.

8.11.5 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."

8.11.6 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 provide self-incriminating testimony. Persons who legitimately claim a privilege against self-incrimination may be compelled to testify if given a grant of immunity. Immunized testimony may not be used against the immunized 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, an officer serves a

subpoena on the witness implying that if the witness submits to an interview, the subpoena will be withdrawn. This is an improper use of grand jury powers. On the other hand, if the officer serves a subpoena on a person, and if the witness then indicates willingness to be interviewed, the officer may lawfully conduct the interview. The 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.

8.11.7 What to Do When a Serving a Subpoena May Result in the Destruction of Evidence - Using a Search Warrant

In some cases, officers 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, the officer 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, the officer should consider obtaining a search warrant. A search warrant has several advantages over a subpoena: the government selects when the search warrant is executed; officers can find the item themselves, 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.

8.11.8 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 officers need a subpoena, they should contact the AUSA's office and request one.

8.11.9 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.

8.12 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 officers 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 the officer was a witness);
- The testimony of a witness (including the officer's 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.

8.12.1 Exceptions to Rule 6(e)

Exceptions to Rule 6(e)'s secrecy requirement are as follows:

(a) 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.

(b) 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 officers. The remainder of this section will discuss only release of grand jury matters by the AUSA.

(c) Access to Grand Jury Matters

The existence of grand jury matters is of little value unless the officer can have access and use them. 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.)

- 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)(D) 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).

(d) The 6(e) list

Officers need, and may use, grand jury matters to conduct criminal investigations. The AUSA who is assigned to the investigation may authorize officers to have access to grand jury materials for that purpose and on a case-by-case basis. If the officer needs access to grand jury matters, request approval from the AUSA. Officers from other agencies, or those in the 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." Officers may disclose grand jury matters only to those on the 6(e) list.

Consider the following examples of when grand jury matters may or may not be disclosed:

- Officer is on a task force with officer B. The officer is 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.

- Officer testified as a grand jury witness targeting a local politician. While out with friends at dinner, the friends (who are not on the 6(e) list) start discussing rumors that the politician is about to be indicted. The officer may neither disclose that he was a grand jury witness nor

reveal 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. The officer 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 the officer's 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 an officer prepares a financial analysis that shows that the target of an investigation has been spending more money than all known sources of income combined. The analysis is based both upon documents subpoenaed by the grand jury as well as on documents and information from non grand jury sources. If the analysis does not identify or refer to the source of information as grand jury matter, the officer may reveal the analysis to those not on the 6(e) list. However, if the analysis does reveal that grand jury matters are involved, the officer 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.

8.13 Documents Required to Formally Accuse a Defendant

Before trial, the government, the 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.

Type of Offense	Court	Minimum Charging Document
Capital	District	Indictment only
Non-capital Felony	District	Indictment, unless waived, and then by information
Misdemeanor	District	Information
Class A Misdemeanor	Magistrate	Complaint
Petty Offenses	Magistrate	Citation or violation notice

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.

8.14 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) the Brady doctrine; (2) the Giglio case; (3) the Jencks Act/Rule 26.2; and (4) Federal Rule of Criminal Procedure 16. 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.

8.14.1 The Brady Doctrine

In the Supreme Court case of Brady v. Maryland[2], 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.

8.14.2 Disclosure under Giglio

The Supreme Court case of United States v. Giglio requires the government to disclose information that tends to impeach any

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

government trial witness, including law enforcement officers. "Impeachment" is information that contradicts a witness or which may tend to make the witness seem less believable. Officers 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 law enforcement 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.

8.14.3 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. 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 the officer shows a witness notes taken during an interview, for example, to have the witness confirm the accuracy of the notes, the notes may thereby become that witness's "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's grand jury testimony.

- The officer's own notes may qualify as a Jencks Act statement if the officer testifies or, as stated above, when a witness is shown the notes and vouches for their accuracy (an adopted statement). The officer must therefore safeguard notes, including original rough notes of interviews and other activities, even if they are later formalized or included in other reports. Determine 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 otherwise discoverable. If that witness testifies at a trial or hearing, however, the statement must be given to the defense under the Jencks Act or Rule 26.2.

8.14.4 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 the law enforcement officer, respond to discovery requests. The officer's 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 includes 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 (trial exhibits).

- 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 recorded (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.

Discovery Review:	
Brady	= Exculpatory
Giglio	= Impeachment of trial witnesses
Jencks Act and Rule 26.2	= Prior statements of witnesses (Includes adopted statements) Jencks Act = @ Trial Rule 26.2 = @ hearing before or after trial
Rule 16	Most of Defendant's statements (Known to the government) Criminal History Scientific tests Trial Exhibits Defendant's property

8.14.5 eDiscovery in Federal Criminal Investigations and Prosecutions

In our digital world with its proliferation of electronic devices, electronically stored information (ESI), electronic communications (eCommunications), and social media, much of the discovery material the government must disclose will be in electronic format. This reality requires procedures be implemented to capture, preserve, and manage ESI and eCommunications to meet the government's obligations. Speed, efficiency, and ease of sharing are real benefits of using this technology, but there are risks as well. Electronic communications are often hastily prepared, quickly sent, and may not be as complete as formal documents. The abbreviated nature of these communications and the lack of context create a

significant danger of misinterpretation. When conducting criminal investigations and prosecutions, agents should strive to take advantage of the technology while minimizing the risks.

- ESI. For investigations, creating, obtaining, seizing, and maintaining ESI is primarily a function of case organization and management. There are numerous software systems that perform well, and agencies typically pick one that fits their kind of cases best. For prosecutions, there are a number of presentation software systems that perform well, and prosecution offices typically pick one that fits best.

- Electronic Communications. The creation, capture, storage, and disclosure of eCommunications during the course of an investigation and prosecution of a federal criminal case is another matter. It can be a huge, costly undertaking to find and assemble all of the case related eCommunications. But those deemed discoverable must be turned over to the defense in full compliance with the government's obligations. The guiding principle is this: Any potentially discoverable information and communication should be preserved and delivered to the prosecutor.

The Department of Justice, Deputy Attorney General Memorandum on Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases, March 30, 2011, establishes best practices for how eCommunications should and should not be used during the investigation and prosecution of a federal criminal case and how to capture and store these communications to ensure that the government meets its discovery obligations. These best practices recognize the scope of the issue, define terms, and set out the responsibilities of all those involved in the investigation and prosecution of federal criminal cases. (A copy of this memorandum is included in the *Legal Division Reference Book*.)

Key concepts:

What are "eCommunications"? They include e-mail, text messages, instant messages, and short message services such as tweets, pin-to-pin, social networking sites, bulletin boards, and blogs. They can be broken down into three categories – Substantive, Logistical, and Privileged.

- Substantive Communications contain factual information about the case, including: information about investigative activity; information from interviews or interactions with victims, witnesses, potential witnesses, informants, cooperators, and experts; discussions about the merits of evidence; and information regarding the credibility or bias of witnesses.

- Logistical communications include those that contain: travel information; dates, times, and locations of hearings or meetings; and those that transmit reports. Generally, purely logistical communications are not discoverable.

- Privileged Communications include those that contain: attorney-client privileged communications; attorney work product communications; deliberative process communications; and protected communications, which are those covered by Federal Rule of Criminal Procedure 16(a)(2). Generally, so long as any discoverable facts in them are disclosed in other materials, privileged and protected communications are not discoverable.

When drafting and using eCommunications during and as part of an investigation and prosecution, first consider whether e-communication is appropriate to the circumstances or whether an alternative form of communication, such as a formal report or telephone call, is a better choice. Don't send substantive, case-related eCommunications unless absolutely necessary and only to those with a need to know. If you do use eComminications, be professional. When sending substantive eCommunications, write them like a formal report with accurate and complete facts. Avoid witticism, careless commentary,

opinion, and over familiarity. Limit eCommunications to a single case and make non-prosecution team members aware that eCommunications are a record and that they may be disclosed to the defense.

Preserving eCommunications. Each person who is the creator, sender, forwarder, or the primary addressee of an e-Communication needs to preserve it. If none of the above apply, then each person who is a secondary recipient (in the "cc" or "bcc" line) needs to preserve it. Preserve all potentially discoverable eCommunications, including attachments and threads of related eCommunications. "All Potentially Discoverable eCommunications" includes all substantive eCommunications created or received during the investigation and prosecution. It includes all eCommunications sent to or received from non-law enforcement potential witnesses, regardless of content. It also includes eCommunications that contain both potentially privileged and unprivileged substantive information. If not sure, err on the side of preservation. Purely logistical eCommunications need not be preserved.

Preserve as soon as possible, but no later than 10 days after the eCommunication is sent or received. Be sure to preserve before agency or department systems automatically delete messages because of storage limitations or retention policies. Use secure permanent or semi-permanent storage associated with the particular investigation and prosecution. For e-mail, create a specific folder to which messages can be moved. If this is not possible, messages can be printed and put it in the criminal case file. Preserve eCommunications in their native e-format whenever possible.

As with all discovery materials, each person involved in the case must provide all potentially discoverable eCommunications for the prosecutor to review to determine what should be produced in discovery. Let the prosecutor know if there are eCommunications that deserve especially careful scrutiny because disclosure could affect the safety of any person, reveal sensitive investigative techniques, compromise the integrity of another investigation, or reveal national security information.

The goal of these best practices is to reduce the volume of potentially discoverable eCommunications and establish a system to manage them. That reduces the time and costs of managing discovery and ensures full compliance with the government's ethical and legal discovery obligations.

8.14.6 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.

8.14.7 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.

8.15 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 an officer performs his or her 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.

8.16 The Statute of Limitations and Speedy Trial Act

8.16.1 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 view 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.

8.16.2 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 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:

An indictment or information must be filed within 30 days of the date of arrest or service of a summons.

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, or prevent flight, notify the AUSA immediately.

8.17 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. 18 U.S.C. § 3593.

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. (Rule 32)

The officer may be asked to provide certain information to the U.S. Probation Officer in the form of a witness interview or otherwise. The officer should comply with these requests. While most of the information for a PSR is available through sources other than the officer, some may only be available using the investigative file prepared by the government. If the officer has information that would assist the probation officer, he or she should make it available, and assist Probation Services to ensure that the report contains complete and accurate information.

Chapter Nine

Fourth Amendment

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NOTES

9.1 The Fourth Amendment - Introduction

The Fourth Amendment prohibits government intrusion upon the privacy and property rights of the people. 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. The areas specifically afforded constitutional protections are "persons, houses, papers, and effects."

9.2 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, public school officials, 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.[1] 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.

9.3 A Fourth Amendment "Search"

The Fourth Amendment prohibits unreasonable "searches" and "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."

The Supreme Court applies two separate tests to determine whether government conduct constitutes a "search" within the meaning the Fourth Amendment. As a result, the Fourth Amendment protects both privacy and property.

9.3.1 The Jones Analysis – Trespass

When the Fourth Amendment was adopted the traditional definition of a "search" was based on a common-law trespass analysis. Ownership or the existence of a possessory right in the enumerated property was a necessary requirement in the definition of a Fourth Amendment "search" until the 1967 Supreme Court decision of Katz v. United States,[1] as described below.

In United States v. Jones officers installed a global positioning

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

satellite (GPS) tracking device on the undercarriage of the defendant's vehicle. The GPS tracking device was used to monitor the vehicle's movements for twenty-eight (28) days. Neither the installation nor the monitoring of the GPS tracking device was conducted pursuant to a warrant or court order.

The Supreme Court found that the defendant's vehicle was an "effect" – a constitutionally protected area listed in the text of the Fourth Amendment. By attaching the GPS tracking device to the defendant's vehicle, the government physically intruded (trespassed) on a constitutionally protected area. In addition, the trespass was made with the attempt to obtain information about the whereabouts of the vehicle during the tracking period.

The Supreme Court applied the traditional common-law trespass analysis holding this activity by the government constituted a "search." As applied to GPS tracking devices on vehicles, the installation in Jones constituted the physical intrusion and the subsequent monitoring provided the requisite intent to gather information. The Supreme Court held in Jones that a physical intrusion by the government into a "constitutionally protected area" for the purpose of gathering information constitutes a "search" under the Fourth Amendment.[2]

The Jones analysis requires both: (1) a trespass or physical intrusion by the government upon a constitutionally protected area; and (2) an intent to gather information.

9.3.2 The Katz Analysis - Reasonable Expectation of Privacy

In addition to the traditional common law trespass analysis in Jones, a Fourth Amendment "search" also occurs when the government intrudes upon an individual's reasonable expectation of privacy (REP).[3]

The Katz reasonable expectation of privacy test added to, not substituted for, the common-law trespass test.[4] In Katz v.

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[2] United States v. Jones, 546 U.S. ____, 132 S.Ct. 945 (2012).
[3] Katz v. United States, 389 U.S. 347 (1967).
[4] Common law trespass test.

United States 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. The defendant did not have an ownership or possessory interest in the public phone booth, so the traditional common law trespass test, as outlined in Jones above, did not apply. However, the Supreme Court recognized that the Fourth Amendment also protects privacy, not just places. 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.

However, what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Using a bugging device to eavesdrop on a conversation as in Katz 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 unaided ear closer to a gap in the booth's door, there would be no REP in those overheard words.

In Katz, 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 under the Katz REP analysis. It is not a "search" to observe conduct that occurs openly in public, such as on a public street. Observations made from a lawful vantage point that develop probable cause do not constitute a "search" under the Fourth Amendment. This is sometimes referred to as the Open View Doctrine. This same

principle applies to perceptions made through seeing, 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. Likewise, as long as there is no physical trespass by the government upon a constitutionally protected area, there is no "search" under a Jones analysis.

9.3.3 Common "Search" Areas

Listed below are some of the more common REP "search" areas and situations.

(a) The Body

Obtaining evidence directly from a person's body 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 reasonable 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. This applies to what officers may see from a lawful vantage point. 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

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. Whether or not a Fourth Amendment "search" has occurred requires an application of both the Jones analysis and the Katz REP analysis.

The effect of a Jones analysis on a home is still being interpreted by the lower courts. However, it is sufficient to conclude that a government intrusion or trespass into a person's home with the intent to obtain information would constitute a "search" under the Fourth Amendment.

An individual has a high expectation of privacy within the

confines of his or her home. 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

Whether or not a container (e.g., purses, briefcases, backpacks,

etc.), is an "effect" within the definition of the Fourth Amendment is unclear. The Supreme Court in Jones noted that "effects" are one of the areas of constitutional protection. There is currently no case law on the Jones analysis with regards to containers.

However, an individual has REP in his or her containers 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 Katz REP 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. The Supreme Court applied the Jones analysis to curtilage in Florida v.

Jardines which involved taking a drug detection K9 to the front porch door of Jardines' residence to perform a free-air sniff for marijuana. The Court held the front porch was curtilage and the government trespass was made in the attempt to obtain information regarding drug manufacturing. There is not customary invitation to enter the curtilage simply to conduct a search. However, this does not prohibit an officer from conducting a knock-and-talk because approaching the home and knocking is no more than any private citizen might do.

In contrast, "open fields" include any unoccupied or undeveloped area outside of the curtilage. 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. An "open field," unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment. Therefore, the physical trespass by the government onto "open fields," even in an attempt to obtain information, would not constitute a "search" under the Jones analysis. In addition, 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. 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 addition, it is likely that any physical trespass into structures combined with an attempt to find evidence or obtain information may constitute a Fourth Amendment "search" under the Jones analysis.

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;

- 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:

- Prior notice to the employee, such as through the use of computer banners, that limit REP or state that no REP exists;

- Common practices and procedures of the employer;

- Openness and accessibility to the area or item in question;

- Whether the position of the employee requires a special trust and confidence (e.g., a position that has security requirements);

- 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.

It is unknown whether the Jones analysis will affect government workplace searches.

(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.

It is reasonable to believe the courts will apply the Jones analysis to garbage located on a suspect's property. Therefore, a physical trespass onto curtilage with the intent to gain information or evidence from garbage would most likely be considered Fourth Amendment "search."

(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.

9.3.4 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.

The courts have not applied the Jones analysis to a dog sniff of property located in a public place. However, the Court held that bringing a dog onto a suspect's front porch (curtilage) for the purpose of conducting a sniff to discover evidence or contraband constitutes a "search" under the Jones analysis. Florida v. Jardines.

(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 not otherwise 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.

9.4 A Seizure

Not all interactions between law enforcement officers and citizens amount to a "seizure" under the Fourth Amendment. Some encounters are purely voluntary. When an officer's 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.

9.4.1 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.

9.4.2 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:

- The time, place, and purpose of the encounter;
- The words used by the officer;
- Language or tone of voice that might indicate compliance with the officer's request is mandatory;
- The threatening presence of several officers;
- Whether weapons were displayed by the officer(s);
- Any physical touching of the citizen;
- Retention of the citizen's identification or personal

property;

- Whether the citizen was notified of the right to end the encounter (though this is not a requirement or voluntary contacts).

9.4.3 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:

- A crime is about to be committed;
- A crime is being committed; or
- 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 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) 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, an 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:

- The amount of detail provided by the source of the information;
- Whether the source accurately predicted future behavior on the part of the suspect;
- Whether and to what extent law enforcement officers corroborate the source's information;
- Whether the information is based upon the source's first-hand observations;
- Whether, by providing the information, the source is putting his or her anonymity in jeopardy;
- Whether the information was provided in a face-to-face encounter with law enforcement officials; and
- 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 the officer heard or saw that led him 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 an investigative detention. 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) 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) 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:

- The number of officers involved;
- The nature of the crime and whether there is reason to believe the suspect is armed;
- The strength of the articulable, objective suspicions;

- The need for immediate action; and
- The presence or lack of suspicious behavior or movement by the person under observation.

(f) Going From Investigative Detention to Arrest

An investigative detention may lead to a lawful arrest only if probable cause to arrest is developed. 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:

- The purpose behind the stop and the nature of the crime;
- Whether the officer diligently sought to carry out the purpose behind the detention;
- The amount of force used, and the need for such force;
- The extent to which an individual's freedom of movement was restrained;
- The number of officers involved;
- The duration and intensity of the stop;
- The time and location of the stop; and
- 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.

9.4.4 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) the investigatory stop must be lawful; and (2) 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 frisk. 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 in Section 9.8 of 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.

9.4.5 Detaining Vehicles

The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle. 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 Brendlin v. California, the Supreme Court held 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 9.7.2(a), 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:

- Ordering the driver and passengers out of 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) 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 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) 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 requirements 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.

