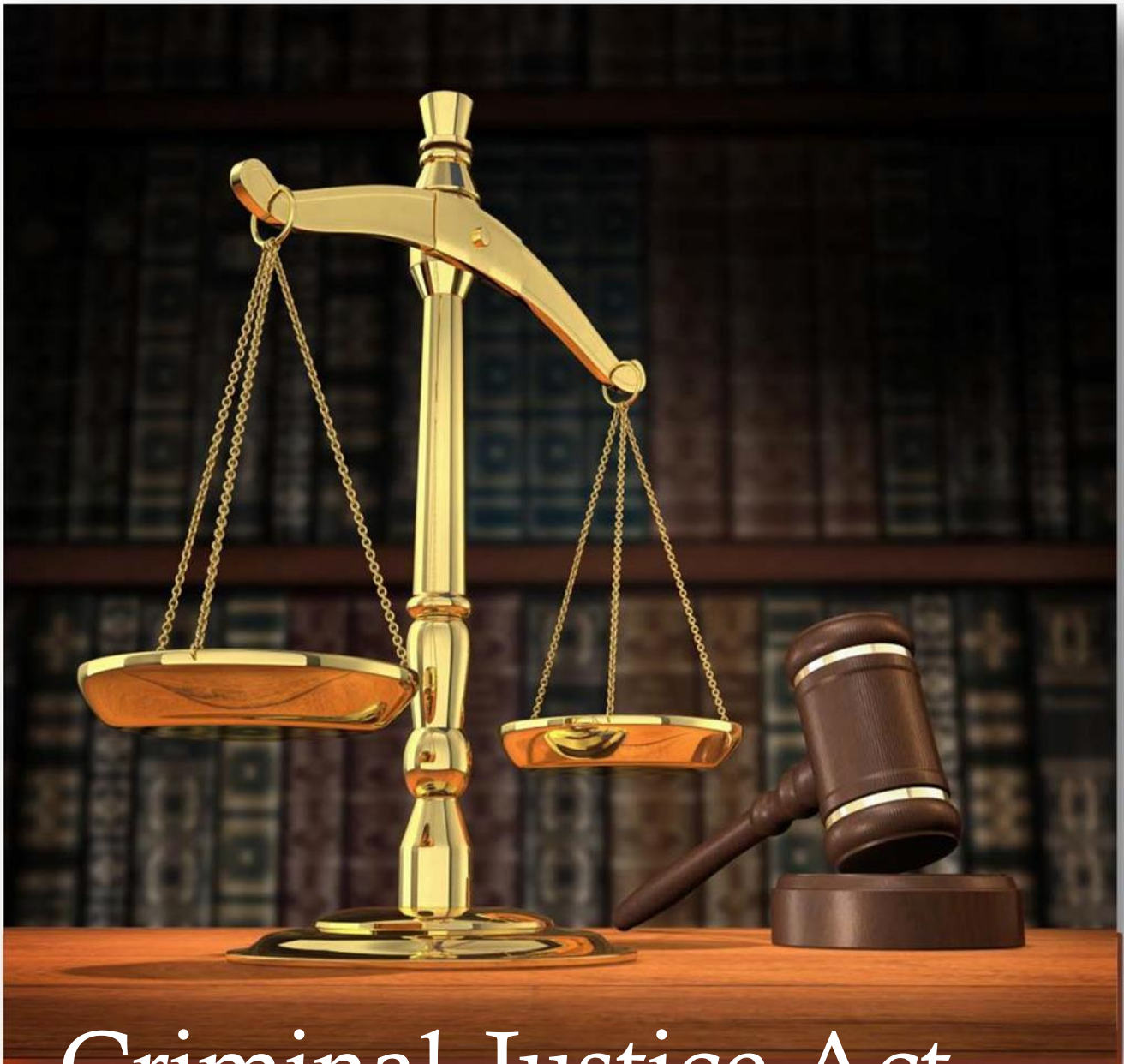

Criminal Justice Act Best Practices Manual

AUGUST, 2021

Adapted for use by the Eastern District of Arkansas FPD with the permission of FPD Heidi Freese, Middle District of Pennsylvania

EASTERN DISTRICT OF ARKANSAS BEST PRACTICES MANUAL

Mission Statement

The Office of the Federal Public Defender is committed to providing federal criminal defense practitioners within the Eastern District of Arkansas guidance regarding the most frequently encountered practical issues and topics that may arise in the daily course of managing a criminal case. This effort is designed to improve the effectiveness of criminal defense lawyers and to strive to provide the highest quality representation to our clients.

Preface

A special thank you to Federal Defender Heidi Freese, Middle District of Pennsylvania, for allowing the Eastern District of Arkansas to adopt and adapt this comprehensive manual compiled by CJA Panel Attorneys from the Middle District of Pennsylvania who saw the need to discuss the practical aspects of handling a federal criminal case and the challenges faced by CJA counsel in the representation of indigent clients. This manual covers the representation of individuals facing federal charges through all stages of the case. The manual is intended as an overview of the law and rules that may apply to a federal case and has been specifically adapted for our District. It is my hope that this Best Practices Manual will facilitate advocacy by providing summaries of the law, tips for practice, references and sample motions.

FPD Lisa G. Peters appreciates and thanks Dave Parker, CJA panel member, for suggesting this wealth of information which can now be used by our own defense bar.

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CHAPTER 1 – GRAND JURY

1.1 Grand Jury Representation

Grand Jury

The Fifth Amendment requires all federal felony charges to be by an indictment from a grand jury. The right to an indictment may be waived, and the case may proceed by way of a felony information with a formal waiver proceeding and consent of both parties.

The authority, power, and specific workings of grand juries can be found in Rule 6 of the Federal Rules of Criminal Procedure and Statutes in Title 18 of the United States Code. See references to "Relevant Sources of Law" at the end of this section.

Federal grand juries must consist of at least 16 but not more than 23 persons. An indictment requires the concurrence of at least 12 jurors. The grand jury has the power to issue subpoenas for people, documents and other physical evidence.

Normally there is no Sixth Amendment right to counsel in grand jury proceedings. The District Court has appointed counsel in some circumstances. Usually, there are some unusual factors such as age, infirmity or the possibility of a contempt finding.

Grand jury witnesses fall into 3 categories:

1. Target
2. Subject
3. Witness

When representing a grand jury witness you should obtain a copy of the subpoena. The subpoena will have the name of the Assistant United States Attorney in charge of the investigation. Defense counsel should meet with the client to discuss the appearance and potential testimony. Defense counsel should discuss the client's constitutional rights, statutory rights, and any privileges that may apply.

While a client may be advised about their right against self-incrimination, counsel should be careful not to convey a message that the witness has an option of not appearing and ignoring the grand jury subpoena. Such advice may be viewed as criminal conduct and subject an attorney to an obstruction of justice charge or contempt.

The client should appear as required and assert any rights or privileges. Ultimately, a court will decide if they apply. You may advise the client on the consequences of refusing to testify after all rights or privileges have been overcome or held not to apply. In practice, you may sit outside or near the grand jury room and be available for consultation with your client.

Ultimately you may need to be prepared to handle a contempt allegation under the Recalcitrant Witness Statute, which usually involves an immunity order. Thus, familiarity with the immunity and recalcitrant witness statutes is imperative. See "Relevant Sources of Law," at the end of this section.

Target Letter

Target letters are widely used in this district. The letter is addressed to a target of the grand jury – your client. They invite the target to provide grand jury testimony. The letter advises that the grand jury is investigating specific violations of federal law.

In practice, this letter may be viewed as an invitation to begin negotiations with the United States Attorney's Office. If ignored, the target will likely be indicted. Our judicial officers have used their discretion and appointed counsel on the basis of the target letter.

Relevant Sources of Law

United States Constitution – Fifth Amendment

"No person shall be held to answer…, unless on a presentment or indictment of a grand jury."

Statutes

- 18 U.S.C. §3321-3322 Grand Jury
- 18 U.S.C. §3331-3334 Special Grand Jury
- 18 U.S.C. §6001-6003 Immunity of Witnesses
- 28 U.S.C. §1826 Recalcitrant Witnesses

CHAPTER 1 – GRAND JURY

Rules

- Federal Rules of Criminal Procedure
  - Rule 6 — The Grand Jury
- Federal Rules of Evidence
  - Rule 101 — Scope; Definitions
  - Rules 501-502 — Privilege in General Applicability
  - Rule 1101 — of the Rules
- Other Helpful Materials
  - Defending a Federal Criminal Case: Vol. I, Chapter 2 (2016)
  - United States Attorney's Manual, §9-11.000
  - http://www.justice.gov/usam/usam-9-11000-grand-jury

CHAPTER 2 – PRETRIAL MATTERS

2.1 Initial Appearance / Arraignment

Introduction

The Initial Appearance and Arraignment serve two distinct functions. However, in the Eastern District of Arkansas, these proceedings are typically combined into one hearing.

Initial Appearance – Rule 5 - Federal Rules of Criminal Procedure

In general, Rule 5 sets forth the procedures after a defendant's arrest.

The Rule requires that "[a] person making an arrest within the United States must take the defendant without unnecessary delay to a magistrate judge." If a federal magistrate judge is not "reasonably available" the initial appearance may be held "[b]efore a state or local judicial officer." Rule 5(c).

The Rule also provides among other things specific details regarding exceptions to the general rule, arrests initiated in other districts and the use of video conferencing.

Typically, four issues are addressed at the Initial Appearance:

- Defendant is provided notice and explanation of the charges and a copy of the charges is provided;
- Defendant is advised of rights, including the right to remain silent and right to counsel;
- Counsel is appointed if defendant meets financial eligibility (Sixth Amendment right to counsel attaches; *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008));
- Proof of "indigence" is not required; the standard for appointment is found in 18 U.S.C. § 3006A
- Bail Determination
- The government must request the defendant's detention at the initial appearance. See 18 U.S.C. § 3142(f)
- A continuance of the detention hearing may be requested in order to provide the court with additional information or witness testimony.

The Pretrial Service Report

- The Pretrial Services Division of the United States Probation Office is responsible for gathering information about a newly arrested defendant and prepares a report recommendation to the court about the defendant's release.
- Section IV((D)(4) of the Eastern District of Arkansas' Criminal Justice Act Plan provides that "the pretrial services officer will not ordinarily conduct the pretrial service interview of a ...defendant until counsel has been appointed, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel". In reality, a defendant typically waives this right and a pretrial service officer will interview the defendant prior to the initial appearance and before counsel has had an opportunity to speak with the defendant.
- A defendant is not required to submit to an interview. Thus, if bail is unlikely for instance because of a state detainer, there may be no reason to be interviewed.
- The officer will prepare a report which includes the defendant's criminal history, biographical information and work history and provide it to the parties and the court. The entire report may now be kept by the parties.
- The report is valuable since it presents the first source of information about the client and most importantly, their criminal history.
- The Government's use of statements made to the pretrial services officer is restricted by 18 U.S.C. § 3153(c) (1)-(3). However, be aware that the pretrial services officer will typically provide the presentence officer with any information it receives and these earlier statements may be included in probation's presentence report. "Materially false information" to the pretrial services officer may later result in obstruction points in the presentence report. *See U.S.S.G. § 3C1.1 cmt. n.4(H); See also, United States v. Greig,* 717 F.3d 212 (1st Cir. 2013) (approving increase for failing to disclose assets to pretrial service officer); *United States v. Saintil,* 910 F.2d 1231 (4th Cir. 1990) (providing false name in interview with pretrial service officer); and two unpublished 8th Circuit opinions *United States v. Ramirez-Lopez,* 1993 U.S. App. Lexis 939 and *U.S. v. Zuniga,* 2012 U.S. App. Lexis 20339 (affirming obstruction increases for providing false information to probation officers).

CHAPTER 2 – PRETRIAL MATTERS

Processing

Before or after the initial appearance, depending on the circumstances of the arrest, the United States Marshal's Service will process the client. Processing typically consists of fingerprinting, photographing and obtaining personal data from the defendant. If counsel can speak to the client prior to processing it is imperative that counsel advise the client not to discuss any information concerning his or her case.

Interpreters – Rule 28 – Federal Rules of Criminal Procedure

Interpreters will be provided at the initial appearance if required. The Clerk of Court is typically responsible for ensuring that an interpreter is present at all court appearances for any client who is in need of such services. In a multidefendant case, the same interpreter will usually provide services to all of the defendants. It is very important to ensure that the interpreter understands that all conversations with the defendant are confidential.

Arrangements may be made with the court's interpreter before or after initial appearance to meet with the client.

Preparation/Practical tips for Initial Appearance

- Get as much information as early as possible from any source (e.g. arresting officer, AUSA, marshal) prior to initial appearance;
- Try and meet with client early if possible;
- At the initial meeting with your client, inform client about the limited role of the initial appearance and what is about to occur, what is likely to occur thereafter, different stages of the process, the attorney's role and a reality check of federal court practice;
- Provide client with the charges explaining maximum penalties and any applicable mandatory minimum sentencing exposure;
- Interview the client and obtain as much detail as possible concerning the events from the time of arrest to the initial meeting with counsel;
- Obtain salient bail information;
- Strive to develop a level of trust and rapport.

CHAPTER 2 – PRETRIAL MATTERS

Arraignment – Rule 10 – Federal Rules of Criminal Procedure

- Arraignment is the first opportunity where the court obtains personal jurisdiction over a defendant and the defendant enters a plea to the charge. In virtually every instance, a not guilty plea is entered at the initial appearance/ arraignment in the Eastern District.
- Rule 10 specifically provides that the arraignment be conducted in open court, must consist of reading the indictment or information, requesting the defendant to plead guilty or not guilty, and providing defendant a copy of the indictment or information.
- The right to counsel attaches at arraignment. *See Hamilton v. Alabama*, 368 U.S. 52 (1961); *Kirby v. Illinois*, 406 U.S. 682 (1972).
- Arraignment triggers the timing requirements to file pretrial motions "at the arraignment or as soon afterward as practicable." *See Fed. R. Crim. P. 12.*

2.2 Pretrial Release

Types of Release

Release on Personal Recognizance or Unsecured Bond

Release on defendant's promise to appear when ordered under Title 18 U.S.C. §3142(b) mandates pretrial release on "personal recognizance" or an unsecured appearance bond unless the court determines that "such release will not reasonably assure" the defendant's appearance or "will endanger the safety of any other person or the community."

Release on Conditions

- 18 U.S.C. §3142(c) mandates release subject to certain specified conditions.
- Conditions must be the least restrictive conditions necessary to reasonably assure the defendant's appearance and the community's safety.
- House arrest is a permissible condition of release.
- Curfew restrictions, limitations on the operation of a vehicle and travel and communications restrictions are also authorized.
- Your client may have to turn in their passport if they have one.

- The Court may order supervision of the defendant by the Pretrial Services Division of the United States Probation Office:
  - Supervision may include drug testing, home visits, and electronic monitoring.
  - Psychiatric treatment can be compelled as a condition of release to ensure appearance.
  - Personal Surety Bond may be secured by property that is encumbered as long as there is sufficient equity remaining to assure the appearance of the defendant. (The Court may conduct an inquiry into the source of any funds used to secure a defendant's release.

Third Party Custodian

- The Court may require a third party custodian.
- Able to assist the Court in monitoring conditions of release to reasonably assure the defendant's appearance in court and the safety of the community.
- Often used in conjunction with pre-trial services supervision.
- Court may also release a defendant directly to third party custodian.
- The defendant and third party custodian usually have a close personal relationship (parents, siblings, other relatives, close friends, employers)
- A third party custodian is not held liable if the person to be supervised absconds or commits crimes while under the custodian's supervision.
- Custodian does have duty to report to the Court any violations of the conditions of pretrial release.
- Third Party Custodians who willfully fail to comply with the release order may be subject to the provision of 18 U.S.C. §401 (Contempt of Court).
- The Court may direct the Pretrial Services Division to provide a report to the Court on the suitability of a potential third party custodian.
- In most cases the Court will request that the Pretrial Services Division conduct a criminal records check **in advance** of a bail hearing so that the proposed third party custodian can be properly investigated.

- Counsel should contact the Pretrial Services Division and provide the following information for any proposed third party custodian:
- Name, Maiden Name
- Date of Birth
- Social Security Number
- Address and Employment Information
- The Pretrial Services Division may choose to personally interview the candidate regarding their willingness to act as a 3rd party custodian.
- In most cases the Court will want the defendant to reside with the third party custodian.
- The proposed third party custodian will be required to provide sworn testimony and answer the Court's questions, if any, at a hearing.

Temporarily Detain the Defendant to Permit Revocation of Conditional Release, Deportation or Exclusion

2.3 Detention Hearings

- Held following Initial Appearance/Arraignment upon Motion of the Government or the Court's own Motion.
- On Motion of the Government or the Court's own Motion, a defendant may be held up to 3 days before a hearing is required.
- Defense counsel may request a continuance of the hearing in order to prepare. If no hearing date is set at the initial appearance, counsel should "reserve the right" to have a bond hearing.
- Pretrial Services will prepare a bail report outlining the defendant's criminal history, any pending detainers, and an analysis of flight risk and background information.
- If time permits, a Probation Officer will interview the defendant prior to preparing the report. Counsel should be present at the interview and care must be taken to protect your client from revealing harmful information.
- This Pretrial Services Report may now be kept by the parties and does not have to be returned to the probation officer following the hearing.

At the beginning of a detention hearing, some courts will ask if you and your client have reviewed the pretrial services report, and if the information is accurate. Be prepared for this. The government may move for a detention hearing under §3142(f) when the case involves:

- Crime of violence;
- Any terroristic offense (18 U.S.C. § 2332b(g)(5)(B)) with a penalty of 10 years or more;
- An offense for which the maximum term of imprisonment is life or death;
- A drug offense carrying a maximum term of imprisonment of 10 years or more;
- Any felony committed after the person has been convicted of 2 or more of the above offenses (state or federal);
- Any felony which is not a crime of violence that involves a minor victim;
- A serious risk of flight;
- A serious risk that the person will obstruct or attempt to obstruct justice; or threaten, injure, or intimidate or attempt to do so to a prospective witness or juror.

- The purpose of a detention hearing is for the Court to determine whether any condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.
- The Court is obligated to consider certain factors when determining whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of any other person and the community. The factors are enumerated in 18 U.S.C. § 3142(g).
- The defendant has a right to be represented by counsel at a detention hearing.
- The defendant has the right to testify, present witnesses, cross examine witnesses and/or to present information by proffer or otherwise.

Two rebuttable presumptions apply in detention hearings:

- In a case where the defendant has been charged with a crime described in §3142 (f) (1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the defendant has been convicted of an (f) (1) offense, the offense was committed while the defendant was on release pending trial and not more than 5 years have elapsed since the date of the conviction or release from imprisonment, whichever is later.
- No conditions or combination of conditions will reasonably assure the appearance and safety of the community if the judicial officer finds that there is probable cause to believe that the defendant committed a drug offense punishable by 10 years or more; some gun offenses (924(c)), certain terroristic offenses, offenses involving a minor (such as child pornography statutes).
- Presumptions have been interpreted to require the defendant to produce "some credible evidence" showing reasonable assurance of appearance and/or no danger to the community.
- Burden of proof remains with the government to prove risk of flight and danger to the community.
- An order of detention shall:
- Include findings of fact and a written statement of reasons for the detention;
- Direct that the person be committed to the custody of the Attorney General for confinement in a correctional facility (Defendants in the Eastern District of Arkansas are generally housed in contracted county jails; defendants with state parole detainers may be housed in state correctional facilities);
- Direct that the person be afforded reasonable opportunity for private consultation with counsel, and;
- Direct that the facility in which the person is confined shall deliver the person to the U.S. Marshal for all court proceedings.
- A Detention Order may be reviewed by the Court of original jurisdiction upon motion for revocation or amendment of the Order.
- The Motion should be determined promptly.

- In the Eastern District of Arkansas, a motion to revoke or amend a Magistrate Judge's pretrial detention order is normally referred back to the Magistrate Judge for determination.
- Orders relating to the release or detention are appealable to the District Court pending trial. *See* 18 U.S.C. §3142, §3145(c) and Rule 9 of the Federal Rules of Appellate Procedure.
- District courts conduct an independent review with some deference to the decisions of the magistrate court.

2.4 Violations of Conditions of Release

- If your client has a positive drug test, is charged with a new crime, or in some manner runs afoul of the release conditions imposed by the court, you will be notified either by the pretrial services officer or by the prosecutor.
- In some instances, there may only be a report of the violation to the court, but no request to revoke or modify the conditions of release.
- If the prosecutor elects to seek revocation or modification of the conditions of release, you will be served with the motion, a hearing will be scheduled, and your client will be served with a summons.
- Occasionally, the Marshals will ask you to accept service of the summons, which should only be done with the client's consent.
- You should advise your client that the possible sanctions include:
  - Revocation of release altogether;
  - Modification of release conditions;
  - Detention; and
  - Prosecution for contempt

NOTE: The penalties for failure to appear and for an offense committed while on release are set forth in 18 U.S.C§. § 3146 and 3147

- If the violation is other than a new charge, then you may be able to persuade the court that some new and different condition or combination of conditions of release will assure the court that your client is not a flight risk or danger to the community.

- If the violation is a new criminal charge, then a (rebuttable) presumption arises that no condition or combination of conditions will suffice to assure that your client is not a flight risk or a danger to the community. This is a difficult presumption to overcome in the context of a violation hearing, and you should prepare your client for the likelihood of detention on the date of the hearing.
- Related to a favorable adjustment to pretrial release is the potential benefit of a future voluntary surrender after sentencing.
- You should advise your client that a violation of conditions of release *could* jeopardize the adjustment for acceptance of responsibility under the sentencing guidelines (if the client is otherwise eligible for the adjustment).
- In some cases where the court has determined that the defendant violated a condition of release, the PSR will recommend no adjustment for acceptance of responsibility.

2.5 Modification of Conditions of Release

- Once imposed, conditions of release can be modified at any time until sentencing.
- Frequent issues that may warrant a temporary or permanent change in the conditions of release include: change in employment or work hours; travel for vacation, funeral, wedding, etc.; cooperation with investigation; good behavior between initial appearance and change of plea.
- After conferring with the prosecutor and the pretrial services officer, defense counsel can file a motion requesting a modification.
- Be aware that under 18 U.S.C. § 3143(a)(2), the Court is obligated to order a defendant detained pending sentencing after a plea to a drug offense for which the maximum penalty is 10 years or more **unless** good reasons exist not to detain the defendant.

2.6 Criminal Defense Investigations

Introduction

Although a defense attorney may not require the services of an investigator in every criminal case, a qualified investigator is a vital member of the defense team. A defense attorney must select the best possible defense for his or her client. Legal defenses are based on events before, during and after the commission of the alleged crime. Because the facts surrounding these events are not always obvious, using an investigator may lead to developing viable defenses and other mitigating evidence.

An Investigator May Be Useful In:

- Reviewing and analyzing the investigation conducted by law enforcement officers and agencies, including without limitation, examining all documents and materials provided by the prosecution and, if applicable, examining the crime scene;
- Locating and re-interviewing witnesses to obtain their version of the facts, to find changes in their prior statements and to develop new leads;
- Seeking new and unidentified witnesses who may have information regarding the alleged crime, or the character of the defendant and/or the alleged victim;
- Conducting witness investigations, including examining criminal records, civil suits, domestic relations cases and bankruptcies and interviewing friends, neighbors, former spouses and former employers of the witness, to discover anything in the witness' background and/or physical or mental condition that can be used effectively to bolster or attack the witness' credibility;
- Serving subpoenas and arranging for the appearance of defense witnesses; and
- Preparing sentencing mitigation.

2.7 Best Practices for Retaining an Investigator

Below are Some Steps to Follow When Hiring a Private Investigator:

- Confirm with the Arkansas State Police that the investigator is licensed in Arkansas in accordance with t**he Arkansas Private Investigators and private security Agencies Act A.C.A 17-40-101 Detective Act of 1953;**
- Communicate to the private investigator your needs and provide him or

her with the discovery and other relevant information from the outset;

- Make sure the investigator has sufficient expertise regarding the subject matter of the criminal action;
- Establish a budget and a time table for completion of the assignment; and
- Require the investigator to execute and deliver an engagement letter.

The *Engagement Letter* Should Contain the Following Terms:

- The scope of the work, the agreed-upon budget, any agreed-upon retainer fee or hourly rate, and a termination clause;
- An indemnity clause in case the investigator engages in professional misconduct or violates the law;
- An agreement that the investigator has been retained by counsel, **not the client**, to assist counsel in the rendering of legal advice and services to the client, and that such mode of engagement requires that all investigative product be treated as confidential and subject to the attorney-client and work product privileges and that such investigative product is the property of counsel;
- An agreement that the investigator will provide counsel with copies of all investigative reports, memoranda and other documentation with appropriate notation on such documents, identifying them as being subject to the attorney-client and work product privileges; and
- If the relationship between counsel is subject to a joint defense agreement, that the investigator's engagement is subject to the terms of that joint defense agreement.

2.8 Availability of Investigative Services for CJA Counsel

- Subsection (e) of the CJA provides that presiding judicial officers may authorize appointed counsel to obtain investigative, expert or other services necessary for adequate representation. 18 U.S.C. § 3006A (e). The cost of these services, including reimbursement of reasonably incurred expenses, is funded by the CJA. 18 U.C.S. § 3006A (i).

- Requests for authorization to obtain investigative or expert services may be made to the presiding judicial officer by *ex parte* application. *Ex parte* applications for services other than counsel must be heard *in camera* and must not be revealed without the consent of the client. The applications shall be placed under seal until the final disposition of the case, subject to future order of court. *See* Guidelines for Administering the CJA and Related Statutes, "Guide" Vol. 7, § 310.30.
- If court authorization is granted prior to obtaining investigative or expert services, compensation for such services may be paid upon approval by the presiding judicial officer in amounts up to $2,400.00 per person or organization, exclusive of expenses. *See* 18 U.S.C.§3006A (e) (3); Guide Vol. 7, § 310.20.10. Payments over $2,400.00 may be made when certified by the presiding judicial officer and approved by the Chief Judge of the Circuit or his/her delegate to provide fair compensation for services of an unusual character or duration. *See* 18 U.S.C. § 3006A (e) (3); Guide Vol. 7, § 310.20.10.
- If court authorization is not granted before obtaining investigative or expert services, the total compensation which may be paid for services in non-capital cases under the CJA, exclusive of expenses, is $800.00. *See* 18 U.S.C. § 3006A (e) (2) (B); Guide Vol. 7 § 310.20.30.
- Be aware that the amounts listed in the above section are subject to change. Consult the latest version of Volume 7 of the Guide or the District Court web site under the CJA tab for the most current amounts.

2.9 Obtaining Documents, Records and Transcripts

Authorization to Release Information

Attorneys commonly use authorization forms to obtain their client's medical information, financial information, employment information, educational information and other confidential records.

Freedom of Information Act (FOIA) Requests

The FOIA provides access to all records of federal agencies in the executive branch. To obtain information under the FOIA, you must make a "FOIA request". There is no specific form that must be used to make a request. The request must be in writing and describe the information. http://www.justice.gov/usao/resources/foiarequests/

Ex Parte Motion for Subpoena *Duces Tecum*

Upon a defendant's *ex parte* application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay witness fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena be issued, the process costs and witness fees will be paid as those paid for the witnesses to government subpoenas. FED. R.CRIM.P. 17(b). A subpoena may order the witness to produce any books, papers, documents, data or other objects the subpoena designates. FED. R.CRIM.P. 17(c) (1). However, after a complaint, indictment or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Unless there are exceptional circumstances, the court must require notice is given to the victim so the victim can move to quash or modify the subpoena or otherwise object. FED. R.CRIM.P. 17(a) (3).

The Housekeeping Statute, 5 U.S.C. § 301

The Housekeeping Statute authorizes the head of each executive department to prescribe regulations for the custody, use and preservation of its records, papers and property. Under that authority, the U.S. Department of Justice has promulgated its own internal regulations (known as the *Touhy* regulations) that set forth the procedures to be followed regarding the production or disclosure of material and information in the files of the Department. 28
C.F.R. §16.21 *et seq*. Other federal departments have enacted regulations governing the procedure by which their records will be provided to the public.

When a party seeking discovery from such department has not strictly complied with the procedure mandated by the Code of Federal Regulations, a subpoena, order or other demand of a court for material or information will not be honored and disclosure will be denied.

Transcripts

Transcripts are considered a service necessary for adequate representation under subsection (e) of the CJA. 18 U.S.C. § 3006A (e). Transcript payments can also be reimbursed as expenses under subsection (d). *See* 18 U.S.C. § 3006(A) (d); Guide Vol. 7A § 230.63.20. Special procedures apply to requests for transcripts. The CJA Form 24 is used to request authorization and payment for transcripts, regardless of whether the court reporter or reporting service is paid directly, or counsel pays for the court reporter and seeks reimbursement.

Compensation limitations for subsection (e) services do not apply to transcripts. *See* Guide Vol. 7, § 320.30.10. The presiding judicial officer has final authority to approve any reasonable and necessary transcript costs. Approval of the presiding judicial officer should be sought before the court reporter begins the transcription service. An estimate of the cost of the transcription is not required to obtain advance approval of the presiding judicial officer.

Publicly Accessible Databases

The following are some public data bases that may be useful to criminal defense attorneys and investigators in gathering information:

Public Access to Court Electronic Records (PACER)

PACER is an electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts.

Zabasearch

Zabasearch.com is a website that searches for and collates disparate information regarding United States residents, including names, current and past addresses, phone numbers and birth years. The website allows free searches, but requests for more information are directed to Intelius.

Spokeo

www.Spokeo.com is a social network aggregator website that aggregates data from many online and offline resources. This aggregated data may include demographic data, social profiles and estimated property and wealth values. Spokeo also offers a paid subscription that bundles extra features in one package.

Court Connect

Found at www.Arcourts.gov, Court Connect is a portal to public case information for courts using the Contexte Case Management System. This website allows you to find public information on cases if you know the name of a person in the case, or if you know the case number.[1]

[1] Other free sites include Facebook, Twitter, Instagram, TikTok, Snapchat, Vinelink, Google, county jail rosters, state prison rosters, and the Federal Bureau of Prisons database.

CHAPTER 3 – PLEA PRACTICE

3.1 Preparing Client for Change of Plea Hearing

The Judge Will Advise, Explain, and Inquire

- Advise the client of the rights being given up by entering a plea.
- The client will need to indicate that she/he understands and still wishes to enter a plea.
- Advise the client that he/she will be placed under oath.
- Explain the purpose of a guilty plea colloquy to your client, i.e. court must be satisfied that your client is giving up their trial rights knowingly, intelligently and voluntarily.
- Inquire whether the client has any medical conditions/takes medications which
- affect the client's ability to understand the proceedings.

Sentencing Guidelines and Plea Agreement

- Go over the sentencing guidelines and make sure that your client understands the probable range.
- Emphasize that you can only provide an estimate of the guideline range. The Judge will ultimately decide the guideline range and final sentence.
- Make sure that your client understands the key elements of the plea agreement and addendum (e.g. any appellate waivers, variance prohibitions, cooperation language).
- Explain that the Judge will question the defendant to determine whether or not the terms of the plea agreement were communicated to the client.
- Make sure that your client understands that the Judge and Probation are not parties to the Plea Agreement.
- If possible, obtain a copy of the statement of facts that the AUSA will put on the record and review it with your client prior to the hearing.
- Advise the client to speak to you if they have a question/disagreement with the fact pattern.
- Make sure that your client knows your name.
- Advise the client that if they become confused at any time during the plea hearing they should stop and ask the Court to allow them to speak with you/or ask the Court to clarify.
- Advise your client of the possibility of a change in their release status as a result of the Plea Hearing.

3.2 United States Probation Interview

- Advise your client that he/she will be interviewed by the Probation Officer preparing the Pre-Sentence Report soon after the plea hearing. Your client should understand that he/she will need to provide:
- The names, ages, current occupations, addresses of his/her parents, siblings, spouse and children.
- Name and phone number of an individual (family member or close friend) that the Probation Officer can contact to verify the information your client provides.
- Education background (high school, GED, College etc.).
- Military service information.
- Addresses for last several years.
- Information on any childhood physical, emotional, or sexual abuse.
- Past work history.
- Past/current use of drugs and alcohol.
- Names and locations of any treatment facilities for mental health problems, drug and/or alcohol abuse.
- Advise your client that they will have to sign releases for school, medical, military (if applicable), treatment and tax records.
- Clients who are not incarcerated will need to complete a statement detailing their monthly income and expenses.

Acceptance of Responsibility (various options)

- Adopt the fact statement provided by the AUSA at the plea hearing.
- Prepare a statement in writing and have client sign.
- Client may make a statement at the PSR Interview

3.3 Plea Negotiations

Proffer Agreement

What is a proffer?

A proffer means a formal interview of the defendant under a written agreement. Usually, it is held at the offices of the investigating agents or prosecutor and attended by the case agents, defendant and the defense attorney, and sometimes by the prosecutor. At the proffer session, the defendant provides information to the government to convince the U.S. Attorney to consider a cooperation agreement, plea agreement or a non-prosecution agreement.

What is a proffer agreement?

The proffer letter or proffer agreement, sometimes called a "Queen for a Day" agreement, is a writing signed by the parties that sets forth the ground rules and governs the conditions under which the parties meet for an interview. The terms of a proffer agreement are enforced according to contract principles. The proffer agreement will not technically bind agents or officers from state and local law enforcement agencies who attend the proffer session unless they counter sign the document or enter into a separate proffer agreement with the defendant.

What does a proffer agreement do?

Under Federal Rule of Evidence 410 and Federal Rule of Criminal Practice 11(f), statements made in plea discussions are not admissible in evidence. However, a proffer agreement requires a defendant to waive the protections afforded by these rules. *See United States v. Mezzanatto*, 513 9S. 196 (1995).

Can the government use defendant's statements?