9.4.6 Arrests

The third type of "citizen-police" encounter is an arrest based upon probable cause. This concept is discussed more fully in Sections 9.9 and 9.10.

9.5 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.

In December 2014 the DOJ published a document entitled "Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation or Gender Identity."[5] The 2014 Guidance built upon and expanded the framework of the 2003 Guidance, and it reaffirmed the Federal governmemnt's deep commitment to

[5] A complete copy of the 2014 Guidance can be found in the *Legal Division Reference Book*.

ensure that its law enforcement agencies conduct their activities in an unbiased manner.

The 2014 Guidance applies to Federal law enforcement officers performing Federal law enforcement activities, including those related to national security and intelligence, and defines not only the circumstances in which Federal law enforcement officers may take into account a person's race and ethnicity, as the 2003 Guidance did, but also when gender, national origin, religion, sexual orientation, or gender identity may be taken into account. The 2014 Guidance also applies to state and local law enforcement officers while participating in Federal law enforcement task forces.

9.5.1 The Constitutional Framework

The Constitution protects individuals against the invidious use of irrelevant individual characteristics. See Whren v. United States, 517 U.S. 806, 813 (1996). Such characteristics should never be the sole basis for a law enforcement action. The 2014 Guidance established requirements beyond the Constitutional minimum that shall apply to the use of race, ethnicity, gender, national origin[6], religion, sexual orientation, and gender identity by Federal law enforcement officers. The 2014 Guidance applies to such officers at all times, including when they are operating in partnership with non-Federal law enforcement agencies.

The following excerpts are taken directly from the 2014 Guidance, and provide the standard taught by the FLETC Legal Division.

[6] As used in this Guidance, "national origin" refers to an individual's, or his or her ancestor's, country of birth or origin, or an individual's possession of the physical, cultural or linguistic characteristics commonly associated with a particular country. It does not refer to an individual's "nationality" (*i.e.*, country of citizenship or country of which the person is deemed a national), which may be relevant to the administration and enforcement of certain statutes, regulations, and executive orders.

9.5.2 Guidance for Federal Officials Engaged in Law Enforcement Activities[7]

(a) 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, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description. This prohibition applies even where the use of a listed characteristic might otherwise be lawful.

(b) All Activities Other Than Routine or Spontaneous Law Enforcement Activities

In conducting all activities other than routine or spontaneous law enforcement activities, Federal law enforcement officers may consider race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity. In order to rely on a listed characteristic, law enforcement officers must also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted.This standard applies even where the use of a listed characteristic might otherwise be lawful.[8]

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[7] Specific examples concerning the use of the listed characteristics when making law enforcement decisions, or in law enforcement activities can be found in the 2014 Guidance. See the *Legal Division Reference Book*.

[8] This Guidance does not prohibit the accommodation of religious beliefs and practices consistent with the U.S. Constitution and federal law. The Guidance also does not prohibit officials from considering gender when "the gender classification is not invidious, but rather realistically reflects the fact

As noted above, there are circumstances in which law enforcement officers engaged in activities relating to particular identified criminal incidents, schemes, organizations, threats to national or homeland security, violations of Federal immigration law, or authorized intelligence activities may consider personal identifying characteristics of potential suspects, including race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity. Common sense dictates that when a victim describes the assailant as possessing a certain characteristic, law enforcement officers may properly limit their search for suspects to persons possessing that characteristic. Similarly, in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organization's activities.

Reliance upon generalized stereotypes is absolutely forbidden. In order for law enforcement officers to rely on information about a listed characteristic, the following must be true:

- The information must be relevant to the locality or time frame of the criminal activity, threat to national or homeland security, violation of Federal immigration law, or authorized intelligence activity;

- The information must be trustworthy; and

- The information concerning identifying listed characteristics must be tied to the particular criminal incident, a particular criminal scheme, or a particular criminal organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.

The prohibition against the use of generalized stereotypes

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that the sexes are not similarly situated." Rostker v. Goldberg, 453 U.S. 57, 79 (1981).

extends to the use of pretexts as an excuse to target minorities. Officers 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 characteristic-based efforts, if properly supported by reliable, empirical data, are in fact race-neutral.

- Relevance to the locality or time frame: Any information that law enforcement officers rely upon concerning a listed characteristic possessed by persons who may be linked to specific criminal activities, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity must be relevant to both time and location.

- The information must be trustworthy: Where the information relied upon by law enforcement officers linking a person possessing a listed characteristic to potential criminal activity, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity is unreliable or too generalized and unspecific, reliance on that characteristic is prohibited. In determining whether information is trustworthy, an officer should consider the totality of the circumstances, such as the reliability of the source, the specificity of the information, and the context in which it is being used.

These standards contemplate the appropriate use of both "suspect-specific" and "incident- specific" information. As noted above, where a crime has occurred and law enforcement officers have eyewitness accounts including the race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity of the perpetrator, that information may be used. Law enforcement officers may also use reliable, locally or temporally relevant information linking persons possessing a listed characteristic to a particular incident, unlawful scheme, or ongoing criminal enterprise, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence

activity—even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident, ongoing criminal activity, threat to national or homeland security, or violation of Federal immigration law will point strongly to a perpetrator possessing a specific listed characteristic, even though law enforcement officers lack an eyewitness account.

In addition, law enforcement officers may use a listed characteristic in connection with source recruitment, where such characteristic bears on the potential source's placement and access to information relevant to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.

Finally, when a law enforcement officer relies on a listed characteristic in undertaking an action, that officer must have a reasonable belief that the action is merited under the totality of the circumstances. This standard ensures that, under the circumstances, the officer is acting in good faith when he or she relies in part on a listed characteristic to take action.

9.5.3 National and Homeland Security and Intelligence Activities

Since the terrorist attacks on September 11, 2001, Federal law enforcement agencies have used every legitimate tool to prevent future attacks 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)).

The years since September 11 have also demonstrated that Federal law enforcement officers can achieve this critical goal without compromising our cherished value of equal justice

under the law. Every day, Federal law enforcement officers work to keep our Nation safe, and they do so without invidious profiling. The standard embodied in this Guidance thus applies to Federal law enforcement agencies' national and homeland security operations, which will continue to focus on protecting the public while upholding our values.

National security, homeland security, and intelligence activities often are national in scope and focused on prevention of attacks by both known and unknown actors, not just prosecution. For example, terrorist organizations might aim to engage in acts of catastrophic violence in any part of the country (indeed, in multiple places simultaneously, if possible). These facts do not change the applicability of the Guidance, however. In order to undertake an action based on a listed characteristic, a law enforcement officer must have trustworthy information, relevant to the locality or time frame, linking persons possessing that characteristic to a threat to national security, homeland security, or intelligence activity, and the actions to be taken must be reasonable under the totality of the circumstances.

9.6 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.

9.6.1 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.

9.6.2 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.

9.6.3 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.

9.6.4 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.

(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.

9.7 The Exclusionary Rule

9.7.1 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.

9.7.2 The Exceptions

(a) 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.

(b) 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.

(c) 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.

d. 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.

e. 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.

9.8 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.

9.8.1 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 immediately adjacent to th place of arrest, 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.

9.8.2 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

- The nexus between the seized object and the items particularized in a search warrant;

- Whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and

- Whether probable cause is the direct result of the executing officer's instantaneous sensor perceptions.

9.8.3 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. An officer's personal observations may establish 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, an officer may stand on the public sidewalk and see a marijuana plant growing inside someone's living room. Without additional facts, however, the officer may not yet enter the residence and seize the plant. The officer has no lawful right of access to the living room where the plant is located. If the resident were to grant the officer consent to enter, however, or if

the resident saw the officer through the window and began destroying the plant, he or she could lawfully enter the house and access the evidence. The plain view doctrine is not a tool that allows officers to search for evidence, but only to seize it if it meets the rule's criteria.

9.9 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.

9.9.1 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."

9.9.2 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 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.

9.9.3 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."

9.9.4 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.

9.9.5 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."

9.9.6 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.

9.10 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.

9.10.1 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 they have the statutory authority to arrest for that specific crime.

Authority to make arrests comes from three different sources.

(a) 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.

(b) 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.

(c) 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.

9.10.2 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).

(a) Outstanding Federal Arrest Warrant

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.

(b) Outstanding State Arrest Warrant

Unless authorized by statute, federal law enforcement officers are not authorized to arrest individuals on outstanding state warrants. Very few agencies have such statutory arrest authority.[9] However, such arrests might be made with state peace officer authority, depending on the law of the state in which the arrest is made. If faced with this situation, the best practice is for the federal law enforcement officer to contact the state or local police department listed on warrant to determine if that department wants the individual detained. If so, the federal law enforcement office may detain the individual 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.

9.10.3 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.

[9] See Title 38 U.S.C. § 902 Enforcement and Arrest Authority of Department [of Veterans Affairs] Police Officers for a rare excpetion to the general rule.

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.

(a) 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.

(b) 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. To enter the third-party's home to make an 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.

9.10.4 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.

(a) 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 the officer is authorized by statute or otherwise to do so. If the person for whom the officer has probable cause is located inside a residence, he or she must have consent or an exigent circumstance to enter the residence to make an arrest without a warrant.

(b) 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 his or her 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 an officer's 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.[10]

9.11 Title 18 U.S.C. § 3109

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.

9.11.1 The Statute

Titled "Breaking Doors or Windows for Entry or Exit," the statute 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

[10] The exigent circumstance of "hot pursuit," discussed in section 9.19.1 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.

> 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.

9.11.2 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.

9.11.3 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.

9.11.4 Requirements Under the Statute

Under the knock-and-announce statute, three requirements must be met before officers may lawfully use force to "break open" some part of a house when executing a search or arrest warrant.

(a) 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.

(b) 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.

(c) 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 earing 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.

9.11.5 Exigent Circumstances and § 3109

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 the 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 felony 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.

9.11.6 Violations of § 3109 and 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.

9.11.7 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. An officer 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.

9.12 Protective Sweeps

9.12.1 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.

9.12.2 Scope of a Protective Sweep

(a) 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.

9.12.3 Timing of the Protective 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.

9.12.4 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.

(a) 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. Although the limited search is for people, any evidence or contraband found in plain view may be seized.

(b) 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 suspicion less extended sweep.

9.12.5 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.

9.13 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.

9.13.1 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.

9.13.2 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 containers. 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.

9.13.3 Scope of a Search Incident to Arrest

The permissible scope of a search incident to arrest varies depending on the context of the arrest.

(a) 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.

(b) 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.

However, in Riley v. California, the United States Supreme Court specifically held that warrants are generally required to search cell phones incident to a lawful arrest. The Court applied the Chimel factors cited above and found that: (1) once officers have seized the phone it cannot be used as a weapon by the arrestee; and (2) officers can take reasonable measures to prevent the remote wiping of data by placing a cell phone in a Faraday container or powering off the phone and removing the battery. Although a cell phone cannot be searched incident to arrest, the Court also stated that traditional exigent circumstances could justify the warrantless search of a cell phone's data after an arrest.

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:

- The distance between the arrestee and the place to be searched;
- Whether the arrestee was handcuffed or otherwise restrained;
- Whether the officers were in a position to block the arrested person's access to the area in question;
- The ease with which the arrested person could access the area; and
- 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.

9.13.4 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 of arrest. 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.

9.14 Issuance of Federal Search Warrants

The rules delineating who may issue federal search warrants are a mix of statutes and federal case law.

9.14.1 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.

9.14.2 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.

9.14.3 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), law enforcement officers 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.[11]

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 to track the movement of a person or property located within the district, outside the district, or both."

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[11] 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.

9.14.4 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."

9.15 The Components of a Search Warrant Affidavit

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.

9.15.1 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.

(a) Stale Information

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 9.15.2 below.) 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. (e.g., child pornography on a computer or digital storage device).

- 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.

9.15.2 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.

9.15.3 Particularity- 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.

(a) 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.

(b) 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.

(c) 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.

9.15.4 Particularity - 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.

9.15.5 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. 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. The officers are only permitted to seize the controlled substance and continue searching areas that could conceal a 27-inch 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.

9.15.6 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.

9.16 Telephonic Search Warrants

A judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony. Rule 4.1, titled "Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means," outlines the procedural rules for obtaining telephonic search warrants. Subsection (A) of the rule provides that:

"A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons."

9.16.1 Purpose of Rule 4.1

Rule 4.1 recognizes that modern technological developments (e.g., cell phones, facsimile, and email) have improved access to judicial officers. The purpose of the rule is to encourage federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches.

9.16.2 Telephonic Warrants and Exigent Circumstances

The time necessary to obtain a traditional warrant is relevant to determine whether circumstances are exigent. Warrants obtained by telephone or other reliable electronic means typically take less time. Courts also consider the amount of time necessary to obtain a warrant by telephone or other reliable

electronic means 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 or other reliable electronic means, the procedures proscribed in Rule 4.1 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.

Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 4.1 is not subject to suppression on the ground that issuing the warrant telephonically or by other reliable electronic means was unreasonable under the circumstances.

9.16.3 Who Can Issue Telephonic Warrants?

Unlike traditional federal search warrants issued pursuant to Rule 41, a state court judge may not issue a telephonic warrant. Telephonic search warrants must be issued by federal judges.

9.16.4 Procedural Requirements

Rule 4.1(b) sets out a variety of procedural requirements that must be met to obtain and execute a warrant by telephone or other reliable electronic means.

(a) 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.

(b) Read It or Transmit It

Second, the officer must read or otherwise transmit the contents of the document verbatim to the judge. The officer may, if the option is available, transmit the duplicate original warrant to the magistrate judge by e-mail or facsimile.

(c) Preparation of "Original" Warrant

If the officer reads 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 file the modified original and 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.

(d) Issuance of Warrant

Upon determining to issue the warrant, the judge must immediately sign the original warrant, enter on its face the exact time it is issued, and transmit the warrant by reliable electronic means to the officer or direct the officer to sign the judge's name and enter the date and time on the duplicate original warrant.

(e) Time of Execution Must Be Entered on the "Duplicate Original Warrant"

The officer must enter the exact date and time the search warrant was executed.

9.16.5 Recording and Certification Requirements

In addition to the requirements listed above, recording and certification requirements must be met.

(a) Oath or Affirmation

Upon learning that an officer is requesting a warrant by telephone or other reliable electronic means, the judge must place under oath, and may examine, the officer and any person on whose testimony the application is based. The oath is administered at the inception of the call.

(b) Creating a Record of the Testimony and Exhibits

If the officer does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit. If the judge considers additional testimony or exhibits, the judge must have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing.

(c) Certification of the Recording

The 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, along with any exhibits, 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.

9.17 Executing Federal 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.

9.17.1 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 determines who qualifies as an authorized officer.

> 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.

9.17.2 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 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 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).

9.17.3 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.

9.17.4 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.

9.17.5 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.

9.17.6 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.

9.17.7 Detaining Occupants - 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 9.17.3 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.

9.17.8 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.

9.17.9 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.

(a) 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.

(b) 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.

(c) 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.

9.17.10 Damage or Destruction of Property

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.

9.17.11 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."

9.17.12 Providing a Copy of the Warrant and Inventory

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.

9.17.13 Warrant Return

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).

9.18 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.

9.18.1 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.

9.18.2 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.

9.18.3 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.

9.18.4 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.

9.18.5 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.

9.19 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.

9.19.1 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:

1. Probable Cause to Arrest. Probable cause must exist to arrest the suspect.

2. 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.

3. 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.

4. 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.

5. 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.

9.19.2 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.

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.

9.19.3 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.[12] 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

[12] 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.

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 rejections of a "'murder scene exception' to the Warrant Clause of the Fourth Amendment."

9.20 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?").

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.

9.20.1 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 (although custody alone is not enough in itself to demonstrate a coerced consent to search);

- 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 or her Miranda rights or told that he or she 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.

9.20.2 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 physically present and expressly refuses to give consent for the search. Georgia v. Randolph. 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. The removal of a potential objector must be objectively reasonable, such as an occupant who is absent due to a lawful detention or arrest. Fernandez v. California. On the other hand, officers may not isolate or remove the potentially non-consenting party just to avoid a possible objection to the

search.

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.

9.20.3 Scope of a Consent Search

"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.

9.20.4 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.

(a) Husband - Wife Situations

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.

(b) 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.

(c) 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.

9.21 Inventory Searches

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.

9.21.1 Justifications for Inventory Searches

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.

9.21.2 Requirements for Inventory Searches

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.

(a) 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.

(b) 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.

9.21.3 Scope of Inventory Searches

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.

9.21.4 Location of Inventory Searches

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.

9.22 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.

9.22.1 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.

9.22.2 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.

9.22.3 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.

9.22.4 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 officers set up a checkpoint to discover drugs. The Supreme Court determined 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.

9.22.5 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.

9.22.6 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.

(a) 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.

(b) 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.

(c) 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.

9.22.7 Border Searches – In General

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.

(a) 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.

9.22.8 Routine Border Search

(a) 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.

(b) 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.

9.22.9 Non-routine Border Search

(a) 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.

(b) 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.

9.22.10 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 about 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) 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) 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:

(c) 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.

9.22.11 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.

9.22.12 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.

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.

9.23 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.

9.23.1 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.

9.23.2 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.

9.23.3 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.

Chapter Ten

Government Workplace Searches

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10.1 Government Workplace Searches - 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.

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[1], 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."

10.2 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

[1] This case is briefed in the companion book, *Legal Division Reference Book.*

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 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."

10.3 Is It a "Search" Under the Fourth Amendment?

There are two tests applied to determine whether a Fourth Amendment "search" has occurred. They are derived from two Supreme Court cases, Katz v. United States and United States v. Jones.[2]

The Jones, Supreme Court held that a physical intrusion by the government into a constitutionally protected area for the purpose of gathering information constitutes a "search" under the Fourth Amendment. This is sometimes described as the

[2] These cases are briefed in the companion book, *Legal Division Reference Book.*

common law trespass test. Unfortunately, there is a lack of case law on how this test might be applied to government workplaces. Therefore, an analysis of government workplace searches requires a more detailed understanding of the other test for a Fourth Amendment "search."

The more common test applied to government workplace searches is the reasonable expectation of privacy test from Katz v. United States. In Katz, the Supreme Court held that a Fourth Amendment "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.

10.3.1 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. 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 desk or 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:

(a) 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 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 any time, day or night" can defeat a claim of REP in a government vehicle.