Initially, proffer agreements forbade use of proffer statements as substantive evidence against the defendant. Proffer statements could only be used for leads to other evidence and for impeachment, *i.e.* if defendant "testifies… and offers testimony materially different from the proffer". Proffer agreements provided limited use immunity. Today, proffer agreements allow use of proffer statements not only to pursue investigative leads - limited use immunity - but also to cross-examine the defendant should he testify, for rebuttal, even if the defendant does not testify, and in the government's case-in-chief.

The U.S. Attorney's Office for the Eastern District of Arkansas has inserted a provision in its standard proffer letter that allows use of proffer statements at any stage of the criminal prosecution. The current text reads:

If the defendant is prosecuted or testifies in a trial involving the United States, the government may use the substance of the proffer or the defendant's statements in cross-examining the defendant, and to rebut any evidence offered or testimony elicited or factual assertion made by or on behalf of the defendant that is contrary to the substance of the proffer or inconsistent with the statements made during this proffer. This exception applies to every stage of a proceeding involving the defendant. This is to ensure that the defendant does not abuse the opportunity for this proffer discussion by making false or misleading statements, either at the proffer discussion, at trial, or sentencing.

This language does not appear to have been challenged in the 8th Circuit.

A proffer that does not result in a plea agreement greatly increases the risks of trial. The expanded language undermines the defendant's ability to contest the government's accusations and forecloses a full range of defense theories. Criminal defense lawyers can no longer prevent the introduction of proffer statements by keeping their clients off the witness stand.

If the defendant offers testimony or evidence contrary to the proffer or through counsel presents a position inconsistent with the proffer, the government may use the proffer statements. Defense attorneys must be careful not to contradict any statements made during the proffer. Otherwise, the prosecution may introduce the entire proffer statement in response to the slightest contradiction.

Why agree to a proffer?

Despite the expanded language, sometimes, it may be in the defendant's interest to proffer in the hope of obtaining a cooperation plea agreement. The enactment of the United States Sentencing Guidelines increased the incentive for defendants to cooperate in federal criminal prosecutions. Under Section 5K1.1 of the Sentencing Guidelines, the federal prosecutor still controls whether there is a reward for cooperation. The United

States Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), has not eliminated the need for the government to move for a downward departure under Section 5K1.1 since judges are unlikely to grant a variance for cooperation when the government has declined to file a 5K motion.

- Are there any alternatives to proffer agreements? Defense counsel might consider: (1) requesting strict use of immunity under 18 U.S.C. §6002; (2) insisting the prosecutor change the standard language and redact and edit the proffer agreement to suit your client; or (3) advise the prosecutor your client will speak to the investigating agents under Federal Rule of Civil Procedure 11(f) and Federal Rule of Evidence 410(4).

3.4 Plea Agreements

Rule 11 - Federal Rule of Criminal Procedure

Outlines the Rules for all Plea Bargaining in Federal Criminal Cases

There are three types of pleas:

- Not guilty;
- Guilty; or
- *Nolo contendere*. (Fed. R. Crim. P. 11(a)(1)-(3)). When entering a guilty or *nolo contendere* plea, a defendant may enter a conditional plea with the agreement of the government and the court (*e.g.* permitting a defendant to withdraw the plea if an adverse pretrial determination is reversed on appeal). Fed. R. Crim. P. 11(a)(2).
- *Nolo contendere* (or "no contest") pleas are rare in federal court, and are expressly disfavored by the government. However, it is not necessary to secure the government's agreement to a *nolo* plea. The court must accept a *nolo* plea, and will

need to be satisfied that there is a strong factual basis for the plea and that the plea is knowing, voluntary, and intelligent. Defense counsel will need to be prepared to make that case at the change of plea hearing. Be sure to advise your client that entering a *nolo* plea is very likely to jeopardize the acceptance of responsibility reduction to the advisory sentencing guideline range.

There are three types of plea bargains:

- charge bargain (agreement by the government to dismiss charges in return for a defendant's plea or not to pursue potential charges), referred to as 11(c)(1)(A) plea;
- Recommendation bargain (entering into a plea in return for a non-binding sentencing recommendation from the prosecutor), referred to as 11(c)(1)(B) plea; and
- Stipulation bargain (the parties agree to a binding sentencing recommendation), referred to as 11(c)(1)(C) plea.

Key Aspects of Plea Agreements

DO NOT ENTER INTO A PLEA AGREEMENT UNLESS THE CLIENT RECEIVES A REAL BENEFIT. SIMPLE DISMISSAL OF A COUNT MAY NOT BE OF ANY REAL BENEFIT.

The Assistant United States Attorney handling your case will prepare a proposed written plea agreement and send it to you to review with your client.

- In some cases, the Assistant United States Attorney will send you a plea agreement very early in a case – possibly with the discovery material. In other cases, you will not receive a plea agreement until you extensively negotiate with the Assistant United States Attorney handling the case.
- In all cases, you will need to carefully review all aspects of the plea agreement with your client. The United States Supreme Court has clarified that defense counsel must advise the client about every plea offer made and advise the client carefully when evaluating the plea offers. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).
- When your client is a non-citizen, you must be particularly careful to advise the client about the potential deportation consequences of the plea agreement. *See Padilla v. Kentucky*, 130 S. Ct. 1473 **(2010).**
- Plea agreements in federal criminal cases are lengthy.
- Best practice is to review all sections of the plea agreement with your client to ensure that they understand each and every aspect of the agreement.
- If your client is non-English speaking, you need to request a translated plea agreement from the government, and make sure to use an interpreter when meeting with the client to review the plea agreement.
- If you cannot receive a translated plea agreement from the government, you should ask an interpreter to read the entire agreement to the client when reviewing the English version.
- Normal contract principles apply to a plea agreement. If your client wishes to modify the plea offer before accepting, then you have the option of going back to the prosecutor to request changes, or simply striking out, adding, or revising language in the agreement. (Make sure that you, the prosecutor, the client, and the interpreter (if present) initial each change.)

3.5 Key Aspects of Plea Agreements

Key portions of the plea agreement will include the count(s) of the Indictment (or Information) to which your client will plead guilty and the statutory maximum penalties, any mandatory minimum sentence, and the government's commitment to move to dismiss any remaining counts (if any).

- You should carefully review with your client the elements of the count(s) to which

he or she is going to plead, and also the facts relevant to each element.

- This is a good opportunity to prepare the client for the factual colloquy regarding his or her guilt that will occur at the plea hearing. Remember to prepare the client for the question that he or she will have to answer at the change of plea hearing:

"Are you guilty of the crime charged?"

- In some courts, the Judge will require the client to explain what he did that makes him guilty, so remember to prepare your client for this.
- This is also a key point to discuss with the client the distinction between the facts supporting his/her guilty plea versus the facts that will be considered for sentencing purposes. (*e.g.* Facts demonstrating a defendant's involvement in a drug trafficking conspiracy vs. facts demonstrating the quantity of drugs attributable to the defendant for sentencing purposes).
- Be sure to **explain the statutory maximum penalties** to the client and the **potential mandatory minimums**, and distinguish these from the estimated sentencing guideline range. You may or may not have already reviewed the guideline range with the client, but it is crucial to explain the distinction between the maximum penalty and the estimated guideline range. Be aware that the plea agreement specifies the maximums, and your client may be confused between your estimate of the guideline range and the (usually much higher) penalties stated in the plea agreement. Be sure to double check the stated mandatory minimums and maximums in the plea agreement to ensure that they are correct.
- Although it seems obvious, you should emphasize to your client that the remaining counts (if any) will not be dismissed until sentencing. You want to make sure that your client understands that no counts are dismissed simply by virtue of entering into the plea agreement, and the Government's commitment to move to dismiss is conditional.

Acceptance of Responsibility - This section provides a conditional promise by the Government to move for a reduction in the offense level at sentencing. It is important to emphasize to the client that the plea agreement is only a conditional promise, and the client must first "adequately demonstrate this acceptance of responsibility to the government."

It is not always sufficient for a client to enter a guilty plea in order to get this reduction at sentencing. This is a good opportunity to discuss the importance of making a statement regarding acceptance of responsibility, and also the various ways in which a client's conduct can result in the loss of this reduction.

Sentencing Recommendation - Some, but not all, plea agreements will include a commitment by the Government to make a specific sentencing recommendation (*e.g.* minimum advisory range sentence; probationary sentence). Be sure to caution your client that this is nothing more than a recommendation by the Government at sentencing, and is not binding on the court.

Specific Guideline Stipulation - Some, but not all, plea agreements will include a commitment by the parties to a specific finding under the Sentencing Guidelines (*e.g.* a quantity of drugs attributable to a defendant; applicability or non-applicability of sentencing enhancements). Once again, be sure to caution your client that the court can reject this stipulation, but the parties cannot argue for a different finding at sentencing.

Fines/Conditions/Special Assessment/Supervised Release/Restitution – There are several sections spread throughout the plea agreement that address the potential penalties flowing from the guilty plea in addition to the period of incarceration or probation. In most cases, you will spend the most time discussing the potential prison sentence, but it is important that you discuss all of the additional potential penalties. Be sure to double check the stated penalties in the plea agreement to ensure that they are correct. The court will review these at the change of plea hearing, and you want to be sure that your client understands the full extent of the potential penalties.

Collateral Consequences - The plea agreement may or may not list certain collateral consequences of the plea, including the loss of the right to possess and/or carry firearms, loss of the right to vote, loss of access to government benefits (including housing and student loans), immigration consequences, loss of professional licenses, loss of pensions, forfeiture of property, sex offender consequences, and increase of prior record score. There may also be state-based consequences of the federal conviction. **Importantly, most plea agreements in this district require a defendant to waive his right to appeal, except in limited circumstances.**

Withdrawal of Plea - The plea agreement will state that a defendant may not withdraw their plea if they are dissatisfied with the sentence imposed or if the court declines to follow any recommendation made by the parties. It is important to discuss with your client the limited circumstances that permit withdrawal of a guilty plea in federal criminal cases. This is addressed in Federal Rule of Criminal Procedure 11(d).

Waivers - There are certain waivers that your client must confirm in order to enter a plea (*e.g.* waiver of the right to trial). In the Eastern District of Arkansas, most plea agreements require that client waive his right to appeal most rights. The client still retains the right to appeal prosecutorial misconduct, and a scattering of other relevant issues. Importantly, the client also retains the right to collaterally attack his or her attorney's performance. You must review these plea agreement limitations very carefully with your client. Appellate courts will hold an appellate waiver valid so long as it was knowing and voluntary; thus, another reason not to enter into a plea agreement unless it is of benefit to your client.

Cooperation - In this district, an under-seal addendum is filed in every case where a client pleads. That addendum either sets out the terms of a cooperation agreement or simply states that there was no cooperation agreement. It is done in this manner so that the public cannot tell whether a person cooperated or not. If your client has agreed to cooperate, the addendum will include terms specifying the requirements of your client in the future including, but not limited to, providing truthful information, undercover work, waiver of Fifth Amendment rights if called to testify, and use (or not) of information against the defendant at sentencing. You should review your client's obligations carefully to ensure their willingness to fulfill their obligations. The Government may also commit to make a motion for a downward departure for substantial assistance. Be sure to advise your client that the Government's promise is always conditioned on the defendant completing his or her obligations.

4.1 Discovery in Federal Criminal Cases

PLEASE BE AWARE - **RULE 16.1 Pretrial Discovery Conference; Request for Court Action**

(a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

Rule 16 - Federal Rule of Criminal Procedure

- Rule 16 is defense counsel's main discovery tool.
- To trigger the government's disclosure obligations, defense counsel must request all information enumerated in Rule 16. Discovery requests should be made in writing and be specific.
- Absent a written request for specific items of information, defense counsel's argument that a discovery violation has occurred will be rejected by the courts. *See* *United States v. De La Rosa*, 196 F.3d 712, 716 (7th Cir. 1999) (finding no discovery violation when defendant failed to file a proper discovery request).
- Do not be lulled into inaction by a prosecutor's assurances of open file discovery. At the earliest stage of every case, an artfully drafted discovery request should be served on the prosecution and supplemented later.

Scope of Discovery Under Rule 16(a)(1)

16(a) (1) provides that, upon request, the government must disclose to the defendant:

- Defendant's Oral Statements, FED. R.CRIM.P. 16(a)(1)(A);
- Defendant's Written and Recorded Statements, FED. R.CRIM.P. 16(a)(1)(B);
- Defendant's Grand Jury Statements, FED. R.CRIM.P. 16(a)(1)(B)(iii);
- Statements of Organizational Defendants, FED. R.CRIM.P. 16(a)(1)(c)(i)-(ii);
- Defendant's Prior Criminal Record, FED. R.CRIM.P. 16(a) (1) (D);
- Documents and Tangible Objects, FED. R.CRIM.P. 16(a) (1) (E);
- Reports of Examinations and Tests, FED. R.CRIM.P. 16(a) (1) (F); and
- Expert Witnesses, FED. R.CRIM.P. 16(a) (1) (G).

Rule 16(a) (2) – Exceptions to Government Disclosure

Rule 16(a) (2) creates two express limitations to discovery under Rule 16(a)(1):

- Attorney Work product; and
- *Jencks Act* Materials (i.e. statements made by prospective government witnesses).

The *Jencks Act*

The *Jenck's Act* defines a statement as:

- A written statement made by a government witness and signed or otherwise adopted or approved by him;
- A recording or transcription or a substantially verbatim recital of an oral statement made by a government witness and recorded contemporaneously with making the statement; and
- A statement made by a government witness to a grand jury, however taken or recorded, or a transcription. 18 U.S.C. §3500(e) (1)-(3).

Under the *Jencks Act*, any recorded statement or report of a government witness must be provided to a defendant, but only after the witness has testified on direct examination. 18 U.S.C. §3500(a). The Court cannot force the government to produce *Jencks Act* statements before the witness testifies. *United States v. Bruton,* 647 F.2d 818 (8th Cir. 1981), *United States*
v. Sanders, 2020 U.S. Dist. LEXIS 127862 (E.D. Mo. Mar. 4, 2020). However, under the *Jencks Act*, "the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use at trial". 18
U.S.C. §3500(c). To alleviate delays and promote judicial efficiency, the courts encourage, and the government usually agrees to disclosure of *Jencks Act* materials three days prior to the commencement of trial. *See United States v. Miles*, 2021 U.S. Dist. LEXIS 53375 (D. Minn. Mar. 22, 2021). (While the Court is not ordering the Government to disclose Jencks Act materials early, the Court encourages the parties to disclose such materials no less than three business days before trial as proposed by the Government.)

Reciprocal Discovery under Rule 16(b)

Rule 16(b) sets forth the defendant's reciprocal discovery obligations. Under Rule 16(b), the defendant's reciprocal obligation is triggered only after the defense first requests government disclosure and the government complies. *See* FED. R.CRIM.P. 16(b) (1) (A).

Rule 16(b) only requires disclosure of information recorded in some tangible form, *i.e.,* documents and objects, reports of examinations and tests and written summaries of expert reports.

Rule 16(b)(2) – Exceptions to Reciprocal Discovery by Defendant

Rule 16(b) (2) provides that, except for scientific or medical reports, Rule 16(b) (1) does not authorize discovery or inspection of:

- Reports, memoranda or other documents made by the defendant or his attorney during the case's investigation or defense; or
- A statement made to the defendant, or defendant's attorney by either the defendant, a witness for either party, or a prospective witness for either party.

Rule 16(c) – Continuing Duty to Disclose

Rule 16(c) provides that a party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

- The evidence or material is subject to discovery or inspection under Rule 16; and
- The other party previously requested, or the court ordered, its production.

Defense counsel's failure to make a discovery request may have lasting consequences. See United States v. Jordan, 316 F.3d 1215, 1249 (11th Cir. 2003) (stating the government has no obligation under Rule 16(c) to produce materials unless there is a defense request.)

Rule 16(d) (2) – Sanctions

Rule 16(d) (2) gives the trial court substantial discretion to impose sanctions for failure to comply with a discovery rule. If a party fails to comply with Rule 16, the court may:

- Order the violating party to permit the discovery or inspections; specify its time, place and manner; and prescribe other just terms and conditions;
- Grant a continuance;
- Prohibit the violating party from introducing the undisclosed evidence; or

- Enter any order that is just under the circumstances.

A continuance is the least intrusive remedy to a discovery violation, especially when the violation was not deliberate. Preclusion of evidence is an appropriate sanction for the willful failure to comply with discovery rules. The most drastic remedy for the prosecution's failure to comply with discovery is dismissal of the indictment.

Discovery Under Other Federal Rules of Criminal Procedure

Rule 6(e) – Grand Jury Transcripts

Identify a Title

Rule 6(e)(2) precludes disclosure of grand jury transcripts; however, Rule 6(e)(3)(E)(ii) provides the court may authorize disclosure of a grand jury matter at the request of a defendant who demonstrates that a ground may exist to dismiss the indictment due to misconduct before the grand jury.

Rule 7 – Bill of Particulars

Under Rule 7(f), the court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within **14 days** after arraignment or at a later time, if the court permits.

A bill of particulars can be useful, and a motion is more likely to succeed in factually complex or multi-defendant cases, such as a narcotics conspiracy case or complex tax and fraud cases.

Rule 15 – Depositions

Rule 15(a) provides that a party may move a prospective witness be deposed to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.

Rule 17 – Subpoenas

Some have said that subpoenas under Rule 17 are not pre-trial discovery devices. Rather, subpoenas under Rule 17 compel witnesses to appear and provide a time and place before trial for the inspection of subpoenaed materials. Rule 17 serves as an aid for obtaining relevant evidentiary material that may be used at trial.

Rule 26.2 – Producing a Witness' Statement

Rule 26.2(a) provides that after a witness, other than the defendant, has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness in their possession and that relates to the matter of the witness' testimony.

The *Jencks Act* has been substantially incorporated into Rule 26.2 of the Federal Rules of Criminal Procedure. Rule 26.2 extends the *Jencks Act* which requires the production of witness statements. The Rule does not alter the Act's schedule for disclosure of statements, nor does it relieve a defendant seeking the production of *Jencks* material of the requirement to make a request for production. However, Rule
26.2 is reciprocal and requires the defendant and defendant's attorney to produce any statements that relate to the subject matter of a defense witness' testimony.

Disclosure by the Defendant

Rule 12.1 – Notice of an Alibi Defense

Rule 12.1 provides that an attorney for the government may request in writing that the defendant notify an attorney for the government of intended alibi defense. If the government fails to comply with the demand requirement, the defendant need not provide notice.

Rule 12.2 – Notice of an Insanity Defense

Rule 12.2(b) requires the defense to give notice of its intent to use an insanity defense or of a defendant's intent to introduce expert testimony relating to a defendant's mental state, regardless of whether the government so requests.

Rule 12.3 – Notice of Public Authority Defense

Rule 12.3 requires a defendant to give notice of intent to rely on a defense of actual or believed exercise of public authority for a law enforcement agency or federal intelligence agency at the time of the alleged offense.

Rule 26.1 – Notice of a Foreign Law Defense

Rule 26.1 provides that a party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice.

4.2 Discovery of Exculpatory Evidence

In several landmark decisions, the Supreme Court clarified that a prosecutor's failure to provide the defense with any information that would exculpate criminal defendants, or that would impeach the character or testimony of a government witness, violates the due process clause of the federal constitution.

Brady v. Maryland, 373 U.S. 83, 87 (1963)

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), after the petitioner was convicted of murder and sentenced to death, he learned the state had withheld a statement in which his accomplice admitted to the actual homicide. The Supreme Court pointed out that the prosecutor has an obligation to pursue the truth and further the interests of justice. The Supreme Court held that a prosecutor's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Giglio v. United States, 405 U.S. 150 (1972)

In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that a prosecutor's failure to disclose a promise of leniency to a key witness for his testimony violated the federal due process clause. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general rule [requiring a new trial]." *Id.* at 153-155.

United States v. Bagley, 473 U.S. 667 (1985)

In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court held that for *Brady*, there is no difference between exculpatory evidence and impeachment evidence.

Notwithstanding *Bagley*, the Department of Justice continues to maintain a distinction between exculpatory information, which should be turned over reasonably promptly, and impeachment information which should be disclosed at a reasonable time before trial.

Disclosure of *Brady* Material

- Courts hold that a prosecutor's duty to disclose *Brady* evidence exists even absent a defense request for exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995).
- Courts have held the prosecutor has no duty to disclose information that is a matter of public record or evidence that defense counsel could have discovered though exercising reasonable diligence.
- A discovery request should always include a request for exculpatory evidence, including without limitation, all documents, statements, reports and tangible evidence, favorable to the defendant on the issues of guilt or punishment or which affects the credibility of the government's case.

Materiality

- "Evidence is material if there is strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal." *United States v. Reddest, 2006 U.S. Dist. LEXIS 108372 (*Dist. S.D. 2006).
- If there is a question regarding whether evidence in the government's possession is exculpatory, the defendant can request that the prosecutor turn over the file to the court for an *in camera Brady* inspection.

Prosecution's Possession

A prosecutor's duty to disclose *Brady* material extends to material that can be found in the prosecution files, and in the files of government agencies, if the agency is considered an "arm of the prosecution" or part of the prosecution team.

General Categories of Brady Material

The following is a non-exhaustive list of items that may be discoverable as *Brady* material:

- Witness statements favorable to the defendant;

- The existence of witnesses favorable to the defendant;

- Psychiatric reports showing the defendant's legal insanity or diminished capacity;
- Negative exculpatory statements, such as statements by informed witnesses that fail to

  mention the defendant, or any eye witnesses inability to identify the defendant;

- Test results that do not implicate the defendant; and
- Any information which would affect the credibility of a government witness, including without limitation:

  - Material lies;
  - Prior inconsistent statements;
  - Witness hostility or bias;
  - Evidence that calls into question the witness' capacity to observe or recall (logistics or use of drugs and alcohol);
  - Evidence inconsistent with a witnesses testimony;
  - Money, rewards, promises, or other consideration, benefits or assistance, provided to the witness for testimony;
  - Prior bad acts of witness bearing upon credibility;
  - Prior criminal history (including adult convictions and juvenile adjudications) of witness;
  - Presentence reports of witnesses or co-defendants;
  - Reports of polygraph examinations of a government witness;
  - Records of psychiatric treatment by witness;
  - The witnesses parole or probation status;
  - Participation in any witness protection or relocation program;
  - Any type of informant status;
  - The fact that witness was target of investigation, threatened with prosecution,

or otherwise threatened about failing to testify;

- The personnel files of government informants, or a summary of any FBI informant file.

4.3 Other Discovery Motions

Motion to Compel Disclosure of Confidential Informant

In *Rosario v. United States*, 353 U.S. 53, 77 S. Ct. 623 (1957), the Supreme Court recognized "the public interest in protecting the identity of a confidential informant, but held that the interest in the anonymity of informants must yield when disclosure is essential to a fair determination of a cause". The *Rosario* court stated "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id*. at 61-62, 77 S. Ct. at 628.

Motion for Order Directing Government to Provide Notice of Intent to Use Evidence of Prior Arrests, Convictions or Bad Acts

The legal basis for such motion include FED. R. EVID. 104 (preliminary questions on admissibility of evidence); FED. R. CRIM. P. 12(b) (a party may raise by pretrial motion any defense, objection or request) and FED. R. EVID. 404(b)(2) (on request by defendant, the prosecutor must provide notice of the general nature of any such evidence that prosecutor intends to offer).

Motion for Order Directing the Government to Provide Notice of Intent to Use Co-Conspirator Statements

Some circuits require that the government give notice of its intent to use coconspirator statements and disclose the substance of such statements so a *James* hearing can be held to determine their admissibility under the coconspirator exception to the hearsay rule. *See* FED. R.EVID. 801(d) (2)(E); *United States v. James*, 590 F.2d 575 (5th Cir. 1979); however, the 8th Circuit does not follow *James. See United States v. Bell,* 573 F.2d 1040 (8th Cir. 1978) and *Llach v. United States,* 739 F.2d 1322 (8th Cir. 1984).

Discovery Obligation of Federal Prosecutors

A prosecutor's discovery obligations are firmly established in law and are derived from several sources, including without limitation:

- The U.S. Constitution and the constitutional principles enunciated in *Brady v. Maryland* and *United States v. Giglio*;
- Statutory mandates from Congress, including 18 U.S.C. §3500 (the *Jencks Act*);
- Federal Rules of Criminal Procedure 16 and 26.2;
- The U.S. Department of Justice's policies, including the United States Attorney Manual ("USAM") and three memoranda released in January 2010 regarding criminal discovery practices, to wit: (i) Issuance of Guidance and Summary of Actions Taken in Response to the Report of the DOJ Criminal Discovery and Case Management Working Group; (ii) Requirement for Office Discovery Policies in Criminal Matters, and (iii) Guidance for Prosecutors Regarding Criminal Discovery (the "DOJ Discovery Guidance" or "Guidance"); and
- The Arkansas Rules of Professional Conduct applicable to federal prosecutors under 18 U.S.C. §530B (the McDade Act), "Ethical standards for attorneys for the government" and its implementation regulations, 28 C.F.R. §77, et seq.

4.4 Best Practices for Obtaining Discovery

Below are some steps to follow when requesting pre-trial discovery:

- At the pre-trial phase of every case, draft and serve a written request for discovery upon the prosecutor, which describes the items of information sought;
- Support your request for discovery with citations to legal authorities, including without limitation, Federal Rule of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the *Jencks Act*), Federal Rule of Evidence 404(b), *Brady v. Maryland*, *United States v. Giglio*, USAM §9-5.001, DOJ Discovery Guidance, 28 U.S.C. §530B (the *McDade Act*) and ABA Standards and Model Rules;
- Make a record describing each item of information disclosed by the prosecution and the date of its disclosure;
- If the prosecution declines the discovery request, move to compel production;

- If the prosecution complies with the discovery request, comply with any requests for reciprocal discovery and make a record of the information disclosed to the prosecution;
- Prepare and serve any supplemental requests for discovery upon the prosecutor.

5.1 Motions Practice

Rule 12 - Federal Rule of Criminal Procedure

This section discusses pretrial motions. Rule 12 defines the parameters of pre-trial motion practice and states in part: "A party may raise by pretrial motion **any defense, objection, or request** that the court can determine without a trial of the general issue." (Emphasis added). Given this broad language, an enormous variety of pre-trial motions can be filed in a federal criminal case. FED. R.CRIM.P. 12(b)(3). The following motions must be raised before trial or are deemed waived:

- A motion alleging a defect in instituting the prosecution;
- A motion alleging a defect in the indictment or information-- but… while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;
- A motion to suppress evidence;
- A Rule 14 motion to sever charges or defendants; and
- A Rule 16 motion for discovery.

FED. R.CRIM.P. 12(b)(3) & (e).

- Other motions may be brought before trial, but can also be raised while the case is pending, e.g. a motion *in limine*, or a motion to dismiss for failure to state an offense or establish jurisdiction.
- The court may, at the arraignment or as soon afterward as practicable, enter a scheduling order to be followed by the parties.

Motions to Suppress Evidence

The most typical pretrial motion is a suppression motion. In these types of motions, the defense moves to suppress evidence, or to prevent the government from using it. These motions can include suppression of evidence, like a gun or drugs seized in a search, or statements, like a defendant's confession.

As to suppression motions, the burdens of proof are allocated between the defendant and the government:

- If the defendant is challenging a search or seizure based on a warrant, the burden of proof is on the defendant.
- If the defendant is challenging a warrantless search or seizure, the burden of proof is on the government.
- The defendant has the burden of production, i.e., showing there was a search or seizure implicated by the Fourth Amendment.
- The defendant must show a factual nexus regarding the fruits of an unlawful search and seizure.
- The defendant must establish standing.
- Regarding suppression of statements, the government must show a knowing, intelligent, voluntary waiver of *Miranda* rights and the voluntariness of the statement.

- The defendant must show he was in custody and subject to interrogation.
- The court must hold an evidentiary hearing on a motion to suppress evidence if the defendant makes an offer of proof sufficiently specific to enable the court to conclude that contested issues of fact pertaining to the validity of the search are in question.

A defendant objecting to the admission of a confession is entitled to a hearing in which both the underlying factual issues and the voluntariness of his confession are determined.

CHAPTER 5 – MOTIONS PRACTICE

Pretrial Motions Checklist

1. **Motion for Bill of Particulars**
   - Rule 7(f) of Federal Rules of Criminal Procedure
   - Intended to Supplement the Indictment by providing more detail of the facts upon which the charges are based.
   - Aids defendant in preparing for Trial.
   - Eliminates surprise at Trial.
   - Protects against Double Jeopardy.
2. **Motion for Competency Evaluation**
   - Due process prohibits subjecting a defendant who is mentally incompetent to a trial.
   - Defense/prosecution/court obligated to inquire into a defendant's mental competence if a good faith basis to question competency exists at any point during the case.
   - Mental Incompetency can result from a traditional mental disease or defect or as a result of a medical condition affecting mental state.
3. **Motion for Continuance**
   - Trial
   - Pre-Trial Motions
   - Motions Hearing
   - Presentence Report Objections
   - Sentencing
4. **Discovery Motions--FED. R. CRIM. P. 16**
   - Motion to Compel Discovery-file when government does not comply with discovery obligations
5. **Disclosure Motions:**
   - *Brady* Motions
   - Motion for early release of *Jenck's* Material

6. **Dismissal Motions:**
   - Speedy Trial Violations
   - Dismissal for Double Jeopardy
   - Duplicity of Counts
   - Failure to State a Claim
   - Motion to Dismiss on Selective Prosecution
   - Motion to Dismiss on Vindictive Prosecution

7. ***Ex Parte* Motions:**
   - Motion for Travel and to Approve Travel Expenses
   - Motion for Funds to Retain Experts
   - Motion for Issuance of Subpoena

8. **Extension of Time to File:**
   - Pretrial Motions
   - Briefs in Support and Opposition

9. **Suppression Motions:**
   - Suppress Evidence
   - Prevent Government from Using Evidence
     - 4th Amendment: Illegal Search and Arrest
     - 5th Amendment: Statements
     - Identification Evidence

10. **Severance Motions:**
    - Fed R. Crim. P. Rule 14
    - Severance of Defendants and/or Counts

11. **Other/Miscellaneous Motions**
    - Motion to Disclose Sentencing Guidelines Information
    - Motion for Recusal of Judge
    - Motion for Change of Venue

CHAPTER 5 – MOTIONS PRACTICE

Notices

- **Notice pursuant to FED. R. CRIM. P. 12(b) (4) (B)**
- **Notice for Disclosure of Hearsay Statements**
- **Notice for Disclosure of Expert Testimony**
- **Notice pursuant to FED. R. EVID. 609(b)**
- **Notice pursuant to FED. R. EVID. 404(b)**

Practical Consideration

- Be resourceful/creative
- Know time periods; file extension requests for pre-trial motions/notices at all times, to

  avoid waiver issues, even if you know your case is likely to end with a plea.
- Pretrial Motions toll speedy trial rights.
- Always check local rules for any special requirements.

Additional Resources on Pretrial Motions:

- *Defending a Federal Criminal Case, (Federal Defenders of San Diego)*
- LaFave-3 Volume Set on Search and Seizure
- *www.fd.org*

CHAPTER 6 – NON-ENGLISH SPEAKING AND NON-CITIZEN CLIENTS

6.1 Representing Non-English Speaking Defendants

When using an interpreter:

- Allow time for interpretation. Typically only **one person** should speak at one time, let the interpreter finish interpreting.
- The interpreter must be able to hear to interpret. Speak loudly; do not turn your back to the interpreter. Do not rustle papers loudly.
- Check the qualifications of an interpreter provided by the Court.
- Make an objection to the use of an unqualified interpreter or whenever you perceive that the interpreter (certified or not) is not performing adequately.

Court Interpreters:

- Should interpret everything and conserve all elements of the communication including: meaning, level of speech (formal, technical, slang, jargon), and tone.
- Should not add to, explain or elaborate on what is being said. Technical or legal terms should be translated but not explained by the interpreter.
- Should not omit any information or change the level of speech.
- Are not advocates and are required to remain impartial.
- Should disclose any conflict of interest they may have in a case.

When an Attorney Speaks the Client's Language and Communicates with him/her Outside of Court or Can "Get by" in English Outside of Court, Make Sure to:

- Use the interpreter to communicate an offer, prepare for a plea, or to prepare for testimony so that your client becomes familiar with the process of interpretation and the terms used in court by the interpreter.
- Ask the client if he/she prefers to use an interpreter. Attorneys often overestimate their bilingual skills or their client's comprehension of English.

CHAPTER 6 – NON-ENGLISH SPEAKING AND NON-CITIZEN CLIENTS

Guidelines to Keep in Mind When Representing a Non-English Speaking Defendant:

- Formality is important in many cultures. Being casual in the U.S. may make you come across as friendly and accessible but this style may not be effective with people from other cultures.
- Make sure to introduce yourself to your client and also introduce the interpreter. Take time to explain the rules of confidentiality. Let your client know that the interpreter is bound by attorney-client privilege.
- Inquire into your client's level of education and factor this into your expectation of a client's ability to deal with sophisticated vocabulary, numbers, measures and other unfamiliar concepts.
- Tell your client that you want to know if they do not understand what is being said.

Translation of Documents:

- Preapproval from the CJA coordinator in the Clerk of Court's Office is required before a document may be translated.

Resources: Representing Non-English Speakers: 10 Points Attorneys Should Know by Mary Lou Aranguren/April 1998

6.2 Representing Non-Citizen Defendants

Duties of Defense Counsel:

- *Padilla v. Kentucky*, 559 U.S. 356 (2010):
- March 31, 2010: Drug trafficking case.
- Defense counsel: Duty under Sixth Amendment to advise non-citizen clients of the immigration consequences of their pleas
- Not limited to affirmative misadvise
- Not the constitutional duty of the court
- types of advice:
- Where deportation consequences are clear: Correct affirmative advice
- Where deportation consequences are unclear: Must advise on risk of deportation

- In both "types" of cases, the duty to analyze immigration consequences of a plea remains the same.