(b) 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.

(c) 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."

(d) 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.

(e) 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).

10.4 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.

10.4.1 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.

(a) 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.

(b) 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.

(c) 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.[3]

(d) 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.

(e) Permissible In Scope

A search is "permissible in scope" when the measures used are reasonably related to the objectives of the search and 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.

(f) 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

[3] This case is briefed in the companion book, *Legal Division Reference Book.*

view seizure so long as the search meets the criteria discussed above.

10.4.2 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.

10.4.3 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

Chapter Eleven

Legal Issues of Identification Procedures

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11.1 Fifth Amendment Due Process Clause

Eyewitness identification evidence is an important component in the investigation and prosecution of criminal offenses. Generally, there are three types of procedures used by law enforcement officers to determine if an eyewitness or victim can identify the perpetrator of a crime: line-ups, photo arrays and show-ups. These identification procedures are governed by the Due Process Clause of the Fifth Amendment. A court will determine whether the pretrial identification procedure used by the law enforcement officers was so "unnecessarily suggestive and conducive to irreparable mistaken identification" that the defendant was denied due process of law. [1]

11.2 Admissibility of Identification Evidence

When the defendant objects to identification testimony to be given by a witness who has identified him prior to trial, the court will use a two-step analysis to determine whether the prior identification or the in-court identification of the defendant is admissible.

First, the court decides whether the pre-trial identification procedure unduly and unnecessarily suggested to the witness that the defendant was the perpetrator. If the procedure was not suggestive, the identification evidence will be admissible.

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[1] Stovall v. Denno, 388 U.S. 293, 302 (1967).

Like all other evidence, the jury will then determine if the identification evidence is credible. However, if the court finds the identification procedure was both unduly suggestive and unnecessary, the court must determine, whether, under the totality of the circumstances, the identification procedure was independently reliable. In other words, even though the identification procedure might be suggestive, as long as the identification procedure did not create a substantial likelihood of misidentification, the identification evidence will be admissible.[2]

In Neil v Biggers,[3] a sexual assault victim identified Biggers as her assailant at a police station show-up seven months after the assault. The show-up consisted of two police officers walking Biggers past the victim. At the victim's request, the officers to direct Biggers to say, "Shut up or I'll kill you." The victim identified Biggers as her assailant and testified at trial that she had "No doubt" about her identification. Even though the identification procedure may have been unduly suggestive, the Supreme Court "found no substantial likelihood of misidentification;" therefore, the victim's identification of Biggers was admissible. The court noted the victim spend up to thirty minutes with her assailant, the victim was with her assailant under adequate light in her house and under a full moon outdoors, and victim faced her assailant directly and intimately during this time. In addition, the witness' description of her assailant to the police, which included his approximate age, height, weight, complexion, skin texture, build and voice was thorough.

Consequently, a court will consider the following factors when evaluating a witness' ability to make an accurate independent identification.[4]

- The opportunity for the witness to view the criminal at the time of the crime;

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[2] Manson v. Brathwaite, 432 U.S. 98 109-114 (1977).
[3] Neil v. Biggers, 409 U.S. 188 (1972).
[4] Id. At 199-200.

- The witness' degree of attention;
- The accuracy of the witness' prior description of the criminal;
- The level of certainty demonstrated by the witness at the confrontation; and
- The length of time between the crime and the confrontation.

11.3 Types of Identification Procedures

11.3.1 Line-Ups

When utilizing a line-up, the eyewitness views a number of actual potential suspects in an attempt to identify the perpetrator of a crime. A suspect cannot invoke his Fifth Amendment privilege against self-incrimination to refuse to participate, as line-ups are non-testimonial in nature. However, the Due Process Clause guarantees the defendant the procedures used in conducting a line-up will be fair. A line-up can be impermissibly or unduly suggestive to the degree it creates a substantial likelihood of misidentification if the defendant matches a witness' description and the other line-up participants obviously do not.[5] In addition, line-ups in which suspects are the only participants wearing distinctive clothing or otherwise matching important elements of the description provided by the witness have been severely criticized as substantially increasing the dangers of misidentification.[6]

In Foster v. California[7], a robbery suspect, who was six feet in height, was placed in a line-up with two other men who were six to seven inches shorter. In addition, Foster was the only one who was wearing a jacket similar to one worn by the robber. After viewing the line-up, the witness could not positively identify Foster as the robber. Immediately afterward, the

[5] Raheem v. Kelly, 257 F.3d 132 (2nd Cir. 2001).
[6] Israel v Odom, 521 F2d 1370 (7th Cir. 1975).
[7] Foster v. California, 394 U.S. 440 (1969).

witness asked to speak to Foster. Police officers then brought Foster into an office by himself, and allowed the witness to speak to Foster. Even after this one on one confrontation, the witness could not identify Foster as the robber. Finally, approximately ten days later, police officers arranged for the witness to view a second line-up. Foster was the only person in the second line-up who had appeared in the first line-up. The witness identified Foster as the robber. The witness later testified to his identification of Foster in the police line-ups and identified Foster in court as the robber.

Citing Stovall v Denno, the court held the suggestive elements in the identification procedures made it all be inevitable the witness would identify Foster as the robber, whether he was or not. As a result, the court concluded these procedures so undermined the reliability of the witness' identification as to violate due process.[8]

11.3.2 Photo Displays / Arrays

To determine whether a photo display is so unnecessarily suggestive so as to give rise to a substantial likelihood of misidentification in violation of 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.[9]

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.[10] The lower the number of photographs used in a photo array, the closer the array must be scrutinized for suggestive irregularities. Generally, using six

[8] Id. at 443.
[9] United States v. Wiseman, 172 F.3d 1196 (10th Cir 1999).
[10] United States v. Sanchez, 24 F.3d 1259 (10th Cir 1994).

photographs in an array has been upheld by the courts.

Improper presentation of photographs may sometimes cause witnesses to mistakenly identify a suspect.[11] Examples of presentations that may increase the risk of misidentification include:

- Repetitive showing of suspect's photo;
- Emphasizing a photo;
- Displaying photos of several individuals, but where the suspect's image keeps repeating or is in some way emphasized;
- Indicating to a witness that police have other evidence that one of the persons pictured committed the crime;
- Telling a witness to assume the suspect is in the array;
- Using a suspect's photo that is a different color than the others in the array;
- The attention-drawing or suggestive details of the photographs themselves;
- Where the suspect's photograph does not look like the men depicted in the other photographs shown to the witness.

11.3.3 Show-Ups

A show-up occurs when the witness, in a direct one-on-one showing of an actual person, attempts to identify the perpetrator of a crime. The practice of showing a suspect directly to a witness for the purpose of identification, and not as

[11] United States v. Barber, 132 Fed. App'x 233 (11th Cir. 2005); Gregory-Bey v. Hanks, 332 F.3d 1036 (7th Cir. 2003); United States v. Cozier, 259 F.3d 503 (6th Cir. 2001); U.S. v. Smith, 156 F.3d 1046 (10th Cir. 1998).

part of a line-up, has been widely condemned. Nevertheless, show-ups can be proper and not impermissibly 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 Twelve

Legal Issues in Interrogations and Interviews

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12.1 Introduction

Law enforcement officers oftentimes obtain exceptionally valuable information from criminal suspects. These statements can provide crucial evidence in bringing a case to a successful prosecution. To use these statements at trial, the government must abide by the constitutional requirements relating to statements and interrogations found in the self-incrimination clause and the due process clause of the Fifth Amendment and the right to counsel clause in the Sixth Amendment.

Courts will evaluate any statements of a suspect to determine if they are worthy of consideration by the trial court. Several factors can come into play to induce a court to determine that statements are not to be admitted into evidence. For instance, a court could determine that the statements were not voluntarily made (in violation of the Fifth Amendment's due process clause), or were compelled by the government (in violation of the Fifth Amendment's self-incrimination clause), or were obtained without legal counsel's presence (in violation of the Sixth Amendment's assistance of counsel clause). This chapter is designed to instruct the law enforcement officer on how to avoid these legal obstacles while conducting effective interviews of suspects and others.

12.2 Voluntary Statements

12.2.1 The Test for Voluntariness

In order for any statement to be admissible against a suspect in a criminal trial, the statement must have been made voluntarily. This is of primary importance to any reviewing court. Courts determine whether a statement is voluntary by deciding whether a statement was the product of free choice or whether the individual's will was overborne by government conduct.

The courts look at the totality of the facts and circumstances surrounding the interrogation when determining whether a suspect's will was overborne. This includes information about

the suspect, the circumstances under which the statement was made, and the officer's conduct. There is a danger that a suspect's will was overborne when the circumstances are such that an innocent person might confess in the same situation. Areas that courts consider include:

(a) Suspect Characteristics

The courts will consider the following factors when assessing the voluntariness of a suspect's statement: the suspect's age, level of education and/or intelligence, known psychological problems, the suspect's current physical condition, the suspect's level of drug and/or alcohol impairment, and the suspect's familiarity with the criminal justice system. For example, a suspect who has considerable experience with the criminal justice system is less likely to be intimidated when confronted with government questioning than someone who has little to no experience in that type of situation.

(b) Circumstances Surrounding the Statement

When determining whether the suspect's will was overborne, the courts will also consider the circumstances under which the statement was made. The court will consider where the statement was taken, for how long the suspect was questioned, whether breaks were taken, and whether the suspect was in custody or free to leave.

A suspect's statement can be voluntarily provided even if made while a suspect is at the police station or under arrest. For example, a suspect may choose to go to the police station to make a voluntary statement instead of staying at home because he does not want others to see him talking to the government. Even when a suspect is under arrest and being detained at a police station, his statement may still be voluntary if other precautions are taken, such as the advisement of Miranda warnings. (Miranda warnings are discussed later in this chapter).

(c) Officer's Conduct

An officer's conduct also influences the court's decision regarding whether a statement is voluntary. Certain interrogation techniques are considered to be coercive, and, if used to obtain a statement, will usually result in the court finding that statement to be involuntary. Not surprisingly, violence or threats of violence are considered coercive. Long interrogations without reasonable breaks can be coercive. Threats of unlawful action, such as threats to falsely arrest family members, are coercive. Similarly, threats to take away the suspect's children if the suspect does not confess are coercive.

Even seemingly positive government conduct, such as promises of immunity or leniency, may be coercive. For example, if an individual is falsely accused of committing a crime, she faces a potential jail sentence and loss of her job if convicted. If an officer tells her that if she cooperates and confesses he will make sure that she does not go to jail, the officer's promise can be coercive. In this situation, a reasonable, innocent person might falsely confess because doing so eliminates the possibility of jail time and minimizes the likelihood that she will lose her job.

While promising a suspect immunity or leniency may be coercive, promising a suspect that her cooperation will be brought to the attention of the prosecutor is acceptable. Officers should not state that prosecutors or judges will, in fact, be more lenient, but can tell a suspect that her cooperation will be shared with those that can influence her fate.

Other acceptable, non-coercive interrogation techniques include confronting a suspect with evidence of his guilt, encouraging him to tell the truth through emotional appeals, and informing him of the potential jail time he faces if convicted. Even trickery and deception may be used during an interrogation as long as a suspect's will is not overborne by such tactics. For example, telling the suspect his prints are on the murder weapon, even when they are not, is usually acceptable. Similarly, telling a

suspect that his accomplice has confessed, when in fact he has not, is also permissible, and, by itself, will not make the statement involuntary.

It is important to remember that these deceptive interrogation techniques are considered as part of the totality of the circumstances along with the suspect's characteristics and the circumstances of the interrogation. For example, if a suspect's mental capacity is below normal levels, these otherwise acceptable deceptive techniques may be considered coercive as the suspect may be more easily influenced by the government than someone whose mental capacity is at normal levels.

Furthermore, permissible interrogation techniques may become coercive when too many are used together on the same suspect. Consider the case of Spano v. New York, 360 U.S. 315 (1959). In this case, a foreign-born man, age 25, with no previous criminal history or experience with official interrogation was suspected of murder. He had only six months of high school education and a history of emotional instability. The suspect was questioned by officials overnight for nearly eight straight hours before he confessed. He repeatedly refused to answer questions. During the interrogation, the officers brought in a "childhood friend" of the suspect who had become a law enforcement officer. This friend/officer told the suspect that the situation had gotten him in trouble and that his job was in jeopardy. He also played up the terrible effect this would have on his family.

The Supreme Court held that the confession was involuntary based on the totality of the circumstances. It had been obtained in violation of the suspect's rights because his will was overborne by official pressure, fatigue, and sympathy created through deception.

In situations where coercive influences are present, there are steps that an officer can take to minimize those influences. For example, if a suspect is highly impaired, the officer might consider delaying the interview. If the suspect is a juvenile or has a detectable mental impairment, officers should explain the

Miranda warnings using simple language and should avoid leading the suspect who may be more easily influenced than others. When an interrogation becomes lengthy but must continue, such as when the officers are questioning a suspect about the location of a missing and endangered child, the officers should take significant breaks and provide food and drinks.

12.3 Right Against Self-Incrimination - Applied

The Fifth Amendment[1] self-incrimination clause states that "No person…shall be compelled in any criminal case to be a witness against himself…" This clause can be broken into five separate elements:

- No person;
- Compelled;
- Criminal Case;
- To be a Witness;
- Against Himself.

All five of these conditions must exist to trigger the protections of the self-incrimination clause.

If any one of these conditions does not exist, then the suspect cannot assert a valid Fifth Amendment right against self-incrimination, and her statements will be admissible against her in court so long as there are no other violations that result in their suppression. If these five conditions are met, then a person may assert the Fifth Amendment privilege against self-incrimination in any proceeding, whether civil, criminal, administrative, investigatory or adjudicatory. As the element "Compelled" is the most comprehensive and, perhaps, difficult

[1] The Fifth Amendment, as all other elements of the Constitution, only applies to governmental actions.

to apply, it will be explored lastly.

12.3.1 Who is a "Person"

Unlike the Fourth Amendment, the Fifth Amendment self-incrimination clause only protects natural individuals ("No person…shall be compelled in any criminal case to be a witness against himself…"), not corporations. Consequently, a corporation cannot refuse to answer questions or provide documents on the grounds that it has a Fifth Amendment privilege against self-incrimination. Braswell v. United States, 487 U.S. 99 (1988).

12.3.2 The Potential for Prosecution

The potential for criminal prosecution ("No person…shall be compelled in any criminal case to be a witness against himself…") is a condition that must be met for the right against self-incrimination to be triggered. 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 testimony is removed, even compelled testimony, then the Fifth Amendment self-incrimination clause does not apply.

The potential for prosecution means exactly that; it must be possible for the suspect to be prosecuted. Prosecution does not have to be imminent or even likely. It is possible that a person could be prosecuted for a crime even if she is not a suspect at the time the officers are interviewing her. If the witness could make statements that could incriminate her, and there are no bars to prosecuting her, then she has a Fifth Amendment right against self-incrimination.

There are a number of situations where there is no possibility for the government to use the statements in a prosecution. If the statements cannot be used in a criminal prosecution, the self-incrimination clause is not applicable.

(a) The Statute of Limitations

If the statute of limitations has run for a given crime, it means that too much time has passed since the commission of the crime or since the government became aware of the crime, and the government can no longer prosecute that crime. If a suspect can no longer be prosecuted for a given crime, then there is no potential for prosecution and she no longer has a right against self-incrimination with regard to that crime.

(b) Double Jeopardy

The Double Jeopardy clause of the Fifth Amendment prohibits the same government (state or federal) from prosecuting an individual more than once for the same offense. This means that once a person has been tried and acquitted or has been tried and convicted (and the period for filing an appeal has passed), that person cannot be prosecuted again for that same crime by the same government.

For example, if a man is tried for murder by the state of Georgia and a jury finds him not guilty, then the state of Georgia cannot try him again for that same murder. Provided that the federal government cannot try him for the same murder, then the defendant no longer has a Fifth Amendment right against self-incrimination. If his statements were needed to help convict a co-criminal, for example, law enforcement officers would be able to compel his testimony using a subpoena. Note that this is a simplified discussion of double jeopardy; a more involved discussion of the double jeopardy clause can be found in the Constitutional Law chapter of this book.

(c) Immunity

When a witness is granted immunity, he receives a form of protection from the government. The granting of immunity allows the government to compel the witness to testify about matters that would otherwise be protected by the Fifth Amendment. Typically, only attorneys for the government have the authority to offer immunity. Law enforcement officers are

rarely permitted to offer immunity on behalf of the government. Immunity can exist is several forms.

1. Use Immunity

If a witness is granted use immunity, the government cannot use the obtained statements, or any evidence discovered based on those statements, against him in a criminal case. For this reason, "use immunity" is also often called "use and fruits immunity." The government cannot use the "fruits" discovered based on the suspects statement either. Importantly, the government can still prosecute the suspect for the very crime for which he was given immunity. In order to do so, however, the government must obtain its evidence against him from an independent source.

2. Transactional Immunity

If a witness is granted transactional immunity, it precludes the government from prosecuted the witness for the offense for which he is given immunity. This is true no matter where the government obtains its evidence. Transactional immunity offers the witness considerably more protection than use immunity, but is rarely granted.

3. Act of Production Immunity

"Act of Production Immunity" is a form of use immunity. Many documents – even those that are incriminating – are not protected by the privilege against self-incrimination. However, while a document may not be privileged, the act of producing a document may be. When a person turns over a document to investigators, it reasonably appears that she knows the incriminating document exists, is controlled by her, and is authentic. It also shows that she believes that the incriminating document is the one that is being requested. Consequently, the act of turning over the documents is equivalent to a gesture or statement by the person who turns them over that can be both "testimonial" and "incriminating." So, when the act of producing documents has these

implications, the privilege applies and a person may refuse to turn over a document unless "act of production immunity" is granted. In that instance, the incriminating document may be used against the person in court, but not the fact that she turned it over.

4. Kalkines Warnings

Kalkines warnings are used when the government wishes to obtain voluntary statements from a government employee about criminal conduct. If the government suspects one of its employees of misconduct that is also criminal, it will be difficult for the government to investigate that misconduct because the employee has a Fifth Amendment right against self-incrimination and can refuse to make statements about the misconduct on the grounds that those statements may incriminate her. If the government were to threaten to fire the employee if she did not cooperate with the investigation, it could violate her Fifth Amendment rights because her statements could also be used against her in a criminal trial. The government employee cannot be lawfully fired for exercising her Fifth Amendment right. Garrity v. New Jersey.