Key Factors to Consider in Non-Citizen Cases

- Current immigration status
  - **Lawful permanent residents (LPRs):** individuals who have indefinite legal status in the United States ("green card holders")
  - **Persons lawfully present who are not LPRs:** asylees, refugees, visitors, foreign students, work visas, temporary protected status
  - **Undocumented individuals:** people who entered with a valid temporary status and overstayed or people who entered without inspection.
  - **Immigration history (date of entry, lawful or unlawful entry, prior deportation) (Questions to ask):**
    - Arrival in the United States?
    - Status when arrived (e.g. tourist visa)?
    - Basis for obtaining immigration status (via relatives, work, refugee status)?
    - Immigration status of relatives, especially spouse or parents?
    - Any travel outside of United States for more than 6 months after obtaining status?
    - Any prior deportations or encounters with immigration or an immigration judge
  - **Criminal history, including arrests**
    - Some non-citizens may face removal based on prior criminal convictions, even convictions that are decades old
    - Multiple convictions may trigger certain negative immigration consequences
    - All criminal history is relevant (arrests, convictions, sentencing, juvenile).

- **Immigration Definition of Conviction**
  - Immigration law defines "conviction" at 8 U.S.C. § 1101(a)(48) as a formal judgment of guilt entered by the court, or if adjudication is withheld, where: A judge/jury finds the non-citizen guilty; or
  - Non-citizen enters a guilty plea; or
  - Non-citizen enters a plea of "nolo contendere"; or
  - Non-citizen admits sufficient facts to warrant finding of guilt

    AND
  - A judge orders some form of punishment, penalty, or restraint on liberty.
- **Major Consequences of Criminal Convictions**
  - Removal (deportation) from the United States
  - Ineligible for an immigration bond, resulting in "mandatory custody" during removal proceedings
  - Ineligible for immigration waivers or relief.
- **Removal from the United States**
  - A non-citizen may be removed from the United States when charged with **inadmissibility** pursuant to 8 U.S.C. § 1182 or **removability** pursuant to 8 U.S.C. § 1227
- **Criminal Grounds of Inadmissibility**
  - Crimes Involving Moral Turpitude (CIMTs)
  - Controlled Substance Offenses
  - Multiple crimes
  - Prostitution
- **Criminal Grounds of Removal**
  - Crimes Involving Moral Turpitude (CIMTs)
  - Aggravated Felonies
  - Controlled Substance Offenses
  - Firearms Offenses
  - Domestic Violence Offenses

- **8 U.S.C. § 1227(a) (2) Criminal Grounds of Removal:**
  - Single Crime Involving Moral Turpitude (CIMT), 8 U.S.C. §1227(a)(2)(A)(i): Conviction for a crime of moral turpitude;
  - Committed within 5 years after the day of admission;
  - Punishable by a sentence of a year or longer.
  - Multiple CIMTs, 8 U.S.C. §1227(a)(2)(A)(ii)Conviction of two or more CIMTs;
  - Not arising out of a single scheme;
  - Can occur any time after admission
  - Aggravated Felonies. 8 U.S.C. § 1227(a)(2)(A)(iii), defined by 8 U.S.C. § 1101(a)(43)
  - Conviction for a Controlled Substance Offense, except for a single possession of marijuana less than 30 grams. 8 U.S.C. § 1227(a)(2)(B)(i)
  - Conviction for Firearms Offenses. 8 U.S.C. § 1227(a)(2)(C) Conviction for a Crime Involving Domestic Violence, Stalking, Child
  - Abuse, Violation of Orders of Protection. 8 U.S.C. §1227 (a)(2)(E).

7.1 Some Important Differences Between Federal and Arkansas Criminal Trials

The Federal Court System	The Arkansas State Court System
• The court may examine prospective jurors, or may permit the attorneys for the parties to do so. See Fed. R.Crim.P. 24(a)(1)	• The Court shall initiate the voir dire examination and may permit the attorneys for the parties to examine, as well. Ark. R. Crim. P. 32.2
• The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when a crime is punishable by imprisonment of over one year. See Fed. R.Crim.P. 24(b)(2)	• In trials involving a non-capital felony with one defendant, the State is entitled to six (6) preemptory challenges and the defense is entitled to eight (8). See Ark. Code 16-33-305.
• Evidence of a criminal conviction for a crime that in the convicting jurisdiction was punishable by death or imprisonment for more than one year must be admitted in a criminal case in which the witness is a defendant if the probative value outweighs its prejudicial effect. See Fed. R.Evid. 609(a)(B)	• Impeachment by criminal conviction is limited to crimen falsi offenses. Ark. R.Evid. 609
• Closing arguments proceed in the following order: (a) government argues; (b) the defense argues; and (c) the government rebuts. See Fed. R.Crim.P. 29.1	• The prosecution proceeds first, then the defense, and then government may rebut. A.C.A. §16-89-123

CHAPTER 8 - SENTENCING

8.1 Federal Sentencing

Preface

The following sections provide an overview of the most common procedural and substantive sentencing issues in our district. At the outset, we note that it is essential for a federal criminal defense attorney to be knowledgeable in the area of federal sentencing. Given that approximately 97% of federal criminal cases are resolved by guilty plea (nationwide), it is certain that your federal criminal practice will involve sentencing issues. From the start of representation through the conclusion of the case, the federal criminal defense attorney needs to understand and educate the client about the sentencing issues present in each case.

- From the outset of representation, gather information relevant to your client's sentencing issues.
- Best practice is to educate your client regarding the potential sentencing ramifications of the charges, and the sentencing ramifications of any contemplated plea in light of his or her criminal history and any other pertinent factors.
- Look for opportunities to gain advantageous sentencing agreements or concessions from the government through plea bargaining.
- Represent your client's interests throughout the sentencing process.
- At every stage, a working knowledge of the United States Sentencing Guidelines and the relevant sentencing statutes is critical.
- This is an area in which federal criminal practice is markedly different than state criminal practice.
- Federal sentences are more severe than state sentences for comparable crimes in nearly every category.
- The time and effort devoted to sentencing in the federal criminal justice system is considerably greater than in the state court system.
- Federal sentencing presents complex statutory, guideline, and discretionary issues that will frequently require careful factual and legal research and arguments.

The Presentence Report

- Fed. R. Crim. Pro. 32(c) requires a pre-sentence investigation report before the court may impose sentence in nearly all cases.
- At the time of the guilty plea or following conviction, the court will establish a schedule for completion of the pre-sentence interview, pre-sentence report, and objections to the pre-sentence report.
- The defense attorney may request an extension of the court-established deadlines for completing the pre-sentence interview and submitting objections to the pre-sentence report.
- A probation officer will conduct the pre-sentence interview and prepare the pre- sentence report. The probation officer is required to give defense counsel notice to attend the interview, and is expected to coordinate the interview with defense counsel.
- **Best practice is to attend the pre-sentence interview with your client.**
- The probation officer will question your client about his or her entire personal, educational, employment, substance abuse, and health history. It is critical for you to be present to learn your client's background (to the extent you have not already), to answer your client's questions, and to assist your client in presenting all relevant mitigating information to the probation officer. It may also be critical for you to advise your client about damaging information that he or she should not provide, since all statements made by your client may be used against him or her at sentencing.
- The probation officer will also ask if your client wishes to make a statement regarding his or her role in the offense. This is the most dangerous aspect of the pre- sentence interview for your client. If your client is potentially eligible for a sentence reduction for "acceptance of responsibility," this statement has the potential to help or hurt your client enormously.
- You should discuss this aspect of the pre-sentence interview with your client in advance, and explain that the purpose of this statement is simply to determine whether the client should receive the "acceptance of responsibility" adjustment.

- The probation officer may present the option of allowing your client to simply agree with the prosecutor's description of his or her role in the offense provided at the time of the plea hearing (and frequently in writing). If your client is comfortable with this option, then this may be a prudent course of action because it avoids potentially damaging remarks by your client intended to minimize his or her role in the offense.
- You can also elect to submit a statement regarding your client's role in the offense in writing. This method enables you to have greater control over your client's statement.
- Under no circumstances should you allow the probation officer to question your client about his or her role in the offense without your approval.
- You may be going to argue that your client should receive an adjustment or departure based on his limited role in the offense, but it is not advisable to allow your client to make that argument when giving a statement to the probation officer. It will likely be construed as a failure to accept responsibility.
- The probation officer will ask your client to sign certain releases at the time of the interview so that background information can be obtained (school reports, medical information, tax returns, etc.).
- Several weeks after the pre-sentence interview, counsel will receive the pre-sentence report through ECF. Probation has at least 45 days to complete the report.
- The pre-sentence report will address all relevant sections of the sentencing guidelines, and calculate the offense level, criminal history category, and resulting sentencing range and kinds of sentences available, among other items. See Fed. R. Crim. Pro. 32(d) for a complete explanation of the required contents of the pre-sentence report and Monograph 107. The Federal Public Defender's Office has a copy of Monograph 107 in their library.
- Counsel is required to confer with the defendant and submit any objections or corrections to the pre-sentence report within 14 days of receipt of the

report.

- **Best practice is to meet with your client as soon as possible to review the entire pre-sentence report together (with an interpreter if necessary).**
- Counsel must submit objections or corrections to the probation officer directly in writing and provide a copy to the prosecutor as well.
- The written objections are not filed with the court, and may be in the form of a letter or memo.
- **All matters not objected to or corrected may be accepted by the court as an admission…even matters that were nolle prossed.**
- The probation officer will then prepare an addendum or revised pre-sentence report addressing the objections/corrections submitted by counsel.
- The addendum and/or revised pre-sentence report is then submitted to the court, and the court will schedule a sentencing date if it has not already done so.
- Be aware that the pre-sentence report will not only be relied upon by the sentencing court, but also by the Federal Bureau of Prisons, where it can affect institutional placement, conditions of confinement, eligibility for prison programs, and release conditions.
- Therefore, even if the factual findings in the pre-sentence report will not necessarily impact the sentencing determination, they must be corrected before sentencing.

Mitigation for Sentencing

- Because the sentencing guidelines are merely advisory and the sentencing court has considerable discretion, federal sentencing practice relies heavily on mitigation.
- The Supreme Court has held that defense counsel has a clear duty to investigate in preparation for sentencing.
- Defense counsel should develop facts and arguments to present to the court to explain why this defendant in this case should receive a particular length or kind of sentence.
- Defense counsel should strive to present the defendant to the court as a

person, rather than just a set of numbers (offense level, criminal history category, and sentencing range).

- The first step is to interview and get to know your client so that you can identify potential mitigators (e.g. lack of educational or vocational opportunity, physical or mental illness, post-offense rehabilitation).
- Consider preparing a checklist of social history topics to discuss with each client.
- It may take several interviews to establish the kind of relationship that enables you to learn personal background information from your client.
- Once you identify potential mitigation leads, get your client to sign release forms so that you can obtain records to corroborate your client's statements, if possible.
- Reach out to family and friends identified by the client to obtain additional mitigation evidence and information.
- Consider reaching out to agencies that had contact with your client (e.g. social services, schools, child welfare) organizations that compile data or study communities (e.g. U.S. Census Bureau, local school board, health department), and organizations and agencies that compile data on or study human rights and international relations if your client is from another country (e.g . United Nations, Amnesty International, and Human Rights Watch).
- Always keep in mind the purposes of sentencing set out in 18 U.S.C. § 3553(a), and consider the judge's likely concerns with respect to your client.
- Consider making use of the studies and statistical data, in addition to other information, compiled in the sentencing resources page on www.fd.org.
- If your client has mental or emotional health issues or especially complex social history issue that are mitigators, you may want to hire a mitigation specialist or other expert (e.g. a psychologist or psychiatrist).
- You will need to seek court approval for the funding of experts, and will then need to follow all normal procedures and guidelines for working with an expert.

- The expert will need to prepare a report and be prepared to testify at the sentencing hearing.
- Reach out to your client's family, friends, and community to obtain character letters or to testify at the sentencing hearing.
- Encourage your client to write a letter to the court or to prepare a statement to read to the court at sentencing. The defendant's own words may be compelling to the court.
- You will need to evaluate the character letters and testimony and your client's statement to ensure that the most effective message is being delivered.
- All of your mitigation evidence will be presented to the court in the sentencing memorandum and/or at the sentencing hearing.

8.2 Authority and General Application Principles – Chapter 1 U.S.S.G.

- Chapter One provides a historical introduction to the Guidelines, its mission, authority, constitutionality of the Guidelines, appeal issues affecting sentencing, and sets the rules for determining the applicable guidelines. See U.S.S.G. § 1A-1A3.1
- General Application Principles. See U.S.S.G. § 1B1.1. This Section provides definitions of a number of critical terms (e.g. "bodily injury," "dangerous weapon," "firearm") and basic Guideline application instructions. The applicable Guideline section is usually determined by the offense of conviction and the defendant's prior criminal history. The offense level is supposed to reflect the seriousness of the offense, similar to Arkansas' sentencing grid. The combination of the offense level and criminal history category produce an advisory Guideline range.
- "Relevant Conduct." The relevant conduct rule is a critical distinction between state and federal sentencing practice and is one of the most important and often overlooked concepts in federal sentencing. The basic principle is that relevant conduct looks beyond the offense of conviction The principle behind relevant conduct was to create a system of "real offense" sentencing whereby the sentencing court punishes the defendant based upon a determination of actual conduct, not simply based upon the more limited offense of conviction. See U.S.S.G. § 1B1.3.

- The Relevant Conduct Guideline mandates that a sentencing be based on (1) "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. §1B1.3(a)(1)(A); and (2) when others are involved "in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1)(B).

- Relevant conduct can be far reaching. It includes acts by other people. A defendant does not have to know the others involved or know details about their involvement. Relevant conduct does not need to be (and usually is not) mentioned in the indictment. It can include acquitted conduct and conduct dismissed pursuant to plea agreements.

- Use of Certain Information
  - Where a defendant chooses to cooperate with the government, the defendant and government may enter into an agreement whereby information disclosed to the government may not be used to determine the defendant's Guidelines. See U.S.S.G.§ 1B1.8.

- What Guidelines Apply?
  - As a general rule, the court should use the Guidelines in effect on the date of the sentencing. See U.S.S.G. § 1B1.11. However, the ex post facto clause may prevent applying Guidelines in effect on the date of sentencing. *See Miller v. Florida*, 482 U.S. 423 (1987). In such a case, the Guidelines Manual in use on the date of the offense is used to calculate the guidelines.

8.3 Offense Conduct – Chapter 2 U.S.S.G

- The offense conduct is divided into several separate sections based upon the nature of the statutory offense. They begin with § 2A1.1 (Homicide) and end with § 2T4.1 (taxes). Section 2X1.1 provides Guidelines for conspiracies, attempts and solicitations, aiding and abetting, accessory after the fact, and misprision of a felony.
- *§ 2D1.1: Drug Offenses* - sentencing for drug offenses is usually driven by the quantity of the controlled substance.
  - When no drugs are seized or the amount seized does not reflect the scale of the offense, the court must approximate quantity.
  - In drug conspiracy cases, the agreed-upon quantity is often used to determine the offense level.
- *§ 2F1.1:* Fraud Offenses – sentencing in fraud offenses is typically driven by the amount of loss associated with the offense.
- *§ 2K2.1:* Firearm Offenses
- Selecting the Offense Guideline
- The U.S.S.G. appendix will provide a quick index of the applicable Guidelines to a specific statutory offense. If the specific offense is not found in the index, then the Guidelines provide that the most analogous offense Guideline should be utilized. See U.S.S.G. § 1B1.2(a).

- Determining the Base Offense Level
  - Once the correct Guideline is determined, you must select the proper base offense level. The base offense level is the minimum offense level for a particular offense and the starting point in determining the correct offense level. The particular Guideline section may contain several base offense levels. You must determine the one that applies to the specific facts of your case.
- Specific Offense Characteristics
  - Once the base offense level is determined, the next step is to see if any specific offense characteristics apply. A specific offense characteristic can add or subtract points to the base offense level and in many instances can significantly change the base offense level and ultimately the Guidelines.
- Cross-References
  - Sometimes a specific Guideline contains a cross-reference. These simply advise the sentencing court to apply different offense Guidelines under certain circumstances.

8.4 Adjustments – Chapter 3 U.S.S.G.

- Adjustments – these adjust the offense level up or down based upon the victims, the defendant's role in the offense, and obstruction of justice. See U.S.S.G. § 3A.
  - Vulnerable victim - § 3A1.1
  - Aggravating role - § 3B1.1
  - Mitigating role - § 3B1.2
  - Abuse of Position of Trust or Use of Special Skill - § 3B1.3
  - Obstruction of Justice - § 3C1.1
  - Grouping
  - Grouping occurs when there is more than one count of conviction. The offense levels for each count must be combined or "grouped." When counts are grouped, these Guidelines produce a single offense level. See U.S.S.G. § 3D1.2.
- Acceptance of Responsibility
  - Defendants who "accept responsibility" are entitled to a minimum of a two-level reduction in the offense level. Depending on the base offense level, an extra point may be awarded to permit a three-level reduction. See U.S.S.G. § 3E1.1.

- Pleading guilty does not automatically entitle a defendant to an acceptance reduction, but provides "significant evidence" of acceptance.
- A defendant is not automatically precluded from receiving an acceptance adjustment by going to trial, but may qualify for it under a few narrow circumstances. See U.S.S.G. § 3E1.1 (n. 2).
- Commission of a new crime while on pre-trial release may be grounds to preclude an acceptance adjustment.
- A defendant does not have to admit to relevant conduct to qualify for this adjustment. See U.S.S.G. § 3E1.1 (n.1(a)).