Kalkines warnings provide a form of use immunity. The government can require the government employee to answer questions specifically, directly, and narrowly related to the performance of her official duties if the employer adequately informs the employee: (1) that she can be fired for not answering; and (2) that her answers and their fruits cannot be used against her in a criminal case. Kalkines v. United States. The warnings remove the potential for the statements' use in a prosecution and thus eliminate the Fifth Amendment privilege.

5. Perjury

Note that immunity does not protect a witness from being charged with perjury. When a witness is granted immunity, that witness cannot commit perjury in the course of her testimony. If the witness commits perjury, she can be prosecuted for it.

6. Civil and Foreign Proceedings

The Fifth Amendment right against self-incrimination does not protect a suspect if her statement cannot be used against her in a criminal trial, even if it can be used against her in a civil proceeding such as a deportation or removal proceeding. However, if a person could demonstrate that any testimony she might give in a deportation investigation could be used in a domestic criminal proceeding, she would be entitled to invoke the privilege. Similarly, the privilege typically cannot be invoked simply because the witness faces potential foreign prosecution.

12.3.3 Testimonial Evidence

The self-incrimination clause ("No person…shall be compelled in any criminal case to be a <u>witness</u> against himself…") protects persons from providing testimonial evidence. Testimonial evidence is words or gestures that communicate a suspect's thoughts or reasoning. For example, if a suspect is asked, "Where are your narcotics," and he replies, "In my backpack," the witness has provided testimonial evidence. It communicates his thoughts on where the narcotics are located. Similarly, if the suspect is asked, "Where are your narcotics," he then points at his backpack, that would also be considered testimonial. In that instance, his gesture communicates his thoughts. The same would be true if the suspect responded by writing an affidavit in which he stated that the narcotics were in his backpack. In all three examples, the suspect is using words (spoken or written) or gestures to communicate his thoughts.

Non-testimonial evidence is not protected by the Fifth Amendment right against self-incrimination. Non-testimonial evidence includes real or physical evidence including fingerprints, voice samples and hand-writing samples. Even though a suspect's words are required for a voice or handwriting sample, the words used are not communicating his thoughts. They are used to compare either the sound of his voice or the style of his handwriting respectively. With voice and handwriting samples, also called exemplars, the content of the words is unimportant as it is already known; it is the audio

or physical characteristics of the voice or handwriting that forms the value of the evidence.

Consider a situation where a man is suspected of robbing a bank while wearing a mask by passing a handwritten note to the teller that reads: "Give me all of the money or I will shoot you." The purpose of a handwriting sample is not to know what the suspect is thinking or even what he is believed to have written, that is already known from the note provided to the officers by the teller witness. The purpose of the handwriting sample is to compare the characteristics of the suspect's handwriting to those of the handwriting in the note. The sample does not convey information about the suspect's thoughts; it is only used for identification purposes. Consequently, it is not testimonial.

Requiring a suspect to stand in a line-up is another example of non-testimonial evidence. The evidence sought by that investigative technique is the suspect's physical appearance, not her thoughts.

12.3.4 Self-Incrimination

If the answer to a question would not incriminate the speaker, then the privilege against self-incrimination does not apply. The Fifth Amendment privilege against self-incrimination is personal ("No person…shall be compelled in any criminal case to be a witness against himself…"). One person cannot assert a privilege against self-incrimination in order to protect someone else.

A mere witness to a crime who has no criminal liability can be compelled by the government to make statements even if those statements might incriminate someone else. Similarly, there is no 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 attaches to the person, not necessarily 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.

When a witness is needed to appear at trial, Grand Jury, or other proceeding, he may be issued a subpoena. 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.

12.4 Miranda and the Definition of "Compelled"

12.4.1 Coercion Defined Generally

Whereas several components of the self-incrimination clause ("No person…shall be compelled in any criminal case to be a witness against himself…") are easily defined, the word "compelled" is more complex. Importantly, the Supreme Court has stated that "coercive government activity" must be present in order to find that a confession is involuntary. Without some coercion by the government, there is no constitutional issue.

Similarly, a mental illness that overbears the suspect's will such that he is not exercising his free will when he makes statements to the government does not violate the Fifth Amendment. This was the case in Colorado v. Connelly, 479 U.S. 157 (1986), when a suspect who told law enforcement officers that he had murdered a little girl and then took them to her body was later found to have been suffering an episode of mental illness at the time he confessed to the government. A psychological evaluation determined that the suspect was coerced by his mental illness and the imaginary voices that he was hearing, and was not able to exercise his free will at the time that he confessed. Nonetheless, the Court ruled that his confession was admissible because it was not the product of government coercion, stating: "The sole concern of the Fifth Amendment… is government coercion (citation omitted, emphasis added)."

12.4.2 Coercion and Miranda

The Miranda decision is based on the premise that the government can overcome a person's will (through compulsion) by more means than the use or threatened use of violence. The Miranda warnings are an additional tool that is used to ensure that suspect statements are voluntary when the suspect is interrogated in a government-dominated atmosphere. In Miranda v. Arizona the Supreme Court ruled that statements from the custodial interrogation of a suspect cannot be used at trial unless law enforcement officers advise him of specific rights and obtain a 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 interrogation, the suspect must be advised of the following:

- He has the right to remain silent;
- That any statement he makes 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.

Sometimes, in addition to the above, officers will advise a suspect that he has the right to stop questioning at any time. While this is correct, it is not required by the Miranda decision. Also, the officers are not required to tell a suspect what the topics of the interrogation will be.

The Supreme Court's overarching concern was that police custodial interrogation is inherently coercive and might lead to involuntary statements. In a custodial interrogation, the officers have the capacity to dominate the scene to such an extent that the risk of intimidation is higher than in other contexts.

12.4.3 Miranda Warnings – When Required

Law enforcement officers are required to advise a suspect of the Miranda warnings when:

- A known law enforcement officer;
- has a suspect in custody; and
- conducts an interrogation.

The combination of these three things creates the government-dominated atmosphere that concerned the Supreme Court. If any one of these factors is absent, Miranda warnings are not required.

(a) Known Law Enforcement Officer

Miranda warnings are only required when the interrogating officer is known by the suspect to be a law enforcement officer. This is true whether the officer is in uniform or not. Questions by undercover officers do not require Miranda warnings. For example, an undercover officer posing as an inmate is not required to give Miranda warnings to an incarcerated suspect before asking questions that could elicit an incriminating answer. Without the presence of a known law enforcement officer, there is little risk of the coercive "government-dominated atmosphere" that concerned the Supreme Court.

(b) Custody

A suspect is considered to be in custody for purposes of Miranda when he is under arrest or detained to the degree associated with a formal arrest. Imagine that law enforcement officers enter a suspect's home at 4:00 a.m. and begin questioning him while he is still in bed. The suspect might reasonably believe that he is being arrested. Consequently, even though no formal arrest is made, the suspect will likely be found to be in custody, which would prompt the need for Miranda warnings.

Note that custody for purposes of Miranda differs from a Fourth Amendment seizure. A Fourth Amendment seizure occurs whenever a reasonable person would not feel free to leave. Miranda custody occurs only when the detention is comparable to that of an arrest. A person who is temporarily detained during a Terry stop, for example, is seized pursuant to the Fourth Amendment, but is not in custody for purposes of Miranda. This is the reason that law enforcement officers can typically question motorists during a traffic stops without reading them Miranda rights. A reasonable person detained during a traffic stop knows that she will be free to go once the officer returns her license and registration. If, however, a situation would appear arrest-like to a reasonable person, it is likely that a reviewing court will consider the person in custody for Miranda purposes.

In situations that verge on being custodial, courts are less likely to require Miranda procedures if the suspect was informed that he is not under arrest, is free to leave at any time, and there was no physical restraint that would cause a reasonable person to perceive that he was under arrest. An officer's unexpressed or unarticulated intent to arrest by itself does not create Miranda custody. The relevant inquiry is whether a reasonable person in the suspect's position would have felt as though he was under arrest.

1. Juveniles

If the government wishes to question a juvenile about a crime then it 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 questioned about a break-in by officers 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.

2. Search Warrants

Like individuals temporarily detained during a Terry stop, courts have held that individuals detained temporarily during the execution of a search warrant and individuals who voluntarily participate in questioning at a police station, are not usually in custody for Miranda purposes. If, however, officers were to closely guard and/or handcuff a person during the execution of a search warrant, that level of restraint might approximate a formal arrest, requiring Miranda warnings prior to questioning.

3. Prisoners

Individuals who are serving prison sentences pose a unique circumstance. They are not necessarily in "custody" for Miranda purposes because prison custody has become their norm. Some type of additional restraint must be imposed on an inmate to transform questioning into a "custodial interrogation." For example, if an inmate is removed from the general population and placed in an interrogation room to be questioned by investigators, he has been taken into custody for purposes of Miranda. Once he has been released back to the general population, he is no longer in custody.

(c) Interrogation

Interrogation involves making statements or asking investigative types of questions that could elicit an incriminating response from a suspect. Consequently, asking for consent is not considered to be interrogation because such a request seeks permission, not incriminating statements. Interrogation includes not only actual questions, but also statements that are the "functional equivalent of questioning." The "functional equivalent of questioning" is defined as words or actions by law enforcement that an officer should know are likely to elicit an incriminating response from the suspect.

A well-known example of the functional equivalent of questioning is the "Christian burial speech" from the Supreme

Court case of Nix v. Williams. In that case, a law enforcement officer instructed an arrested suspect not to say anything then engaged in a lengthy and emotionally charged monologue about the whereabouts of the body of a missing child, prompting the suspect to disclose the location of the body. Despite the fact that the detective did not expressly question the suspect, the Court held that the monologue was the "functional equivalent of questioning" as the detective should have known that it was likely to elicit an incriminating response from the suspect.

Spontaneous or volunteered statements are not considered the product of "interrogation" for Miranda purposes. For example, if an arrested suspect blurts out, "I stabbed her" while being transported to the police station and with no prompting by the officer, his statement is not the product of interrogation. Absent interrogation, Miranda warnings are not required.

Also, "routine booking questions" are not interrogation as they are not designed to result in an incriminating statement. This includes questioning to secure biographical data necessary to complete booking or pretrial services. Such questions may relate to physical appearance (e.g., actual hair color), personal history, and place of residence.

12.5 Miranda Waivers

Law enforcement officers' ability to interrogate those in custody remains a critical feature of the standard criminal investigation. This technique may still be deployed, provided that the officer is in compliance with the Miranda decision. The officer must provide Miranda warnings to the suspect and attempt to secure a valid waiver of those protections.

12.5.1 Valid Miranda Waivers

After Miranda warnings are given, an individual may waive his rights and agree to answer questions or make a statement. There are two distinct requirements for a valid waiver. It must be (1) voluntary, and (2) knowing and intelligent. If an individual's waiver is voluntary, knowing and intelligent, then

his statement may be used against him in a criminal case. The government must prove a valid waiver by a preponderance of the evidence.

(a) Voluntary

For a waiver to be valid, it must be voluntary. A voluntary waiver is one that is the product of free and deliberate choice without any intimidation, coercion, or deception by the government.

(b) Knowing and Intelligent

The waiver must also be knowing and intelligent. A knowing and intelligent waiver is one made with a full awareness of both the rights being waived and the consequences of waiving them. For the waiver to be considered knowing and intelligent, a suspect should be given the complete Miranda warnings. It is not sufficient to give incomplete warnings to a suspect even when the suspect insists that he know his rights.

When deciding if a waiver is knowing and intelligent, the courts will consider the suspect's education, understanding, age, familiarity with the criminal justice system, physical and mental condition, drug or alcohol impairment and language barriers.

In determining whether a suspect has understood his Miranda rights, courts will consider whether he received a written copy; whether he read the warnings or any portion of them out loud (showing both that he can read and that he understands English); whether he was given time to read the warnings to himself; whether they were read aloud to him; and any other statements that were made at the time that the warnings were given.

Trickery and deception should never be used when advising a suspect of the Miranda warnings or when obtaining a Miranda waiver. If a suspect is threatened, tricked, or pushed into a waiver, the waiver will not be voluntary, intelligent, and knowing. Reasonable deception can still be employed, however,

after a valid waiver, as a tactic for obtaining statements.

12.5.2 Affirmative and Implied Waivers of Miranda

A valid Miranda waiver can be express or implied. An express waiver occurs when the suspect agrees to waive his rights by saying "Yes," signing a waiver form, or nodding his head.

Officers do not have to obtain an express waiver prior to questioning, provided that the officers get an implied waiver during the course of the interrogation. An implied waiver occurs when a suspect initially remains silent during interrogation by law enforcement officers but eventually makes an un-coerced statement. With an implied waiver, the government must still prove the suspect understood the rights that he waived, and that his statements were made voluntarily. As long as the suspect received and understood the Miranda warnings, his un-coerced statement is an implied waiver of his rights.

12.5.3 Form of the Waiver of Miranda Rights

Waivers can be made orally, in writing or by gesture (e.g. nodding). If a suspect waives the Miranda rights orally, but refuses to sign the waiver form, it is still a valid waiver. Similarly, if a suspect agrees to give only an oral statement, but not a written statement, his waiver is still valid. A suspect can even waive his protections to certain questions, but retain them for others.

12.5.4 Staleness

Once a suspect has been advised of his Miranda rights and indicated that he has understood them, there is no need to re-advise him of those rights. The passage of time alone does not invalidate a Miranda warning. Some factors courts will consider, however, in determining whether a suspect should be re-advised of his Miranda rights include:

- The amount of time between the last Miranda warnings and the suspect's statement;

- Interruptions in the continuity of the interrogation;

- 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;

- Whether the same officer who gave the warnings also conducted the interrogation resulting in the suspect's statement;

- Whether the statement from a later interrogation differed significantly from other statements which had been made directly after Miranda warnings.

A concern based on the above factors that the rights advisement may be stale can be addressed by re-advising the suspect of his right and seeking a new valid waiver.

12.5.5 Correcting Miranda Violations

(a) Intentional Violations

The Supreme Court has held that when officers intentionally question a suspect without Miranda warnings as a tactic to gain a confession, then read the suspect Miranda warnings, and obtain a second confession, both statements will be inadmissible. Missouri v. Seibert.

(b) Unintentional Violations

The Supreme Court has also held it is possible to correct an unintentional Miranda violation so as to obtain a statement that will be admissible in a criminal case. If an officer mistakenly fails to advise a suspect of her Miranda rights when required to do so, any statements that she makes while in custody and in

response to government interrogation will be inadmissible. However, provided that the initial statements were otherwise voluntary, the government may obtain a second statement that will be admissible if they first advise her of her Miranda rights and obtain a valid waiver. The following tend to show that a Miranda violation was unintentional and to "cleanse" the second statement:

- Advising the suspect that the initial statement cannot be used against her;
- Having a new officer conduct the second interrogation;
- Changing locations; and
- Waiting for some time to pass before taking the second statement.

12.5.6 Public Safety Exception to Miranda

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 is true even if the question is likely to elicit an incriminating response.

For example, if an officer pursues, apprehends, and arrests a robbery suspect who is believed to have a gun in a grocery store, but finds only an empty holster, the officer can ask the suspect where the gun is without advising him of the Miranda warnings. If the suspect tells the officer where the gun is located, and the officer secures the gun, then the threat posed by the gun to public safety is gone. The officer must then read the suspect his Miranda rights prior to asking any additional questions about the gun. New York v. Quarles.

The "public safety" exception has been extended to cover questions necessary to secure the safety of the public, an officer, 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.

12.6 Invocation of Miranda Rights

12.6.1 Invocations

There are two separate rights under Miranda that a suspect can invoke when subjected to custodial interrogation. A suspect can invoke the right to remain silent by affirming that he does not want to communicate with the government, or a suspect can invoke the right to counsel by expressing that he wants an attorney.

If a suspect invokes either right, questioning must stop unless an exception applies. However, Miranda does not require the government to inform a suspect that an attorney is trying to contact him, nor does it require the government to allow him access to an attorney while they are seeking a waiver.

A suspect cannot successfully invoke his Miranda rights before he faces custodial interrogation. Unless the interrogation is imminent or occurring, an invocation is premature. Consider a situation where an officer arrests a suspect and places him in a police car to transport him. The officer says nothing, but the suspect states that he does not want to speak to the officer and that he wants a lawyer. The suspect's attempted invocation will not prevent the officers from lawfully advising him of his Miranda rights and attempting to get a valid waiver.

When a suspect properly invokes his Miranda rights, the procedure to follow differs in some respects depending on the right invoked. If the suspect invokes both rights, the government must follow the procedure regarding the right to counsel.

(a) Right to Silence

If a suspect asserts the right to silence, interrogation must immediately stop, but officers may later attempt to re-approach the suspect after a reasonable "cooling off" period. The Supreme Court found that two hours is a reasonable cooling off period. Michigan v. Mosley. If officers re-approach a suspect who has previously invoked his right to silence, the officers must re-advise the suspect of his Miranda warnings and get a valid waiver.

A suspect can re-initiate contact with the government whenever he chooses. If a suspect reinitiates contact with the government about the case, then officers must re-advise him of his Miranda rights and seek a valid waiver. For example, if after asserting his right to silence, a suspect later asks an officer, "[w]hat is going to happen to me now?" he is reinitiating contact about the case. If, however, a suspect re-initiates contact with an officer about non-case related topics, such as his cell conditions or the quality of the food at the jail, he is not reinitiating contact about the case, and the officer must follow the normal procedure following the invocation.

(b) Right to Counsel

When a suspect invokes his right to counsel, interrogation must immediately stop and he cannot be subjected to further custodial interrogation unless he re-initiates the contact about the case, or his counsel is actually present. There is no cooling off period for an invocation of the right to counsel. The government may not try to approach and question the suspect again without his attorney being present.

The government may not re-approach a suspect who has invoked his Miranda right to counsel for as long as he remains in custody. If he is released from custody, the government may re-approach him because Miranda no longer applies as he is no longer in a government-dominated atmosphere. However, an invocation of the right to counsel will attach to the suspect for a period of 14 days. If he is taken back into custody within 14

days, then the government must honor his prior invocation, and they cannot attempt to get a waiver and question him. If he is taken back into custody after 14 days, officers may attempt to seek a waiver and question him without violating his Miranda rights. Law enforcement officers are responsible for determining whether a suspect who is in custody previously invoked his Miranda right to counsel within the past 14 days. See Maryland v. Shatzer, 559 U.S. 98 (2010).