8.5 Calculating Criminal History – Chapter 4 U.S.S.G

Criminal History Category

A defendant's past record of criminal conduct is relevant to sentencing in a federal case. The Criminal History Category is the horizontal part of the Sentencing Table. There are six Criminal History categories denominated by roman numerals.

Criminal History Points are Calculated as Follows:

- Three points for each prior sentence of imprisonment exceeding one year and one month. (4A1.1(a))
- Two points for each prior sentence of imprisonment of at least 60 days and not counted in (a). (4A1.1(b))
- One point for each prior sentence of imprisonment not counted in (a) or (b) up to a total of 4. (4A1.1(c).)

Additional Points are Added When:

- The instant offense was committed while the defendant was under any criminal justice sentence (includes probation, parole, supervised release, imprisonment, work release or escape status). (add 2 points) 4A1.1(d)
- For each prior sentence resulting from a crime of violence that did not receive any points under (a), (b) or (c) because such sentence was counted as a single sentence. (add 1 point, up to a total of 3 for this subsection) 4A1.1(e)

Prior Offenses not Counted or Counted only under Certain Conditions

- Certain Prior Offenses are not counted or counted only under certain

conditions. See 4A1.1(a)(b) and (c) and 4A1.2 : e.g.

- Sentences imposed more than ten years prior to the defendant's commencement of the instant offense are generally not counted
- Sentences imposed more than 15 years prior to the defendant's commencement of the instant offense - not counted unless the defendant's incarceration extended into this fifteen year period.
- Juvenile Offenses - counted only if it resulted from an adult conviction.
- Sentences for a foreign conviction, expunged conviction or invalid conviction.
- Tribal court convictions or expunged or invalid convictions.
- Military convictions – counted only if imposed by a general or special court martial.

Definitions and Instructions 4A1.2:

- *Prior Sentence*: any sentence previously imposed upon adjudication of guilty, whether by plea, trial, or nolo contendere, for conduct not part of instant offense.
- *Sentence of Imprisonment*: sentence of incarceration (refers to the maximum sentence imposed).
- *Suspended Sentence*: sentence of imprisonment refers only to portion that was not suspended.
- *Multiple prior sentences*: it is important to determine if multiple prior sentences are counted separately or as a single sentence.
  - Prior sentences **always** counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (defendant arrested for first offense prior to committing the second offense).
  - When no intervening arrest: prior sentences counted separately **unless** the sentences resulted from offenses contained in same charging instrument or the sentences were imposed on the same day.
- Convictions for which imposition of sentence was suspended or stayed: count as prior sentence under 4A1.1(c) – One point.

- Defendant convicted but not yet sentenced: Conviction counted as a prior offense under 4A1.1(c) (one point) if a sentence resulting from that conviction would

otherwise be countable. ***So, warn client about pleading to other charges prior to being sentenced on the federal charge.***

- Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted except:
- The following offenses are only counted if the sentence was a term of probation of more than one year or term of imprisonment of 30 days or prior offense is similar to the instant offense – 4A1.2(c)
  - Careless/Reckless Driving
  - Contempt of Court
  - Disorderly Conduct or disturbing the peace
  - Driving without a license or with revoked/suspended license
  - False information to a police officer
  - Gambling
  - Hindering or failure to obey a police officer
  - Insufficient funds check
  - Leaving the scene of an accident
  - Non-support
  - Prostitution
  - Resisting Arrest
  - Trespassing
  - Sentences for the following offenses are never counted:
  - Fish and game violations
  - Hitchhiking
  - Juvenile status offenses and truancy
  - Local ordinance violations (unless the violation is also a violation of state law)
  - Loitering
  - Minor traffic offenses
  - Public Intoxication
  - Vagrancy
- Offenses committed prior to age of 18: in cases where defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month – add 3 points. In all other cases: add 2 points for sentences of at least 60 days if defendant was released from confinement within 5 years of commencement of the instant offense. Add 1 point for each adult or juvenile sentence imposed within 5 years of commencement of instant offense not counted

in (A).

Departures Based on Criminal History:

Upward Departure

If reliable information suggests that a defendant's criminal history under-represents the seriousness of his/her criminal history or the likelihood that the defendant will commit other crimes, an upward adjustment may be warranted.

Downward Departure

If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of their criminal history a downward departure may be warranted.

- A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under the guidelines.
- Armed Career Criminal/ Repeat and Dangerous Sex Offender (against Minors) – downward departures in criminal history categories are not permitted.
- Career Offender – Downward Departure may not exceed one Criminal History Category.

Career Offenders: 4B1.1

- A defendant is a career offender if:
  - 1. The defendant was at least 18 years old at the time the defendant committed the instant offense;
  - 2. The instant offense is a felony that is either a crime of violence or a controlled substance offense and
  - 3. The defendant has at least 2 prior felony convictions of either a crime of violence or a controlled substance offense.
- All Career Offenders receive a Criminal History Category of VI.
- Determining the Offense Levels for Career Offenders are also calculated in Chapter 4. If the offense level for a career offender from the table contained in 4B1.1(b) is greater than the offense level otherwise applicable then the offense level from the table applies.
- Special Rules with respect to convictions under 18 U.S.C. 924(c) or 929(a) – see 4B1.1(c).
- Definitions:
  - *Crimes of Violence*: Any offense under state or federal law, punishable

by imprisonment exceeding one year that has as an element the use, attempted use or threatened use of physical force against another or the burglary of a dwelling, arson or extortion, involves explosives or conduct that presents a risk of injury to another.

- *Controlled Substance Offense*: offense under state or federal law, punishable by more than one year in prison that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance or possession of a controlled substance with intent to manufacture, import, export, distribute or dispense.
- *Pattern of criminal conduct*: planned criminal acts occurring over a period of time. May subject a defendant to an offense level of 13 (11 after acceptance).

Armed Career Criminal

A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. Section

924(e).

- The offense levels for an armed career criminal are calculated in Chapter 4. The offense level is the greatest of the offense level from U.S.S.G. Chapters 2 and 3 **or** the offense level from the table in 4B1.1 **or** 34 if the defendant used or possessed a firearm **or** ammunition in connection with either a crime of violence or controlled substance offense **or** 33 otherwise.
- The criminal history category for an ACC is the greatest of the criminal history category from Chapter 4 or 4B1.1 (if applicable) **or** Category VI (if a firearm is used or possessed in connection with a crime of violence or controlled substance offense) **or** Category IV.
- Due to the increased penalties for career offenders it is important to review your client's criminal history early on in your representation. Do not rely solely on your client's memory, obtain copies of his criminal history, including judgments.
- In some situations it may be helpful to obtain the Guilty Plea Colloquy Form or transcript from a state court conviction.

8.6 Determining the Sentence – Chapter 5 U.S.S.G

- Sentencing Table (Chapter 5, Part A): Consult once you have determined the total offense level and Criminal History Points. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment.
- Terms of Probation: see 5B1.1
    - The guideline range is in Zone A of the sentencing table or
    - The range is in Zone B and the Court imposes a condition or combination of conditions requiring intermittent confinement, community confinement or home detention.
- Probation is not authorized when:
    - The offense is a Class A or B Felony. *See* 18 U.S.C. §3559 for classifications.
    - The offense specifically precludes probation as a sentence (18 U.S.C. Sec. 3561(a)(2).
    - The defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. (18 U.S.C. Sec. 3561(a)(3).
- The term of probation shall be at least one year but no more than 5 years if the offense level is 6 or greater and no more than 3 years in any other case. 5B1.2.
    - Remember that under the Advisory Guidelines a Judge may impose probation even if the above conditions are not met.
- Conditions of Probation: outlined in 5B1.3. In addition the Court may impose additional conditions.
- Limitation of Applicability of Statutory Minimum Sentences (Safety Valve)

  5C1.2: For this provision to apply the defendant must meet the following criteria:

    - He must not have have –

  (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and
(C) a prior 2-point violent offense, as determined under the sentencing guidelines. U.S.C. § 3553(f)(1).22

- No violence or credible threat of violence or possess a firearm or other dangerous weapon.
- Offense did not result in death or serious bodily injury to any person.
- Defendant not an organizer, leader, manager or supervisor of others in the offense.
- Not later than the sentencing hearing the defendant has truthfully provided to the Government all information and evidence he/she has concerning the offense or offenses.

- Supervised Release: 5D1.1:
  - Imposed by the Court to follow a term of imprisonment.
  - Terms of Supervised Release (5D1.2): at least 2 years but not more than 5 years for Class A or B felonies, at least 1 year but not more than 3 years for Class C or D felonies. One year for Class E Felony or Class A misdemeanor.
  - Conditions of Supervised Release are outlined in 5D1.3
- Restitution, Fines, Assessments and Forfeitures
  - Restitution (5E1.1):
    - Ordered by the Court to compensate an identifiable victim.
    - Order may direct single lump sum payment, partial payments at specified intervals, return of property, replacement of property or services rendered to the victim (if victim agrees)
    - Nominal periodic payments may also be ordered.
    - Can also be joint and several if there are multiple defendants
  - Fines (5E1.2)
    - Always imposed unless defendant establishes that he is unable to pay and is not likely to become able to pay.
    - Fine Guideline Range Table: 5E1.2(c)(3)
    - The Court considers various factors in determining the amount of the fine – see 5E1.2(d)
  - Special Assessments (5E1.3)
    - Must be imposed on a defendant in the amount prescribed by statute. (see commentary for amounts)

- Forfeiture (5E1.4)
  - Must be imposed upon a convicted defendant as provided by statute.
- Cost of Prosecution (5E1.5)
  - Normally not imposed on indigent clients, but can be imposed on a defendant as required by statute

- Sentencing options
  - Community Confinement (5F1.1) (halfway house etc.)
  - Home Detention (5F1.2) (house arrest)
    - Program of confinement and supervision that restricts the defendant to his place of residence continuously except for authorized absences.
  - Occupational Restrictions (5F1.5)
  - Denial of Federal Benefits to Drug Traffickers and Possessors (5F1.6)
    - Court may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.
- Intermittent Confinement (5F1.8)
  - Remaining in the custody of the Bureau of Prisons during nights, weekends or other intervals of time totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of a term of probation or supervised release.
- Departures Under the Guidelines: (5 K)
  - The most common guideline departure is for substantial assistance to authorities under 5k1. – In our District the Government typically files a 5k Motion just before Sentencing recommending to the Court that a defendant's guideline range be reduced
  - If a defendant has been sentenced, but cooperation is not complete, the government has up to a year to file a Rule 35 motion asking for the reduction.
  - If the cooperation is still not completed within a year, defense counsel should ensure the government files a "placeholder" motion stating that the defendant has cooperated, but it is not complete. This informs the Court that a departure motion is expected at some point.

8.7 Sentencing Memorandum

- Defense counsel should present all relevant mitigating arguments to the district court in a persuasive sentencing memorandum, advocating for a sentence sufficient but not greater than necessary to comply with the purposes of sentencing. A sentencing memorandum should address all the sentencing factors in 18 U.S.C. §3553(a).
- The final reduction is always determined by the Court
  - The possibility of a 5k is often (but not always) spelled out in the plea agreement.
- Tie the mitigating facts to one or more of the purposes of sentencing and the parsimony clause
  - Other possible departures are described in Guideline Sections 5K2.0-2.24. in section 3553(a).

- File the sentencing memorandum at least seven days before sentencing (unless otherwise required by local rule or order of court). If the sentencing memorandum contains confidential information, that should be shielded from public view, such as the client's cooperation, physical or emotional condition or history of drug and alcohol use, move for an order to seal the document and to limit its disclosure to the parties and probation office.
- Waiting until sentencing to make your argument for leniency, as in state court, makes it less likely the court will give weight to your position.
- The sentencing memorandum is an opportunity to explain:
  - Who your client is and his/her background
  - Who the people are in the client's life, and what he/she means to them
  - What led the client to commit this crime
  - The good acts by the client that the court has not heard
  - How the client has already been punished for this crime
  - How the client has worked to better him/herself since his/her arrest
  - Whether the client needs educational or vocational training
  - Whether the client needs medical care
  - Where the client see him or herself after he or she is released
  - Whether the client is likely to reoffend

Best Practices for drafting a Sentencing Memorandum

- There is no required form for a sentencing memorandum, but it should not read like an "official" court document.
- Make a persuasive argument for leniency by presenting the client's biographical history, personal characteristics and all relevant mitigating factors to the court.
- Use the sentencing memorandum to tell the client's story. Successful sentencing advocacy involves the full exposition of all the factors in the client's life that brought him or her before the court. Develop a theme, not merely a tally of mitigating factors.
- Attach character letters from people willing to offer insight into a client's true nature, notwithstanding their awareness of the offense conduct.
- Recognize that character letters are an important part of effective sentencing advocacy, and use such letters by quoting passages in the sentencing memorandum.
- Use more than words to persuade; consider the power of images and pictures. When appropriate, include photographs of the client with his or her family members (including parents, spouses, partners and children) in the sentencing memorandum.
- Provide supporting documentation. If your client has a physical or mental impairment, or drug or alcohol dependency issues, corroborate the issue with a doctor's report and/or medical records. Similarly, if your client has a college transcript, military service record, professional or occupational licenses, or history of charitable works, provide documents or testimonials.

CHAPTER 8 - SENTENCING

I. LEGAL DISCUSSION

After *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts must: (1) properly calculate the guideline range; (2) rule on any departure motions made under the guidelines; and (3) exercise their discretion by choosing a sentence in light of all §3553(a) sentencing factors, "regardless [of] whether [the chosen sentence] varies from the sentence calculated under the guidelines." See *Rita v. United States*, 127 S. Ct. 2456 (2007);

(Brief all issues regarding objections to Presentence Investigation Report and/or downward departure motions before addressing the §3553(a) factors)

A. THE APPLICATION OF 18 U.S.C. §3553(A)

Under the Third Circuit's three-step sentencing approach, after the Court determines the guideline sentence, it must consider whether to impose a sentence below the Guidelines. Under *United States v. Booker*, 543 U.S. 220, 259-60 (2005), the Court must consider each of the Section 3553(a) factors in fashioning a sentence.

These factors are:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for a sentenced imposed – (a) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;

(b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or correctional treatment in the most effective manner;

(3) The kind of sentences available;

(4) The Guidelines;

(5) Any [Guidelines] policy statement;

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) The need to provide restitution to any victims of the offense.

CHAPTER 9 – CRIMINAL APPEALS

9.1 Criminal Appeals

Continuous Representation

A person for whom counsel is appointed shall be represented at every stage of the proceedings through appeal. See 18 U.S.C. §3006A(c). The Criminal Justice Act Plan for the Middle District of Pennsylvania provides, "once counsel is appointed under the CJA, counsel shall continue the representation until the matter, including appeals or review by Certiorari, is closed…" Art. VIII, Section D. Likewise, Chapter 3 of the CJA Plan for the Court of Appeals for the Third Circuit states, "Counsel appointed under the Act by the trial court shall be deemed to have seen designated under the Act to continue on appeal unless relieved by order of the Court of Appeals.

Notice of Appeal

A federal criminal appeal is commenced by filing a Notice of Appeal with the Clerk of the District Court.

Time for Filing Notice of Appeal

Federal Rule of Appellate Procedure 4(b) requires that a notice of appeal be filed within fourteen (14) days after the entry of judgment on the docket, or if the government appeals first, within fourteen (14) days after the date on which the government filed its notice of appeal. The government has thirty days after the judgment is entered, or any defendant appeals, to file its notice of appeal. The filing deadlines are mandatory and jurisdictional. See Browder v. Dir. Dept. of Corrections, 434 U.S. 257 (1978).

Post- Judgment Motions

If a defendant files certain timely post-judgment motions, the notice of appeal must be filed within fourteen (14) days after entry of the order disposing of the last remaining motion or the entry of the judgment of conviction, whichever period ends later. See Fed. R. App. P. 4(b)(3)(A). If a notice of appeal was already filed, it will become effective upon entry of the order disposing of the last remaining motion or the entry of the judgment of conviction, and an amended notice of appeal need not be filed. Fed. R. App. P. 4(b)(3)(B).

CHAPTER 9 – CRIMINAL APPEALS

Jurisdiction

The filing of a notice of appeal generally divests the district court of jurisdiction over the case; See 9 Moore's Federal Practice P 203.11 (2d ed. 1979-80). However, the district court retains jurisdiction to correct a sentence under Fed. R. Crim. P. 35(a). The entry of the correction order does not stay the time of filing a notice of appeal, nor does it affect the validity of a notice filed before entry of the order disposing of the motion. See Fed. R. App. 4(b)(4).

Case Opening Documents

Upon receipt of the notice of appeal from the district court, the Clerk of the Court of Appeals will send a case opening letter to all parties, directing counsel for the Appellant to file:

- Application for Admission (if applicable);
- Appearance Form;
- Criminal Appeal Information Statement; and
- Transcript Order Form

These forms are available on the Court's website, www.ca8.uscourts.gov

Requirements for Briefs

The Court's website also contains a chart that provides information about the requirements for briefs and appendices. See Fed. R. App. P. 25, 30 and 32 for the full text of rules and requirements for appendices.