12.6.2 Not Offense Specific

When a suspect invokes his Miranda right to counsel or silence, interrogation by all government officials about all crimes must cease. If officers are initially questioning a suspect about a robbery when he invokes his protections, they must not only stop questioning him about the robbery, but they cannot question him about any other crimes. The Fifth Amendment right against self-incrimination, which Miranda protects, applies beyond the crime for which the suspect is being held. This means that the suspect's invocation of the right to counsel or silence applies to any and all crimes and to questions by any known law enforcement officers. Prior to interrogating any suspect in custody, an officer must determine whether any other officers have attempted to question the suspect and, if so, whether the suspect invoked his rights.

12.6.3 Ambiguous Invocations

A valid invocation of a Miranda right must be clear and unambiguous. If a suspect makes a statement concerning his right to counsel that is unclear or ambiguous, officers are not required to stop or avoid questioning. Likewise, officers are not required to clarify whether a suspect is invoking his Miranda rights. For example, if a suspect says, "maybe I should talk to a lawyer," his invocation is ambiguous and not an actual request for an attorney, so the government may continue the interrogation.

12.7 Miranda Violations

12.7.1 Where It Occurs

Unlike the Fourth Amendment which is violated when the government conducts an unreasonable search or seizure, Miranda and the Fifth Amendment right against self-incrimination are not violated when the government fails to advise a suspect of the Miranda warnings before obtaining a statement. A violation occurs only if the unwarned statements are used in a criminal trial. This is because the Fifth Amendment self-incrimination clause, which Miranda is designed to protect, is a prohibition against compelling a suspect to testify against himself in a criminal trial. It does not protect suspects from making otherwise voluntary statements. The Fifth Amendment protects suspects from having those statements used against them in a criminal prosecution.

12.7.2 Suppression of Statements

The Supreme Court has held that the self-incrimination clause has its own built in exclusionary rule. By its own words, it protects suspects from the use of their involuntary statements against them in a criminal case. When Miranda warnings are required but not given, the unwarned statements will be excluded from use in a criminal prosecution.

12.7.3 Fruits

Unlike with Fourth Amendment violations, the fruits of an unwarned statement will not be excluded from use in a criminal trial. The self-incrimination clause protects people against the use of compelled testimonial evidence, or statements, at trial. It does not protect against the use of real or physical evidence at trial. Consider an example where an officer arrests a suspect and does not advise him of his Miranda rights, but asks him where in his house he keeps an illegally possessed gun. If the suspect shows the officer where the gun is and admits to owning it, then the suspects' statements will be inadmissible in the criminal case against him, but the fruit of his statements,

the gun, will be admissible.

12.7.4 Coerced Statements

Coerced statements are treated differently from statements that are otherwise voluntary but obtained without required Miranda warnings. If a statement is involuntary or coerced, not only will the statement be excluded, but any fruits of that statement will also be excluded.

For example, if an officer threatens to arrest a suspect's family member unless she tells him where evidence of a crime is hidden, then both the suspect's coerced statement and the evidence of the crime, the fruits of her coerced statement, will be suppressed. If an officer arrests a suspect, fails to give her the Miranda warnings, and simply asks her to show him where evidence of a crime is hidden, then her voluntary but unwarned statement will be excluded but the physical evidence of the crime will still be admissible.

12.8 The Sixth Amendment Right to Counsel

(Not all programs are responsible for the material in this section. Students should check their course syllabus.)

12.8.1 Purpose

The Sixth Amendment right to counsel provides defendants with the assistance of an attorney once the government has commenced a criminal prosecution. It serves to equalize any imbalance stemming from the full weight of the government's resources brought to bear against a single individual.

The Sixth Amendment right to counsel is different from the right to counsel established in the Miranda decision. The Miranda right to counsel is designed to protect suspects in a government-dominated atmosphere from making incriminating statements that could be used against them at trial. The protections of the Sixth Amendment right to counsel are different (in both a narrower and broader sense). For example,

the Sixth Amendment right to counsel protects defendants even when they are not in government custody. At the same time, the Sixth Amendment right to counsel only applies to the crime or crimes for which the defendant is being prosecuted, whereas the Miranda right to counsel protects a suspect against being compelled to make statements about any crime.

The Sixth Amendment right to counsel is a right enjoyed at trial. That is, it begins (or attaches) when the government has formally accused a person of committing a crime, thereby initiating the adversarial process. Once the government formally accuses a suspect, it marks the transition from an investigation to a prosecution, and the suspect, now the defendant, is given the assistance of an attorney at all "critical stages" of the prosecution.

12.8.2 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 events:

- Indictment returned by a federal grand jury;
- Information filed by a federal prosecutor; or
- Initial Appearance of the defendant after arrest.

Whenever the earliest of these events occurs in a case, the adversarial process has begun, and the defendant's right to have counsel present at all critical stages has then attached.

12.8.3 Critical Stages

Once the Sixth Amendment right to counsel has attached, the defendant has a right to have counsel present during every "critical stage" of the criminal proceedings.

(a) Court Proceedings

Critical stages include all court proceedings. Court proceedings include, bail hearings, suppression hearings, as well as the trial itself.

(b) Government Questioning

Any interrogation is considered a critical stage. All attempts by law enforcement to elicit information from the defendant about the charged crime are to be included in this critical stage.

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. Unlike Miranda, which is concerned with a government-dominated atmosphere, the Sixth Amendment right to counsel seeks to address the potential imbalance between a charged defendant and the government. Once the criminal charge has been brought, the defendant is entitled to the assistance of counsel for all government questioning.

However, undercover officers who only listen to the defendant, without eliciting any information, do not violate the Sixth Amendment right to counsel. The undercover officer must be careful not to discuss the charged crime with the accused. Even if the officer does not ask any questions, the conversation might be seen as an attempt to elicit information.

(c) Line-ups

Live identification procedures require a defendant to interact with the government in person. Consequently, the courts consider line-ups to be a critical stage in the proceedings at which he is entitled to have counsel present.

The defendant may waive his right to have counsel present at a line-up, and the validity of any waiver will be determined by the totality of the circumstances under which it was made.

Violations of this right can result in the exclusion of any identification and may even prevent later in-court identification by the witness.

Identification through an array that includes a photo of the defendant does not involve a confrontation, and therefore is not considered a critical stage of the adversarial proceedings. The defendant has no Sixth Amendment right to the presence of counsel when photo arrays are used.

12.8.4 Offense Specific

As previously noted, the Sixth Amendment right to counsel is offense specific while the Miranda rights are not. Miranda rights are applicable for any crime, regardless of the offense for which the suspect is in custody. By contrast, the Sixth Amendment right to counsel applies only when adversarial proceedings have been initiated and applies only to the charged offense(s).

Even when officers are barred from questioning a defendant about a charged crime, they may question him about other, uncharged offenses, since the right has not attached 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 released on bond when he was arrested again, this time for the murders. The Court held that the Sixth Amendment right to counsel did not bar the government from interrogating the defendant about the murders, despite the fact that they arose from the same incident. Thus, 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.

12.8.5 Waiver and Invocation

(a) Waiver of Sixth Amendment Right to Counsel

Once the Sixth Amendment right to counsel has attached, the government must advise the defendant of his right to have counsel, and then obtain a voluntary, knowing, and intelligent waiver prior to questioning. This is true whether or not the defendant is actually represented by counsel at the time the government seeks to question him.

Although Sixth Amendment rights differ from the Fifth Amendment Miranda rights, the same Miranda warnings are used to obtain a waiver of the Sixth Amendment rights. Officers are not required to tell the defendant that he has been charged, or for what offense with which he has been charged.

NOTE: A suspect's waiver of the Miranda right to counsel in a Miranda situation (police custodial interrogation) is not necessarily also a waiver of his Sixth Amendment right to counsel. If a suspect in custody who has not yet been charged (that is, no Sixth Amendment right has attached) waives his Miranda right to counsel, the government may still need to seek a Sixth Amendment waiver prior to future interrogation after the suspect has been formally charged.

(b) Invocation of Sixth Amendment Right to Counsel

If a defendant chooses to invoke his Sixth Amendment right to counsel, the government may not question him about the crime charged without an attorney present. If the defendant is in custody, the Miranda rules will also apply.

As noted in the portion of this chapter on 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 (but see Maryland v. Shatzer). Since the Sixth Amendment right to counsel attaches

when the defendant is charged (the defendant's custodial status is immaterial for Sixth Amendment purposes), this right would continue to apply to an officer's attempt to question the defendant who is not in custody.

Unlike the Miranda rule however, a defendant's prior request for an attorney will not automatically prevent the government 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 officers 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.)], they 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, officers cannot question the defendant without counsel being present.

Re-approaching the defendant may be acceptable so long as it does not rise to a level of badgering that calls into question the voluntariness of any waiver or statement obtained thereafter. If the invoking defendant initiates the contact with the government, a valid waiver will permit questioning about the pending charged offenses without counsel being present. (But see the McDade Amendment below for possible ethical issues involved in contacting persons known to be represented by an attorney.)

12.8.6 Violations

Violations of the Sixth Amendment right to counsel may result in the exclusion of statements and evidence at trial.

12.8.7 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. There are circumstances, often pre-indictment or pre-filing when officers may contact a represented party without the presence of his lawyer. However, 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.

NOTES

Chapter Thirteen

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13.1 Introduction

Law enforcement work is dangerous. Contact with the public is constant, often confrontational and charged with emotion. Within this context, law enforcement officers 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.

Officers must perform their duties in accordance with the Constitution and federal law. They may be both civilly and criminally liable for violations of civil rights if duties are discharged unreasonably, recklessly, or indiscriminately, or exceed the scope of employment and authority.

13.1.1 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.

13.1.2 Civil Liability

(a) 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.

(b) 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.

13.2 Federal Criminal Remedies

Congress passed criminal statutes designed to punish those who violate the civil rights of others.

13.2.1 Title 18 U.S.C. § 241, 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
>
> 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.

(a) 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.

(b) 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.

13.2.2 Title 18 U.S.C. § 242, 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.

(a) 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.

(b) "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.

(c) "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.

13.3 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.

13.3.1 Title 42 U.S.C. § 1983 (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.

"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.

13.3.2 Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics

Until the 1971 Supreme Court decision, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,[1] a person whose civil rights were violated by a federal officer or agent was unable to sue a federal agent in federal court. Title 42 U.S.C. § 1983 was not available as by its language, it applied only to civil

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

rights violations committed by state and local officials.

In the Bivens case, 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. 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 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."

13.4 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.

13.4.1 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.

13.4.2 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.

13.4.3 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.

13.4.4 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:

- That excessive force is being used; or
- That a citizen has been unjustifiably arrested; or

- That any constitutional violation has been committed by a law enforcement official.

Therefore, 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. However, 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.

13.4.5 Immunity for Constitutional Violations

(a) 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.

(b) 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.

(c) Qualified Immunity

Qualified immunity is immunity from civil suit and entitles a law enforcement officer to avoid standing trial or facing the burdens associated with civil litigation. When a law enforcement officer is sued for a constitutional tort, the officer may be entitled to qualified immunity. Qualified immunity is an affirmative defense that can protect the officer from individual civil liability and is raised by the defendant (officer). Qualified immunity shields government officials from personal liability for civil damages provided: (1) they act reasonably; 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 when they relied 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.

13.5 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).

13.5.1 Negligent Torts

For federal law enforcement officers, negligence is the most frequently occurring of the state law torts due to the operation of government motor vehicles. The elements of an action for negligence are: Duty; Breach of Duty; Causation; and Damages.

(a) 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.

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.

Elements of a Negligent Tort

- **Duty**
- **Breach Of Duty**
- **Causation**
- **Damages**

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.

(b) 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.

(c) Causation

The defendant's act that breached the duty of care must be the cause of plaintiff's damages.

(d) 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.

13.5.2 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:

(a) Intentional Torts to Persons

- 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.

(b) Intentional Torts to Property

- Trespass to Land: Damage to real property.
- Trespass to Chattels: Damage to personal property.
- Conversion: Personal property, theft.

13.6 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.

13.6.1 Negligent Torts

The FTCA covers lawsuits for negligent or wrongful acts or omissions of federal employees within the scope of their employment that cause 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.

13.6.2 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.

13.6.3 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.

(a) 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.

(b) 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."

(c) 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.

13.6.4 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.

13.6.5 Defenses to Negligent and Intentional Torts

There are several common defenses available to every defendant to the extent that the defenses are recognized in the state where the tort occurred.

(a) 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.

(b) To Intentional Torts

- Consent: Knowing and voluntary consent by plaintiff will bar recovery against defendant. However, defendant's actions much stay within the bounds, or 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.

- 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 Fourteen

Searching and Seizing Computers and other Electronic Devices

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14.1 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, the officer must take reasonable steps to confine the 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 the officer observes evidence that is immediately apparent as evidence of another crime, the officer may seize it under the 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.

14.2 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, the officer must limit the 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 the government to obtain a warrant for a further search of that computer. Moreover, the government may temporarily seize that computer while it is actively seeking a search warrant. Of course, the officer could also conduct a warrantless search of that computer if a valid exception to the warrant requirement applies.

14.3 Reasonable Expectation of Privacy in Computers

14.3.1 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 the officer 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 the government from accessing and viewing information stored in a computer without a warrant if, in the same situation, an officer would be prohibited from opening a closed container and examining the contents. That stated, 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.

14.3.2 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.

(a) 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.

(b) 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.

(c) 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.*

14.4 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.

14.4.1 Consent

If a person gives valid consent to search, a warrant is not required.

(a) 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.

(b) 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 the officer 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, the officer must immediately stop searching unless another Fourth Amendment exception applies. Of course, any incriminating evidence that the officer 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 the officer then wants 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, the officer 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 the government wants to search them.

(c) 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, the government 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 the officer 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 (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, the officer 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).

(d) 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.

14.4.2 Exigent Circumstances

Under the "exigent circumstances" exception to the warrant requirement, the officer 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 the government 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 the government 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, the officer must quickly move to obtain a warrant unless valid consent to search is obtained.

14.4.3 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, the officer 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 the officer to engage in a search for which he or she did not have independent authority, such as consent or a search warrant. Rather, while the government is engaged in an otherwise lawful search, plain view allows the officer to seize evidence of another crime when the incriminating nature of that evidence is immediately apparent.

In computer cases, this means that the government 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 an officer observed a computer in a public place and saw data on a suspect's computer monitor that constitutes probable cause evidence of a crime, he or she may immediately seize that computer to prevent the destruction of the data. Thereafter, if the officer wished to conduct a further search of that computer, he or she will need a warrant or consent to do so. However, what the officer observed 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

[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.

admissible because the agent was lawfully searching 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 an officer finds evidence of a crime that is arguably outside the scope of the warrant, the officer may seize it under the plain view authority. If the officer has not yet concluded the search reasonably permitted by the search warrant, the officer may continue that search. If, however, the officer's intent is in any way to expand the search to include evidence of the criminal activity beyond the scope of the search warrant, the officer must obtain a separate search warrant. In doing so, the officer may 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 the originally-authorized search, and

then re-commence searching once the government has obtained the additional search authority.

14.4.4 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.

In June 2014, the Supreme Court resolved the split in the circuits regarding the SIA of a cell phone. Recognizing that modern cellphones have the capability to store and access huge amounts of private data, Chief Justice Roberts noted:

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life". The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."[5]

Accordingly, the court held that a warrant is required to search a mobile phone.

14.4.5 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

[5] Riley v. California, 573 U. S.____, (slip op., at 28) (2014).

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.

14.5 Preparing Warrants to Search and/or Seize Computers

Searches that target computers and data are potentially somewhat different from traditional searches. In most searches, the government is 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, the government 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.

14.5.1 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 a search warrant, the officer should attempt to determine:

- What types of computers and operating systems is the 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.

14.5.2 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.

(a) The "Independent Component Doctrine"

The officer 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 the government wants 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, the government may wish to seize a keyboard, monitor, cables or other devices during the 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.

(b) 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, the government must articulate probable cause that the data exists, and describe what that data is. The officer 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, the government 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, the officer 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.

14.5.3 Justifying Off-Site Searches

In many, if not most, computer searches, the government will want to remove the computer from the location listed in the

search warrant and conduct the search and forensic analysis of its contents at a different location. If so, the government must ask for and justify an off-site search in the search warrant affidavit and ensure that the 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 the officer considers such factors and include sufficient information in the 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, the officer must articulate in the 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: The government 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 the government knows specific information about the files sought, 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 officers 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, the government should seize the items and not search them until a new search warrant has been obtained justifying the removal of the items.

14.5.4 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) 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, the officer 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-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.

Is a Multiple-Jurisdiction Warrant Required?	
Stored Electronic Communications (e-mails) in the hands of Internet Service Providers	Data
• Any judge in any district who has jurisdiction over the offense. • Such a warrant is valid in any district where the stored emails are kept.	• From a judge in the district where the data is located. • A separate warrant is required for each district.

14.6 Executing Warrants to Search and/or Seize Computers

14.6.1 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, the officer 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 the 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.

14.6.2 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 the officer acquire as much information as possible in advance of the search about the criminal suspect and the computer hardware and software that will be the subject of the search. When the officer has reason to believe that knocking and announcing the government's presence would result in the destruction of any evidence being sought, would be dangerous, or would be futile, the officer 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 the officer from conducting a no-knock search, if, upon arrival at the search location, the officer develops 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, the officer may exercise independent judgment and decide to conduct a no-knock search when executing the search, even if he or she does not have a no-knock warrant.

For example, while approaching a residence with a warrant to search for data, an officer develops reasonable suspicion that his 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 the officer dispenses with the knock and announce requirements, he or she must be prepared to articulate the basis for this decision to a judge.

14.6.3 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, the government 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.

14.6.4 Authentication of Information Contained on Computers

This material is covered in Chapter 4, Section 4.13 in this Handbook.

Chapter Fifteen

Use of Force - Legal Aspects

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15.1 Introduction

"How will I be judged by a court of law if someone sues me for using excessive force?" That is a fair question from someone studying to be a law enforcement officer. This chapter focuses on the legal aspects for using force in the course of effecting an arrest, investigatory stop, or other seizure of a free citizen.

15.1.1 Graham v. Connor

The leading case on use of force is the 1989 Supreme Court decision in Graham v. Connor.[1] The Court held, "…that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its objective reasonableness standard…"

A seizure occurs when a law enforcement officer terminates a free citizen's movement by a means intentionally applied. Traffic stops, investigative detentions, and arrests are all seizures under the Fourth Amendment. To seize someone, an officer may yell, "Stop!" The officer may use handcuffs, a baton, or firearm to make him stop. Every aspect of a seizure must be objectively reasonable – including its inception, the degree of force used, and its duration. This chapter focuses on the degree of force an officer may use to seize someone. The Fourth Amendment chapter discusses when, and for how long someone can be seized; but they are all related and go to the overall question – was the seizure objectively reasonable?

15.1.2 The Facts in Graham

Mr. Graham was a diabetic. After feeling the onset of an insulin reaction, he called his friend Berry and asked for a ride to a convenience store. Graham hoped to buy some orange juice. He thought that the sugar in the juice would counteract the reaction.

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[1] Graham v. Connor, 490 U.S. 386 (1989); See the *Legal Division Reference Book*.

Graham and Berry arrived at the store. Graham got out of the car and "hastily" went inside. Unfortunately, the check-out line was too long for Graham so he "hastily" returned to the car, got in, and told Berry to drive to another friend's house. Maybe this friend would have some juice.

Waiting outside the store was Officer Connor. Connor had watched Graham hastily enter and leave the store. He suspected something was amiss. Connor followed the two men for a block or so before activating his overhead lights. Berry pulled over.

Berry tried to explain that his friend was just having a "sugar reaction" but Connor was not convinced. Connor told the two men to wait at their car while another officer returned to the store to determine what happened. Things got worse from that point.

Graham got out of the car. He ran around the car two times, sat down on the curb, and momentarily passed out. Back-up officers arrived. According to Mr. Graham, he was violently picked up, pushed against a police car, handcuffed, and placed into the backseat of one of the cruisers.

All this time, Berry, and Graham after he regained consciousness, tried to explain that that Graham was just having an insulin reaction. But their pleas had no effect. One officer commented that he had seen a lot of people with diabetes before and that none of them had acted like Graham. In the officer's opinion, Graham was just drunk.

Connor finally received the report from the officer who returned to the store. The officer confirmed what Berry and Graham had been saying – nothing was amiss. But in the meantime, Mr. Graham had suffered cuts on his wrist, a bruised forehead, a broken bone in his foot, an injured shoulder, and persistent ringing in his ears.

Graham sued the police officers. On appeal, the Supreme Court stated that the officers should be judged based on the Fourth

Amendment's objective reasonableness test.

15.1.3 The Objective Test and the Reasonable Officer

The Court stated, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The objective test requires the court to envision a reasonable officer and ask this question: Based on the totality of the facts and circumstances, could such an officer believe that the force was reasonable?

Since the objective test judges the officer through the lens of a reasonable officer, the subjective beliefs of the actual officer, whether they are good or bad, are not relevant. Officer Connor may have honestly believed that Graham was a shoplifter; however, the objective test asks whether a reasonable officer could believe that, based on the facts.

In short, facts make force reasonable. The objective test requires officers to rely on their senses, or what they saw, heard, smelled, tasted, or touched, and then articulate a factual basis for what they did. Was it reasonable to stop and use force on Mr. Graham? The Supreme Court said this was the relevant question. What follows are some facts and circumstances that could cause a court to find that the force was reasonable. Some of these facts are for illustrative purposes, only, and are not in the Graham decision.

For example, Officer Connor might write in his use of force report:

> "I saw Mr. Graham run into the store. Less than 15-seconds later, I saw him run back out and get into Berry's car. I heard the tires screech as the car drove away at a high rate of speed."[2]

Based on those facts, what could a reasonable officer say? The

[2] This is a hypothetical use of force report that is intended for instructional purposes only. It is not Officer Connor's report.

Supreme Court's decision in Terry v. Ohio states that an officer may conduct an investigative detention based on articulable facts that give reasonable suspicion that criminal activity is afoot.[3]

An officer's training and experience is relevant. Connor might add:

> "Based on what I saw, and my department having received no less than four complaints of shoplifting from this store within the past two weeks, I activated my overhead lights and Berry pulled to the side of the road."

Connor would be admitting to effecting a Fourth Amendment seizure; but a seizure is reasonable if Connor can point to specific, articulable facts indicating that criminal activity is afoot.

It should be obvious by now that the officer must help the court visualize what happened. Using good action verbs in a written report makes that visualization possible. Connor might write:

> After Berry stopped, I walked to his car. I saw Berry behind the wheel. I saw Graham seated on the passenger side. I told both of the men to wait at the car. I ordered another officer to go back to the convenience store and find out what happened. Then Graham got out of the car. Graham opened the passenger door. He ran around the car two times. Then he sat down on the curb and fell over as if he had passed out.

Personal beliefs (or conclusions) are generally appropriate, if they are supported by facts. Connor might state:

> I believed that Graham was under the influence of alcohol based on my experience with intoxicated people. They are generally irrational. Graham was

[3] Terry v. Ohio, 392 U.S. 1 (1968); See the *Legal Division Reference Book*.

> irrational; he ran around the car two times after I (a police officer) told him to wait at the car. Then he sat on the curb and fell over - as if he passed out.

Connor might add:

> "Graham's eyes were glassy. His speech was slurred. His breath smelled sweet, like alcohol." Referring back to his training and experience, Connor could explain why intoxication is relevant. "I know that many assaults on police officers are committed by people under the influence of alcohol or narcotics."[4]

But mere conclusions like "Graham appeared drunk" or "He posed a threat to me" are not relevant. Note the differences:

Facts: "I ordered Mr. Graham to stay in the car. Instead, Mr. Graham got out of the car."

Conclusion: "Mr. Graham was non-compliant."

Officers should avoid statements like, "The suspect indicated [that he would not do as I ordered]" or "He suggested [that he had a weapon]" or "He implied [that he would fight me]." For the court, trying to visualize what happened, those statements raise too many questions. How? Cop talk creates the same confusion. Note the differences:

Facts: "I ordered the suspect to keep his hands on the steering wheel of the car. Instead, he reached under the seat with his right hand.

Cop talk: "The suspect made a furtive movement."

Facts: "The suspect put one foot in front of the other like a boxer and clenched his fists."

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[4] Darrell L. Ross, "Assessing Patterns of Citizen Resistance During Arrest," FBI Law Enforcement Bulletin 1999.

Cop talk: The suspect showed pre-assault indicators.

Stating conclusions is easy; good fact articulation is not. To make matters more difficult, officers often experience tunnel vision, auditory exclusion, and memory loss in stressful situations. But officers should still "paint the picture" with the sights and sounds they remember. While it may be impossible to recall exactly what the suspect said, the officer may still remember that the suspect screamed at me; that his face was beet red; and that he clenched his fists, like a boxer.

15.1.4 The No "20/20" Hindsight Rule

Officers are judged based on the facts that are reasonably known to them at the time they used the force. If that is the question, what officers learn later (after-the-fact) is not relevant under the objective test. What was not available to the officers when Graham was initially stopped, handcuffed, and put in the cruiser was the report from the officer who returned to the store. Nothing was amiss. But again, using that report would be judging the officers based on 20/20 hindsight.

The no "20/20" hindsight rule probably worked to Officer Connor's advantage, in this case. But what if Connor had learned the next day that Graham had previously assaulted a police officer? In that case, the rule would work to Connor's disadvantage. Why? He did not know that fact when he used the force on Graham. Again, what were the facts reasonably known to the officer at the time?

15.1.5 No Perfect Answers

"The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the Court stated. Allowance must be made 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." Obviously, there may be more than one way to effect a seizure in a tense, uncertain, and rapidly

evolving event - and while hindsight may prove one option better than another - what matters is whether the one chosen at the time fell within the range of reasonableness.

15.1.6 The Graham Factors – When is Force Reasonable?

The Court stated that determining whether the force used is reasonable requires a careful balancing of the nature of the intrusion on the suspect's liberty against the countervailing governmental interest at stake. While this may sound complicated, it is actually a simple task. What did the officer do to the suspect (or what was the nature of the intrusion on the suspect's liberty) and why did the officer do it (or what was the governmental interest at stake that justified the intrusion)?

Applying the Graham factors to the facts of a case can help determine the governmental interest for using force. These factors are like a checklist of possible justifications for using force. Not all of the factors apply in every case. **The Graham factors are:**

1. **The Severity of the Crime**

The "severity of the crime" generally refers to the reason for seizing or making someone submit to governmental control in the first place. Officer Connor may have been acting under a reasonable suspicion that Graham stole something from the store. Arrests and investigative detentions are traditional, governmental reasons for seizing people. Generally, the more serious the crime at issue, the more intrusive the force may be.

There may be a governmental interest for seizing someone who is not suspected of any wrongdoing. Reasonable force may be used to control the movements of innocent passengers during a traffic stop.[5] During a search for contraband, reasonable force may be used to detain people on the premises.[6] The operative

[5] Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997); See the *Legal Division Reference Book*.
[6] Michigan v. Summers, 452 U.S. 693 (1981); See the *Legal Division Reference Book*.

word under the Fourth Amendment is reasonableness.

2. The Immediacy of the Threat

Whether the suspect is an immediate threat to the safety of the officer or others is generally considered the most important governmental interest for using force. The greater the threat, the greater the force that is reasonable.

3. Actively Resisting Arrest

Resisting an arrest or other lawful seizure affects several governmental interests. It may prevent the officer from effecting an arrest, investigating a crime, controlling a traffic stop, or executing a search warrant. In addition, the nature of the suspect's resistance might also pose a threat to the safety of the officer or others.

4. Attempting to Evade Arrest by Flight

Attempting to evade an arrest or other lawful seizure by flight frustrates some of the same governmental interests as resistance. Suspects who attempt to evade arrest or other lawful seizure by flight, might, under certain circumstances, also pose a threat to the safety of the officer or others.

With the facts, the court can apply the Graham factors to determine if an officer's use of force was objectively reasonable. In Graham, for example, the offense at issue was possible shoplifting; and the initial intrusion Graham's liberty was sitting in a car beside the road while a back-up officer returned to the convenience store. Granted, the intrusion on his liberty became much greater, but so did the governmental interest at stake. Recall that Officer Connor told Berry and Graham to wait at the car. Graham resisted that order. He got out of the car. Add that to evidence of Graham's possible intoxication and a reasonable officer might believe that Graham posed an immediate threat to Officer Connor; to other motorists on the adjoining road; and to Graham, himself. So what would a reasonable officer say? Was it objectively reasonable to at least

handcuff Mr. Graham and put him in the back of the patrol car?

15.1.7 Other Factors

The Graham factors are not a complete list. While the lower courts have listed other factors, most are a subset of what is generally considered the most important factor: the immediate threat to the officer or others. For example, the number of suspects verses the number of officers may affect the degree of threat. Initially, it was Officer Connor against two suspects. Also affecting the degree of threat is the size, age, and condition of the suspect confronting the officer. Is the suspect 75 years old and frail, or 25, 6'2" and about 250 pounds? The duration of the action is important. How many times does an officer have to tell a suspect to get out of a car before using force to make him? And any officer would want to know a suspect's criminal or psychiatric history, if possible.

Time is also a factor, as is the need for the force in light of the Court's statement that "The calculus for reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - - in situations that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation." A robbery suspect who reaches into his waistband creates some split-second decision making for the officer; more deference should be given to the officer's decision. But not every encounter requires split-second decision making. The more time the officer has, the more options the officer can consider. In a case where protestors are simply refusing to get up and leave, spraying them with oleoresin capsicum (OC) spray is probably not necessary to make them. There is time to consider less intrusive options.[7]

[7] Headwaters Forest Defense v. The County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002). (It is the need for force which is at the heart of the Graham factors.)

15.2 Deadly Force

Shooting a suspect is "deadly force." This is the highest level of intrusion on someone's liberty, so it must be justified by a very high governmental interest.

15.2.1 Tennessee v. Garner[8] – Force highly likely to have deadly effects.

The Supreme Court's decision in Tennessee v. Garner started with a complaint about a prowler inside a house. Two police officers responded and one of them saw Garner run out of the house. The officer saw no sign that Garner was carrying a weapon and was "reasonably sure" he was not armed. The officer yelled "police, halt!" but Garner kept running. When Garner began to climb over a fence, the officer had two options. He could let Garner escape, or shoot him. Relying on a Tennessee statute that allowed police officers to use all necessary force to effect the arrest of any fleeing felon, the officer did what he deemed was necessary. He shot Garner in the back of the head.

The Court held that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to stop any fleeing felon. The court decided Garner before Graham; however, applying the facts in Garner to the Graham factors illustrates why the force was unreasonable. The "seriousness of the crime" was burglary and Garner "attempted to evade arrest by flight." That was all. The governmental interest was not strong enough to justify what the officer did. "It is not better that all felony suspects die than that they escape" the Court stated. "We conclude that such force may not be used unless it is necessary to prevent the escape and the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others."

[8] Tennessee v. Garner, 471 U.S. 1 (1985); See the *Legal Division Reference Book*.

15.2.2 Other Shooting Cases

In light of Garner, shooting a suspect with a firearm is not unconstitutional when a reasonable officer would have probable cause to believe the suspect posed a significant threat of death or serious physical injury to the officer or others. Probable cause is a common-sense, all things considered standard for assessing probabilities in a particular factual context. A warning also adds to the reasonableness of a force option, but is not always feasible.

(a) Could a reasonable officer believe the suspect posed a threat of serious bodily harm?

Consider Ayala v. Wolfe.[9] Late one night, Officer Wolfe responded to a report that three men had robbed a restaurant and then fled on foot. Wolfe saw Ayala just a few blocks away.[10] Wolfe stopped his cruiser, ordered Ayala to put his hands on the hood, and began to frisk Ayala. Wolfe felt a gun in Ayala's waistband. Upon feeling the gun, Wolfe backed away, moved behind the cruiser, and drew a pistol. Without a word of explanation, Ayala took his hand off the hood (where he had been ordered to keep it) and removed the gun from his waistband. Wolfe shot Ayala several times. Wolfe's first bullet knocked Ayala's gun out of his hand. But the muzzle flash and darkness prevented Officer Wolfe from seeing Ayala's gun fall. Wolfe fired until Ayala hit the ground.

Ayala claimed that Officer Wolfe used excessive force by shooting him initially, and by continuing to shoot after he dropped the gun. The United States Court of Appeals for the Fourth Circuit viewed the facts through the lens of a reasonable officer.

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[9] Ayala v. Wolfe, 546 Fed. Appx. 197 (4th Cir. 2013).

[10] Ayala, at 200. (The Court did not consider whether Officer Wolfe had reasonable suspicion to stop Ayala because Ayala failed to properly raise this issue.)

(b) Does the officer have to wait until the suspect points the gun at the officer?

Wolfe ordered a robbery suspect to put his hands on the car and felt a gun during the frisk. Another crucial fact was that Ayala took his hands off the car and removed the gun from his waistband, without any explanation. "But I never pointed the gun at Wolfe," Ayala claimed. Still, a reasonable officer would have cause to fear serious physical harm.

(c) What facts will the court consider?

Ayala's next argument was that the threat was gone after he dropped the gun. He made a valid point: Force justified at the beginning of an encounter is not justified later if there is no longer a significant threat. But officers are judged based on the facts reasonably known to them at the time. The darkness and the muzzle flash prevented Wolfe from seeing Ayala's gun fall. A reasonable officer could believe that Ayala still held the gun, and that continuing to shoot was reasonable.

The bottom line: Facts make force reasonable.

"No citizen can fairly expect to draw a gun on police without risking tragic consequences," the Fourth Circuit stated. The Court would also caution officers not to rely too heavily on generalized statements. Facts make force reasonable. They did not in Cooper v. Sheehan.[11]

After receiving a 911 call, officers drove to Mr. Cooper's house. It was late at night. According to Mr. Cooper, the officers came on his property and walked to his house without announcing themselves. From inside, Cooper called, "Who's out there?" When no one answered, Cooper walked out on the porch with his shotgun. Cooper said that he held the butt of the shotgun with his right hand and that the muzzle was pointed at the ground. Without warning, Cooper claimed that the officers immediately fired and that he was hit multiple times. Those facts failed to support the proposition that a reasonable officer

[11] Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013).

would have cause to feel threatened by Cooper's actions. Simply walking out on one's porch with a firearm to investigate is nothing more than any free citizen might do.

(d) Change the facts, change the answer (about whether force is reasonable).

Just holding a firearm is not enough to justify deadly, or any force. But what if the officers had identified themselves to Cooper as police and their commands to drop the gun went unheeded? In Montoute v. Carr,[12] a man fired an illegal sawed-off shotgun in a crowd of people during a near-riot situation. Still holding the gun, he ran past an officer who repeatedly ordered him to drop it. While he never turned to face the officer again, or pointed the gun at anyone, the Eleventh Circuit recognized "There was nothing to prevent him from doing either, or both, in a split-second." At least where orders to drop the weapon have gone unheeded, an officer is not required to wait until an armed and dangerous suspect has drawn a bead on the officer before shooting him first.

A suspect may also turn very violent, very quickly. When he does, more deference is made for split-second decisions. Consider the Eighth Circuit's decision in Morgan v. Cook.[13] Two officers were dispatched separately to the Morgan residence about a domestic dispute. Officer Cook arrived first, got out of his car, and walked towards the house. Cook saw Mr. Morgan on the porch. Morgan walked towards some chairs, stumbled over one, and fell into a recliner. Based on past dealings with Morgan and the way he was walking, Cook believed Morgan was intoxicated.

Officer Cook stopped about six to twelve feet from the front porch. Then Morgan's girlfriend came out. "He's got a knife," she said. Cook looked and saw Morgan try to conceal a kitchen-type knife in his right hand. Cook drew his pistol, told the girlfriend to go back inside, and twice ordered Morgan to drop the knife. Instead, Morgan got out of the recliner. Now

[12] Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997).
[13] Morgan v. Cook, 686 F.3d 494 (4th Cir. 2012).

standing, and with the knife still in his hand, Morgan raised his right leg - as if to take a step in Cook's direction. Officer Cook fired one shot, killing Morgan. The Court found that a reasonable officer could believe that Morgan posed an immediate threat of serious bodily harm to the officer.

Morgan's Estate tried to argue that the step forward did not create an immediate threat. But there was more than just that. Cook had ordered Morgan to drop the knife; the knife was in Morgan's hand; Morgan was less than twelve feet from the officer; and he appeared to be coming forward.