Briefing Schedule

The Clerk of Court of Appeals will transmit a briefing schedule to all parties upon receipt of the certified list or record. Generally, Appellant's brief is due forty (40) days from the date of the certified list or record is filed and the Appellees brief is due twenty-one (21) days from service of Appellant's brief. A reply brief must be filed within fourteen (14) days of service of Appellee's brief. See Fed. R. App. 31(a)(1).

- Petitions for Rehearing or Rehearing En Banc
  - A petition must be filed within fourteen (14) days from the date judgment was entered and meet the rigorous criteria of Fed. R. App. P. 35.

- **Mandate**: Although largely a ministerial function, the mandate is the official document (consisting of a certified copy of the judgment and the opinion of the Court of Appeals) that the Court issues to conclude proceedings and return jurisdiction over the case to the district court. The mandate is issued within seven days after the time to petition for rehearing has expired. *See FED*. R. APP. 41(b). A petition for rehearing automatically stays the issuance of the mandate, but an application for a writ of *certiorari* does not. While you do not have to stay the mandate while seeking *certiorari*, there may be instances where your client could be harmed if the mandate is not stayed, *i.e*, he/she has been released pending appeal. In such instances, Rule 41(d) provides the mechanism for a stay, which involves a showing of a substantial question (a reasonable probability that the Supreme Court will grant review) and good cause for a stay, *e.g.,* client will be harmed.

- Petition for Writ of Certiorari to U.S. Supreme Court

  - A petition must be filed within ninety (90) days after entry of the judgment. See Supreme Ct. R. 13(1).

- Motion for Extension of Time

  - The time for filing a notice of appeal may be extended by the district court based on excusable neglect or good cause, either before or after the time for filing expires, with or without motion or notice. The maximum extension of time is thirty (30) days from the expiration of time otherwise prescribed. Fed. R. App. P. 4(b)(4).

The Mailbox Rule

A notice of appeal filed by an incarcerated inmate is timely filed if deposited in the institution's internal mail system on or before the due date. If the institution has a system designed for legal mail, it must be used. Proof of timely filing is shown by a declaration under 18 U.S.C. §1746 or a notarized statement which sets forth the date of deposit and that First Class postage has been prepaid. See Fed. R. App. P. 4(c).

CHAPTER 9 – CRIMINAL APPEALS

Mistaken Filing with Court of Appeals

If the notice of appeal is mistakenly filed with the Court of Appeals, the clerk of that court must note on the notice of appeal the date on which it was received and forward to the district court. Such notice of appeal is deemed filed on the date noted by the clerk of appeals' court. See Fed. R. App. P. 4(d).

Austin Procedures

Counsel who has been appointed under the CJA Act and is of the opinion that no issues are present which warrant the filing of a petition for certiorari must file a motion stating that opinion and requesting leave to withdraw with the Court of Appeals. *See Austin v. United States*, 513 U.S. 5 (1994). The motion must be served on both Appellant and the United States.

CJA Vouchers

Appointed counsel must submit a Criminal Justice Act Voucher within forty-five days from the conclusion of the attorney's representation.

CHAPTER 10 – POST CONVICTION

10.1 Federal Post-Conviction Remedies

Overview

There exists a variety of post-conviction remedies in federal court. As a general rule, they are available only after direct appeal rights have been exhausted. Many of them are subject to strict pleading and timeliness requirements. These areas can be very complex and there are numerous obstacles to relief. Skill, detail and creativity are needed to navigate through any of these post-conviction claims.

Motion to Vacate, Set Aside or Correct Sentence – 28 U.S.C. §2255

- The primary federal post-conviction remedy for persons convicted in federal court.
- Filed in the federal district court of conviction.
- Claims for relief include attacking the conviction or sentence.
- Strict one-year time for filing. 28 U.S.C. § 2255(f)
- Limited exceptions:
  - Unconstitutional or unlawful impediment (28 U.S.C. § 2255(f)(2))
  - Newly recognized right by Supreme Court (28 U.S.C. § 2255(f)(3))
  - Newly discovered evidence (28 U.S.C. § 2255(f)(4))
- Most popular claim = ineffective assistance of counsel in violation of the Sixth Amendment.
  - *Strickland v. Washington*, 466 U.S. 668 (1984) controls. Petitioner must show (1) that his counsel's acts or omissions made counsel's overall performance fall below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.
- Discovery not mandatory. Requires leave of court and is controlled by Rule 6(a) (governing § 2255 cases)
- Evidentiary hearing (28 U.S.C. § 2255(b)). While evidentiary hearings appear to be presumed in the statute, they are often elusive.
- Counsel appointment discretionary in non-capital cases. Rule 8(c) (governing § 2255 cases)
- Appeal § 2255

  - Time to file – considered civil in nature and governed by Rule 4(a)(1)(B) of Federal Rules of Appellate Procedure.
  - No automatic right to appeal. Need Certificate of Appealability ("COA") issued.
  - Application for COA must be made first in district court; if denied, may apply to the circuit court.
- Second or successive § 2255 Motions
  - Very difficult
  - Must obtain permission from the circuit court first

Writ of Habeas Corpus -28 U.S.C. §2241

- Limited. Filed in instances where § 2255 inadequate or ineffective to test the legality of detention. Claims that do not attack the validity of the conviction or sentence, such as claims involving sentence calculations
- Filed in district court having territorial jurisdiction over petitioner, i.e. location where inmate is in custody.
- No strict one-year timing requirement.
- No COA required to appeal.

Writ of Habeas Corpus on Behalf of State Convictions – 28 U.S.C. §2254

- Only federal remedy for individuals convicted in state court and who are in state custody.
- Filed in the district court in the state where the petitioner was convicted.
- Similar procedural and substantive standards to § 2255.
- Cite to effective assistance of counsel standards under both federal and state constitutions.

Writ of Coram Nobis – 28 U.S.C. §1651

- Motion is filed in the convicting court.
- Is very rare and considered an "extraordinary remedy" used to correct errors where otherwise no other statutory remedy is available or adequate. *United States v. Morgan*, 346 U.S. 502, 511-512 (1954).

Rule 35(a) of Federal Rules of Criminal Procedure

- Motion to correct sentence resulting from a technical, arithmetical, or other clear error.
- Filed in the court of conviction.
- Must be filed within 14 days after sentencing.

Rule 36 Motion to Correct Clerical Error

- Filed in the convicting court.
- Limited; remedy cannot be used to attack validity of conviction, sentence or custody.
- Only used to correct clerical errors in orders, judgments or other parts of the record.

Motion to Modify Sentence – 18 U.S.C. §3582(c)

- Filed in the convicting court.
- Filed in the district of conviction.
- Can be used in three circumstances:
  - When Sentencing Commission amends the guidelines and lowers a defendant's sentencing range.
  - As part of the "compassionate release" provision.
  - When expressly permitted by a statute, including Rule 35.

10.2 Revocation Proceedings

Revocation of probation or supervised release is governed by Federal Rule of Criminal Procedure 32.1.

Pursuant to Fed. R. Crim. Pro. 32.1:

- The defendant has a right to an initial appearance before a magistrate judge when they are in custody for an alleged violation of probation or supervised release "without unnecessary delay." Fed. R. Crim. Pro. 32.1(a)(1).
- The defendant must be informed of the alleged violation, the right to counsel, and if held in custody, the right to a preliminary hearing. Fed. R. Crim. Pro. 32.1(a)(3).
- A defendant may be detained or released pending the revocation proceedings. Fed. R. Crim. Pro. 32.1(a)(6). If detention is requested, then the defense bears the burden of showing by clear and convincing evidence that the defendant will not flee or pose a danger to the community. Fed. R. Crim. Pro. 32.1(a)(6) and 18 U.S.C. § 3143.
- If the defendant is detained after the initial appearance, then a prompt preliminary hearing is required to determine whether probable cause exists to detain the defendant for a revocation hearing. Fed. R. Crim. Pro. 32.1(a)(3).
- The initial appearance and preliminary hearing may be combined.
- Note that the preliminary hearing may be deemed waived if not requested by the defendant.
- The preliminary hearing is not required if the defendant is not detained pending the revocation hearing, but it may be requested. Fed. R. Crim. Pro. 32.1(b)(1)(A).
- When a defendant is arrested in a district other than the sentencing district, then different actions are required for the preliminary hearing. Fed. R. Crim. Pro. 32.1(a)(4), (5).
- Although there is no constitutional right to counsel in revocation cases, the Criminal Justice Act creates a right to appointed counsel in such

cases. See 18 U.S.C. §§ 3006A(a)(1)(C), (a)(1)(E).

- Defendants have normal Due Process protections in a revocation proceeding (e.g. written notice of violations, disclosure of evidence against him, opportunity to be heard and present witnesses and evidence, cross examine witnesses, a neutral hearing body, and a written statement by fact finder as to evidence relied upon and reasons for revocation). See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Fed. R. Crim. Pro. 32.1(b)(2).
- However, the Federal Rules of Evidence generally do not apply in revocation proceedings. Fed. R. Evid. 1101(d)(3).
- Due process requires that an individual receive "fair warning" that an activity is prohibited. The court will impute knowledge when the prohibited act is an obviously criminal act, but when the proscribed act is not criminal, then the defendant must receive actual notice. Thus, the defendant may have a "fair warning "defense in a revocation proceeding.
- The standard of proof is preponderance of the evidence in a revocation proceeding. 18 U.S.C. § 3583(e)(3).
- A revocation proceeding is a twostep process: 1) the court must determine whether a violation occurred; and then 2) determine whether the violation warrants a revocation.
- The court must consider mitigation evidence, if presented, before determining whether to revoke.
- Revocation is mandatory, however, when the defendant possessed a controlled substance, a firearm in violation of law, refuses to comply with drug testing, tests positive for illegal controlled substances more than three times in one year, or for certain offenses when the defendant is a registered sex offender. 18 U.S.C. §§ 3565(b), 3583(g), 3583 (k).
- Probation revocation sentencing is governed by 18 U.S.C. § 3553 and the "parsimony clause" in addition to the post-Booker sentencing caselaw. In addition, the sentencing court is required to consider Chapter Seven of the Sentencing Guidelines.

- The defendant has a right to allocution and to present mitigation evidence before the court imposes sentence in all revocation proceeding. Fed. R. Crim. Pro. 32.1(b)(2)(E) and (c)(1).
- When sentencing for a probation violation, the court may impose any sentence available at the time of the original sentencing up to the statutory maximum or the Sentencing Guidelines applicable to such violation. Thus, defense counsel must be aware of both the original sentencing range and the Chapter Seven guideline range (and argue for the lower). A probation violation sentence may include a term of custody and a term of supervised release.
- Supervised release revocation sentencings do not incorporate all of the 18

  U.S.C. § 3553 factors. The statutory maximum sentence for supervised release violations are established in 18 U.S.C. §§ 3559 and 3583.
- When sentencing for a supervised release violation, the court may include a term of custody and a term of supervised release.
- A revocation sentence may be run either concurrently or consecutively with any other custodial sentence that the defendant is serving. 18 U.S.C. § 3584(a).

APPENDIX –DETENTION FACILITIES

Bureau of Prisons – Federal Institutions

General Dress Code Policy

No revealing shorts, sundresses, halter tops, bathing suits, see-through garments of any type, crop tops, low-cut blouses or dresses, leotards, spandex, miniskirts, backless tops, hats or caps, sleeveless garments, skirts two inches or more above the knee, dresses or skirts with a high-cut split in the back, front, or side, any clothing that looks like inmate clothing (such as khaki or green military-type clothing). Certain facilities may not allow wire undergarments because they set off the metal detectors. Please check with the facility prior to your visit.

Federal Bureau of Prisons Facilities:

Contact Information for a particular institution can be found at http://www.bop.gov

When scheduling a legal visit, you should call the institution several days before your anticipated visit and request a visit through the inmate's Counselor. At the time of your call, you should have available the inmate's full name and Register Number. The inmate's Register Number can be found on the BOP website under "Inmates." Visiting days vary by institution and can be located on the BOP website. Confirm your clearance prior to your arrival.

CorrLinks:

CorrLinks is an official inmate emailing system through the Federal Bureau of Prisons. CorrLinks permits inmates to communicate with attorneys and individuals on an inmate's approved visiting list. All messages are subject to screening by the prison. It may take one to two hours for an inmate to receive an email. They may receive only text messages. Pictures and other attachments are not permitted. There is a minimal cost for using CorrLinks. An inmate must make a specific request to exchange electronic messages with attorneys or individuals on their approved visiting list. Upon approval of the electronic messaging request, a message is generated through the system directing the recipient to www.corrlinks.com. They may choose to accept or reject the request. The inmate will be notified, and if accepted, messaging may begin.

Discovery Motions

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DDISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

DEFENDANT_____'S SPECIFIC DISCOVERY REQUEST FOR IMPEACHMENT EVIDENCE PURSUANT TO *GIGLIO v. UNITED STATES*

The Defendant, by and through undersigned counsel, hereby files this specific request for impeachment evidence pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), averring as follows:

1. **Defendant requests that the government provide the following for all witnesses intended to be called at trial**. Please provide any evidence of:

(a) bias;

(b) narcotic treatment or habit;

(c) psychiatric treatment;

(d) monetary incentives for testimony or conviction;

(e) leniency or favorable treatment of the witness in exchange for testimony;

(f) arrests (felonies, misdemeanors and summary offenses) before, during or following any cooperation including but not limited to_____;

2. This request is made pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), where Mr. Chief Justice Burger found:

> [1-3] As long *as Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with Arudimentary demands of justice.@ This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959), we said, A[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.@ Id., at 269, 79 S.Ct. at 1177. Thereafter, *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution. *"See* American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function ' 3.11 (a). When the "reliability of a given witness may well be determinative of guilt or innocence,"nondisclosure of evidence affecting credibility falls within this general rule. *Napue*, *supra*, at 269, 79 S.Ct., at 1177.

Giglio at 154.

3. The United States Court of Appeals for the District of Columbia explained the reasoning behind this ruling.

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.
>
> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test without which the jury cannot fairly appraise them.

United States v. Fowler, 465 F.2d 664 (D.C. Cir. 1972).

4. It is well settled that the government must provide this information upon request. "The rationale for this is clear; 'such evidence is 'evidence favorable to the accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.'"

United States v. Bagley 473 U.S. at 676, (1985) (quoting *Brady v. Maryland*, 373 U.S. at 87 (1963)).

5. _____ specifically requests any and all information within the purview of *Giglio v. United States*, 405 U.S. 150 (1972), as set forth above, so that he may properly cross-examine the witnesses and test their credibility.

6. _____ requests this information so that he may properly determine the reputation place the witnesses and test their credibility.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I,_____, of the Federal Public Defender's Office, do hereby certify that on this date I served a copy of the foregoing **Specific Discovery Request for Impeachment Evidence Pursuant to *Giglio v. United States***, via Electronic Case Filing, or by placing a copy in the United States mail, addressed to the following:

_____, ESQUIRE
United States Attorney's Office

_____
Defendant

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Dismissal Motion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

MOTION TO DISMISS INDICTMENT

The Defendant, by and through undersigned counsel, files this Motion to Dismiss the Indictment, and in support thereof states as follows:

1. By indictment filed December 19, 2007, [Defendant] was charged with failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) pursuant to 18 U.S.C. § 2250 (a) and 2 (Count I); failure to comply with updating the FBI database in violation of 42 U.S.C. § 14072(i)(1) and 18 U.S.C. § 2 (Count II); and making false statements when he provided information regarding his prior record and place of residence in violation of 18 U.S.C. § 1001 and 2 (Count III); and tampering with a witness, victim or informant for statements to law enforcement regarding the SORNA requirements, in violation of 18 U.S.C. § 1512(b)(3) and 2 (Count IV).

2. On May 13, 2008, Mr. [Defendant] appeared before the Honorable [Judge] and entered a plea of not guilty to the indictment.

3. The Federal Public Defender was appointed and a detention hearing was held on May 19, 2008.

4. Trial in this matter is scheduled for July 7, 2008.

5. [Defendant] moves to dismiss the indictment for the following reasons:

A. The Indictment violates the Commerce Clause because (1) Congress cannot force citizens convicted of purely local offenses to register; (2) Congress lacks the power to federalize a local offender's failure to register in a state-run registry, and (3) the jurisdictional element of 18 U.S.C. § 2250 (interstate travel) does not require that the travel be related to the failure to register.

B. The retroactive implementation of SORNA violates the Administrative Procedures Act because it was promulgated without notice and comment.

C. The indictment violates the Tenth Amendment of the United States Constitution because it impermissibly encroaches on State power.

D. The indictment violates the Right to Travel.

E. SORNA does not apply to Mr. [Defendant] because neither Pennsylvania nor New York has implemented the law and therefore the indictment violates the Due Process and the Ex Post Facto Clauses.

F. [Defendant] had no duty to register because the Government did not follow the requirements of the SMART Guidelines in notifying him of the Act's provisions.