(e) The law requires objectively reasonable force, not the minimal force.

Morgan's Estate also argued that Cook had non-lethal alternatives available. It argued that Officer Cook should have warned Morgan that he would fire; that Cook should have used an intermediate weapon instead of a firearm; and, that he should have retreated and waited for backup. But the law only requires that the seizure be objectively reasonable, not that the officer pursue the most prudent course of conduct as judged by 20/20 hindsight. You should have… and I would have… often mark the beginning of subjective opinions that are based on just that – hindsight. And while a warning should be given if feasible, Morgan got one: A gun pointed at him and a command to drop the knife. Officer Cook did not have time to be more specific.

15.2.3 Use of Force Reports – Facts vs. Conclusions

An officer involved shooting will likely require the officer to put "pen to paper" and write a use of force report about what happened. What follows is a report that is based on an actual case before the Eighth Circuit.[14] The objective test demands that the officer state the facts, and not make mere conclusions. (See if you can distinguish facts from mere conclusions in this report.)

[14] Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993).

> I am Officer Fuhr, a Springfield, Missouri police officer. On June 6, 1989, I received a be-on-the-lookout (BOLO) for Leon Krueger. Dispatch described Krueger as a white/male, wearing blue jeans, and a black shirt with the number 12 on it. Dispatch stated that Krueger escaped from a half-way house and was later involved in an assault at the Tri-State Laundry. Another radio transmission stated that Krueger was high on drugs and that he had a knife. A third stated that Krueger was spotted on East Walnut. I drove to East Walnut. A man matching Krueger's description was on East Walnut. I stopped my cruiser. I got out of the car and I drew my pistol. The man got up and began running. I chased him for about 200 feet and yelled, "Freeze!" When I was within about 3 to 4 yards of the man, he threatened me with a knife. Before he could turn around, I shot him three times in the back.

See the conclusions? Mere conclusions make the reasonable officer ask, "How?" In the report, how did the person on East Walnut match Krueger's description? The officer should state what he saw: "He was a white male wearing a black shirt and blue jeans. He was lying on his stomach between two cars parked on East Walnut, as if he was hiding."

And how did Krueger threaten the officer with a knife? This is what the officer saw: "When I was within about 3 to 4 yards of the man, I saw him reach to his right hip and grab a knife. The man gripped the knife in a fist. Before he could turn around, I shot him three times in the back."

"Paint the picture," states the reasonable officer. With the facts, the reasonable officer (who is really the judge) can visualize what happened and make an objective decision about whether the force fell within the range of reasonableness. It did in Krueger v. Fuhr.

15.2.4 Scott v. Harris[15] - How to Interpret Garner and Graham.

For several years, the lower courts believed that the Garner decision set rigid, preconditions as to when deadly force was authorized. The fact that Graham's objective reasonableness test is the standard for judging all force was not made clear until the Supreme Court's decision in Scott v. Harris.

Mr. Harris was speeding. When an officer signaled for Harris to stop, Harris fled, and a car chase ensued. Enter Officer Scott. Officer Scott terminated the pursuit by applying the push-bumper of his cruiser to the rear of Harris' car, pushing Harris off the road. Harris claimed Scott's push was unconstitutional "deadly force" because Scott had not satisfied any of the Garner conditions for using it. In case of flight, the Garner Court had stated:

> "If…there is probable cause to believe that [the suspect] 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 if, where feasible, some warning has been given."

The Garner Court was probably envisioning someone like Timothy McVeigh[16] who would pose a significant threat to society merely by being at large if allowed to escape arrest. Harris argued that he did not pose such a threat, merely by being at large, and therefore, deadly force was unconstitutional to stop him.

The Supreme Court disagreed with Harris' argument. The Court stated, "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" Garner merely held it was unreasonable to shoot a fleeing burglary suspect in the back of the head when the suspect posed no articulable threat. Garner

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[15] Scott v. Harris, 550 U.S. 372 (2007).

[16] Timothy McVeigh killed 168 people on April 19, 1995 when he detonated a bomb in front of the Alfred P. Murrah Building in Oklahoma City.

was simply an application of the objective test, described in more detail later in Graham. The heart of the Graham decision is to weigh the nature of the intrusion on the suspect's liberty (what the officer did) against the countervailing governmental interest at stake (why the officer did it.)

The Supreme Court applied Graham's objective reasonableness test.

So, what did Officer Scott do? Scott pushed Harris' car off the road with his cruiser while Harris was traveling over 80 miles per hour. Scott's actions posed a high likelihood of serious injury or even death to Harris.

And why did Officer Scott push Harris' car off the road? Harris fled when an officer activated his cruiser's overhead lights. A high-speed pursuit ensued. Officer Scott joined the chase and saw Harris racing down narrow, two-lane roads in the dead of the night, and at speeds in excess of 85 miles per hour. Harris swerved around more than a dozen other cars, crossed the double yellow line, and forced other cars off the road to avoid being hit. Harris ran multiple red lights and traveled for considerable periods of time in the occasional center left-turn-lane. Harris did all that while being chased by numerous police cars. Harris even rammed one of the cruisers chasing him. Six minutes, and nearly 10 miles after the chase began, Officer Scott terminated the pursuit by applying the push-bumper on his cruiser to the rear of Harris' car. Harris lost control of his car, crashed, and his injuries left him a paraplegic.

The Court then applied the facts listed above to the Graham factors. Granted, the underlying reason for stopping Harris was a minor traffic violation. But Harris fled. And his flight (by means of a speeding vehicle) posed the significant threat of serious physical harm to others, and created the strong governmental interest that justified what Scott did as within the range of reasonableness.[17]

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[17] There is not a Fourth Amendment prohibition against vehicle pursuits of fleeing misdemeanants. Harris argued that the public would have been protected, and the tragedy avoided, if the police simply ceased their pursuit.

Scott v. Harris established the relationship between Garner and Graham. Graham established the test for judging police officers accused of using excessive force. The test is objective reasonableness. Garner provided examples as to when deadly force, particularly shooting someone, is objectively reasonable. If force is highly likely to have deadly effects, the reasonable officer will require a very strong governmental interest for using it. Shooting a suspect is not unreasonable when a reasonable officer could believe that the suspect poses a significant threat of serious bodily harm to the officer or others.

Unfortunately, there is no precise definition of what "deadly force" is or when it can be used. Shooting Garner in the head was certainly deadly. Pushing Harris off the road - - maybe not so much, but it was still likely to cause serious injuries. And what about road blocks, choke holds, and baton strikes? They too may cause serious injuries – though maybe not the near certainty of serious injury posed by, say, pushing Harris' speeding car off the road. Each case requires the reasonable officer to weigh the nature of the intrusion against the countervailing governmental interest at stake.

That leads to intermediate weapons. The good news is that the legal standard for using them is the same.

15.3 Intermediate Weapons

Batons, electronic control devices (ECDs), and oleoresin capsicum (OC) spray have been called intermediate weapons because they are a force option between a firearm and going "hands-on." Suspects often claim that the officer should have gone hands-on, or done even less. Objective reasonableness is the test.

However, the Court stated, "…we are loath to lay down a [constitutional] rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives at danger." Still, state law and agency policy may place heightened restrictions on pursuits due to the extreme risks they pose to the officers and the public. See Day v. State of Utah, 980 P.2d 1171, 1179 (Utah 1999).

15.3.1 The Nature of the Intrusion

What can an officer do with an intermediate weapon? That obviously depends on the weapon and how it is used.

15.3.2 Batons

A baton can be held at port arms to gently push a protestor back to the sidewalk. It can also be used to strike his attacking limbs. A baton is capable of causing deep bruising, blood clots capable of precipitating a stroke, and even death. The greater the intrusion, the greater that the governmental interest must be to justify it.

15.3.3 Oleoresin Capsicum Spray

Oleoresin Capsicum (OC) spray comes from the oily extract of the cayenne pepper plant. Exposure to OC creates a deep burning sensation and difficulty breathing. It may cause a suspect to stop struggling. But OC hurts, and unless the suspect is decontaminated, it will continue to hurt after he is under control. There is no governmental interest in allowing the suspect to continue to suffer. Failing to decontaminate him is excessive force.[18]

15.3.4 Electronic Control Devices

Electronic control devices (ECDs) come in two modes – dart and drive-stun. In the dart mode, the ECD uses compressed nitrogen to propel a pair of "probes," or aluminum darts, tipped with stainless steel barbs, towards the suspect. The darts travel at about 160 feet per second and are connected to the ECD with insulated wires. When the darts strike the suspect, the ECD delivers a 1200 volt, low ampere electrical charge through the wires and probes and into the suspect's muscles. The impact is as powerful as it is swift. The electrical impulse momentarily overrides the central nervous system and the suspect falls, momentarily incapacitated. That provides an opportunity for the officer to move in with handcuffs.

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[18] Lalonde v. Co. of Riverside, 204 F.3d 947 (9th Cir. 2000).

In the drive-stun mode, the officer removes the dart cartridge and pushes two electric contacts located on the front of the ECD directly against the suspect. In drive-stun, the ECD delivers an electronic shock. The drive-stun does not override the central nervous system like the dart-mode, but it is painful and will most likely cause a struggling suspect to release his grip on something.

ECDs and OC have been credited with decreasing injuries among officers and suspects, alike. They may reduce the need for more serious force options, and unlike baton blows, the pain is generally temporary. But the reasonable officer gauges the nature of the intrusion, based on the facts. A dart-mode ECD may seriously injure a suspect standing in a tree,[19] climbing over a fence,[20] saturated with flammable liquids,[21] or over water. Spinal injuries or death may result from falls. People over water may drown. People have been seriously burned after the ECD ignited flammable liquids. Absent a strong governmental interest, such as when the suspect poses a significant threat, the ECD is excessive when any reasonable officer would know it is likely to cause that type of harm.

15.3.5 ECDs – Battling Expert Witnesses

More controversial is the issue about whether the ECD, alone, causes serious injuries. Experts have testified that ECDs can cause ventricular fibrillation if shot into the chest of human beings. They argue that this may cause abnormal heart beat leading to stoppage and death. On the other hand, a National Institute of Justice panel determined that there is no conclusive evidence that indicates a high risk of serious injury to humans from short-term ECD exposure in healthy, non-stressed, non-intoxicated persons. So what is the reasonable officer to believe?

ECDs rarely cause serious injuries. Statistically, they carry a

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[19] Harper v. Dixon, 2014 U.S. App. LEXIS 13364 (11th Cir. 2014).
[20] Snauer v. City of Springfield, 2010 U.S. Dist. LEXIS 124770 (D. Or. 2010).
[21] Brown v. Burghart, 2012 U.S. Dist. LEXIS 73543 (E.D. Penn. 2012).

significantly lower risk of injury than physical force.[22] Still, attention to the following manufacturer's warnings can help officers stay firmly within the range of reasonableness.[23]

Some people may be more susceptible to the effects of ECDs. They include the elderly, those with heart conditions, and people suffering from excited delirium, severe exhaustion, drug intoxication or chronic drug abuse.

Cardiac arrest may be more likely in a child or thin adult who is hit by a dart in the chest because the dart is closer to the heart. In any case, officers should use the shortest duration of ECD exposure objectively reasonable, and reassess the suspect's behavior, reaction, and resistance before each additional exposure.

Multiple exposures (using two or more ECDs at the same time) may increase the chance of injury. If the ECD is ineffective, officers should consider alternative control measures in conjunction with or separate from the ECD.

Officers should avoid prolonged exposures (those more than 15 seconds) and handcuff the suspect as soon as it is safe.

When practicable, officers should avoid shooting the suspect in sensitive areas. For back shots, the preferred target areas are below the neck. For front shots, the lower center mass (below the chest) is preferred. This is sometimes called "splitting the belt-line."

15.3.6 ECDs – Weapons Confusion

Finally, officers have mistaken their pistol for an ECD. The mistake is not unconstitutional per se; instead, the reasonable officer decides whether the mistake was reasonable. In Henry v.

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[22] John H. Laub, Director, National Institute of Justice, Study of Deaths Following Electro Muscular Disruption 31 (2011).

[23] The following warning are based on "Taser International, Inc. (Taser) Conducted Electrical Weapons Warnings, Instructions and Information: Law Enforcement."

Purnell,[24] for example, the officer mistook his Glock pistol for an ECD and shot a fleeing, nonthreatening misdemeanant in the elbow. The Fourth Circuit refused to dismiss the case against the officer because there were several facts that would have alerted a reasonable officer that he was holding the Glock. First, the officer knew he carried the ECD in a holster directly below the pistol. Second, the officer could feel the weight differences. The Glock was about twice that of the ECD. Third, the officer knew the ECD had a thumb safety, unlike the Glock.

15.3.7 The Governmental Interest

The nature of the intrusion (what the officer did) is weighed against the counterveiling governmental interest at stake (why the officer did it). The issue: Could a reasonable officer believe that the intermediate weapon was reasonable to control the suspect's active resistance, stop his flight, or deter an immediate threat?

15.3.8 Intermediate Weapons (IWs) are not reasonable when the suspect is under control.

Consider the facts in Lewis v. Downs.[25] The suspect tried to stop two officers from arresting his mother and confronted them with a rake. One of the officers drew a pistol and ordered the suspect to drop it. The suspect did, and while handcuffing and arresting him was not unconstitutional, a baton blow to the mouth, after he was handcuffed and being led away, was.

The Tenth Circuit reached a similar result in Dixon v. Richer.[26] Officers stopped and proceeded to frisk the suspect for weapons, but he purportedly did as he was told. He placed both hands on the hood of the car. The officers struck him anyway. As he fell, another hit him in the stomach with a flashlight. Reasonable? The Court thought not.

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[24] Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011).
[25] Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985).
[26] Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991).

15.3.9 Active Resistance?

Like Mr. Graham, Mr. Clement was a diabetic.[27] He felt the onset of a diabetic reaction one day and stopped his car in a company parking lot. When an employee told Clement to move, he responded in gibberish. Someone called 911 and police were dispatched to investigate an "intoxicated man." They found Mr. Clement slouched over in the front seat of his car – apparently passed out. They shook and tried to revive him and told him to get out of the car. Clement only responded in an angry tone. One of the officers described Clement as unkempt; that his eyes were bloodshot; and that the interior of the car smelled like stale beer.

When the officers opened the car door and began to pull Mr. Clement out, he flailed his arms. An officer managed to handcuff one arm. Clement would not give-up the other and the officer struck his free arm with a baton, which was eventually secured with the other handcuff. Next, Clement began to kick and try to get up. One of the officers struck Clement's kicking legs three times with a baton. Another sprayed mace in his face in the process of moving him from the car to the ground because Clement was swinging his arms as if he were trying to strike the officers.

A paramedic arrived. By this time Clement was laying on his side. (The officers apparently understood the danger of positional asphyxia. See "After the Fight," below.) Clement's blood sugar was low, and suspecting that something was seriously wrong, he was taken to the hospital. There, one of the officers looked in Clement's wallet for the first time and found his diabetic card. Clement's grandmother later found his diabetic kit when she retrieved the car.

Mr. Clement died two weeks later of natural causes and his Estate sued. The Estate first alleged that the officers did not have probable cause to arrest him. Even if they did, the Estate argued that the force was excessive. The Seventh Circuit disagreed.

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[27] Padula v. Leimback, 656 F.3d 595 (7th Cir. 2011).

(a) What were the facts reasonably known at the time?

There was ample evidence that Clement was driving under the influence of alcohol. On the other hand, the officers did not see the diabetic card until later. Moreover, Clement was not wearing a diabetic necklace or bracelet to alert the officers that something else was wrong. And finally, the diabetic kit on the car seat could have also been overlooked in the heat of the moment.

The force was not excessive, either. Clement did not get out of the car. He had to be pulled out, and then flailed his arms and kicked. A witness also described the baton blows as stern, but not severe. A reasonable officer could believe that the mace and measured blows were necessary to control Clement and effect the arrest.

15.3.10 Threat?

In baton training, the Physical Techniques Division of the Federal Law Enforcement Training Centers teaches officers to target the suspect's large muscle groups. But fights are dynamic encounters and less than precision strikes may still fall within the range of reasonableness. For example, in Cotton v. Busic[28] officers responded to a call that Bobby Cotton was causing a disturbance. Cotton was a schizophrenic and off his medication. He met the officers with hunks of concrete in each hand and refused to put them down. A scuffle ensued. Cotton got one of the officers in a "bear hug." One of the officers described him as "strong as hell." The officers struck Cotton with nightsticks and flashlights, and when the fight was over, Cotton was missing one eye. The district court stated, "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…"

The seriousness of the offense may also alert the officer to a threat. In Kellough v. Bertrand,[29] officers had facts to believe

[28] Cotton v. Busic, 793 F.Supp. 191 (S.D. Ind. 1992).
[29] Kellough v. Bertrand, 22 F.Supp 2d 602 (S.D.Tx 1998).

Mr. Kellough was an armed robber. Officers stopped and ordered him out of his car. He got out in a non-threatening manner. But Kellough did not immediately lie face down on the ground as the officers ordered. "What did I do?" he asked. That caused an officer to kick his legs out from under him. As he fell, another struck him on the arm with a flashlight. Even accepting Kellough's argument that he exited the car in a non-threatening manner, his refusal to follow the officer's orders and to lie face down on the ground could cause a reasonable officer to employ some force to make him. While the court described the blow with the flashlight as "troubling," it was not unreasonable because it occurred before Kellough was under control.

(a) Change the Facts, Change the Answer

But what if the crime at issue in Kellough was possession of child pornography, not armed robbery? The same urgency and force to get him on the ground might not fall within the range of reasonableness.

Still, the seriousness of the offense is only one factor that might alert an officer to a threat. In Draper v. Reynolds,[30] an officer stopped Mr. Draper because the light was out over his license plate. The officer asked Draper for documentation five times. Instead of retrieving it, Draper accused the officer of harassment. Draper paced beside the road, yelled, and cursed, "How about you just go ahead and take me to f---ing jail…" and "I don't have to kiss your damn ass because you're a police officer." (Driving without the light and failing to provide the documents were arrestable offenses and the officer decided to effect one.) After the fifth request for documents, the officer promptly shot Draper with an ECD in the dart-mode. Draper fell, was quickly handcuffed, and taken into custody.

Draper argued, "There was no need to use any force. I would have gladly complied with the officer's arrest commands." On the other hand, the officer believed that arrest commands would have only escalated the matter. Based on the facts, the court

[30] Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

concluded a reasonable officer could have believed that a verbal arrest command, accompanied by attempts to handcuff Draper, would have escalated an already tense and difficult situation into a more serious physical struggle and could have caused either the officer or the suspect to be seriously injured.

Distinguish the facts in Draper from those in Bryan v. MacPherson.

The facts made it reasonable to believe that a threat existed in Draper. In Bryan v. MacPherson,[31] the facts fell short. Mr. Bryan drove onto Coronado Island one morning and stopped at an intersection. A police officer noticed that he was not wearing his seat-belt and directed Bryan to pull to the side of the road. Bryan did so, but he began to pound the steering wheel and to curse (… apparently upset about the pending traffic ticket). Then he got out of the car. Wearing only boxer shorts and tennis shoes, he must have looked strange. Adding to his bizarre behavior, the slightly clad young man began to yell gibberish, expletives (though apparently not at the officer) and to hit his thighs. The officer was about twenty to twenty-five feet away from Bryan when, without warning, the officer shot Bryan with an ECD in the dart-mode. Bryan fell to the pavement, shattering his front teeth.

The Ninth Circuit distinguished the facts in Bryan from those in Draper. The only similarities between the two cases were that both men were stopped for a traffic violation; they were loud; and, they were shot by an ECD. In Draper, a reasonable officer could believe that a threat existed and that the ECD was necessary to effect the arrest. Draper was close to the officer, belligerent, and argumentative with the officer. Bryan was further away and appeared to be angrier with himself.

[31] Bryan v. MacPherson, 630 F.3d 805 (9th Cir. 2009).

15.3.11 Multiple Electro-Shocks

Each application of the ECD must be objectively reasonable. Not all of them were in Beaver v. City of Federal Way.[32] Mr. Beaver was a burglary suspect. He fled from the responding officer and a dart-mode ECD brought him to an abrupt halt. Besides just flight from a serious offense, other factors added to the reasonableness of the ECD. Beaver was about the same size as the officer. The facts also suggested he was under the influence. He was sweating, his veins were bulging, and the officer said he had that far-off look.

Once down, the officer ordered Beaver in a loud voice to roll over on his stomach. Instead, Beaver tried to get up - and sixteen seconds after the first application, he was shocked a second time. Again, the officer commanded Beaver to roll over on his stomach and to extend his arms. Beaver did not immediately comply, and two seconds after the second application, he was shocked a third time.

Then a back-up officer arrived. But conflicting commands – one for Beaver to lie on his stomach and another to lie on his back – were given by the two officers. Beaver apparently did not know what to do, and ten seconds after the third, he was shocked a fourth time.

Now two officers now stood over Beaver. Beaver remained on the ground with his arms curled underneath his chest. No conflicting commands were given this time. Both officers ordered him to show his hand, but Beaver kept them under his chest, and twenty-two seconds after the fourth, he was shocked for a fifth and final time. Beaver finally extended his arms for handcuffs.

The court had no trouble with the first ECD application, but expressed some concern over the second and third. After Beaver was knocked down, a witness testified that Beaver said "I can't" in response to the officer's commands. So did he have the ability comply? An expert witness also testified that

[32] Beaver v. City of Federal Way, 507 F.Supp. 2d 1137 (W.D. Wash. 2007).

Beavers' actions (trying to get up) may have been as much a reaction to being shocked as an intentional effort to resist arrest. And finally, the period between the second and third shock was only two seconds, making it difficult to see how Beaver even had the opportunity to comply. Still, the court held that the first three shocks fell with the range of reasonableness. The officer was alone and had to make split second decisions.

But the analysis changed when backup arrived. With a backup officer, the threat diminished. Now it was two against one. And obviously, the conflicting commands by the two officers did not weigh in their favor. The officers tried to argue that Beaver could have been holding a weapon under his chest. Still, the officers had no facts to believe that. They had watched him role around on the ground and had not seen any bulges or other signs of a weapon. The court held that reasonable, less intrusive options were available. Instead of shocking Beaver, one officer could hold the ECD in the ready, while another went in with handcuffs.

15.3.12 Flight?

Stopping a burglary suspect's flight with an ECD was reasonable in Beaver. In Cockrell v. City of Cincinnati, the officer used an ECD to stop a fleeing jaywalker.[33] The jaywalker fled when the officer tried to stop him, and without any warning, the officer shot him with a dart-mode ECD. The case against the officer was ultimately dismissed because the law did not clearly put the officer on notice that using an ECD was unconstitutional. It fell within that grey area between, constitutional and excessive.

Still, causing neuromuscular incapacitation to stop a fleeing jaywalker…? Professional law enforcement would require a stronger governmental interest than that.

[33] Cockrell v. City of Cincinnati, 468 Fed. Appx. 491 (6th Cir. 2012)(not recommended for full text publication).

15.3.13 Control vs. Compliance

Intermediate weapons are sometimes called control tools. They are used to control a suspect's active resistance, deter a threat, or stop his flight. They are not compliance tools. This problem is sometimes called passive resistance. Applying the facts to the Graham factors, the crime at issue is minor. The suspect is not attempting to flee and there is no articulable threat. The problem? The suspect simply refuses to obey the officer's arrest commands.

OC was used like a compliance tool in Headwaters Forest Defense v. Co. of Humboldt.[34] This case concerned three nonviolent protests against the logging of ancient redwood trees in the Headwaters Forest. The protestors linked themselves together with self-releasing lock-down devices and sat-down. The officers warned them that OC would be used if they did not leave. When they refused the officers used it. The officers sprayed them and applied the OC directly to their eyes with Q-tips.

These types of protests were not new to the officers. Previously, the officers had used electric grinders to safely remove the lock-down devices - and the protestors - in a matter of minutes. And the officers had done so, previously, without causing pain or injury to anyone. Without apparent explanation, OC was used here. The Ninth Circuit found that the OC was excessive.

But in Crowell v. Kirkpatrick,[35] the Second Circuit held that a stun-drive ECD was reasonable – and did so under circumstances similar to those in Headwaters. Several protestors chained themselves to heavy barrel drums. Like the protestors in Headwaters, they could have released themselves anytime they wished. When they refused to leave, they were warned that the officer intended to use a stun-drive ECD to make them. They were told that the ECD was painful and they were given another opportunity to release themselves before the ECD was used. They were shocked when they did not leave.

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[34] Headwaters v. Co. of Humboldt, 276 F.3d 1125 (9th Cir. 2002).
[35] Crowell v. Kirkpatrick, 400 Fed. Appx. 592 (2nd Cir. 2010).

And before more shocks, they were warned again.

So how does the reasonable officer distinguish Headwaters and Crowell? One explanation may be that the Ninth Circuit's opinion about what a reasonable officer would do is different than the Second's. But the better explanation may be in the facts.

For one, a stun-drive ECD is arguably less intrusive than OC, particularly when the OC is applied directly to the eyes with Q-tips. The court also stated that a sense of urgency arose when one of the protestors asked an acquaintance at the scene to a call other members of their group to return to the property. And still another difference was that the officers in Headwaters had previously removed the lock-down devices in minutes. In Crowell, the Court believed that the chains could not be removed by a more conventional means.

Still, would a conventional means not include a set of bolt-cutters in a police car, or even back at headquarters? The Second Circuit did not say. Perhaps the real difference is that the Court was satisfied that the officers used their available time to find a force option that fell within the range of reasonableness. The more time, the more reasonable options the officer has to consider.

15.4 Myths vs. Reality

No subject is plagued with more myths than use of force. What follows are some of those myths about using force, and the law.

15.4.1 I thought I had to "fear for my life."

One common myth is that an officer must fear for her life before shooting a suspect with a firearm. "I feared for my life" is like saying, "I did it for officer safety." Absent the facts, it is merely the officer's subjective opinion. The objective test asks whether the facts could lead a reasonable officer to believe that the suspect posed a significant threat.

15.4.2 I thought I had to see the gun.

More myths are that the officer must see the suspect's gun, and if it turns out that the suspect does not have one, the force is unreasonable. Along those same lines it has been said that an officer cannot shoot someone in the back, or until the suspect actually points the gun in the officer's direction. The law, however, does not require a confirmed threat. It requires facts to believe that one exists. Waiting to see if the threat is real, or for the suspect to turn and point the gun, may be fatal for the officer.

15.4.3 I thought "deadly force" was only reasonable when responding to a felony.

The seriousness of the offense is only one factor in determining the governmental interest for using force. The nature of a suspect's resistance or flight, from even a minor offense, may still pose an immediate threat of serious bodily harm to the officer or others. (See Scott v. Harris.)

15.4.4 I thought you always had to give a warning.

A warning adds to the objective reasonableness of a force option; but, the reasonable officer understands that warnings are not always feasible in a tense, uncertain, and rapidly evolving situation. Shouting, "Stop or I'll shoot!" at an armed robber may simply cause the robber to turn and shoot the officer.

15.4.5 Isn't shooting someone more than once excessive?

Shooting a suspect is reasonable until the threat is over. The Supreme Court stated in Plumhoff v. Rickard, "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.[36]

[36] Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); See the *Legal Division Reference Book*.

15.4.6 Isn't agency policy the law?

The Supreme Court established the law in Graham v. Connor. Agency policies may establish restrictions on using force more restrictive that what the law requires. Common policy restrictions include prohibitions against warning shots, shooting at moving vehicles, carrying back-up weapons, or engaging in high-speed vehicle pursuits. Following agency policy is certainly important. Failing to do so may result in administrative sanctions. Still, if an officer uses a back-up weapon in violation of policy, the court will only decide whether the force was objectively reasonable.

15.4.7 I thought that you had to use minimal force.

Like the perfect answer, determining the minimal amount of force necessary to effect a seizure can only be found by hindsight. Officers are judged by the facts known to them at the time. They are responsible for selecting reasonable force options, not perfect ones.

15.5 Qualified Immunity

Law suits go along with a democracy that balances law enforcement with individual freedoms. These are civil actions. The plaintiff is generally the defending officer's former suspect. Now the plaintiff (or former suspect) is claiming that the officer violated his Fourth Amendment right to be free from an unreasonable seizure.

Suspects may sue; that much is true. But the officer does not always have to stand trial. The officer can request qualified immunity.

15.5.1 The Rationale

Qualified immunity is a defense to standing trial in a civil case for a constitutional tort. It is raised by the officer well in advance of trial. The rationale behind qualified immunity is two-fold. First, it permits officers to perform their duties

without fear of constantly defending themselves against insubstantial claims for damages. On the other hand, it allows the plaintiff to recover damages when any reasonable officer would know that the officer violated the plaintiff's constitutional rights.

15.5.2 Getting Qualified Immunity

Qualified immunity is raised by the officer. It protects the officer in an individual capacity, not the governmental entity employing her. Qualified has two elements. The officer may receive qualified immunity under either one.

1. Did a Constitutional Violation Occur?

This element focuses on the facts. Based on the plaintiff's version of what happened, could a reasonable officer believe that the force was reasonable? If no constitutional violation occurred, there is obviously no basis for the lawsuit, and the suit is dismissed. In Scott v. Harris, the nature of Mr. Harris' flight (by means of a speeding vehicle) posed a significant threat of serious physical harm to others and made what Scott did (pushing Harris off the road) fall within the range of reasonableness. The facts made the force reasonable.

2. Was the Law Clearly Established?

Th second element focuses on the law. Even if the force was unconstitutional, the officer may still receive qualified immunity if the law was not clearly established at the time. The law was not clearly established when the officer shot Garner. Recall that the officer in Tennessee v. Garner relied on a state statute that authorized all necessary force to stop any fleeing felon. The Supreme Court later declared the statute unconstitutional in so much as it allowed deadly force to seize any fleeing felon. But the officer had no way of knowing that. The force was unconstitutional, but the law was not clearly established at the time, and he received qualified immunity.[37]

[37] Garner v. City of Memphis, 600 F.2d 52 (6th Cir. 1979).

Plumhoff v. Rickard is a rare case where the Court considered, and granted, officers qualified immunity under both elements. First the Supreme Court held that the force was constitutional, but went on to explain that even if it was not, the law would not have clearly put the officers on notice that what they did was unconstitutional.

Scott v. Harris left open whether shooting a fleeing motorist was reasonable. Plumhoff allowed the Court to make that decision. It waded through the facts. Like Mr. Harris, Mr. Rickard started a high-speed pursuit when he fled from a minor traffic offense. Unlike Harris, he had a passenger in the car. The chase exceeded 100 miles per hour and lasted over five minutes. Rickard passed more than two dozen vehicles, several of which were forced to alter course. He eventually collided with a police car and came to a temporary standstill. But that did not end the chase. With his front bumper flush against a police car, Rickard hit the accelerator causing the car's tires to spin. Officer Plumhoff fired the first three shots into the car. Rickard then threw the car into reverse and started to flee down the street. Officers then fired 12 more shots into the car. Richard crashed and he and his passenger died of some combination of gunshot wounds and injuries from the crash.

The Court applied the facts to the Graham factors. Rickard's flight posed a grave threat to others. Here, as in Scott, the force used to stop the speeding vehicle fell within the range of reasonableness. All 15 shots were were fired to end that threat.

But should the passenger make a difference? Not in Rickard's case; the issue in Rickard's case was whether the officers violated Rickard's Fourth Amendment rights, not the passenger's.[38] It was Rickard, after all, who put the passenger in danger. It would be perverse if his disregard for her safety worked to his benefit.

The Supreme Court went on to explain that even if the officers

[38] There is some disagreement among the lower courts as to whether a passenger in this situation can recover under a Fourth Amendment theory. See Plumhoff v. Rickard, 134 S. Ct. 2012, fn. 4 (2014).

had violated the constitution, they would still be entitled to qualified immunity because the law was not clearly established. This additional explanation was necessary due to the lower courts incorrect decision to deny the officers qualified immunity under the premise that "the devil is in the details." The lower court pointed to insignificant differences between this case and Scott. The lower court stated that Harris, unlike Rickard, was fleeing at a high rate of speed when force was used; that Harris did not have a passenger; and, that Harris was pushed off the road, rather than shot. Those details did not make any difference. And even if they had, the Court stated that the law at the time did not clearly establish the unconstitutionality of shooting a driver to end a high-speed car chase. "Clearly established" means that the law must be sufficiently definite so that any reasonable officer would have understood that he was violating it. In other words, the law at the time must place the situation confronted by the officer beyond debate.

15.5.3 Qualified Immunity Under Either Element

An officer may receive qualified immunity either because the force was constitutional or the law was not clearly established. The courts are not required to go in any particular order, either. The court may find, "We don't know if the officer violated the constitution; however, we have reviewed the Supreme Court and circuit decisions and find that the law did not clearly put the officer on notice that the force was excessive." In short, the court may opt to answer the easier of the two questions, saving the harder one for another day.

The court made such a decision in Cockrell v. City of Cincinnati where an officer shot a fleeing jaywalker with a dart-mode ECD without any warning. The court expressed no opinion on whether the force was constitutional; however, the court held the law was not clearly established. The court saved the harder question for another day. As a result, the officer was granted qualified immunity.

15.5.4 Qualified Immunity: Denied

To deny the officer qualified immunity, the court must find that the plaintiff's version of the facts supports both of these elements: (1) a constitutional violation that (2) was clearly established. If the officer is denied qualified immunity, the case goes to trial. Questions:

(a) Why Send the Case to Trial?

In other words, why not simply find against the officer? The answer is simple. Denying the officer qualified immunity does not mean that the officer is liable for a constitutional tort. It means that there is a triable issue for the jury. During the qualified immunity analysis, the court is generally required to accept the plaintiff's version of the facts as being true. If there is a material dispute between the plaintiff and the officer about what happened, the judge sends the case to trial to resolve the dispute.

This seemingly unfair requirement (to accept the plaintiff's story) is because qualified immunity dismisses the case. It denies the plaintiff his day in court. The court says, "Mr. Plaintiff, we have looked at your version of the facts. No reasonable jury could find for you." Before the court can say that, however, it must accept the plaintiff's version of what happened as being true. The Fourth Circuit followed that rule in Cooper v. Sheehan. Recall that Cooper claimed that he merely walked out on his front porch with a shotgun to investigate a noise and that the officers immediately fired on him. The officers had a dramatically different story, but the Court had to accept Cooper's. The case goes to trial.

(b) So What Happens at Trial?

At trial, the burden of proof shifts back to the plaintiff. The plaintiff has the burden of proving that a constitutional violation actually occurred. Credibility is an important issue at trial. Who is telling the truth, the plaintiff or the officer? Force science experts may also testify and breathe life into the words,

"…tense, uncertain, and rapidly evolving…"

- Tense: When someone's life is threatened, the body's natural defense mechanisms are triggered. Hearing may diminish. Gunshots may sound like blanks. The sense of sight may be more acute, but become tunneled on the threat. Tunnel vision reduces peripheral vision. Blood may rush to the large muscle groups for the "fight or flight" response, which reduces fine motor skills. The officer may feel like she is wearing heavy gloves while holding her pistol. Blood pressure skyrockets and the body may shake.

- Uncertain: "Is that silver object the suspect is pointing at me a gun or cell phone?" That decision may have to be made on a street corner at night.

- Rapidly evolving: That same decision may have to be made in a split-second. "Should I wait – to see if it's actually a gun?" Waiting might be fatal.

The bottom line: Denying an officer qualified immunity does not mean that the officer is liable for excessive force. It just means that there has to be a trial to decide.

15.6 After the Fight

Taking a suspect into custody creates the duty to care for him. An officer cannot be deliberately indifferent to a suspect's serious medical needs.[39]

These steps should be followed when a suspect is taken into custody:

- As soon as the suspect is handcuffed, get him off his stomach, and belt him inside the car in the seated position. In-custody deaths may result from positional asphyxia – i.e., death as a result of positioning the

[39] Jones v. City of Cincinnati, 507 Fed.Appx. 463 (6th Cir. 2012) citing Ewoiski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2012).

suspect's body in a way that interferes with his ability to breathe.

- Monitor the suspect carefully and obtain medical treatment if needed. Ask the suspect if he has used drugs recently or suffers from any other medical condition. Do not assume that the suspect is "playing possum" and obtain medical care on his request.

- If the suspect is not breathing or there is other evidence that he suffers from a serious medical condition, call EMS, apply CPR, and provide first aid as necessary.

- Inform the detention facility's custodians of any medical problems.

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