G. The Non-Delegation Doctrine was violated by 42 U.S.C. § 16913 (d) which permitted the Attorney General to make the Act retroactive.

WHEREFORE, for the foregoing reasons, [Defendant] respectfully requests that this Honorable Court grant his Motion to Dismiss the Indictment against him.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I, [Attorney], Esquire, of the Federal Public Defender's Office, do hereby certify that I served a copy of the foregoing **MOTION TO DISMISS INDICTMENT** via Electronic Case Filing, and/or by placing a copy in the United States mail, and/or by hand delivery, addressed to the following:

AUSA, ESQUIRE
United States Attorney's Office

DEFENDANT NAME
Address
Address
Address

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Motion to Seal a Document

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Under Seal)

MOTION TO SEAL DOCUMENT

The Defendant, by and through undersigned counsel, pursuant to Local Criminal Rule XX for the Eastern District of Arkansas, and moves to file under seal the accompanying document based upon the attached declaration in support.

WHEREFORE, for all the foregoing reasons, the Federal Public Defender's Office moves to seal this Motion and the accompanying documents

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I,_____, Esquire, of the Federal Public Defender's Office, do hereby certify that I served a copy of the foregoing**Motion to Seal Document**, via Electronic Case Filing, and/or by placing a copy in the United States mail, and/or by hand delivery, addressed to the following:

_____, ESQUIRE
Assistant United States Attorney

_____
United States Probation Office

DEFENDANT
Address
Address
Address

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Ex-Parte Motion for Appointment of Expert Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	Electronically Filed

PETITIONER'S EX-PARTE MOTION FOR APPOINTMENT OF EXPORT CONTROLS WITNESS AT GOVERNMENT'S EXPENSE

Petitioner,_____, by his undersigned counsel, moves this Court for an Order authorizing

Petitioner's court-appointed counsel to obtain expert services, pursuant to the provisions of 18 U.S.C. §3006A(e), to assist him in developing and verifying the claims raised in Petitioner's Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. Section 2255 and to obtain an opinion on the sine qua non question whether the commodities that Petitioner stands convicted of having exported unlawfully were "defense articles" or "controlled items" at the time of their alleged export.

Accordingly, Petitioner desires to retain the services of an export controls specialist, to wit: _____. Mr._____focuses his practice on international business transactions, export controls and customs matters. His international business transaction work and export control work involves representing clients in connection with sales of military equipment and includes matters involving the Export Administration Regulations administered by the Department of Commerce and the International Traffic in Arms Regulations administered by the State Department.

This Motion is made on the grounds that Petitioner is financially unable to obtain such expert services and that such expert services are necessary to the full development by the Petitioner

of the factual claims before the Court in this Section 2255 proceeding, as more fully appears in the Declaration of Petitioner's Counsel attached hereto.

The proposed expert,_____, has agreed to reduce his normal hourly rate to $350.00 per hour from $650 per hour and it is anticipated that he will spend at least ten hours in reviewing records and preparing his report. Therefore, Petitioner further requests that advance authorization be granted to obtain services in an amount in excess of the maximum allowed under the provisions of subsection (e)(3) of the Criminal Justice Act, 18 U.S.C. Section 3006A, in order to provide fair compensation for services of an unusual character.

Date:

Respectfully submitted,

/s/ ATTORNEY_____
ATTORNEY, ESQUIRE

Suppression Motions:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

PRETRIAL MOTIONS TO SUPPRESS EVIDENCE

The Defendant, by his attorney, [Attorney], Esquire, of the Federal Public Defender's Office, files this Pretrial Motion to Suppress Evidence, averring as follows:

I. Procedural History

1. By indictment filed September 10, 2014, the defendant, [Defendant], was charged with felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

2. On September 16, 2014, Mr. [Defendant] appeared before the Honorable [Judge] and entered a plea of not guilty to the indictment.

3. Trial is currently set for December 8, 2014.

II. Factual History

4. On March 19, 2014, Officer [Officer] of the Little Rock Police Department was dispatched to [Address], to take a domestic report.

5. Officer [Officer] interviewed [Witness] who allegedly stated that her boyfriend, Mr. [Defendant], had assaulted her, threatened to "blow her head off," and "pistol whip" her while at their residence, [Address].

6. Ms. [Witness] told the officer that after the argument, Mr. [Defendant] demanded that she leave the house, and that when she refused, Mr. [Defendant] punched her in the face several times.

7. While Ms. [Witness] was collecting her things to leave, Mr. [Defendant] allegedly stated that he was going to "blow her head off" if the cops came.

8. Ms. [Witness] left the [Address] and went to her mother's at [Address] and called the police.

9. Officers [Officer] and [Officer] went to [Address], removed Mr. [Defendant] from the residence, and took him into custody.

10. Later, Officer [Officer] transported Ms. [Witness] back to [Address] where she allegedly gave written consent to search the house. A written copy is attached. See (Exhibit A).

11. During a search of the [Address] residence, a silver Ruger .44 Magnum Caliber Super Black Hawk revolver was recovered.

12. Mr. [Defendant] is challenging: 1) Ms. [Witness] consent to search the residence; and 2) his removal from the residence in order to prevent him from objecting to the search.

13. While a third party may give consent to search a place in which both she and the defendant have a legitimate expectation of privacy, a defendant can challenge the validity of the consent given by the third party.

14. Ms. [Witness] consent was not valid as Mr. [Defendant] alleges herein that she did not sign the consent to search document.

15. If the consent was not valid as to Ms. [Witness], then Mr. [Defendant] constitutional rights were violated as well. These facts will have to be developed at a hearing.

16. Moreover, in this case, the officers arrested Mr. [Defendant] at his residence.

17. The officers could have asked Mr. [Defendant] for consent but the officers intentionally removed him from the residence in order to avoid any objections to such a search.

18. The officers violated Mr. [Defendant] Fourth Amendment rights when they searched his residence without a warrant and without consent. U.S. CONST., amend IV.

19. Mr. [Defendant] requests that a hearing be held to develop the facts.

WHEREFORE, for the foregoing reasons, Mr. [Defendant] respectfully requests that this Honorable Court schedule a hearing and thereafter suppress the unlawfully obtained evidence.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I, [Attorney], Esquire, of the Federal Public Defender's Office, do hereby certify that I served a copy of the foregoing **Pretrial Motions to Suppress Evidence**, via Electronic Case Filing, and/or by placing a copy in the United States mail, and/or by hand delivery, addressed to the following:

AUSA, ESQUIRE
United States Attorney's Office

[DEFENDANT]
Address
Address
Address

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

PRETRIAL MOTION TO SUPPRESS STATEMENTS

The Defendant, [Defendant], by his attorney [Attorney], Esquire, of the Federal Public Defender's Office, files this Pretrial Motion to Suppress Statements, averring as follows:

1. By indictment filed January 14, 2009, the defendant, [Defendant], was charged with conspiracy to distribute and possess with the intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. § § 846 and 841(a)(1) and (b)(1)(A)(iii), and 18 U.S.C. § 2; and with distribution and possession with the intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii), and 18 U.S.C. § 2.

2. Mr. [Defendant] appeared before the Honorable [Judge] on January 27, 2009 and entered a plea of not guilty to the charges.

3. Trial is set for April 6, 2009, and pretrial motions are due on or before February 16, 2009.

4. On December 3rd and 9th, 2008, law enforcement allegedly conducted controlled purchases of heroin, utilizing an informant, from the defendant, [Defendant].

5. On December 9, 2008, Mr. [Defendant] was arrested.

6. After he was arrested, Mr. [Defendant] was taken to the DEA headquarters. According to agents, Mr. [Defendant] was read his Miranda rights and the following were statements allegedly taken from Mr. [Defendant]:

> [Defendant] related that he was bringing up 100 grams of heroin from Houston and he was going to get paid $10,000 for this heroin. He then related that he then would have to take $7000 back to this supplier. He would not give the name of his supplier. [Defendant] also related that he has a few people in Houston that he can get heroin from and that he has got up to 500 grams of heroin at a time from one of his suppliers.

7. Mr. [Defendant] denies that he made these statements. Mr. [Defendant] claims that the arrest left him dizzy as he had fallen to the ground. Moreover, he had used approximately three grams of heroin about twenty minutes before his arrest.

8. Mr. [Defendant] seeks to suppress his statements as he was "dizzy and high," and does not recall much of what was said. U.S. CONST. amend. V.

9. The Government has the burden to establish by a preponderance of the evidence that a challenged confession is voluntary.

10. A hearing is requested so that Mr. [Defendant] can establish that any statements he may have made were not voluntary.

WHEREFORE, for the foregoing reasons, the defendant, [Defendant], respectfully requests that this Honorable Court schedule an evidentiary hearing so that a determination can be made as to the voluntariness of Mr. [Defendant] statements.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I, [Attorney] of the Federal Public Defender's Office, do hereby certify that on this date I served a copy of the foregoing Pretrial Motion to Suppress Statements via Electronic Case Filing, and/or by placing a copy in the United States mail, and/or by hand delivery addressed to the following:

AUSA, ESQUIRE
United States Attorney's Office

DEFENDANT
Address
Address
Address

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Severance Motions

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

DEFENDANT X MOTION FOR SEVERANCE OF DEFENDANTS PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE

The Defendant, by and through his attorney,_, Esquire, files this Motion For Severance and respectfully states:

1. On_____a 5 Count Superseding Indictment was filed charging and approximately 18 other individuals with:

2. The defendant entered a plea of not guilty to the above charges and was ordered detained.

3. Discovery has been provided by the Government and the trial in this matter is currently scheduled for_____.

4. Mr. X's case is currently joined with eighteen (18) codefendants who are also listed on the Superseding Indictment.

5. The Superseding Indictment of_____alleges that Mr. X and other persons conspired to distribute controlled substances in several locations in Arkansas as well as Louisiana, Texas, Florida, and Georgia.

6. The Discovery in this matter reveals that the Government has conducted extensive surveillance on the majority of the Defendants named in the Superseding Indictment, has observed transactions involving controlled substances and the U.S. has found both controlled substances and

large quantities of currency in the residences of several of the co-defendants. Many of these residences are located outside of the Eastern District of Arkansas.

7. A review of the discovery provided to date reveals that, expect for a limited number of text messages and phone calls to one co-defendant and an alleged historical witness, the United States does not have the above forms of evidence against Mr. X in any manner that connects him to the co-defendants listed in the Superseding Indictment.

8. In addition, Count Three of the Superseding Indictment charges 12 of Mr. X's codefendants with Criminal Conspiracy to Possess Firearms in Furtherance of Drug Trafficking.

9. A review of the discovery provided by the United States reveals a significant distinction between the evidence and allegations related to Mr. X and the evidence and allegations related to his Co-Defendants.

10. Mr. X avers that the United States' allegations fail to establish a temporal or logical connection between the charges alleged against him and those alleged against his codefendants.

11. Mr. X avers that the Government's allegations do not provide the necessary link between his actions and the alleged conspiracy.

12. Mr. X avers that a jury impaneled in the above matter will not be able to compartmentalize the evidence against him from that presented against his Codefendants.

13. Mr. X avers that the majority of the Government's witnesses will provide information and testimony unrelated to the allegations against him and that those witnesses testifying against Mr. X will provide information and testimony unrelated to and inadmissible against his Co-defendants.

14. Mr. X further avers that the language of the Superseding Indictment and the information provided via discovery suggest that the primary focus of the Government's case and the majority of the evidence against his codefendants will not relate to his case and will be prejudicial.

15. Mr. X avers that his case was incorrectly joined with that of his codefendants under Federal Rule of Criminal Procedure 8 in that, the Government has not offered evidence to suggest that he

and any of his codefendants participated in the same act or transaction constituting the offenses charged.

16. Accordingly, Mr. X avers that a joint trial held on the allegations against him in conjunction with those against his codefendants will prejudice his right to receive a fair trial and that this Court must sever his trial from that of his Codefendants in accordance with Federal Rule of Criminal Procedure 14. .

17. Assistant United States Attorney was contacted by undersigned counsel and she indicated that she does not concur in this Motion.

WHEREFORE, the Defendant respectfully requests that this Honorable Court find his case misjoined with that of his codefendants, or in the alternative, sever his trial on the above captioned charges from the trial scheduled against his Codefendants in accordance with Federal Rule of Criminal Procedure 8 and 14.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

PRETRIAL MOTION TO SEVER CHARGES

The Defendant, [Defendant], by his attorney, [Attorney], Esquire, of the Federal Public Defender's Office, files this Pretrial Motion to Sever Charges, averring as follows:

1. By indictment filed November 12, 2014, the defendant, [Defendant], was charged with wire fraud, in violation of 18 U.S.C. § 1343 (6 Counts).

2. By superseding indictment filed April 15, 2015, Mr. [Defendant] was charged with wire fraud, in violation of 18 U.S.C. § 1343 (Counts 1-3); money laundering, in violation of 18 U.S.C. §§ 1956 and 2 (Counts 4-30); aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Count 31); felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 32); and a forfeiture allegation, in violation of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

3. On April 28, 2015, Mr. [Defendant] appeared before this Honorable Court and entered a plea of not guilty to the superseding indictment.

4. Trial is currently set for June 9, 2015.

5. The Government is alleging that from November 25, 2012, to November 20, 2014, Mr. [Defendant] orchestrated a scheme to defraud investors using an individual named [Name].

6. Mr. [Name] solicited money from investors to invest in a government program. Investors were guaranteed a return of three times their initial investment.

7. Mr. [Name] allegedly received more than $350,000 from approximately nineteen investors, which he claims he turned over to Mr. [Defendant] for investment purposes. The money was allegedly never invested and never returned to the investors.

8. The Government is also alleging in Count 32 of the superseding indictment, felon in possession of a firearm, that [Name] straw purchased a firearm for Mr. [Defendant] on December 24, 2013.

9. Mr. [Defendant] is prohibited from owning or possessing a firearm because of his prior record. There are no allegations that Mr. [Defendant] used or possessed this firearm in relation to any of the fraud allegations.

10. Mr. [Defendant] is asking this Court to sever Count 32, felon in possession, from the remainder of the counts in the superseding indictment.

11. The offense of felon in possession of a firearm was improperly joined with the fraud offenses and should be severed from the fraud offenses to avoid any prejudice.

12. Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) **Joinder of Offenses**. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged – whether felonies or misdemeanors or both – are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

See FED. R. CRIM. P. 8(a)

13. Rule 14(a) of the Federal Rules of Criminal Procedure provides:

> (a) **Relief**. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

See FED. R. CRIM. P. 14(a).

14. The fraud offenses and the firearm offense have nothing in common other than that the firearm offense occurred during a part of the time frame the fraud offenses are alleged to have occurred.

15. The Government has not alleged that the firearm was used during or in relation to the fraud offenses, and the introduction into a trial of a firearm on the fraud offenses would prejudice Mr. [Defendant].

16. Mr. [Defendant] is asking this Court to sever Count 32, felon in possession, from the remaining counts of the superseding indictment.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Honorable Court grant the within Pretrial Motion to Sever Charges.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

CERTIFICATE OF SERVICE

I, [Attorney], Esquire, of the Federal Public Defender's Office, do hereby certify that I served a copy of the foregoing **Pretrial Motion to Sever Charges**, via Electronic Case Filing, and/or by placing a copy in the United States mail, and/or by hand delivery, addressed to the following:

AUSA, ESQUIRE
United States Attorney's Office

[DEFENDANT]
Address
Address
Address

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Motion for Leave to File Interim Voucher

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

MOTION FOR LEAVE TO FILE INTERIM VOUCHER

AND NOW, this____day of_____, 20_, comes, esquire, and requests permission from the court to file an interim voucher in the above captioned case, respectfully representing as follows:

1. Undersigned counsel was court appointed to represent_____on_____.

2. Mr._____was charged with violations of_____.

3. Counsel was served with and reviewed voluminous discovery documents in this matter.

4. In addition, due to the complex nature of this case, numerous interviews of the defendant were conducted via phone and in person at three different prisons.

5. At the time of the indictment_____was being held at_____in XXX. Due to his state parole detainer he was transported to_____where he has been held in state custody since _____.

6. On two occasions counsel has obtained permission for overnight travel to XXX. The prison is located XXX hours from counsel's office and home in XXX, Arkansas. Counsel has incurred expenses for lodging, mileage and travel time for these necessary trips.

7. Due to_____regulations all telephone contact with the defendant is through Global Tel Link and is billed to undersigned counsel.

8. The date for sentencing has not yet been set by this court.

9. To date counsel's fees and expenses in this case total $_____.

10. Due to the complex nature of this case and its extended duration counsel avers that it would be a financial hardship for her not to receive an interim payment of counsel fees and expenses.

11. Accordingly, counsel is requesting a interim payment in the amount of $_____.

WHEREFORE, undersigned counsel respectfully requests that this court grant this motion and permit counsel to submit an interim voucher in the amount of $_____.

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Motion for Interim Payment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

MOTION FOR INTERIM PAYMENT

AND NOW, this_____day of_____, 20_, comes_____, esquire, and requests permission from the court to file an interim payment in the above captioned case, respectfully representing as follows:

1. Undersigned counsel was court appointed to represent_____on_____.

2. _____ was charged in this court in a one count criminal information. The defendant was charged with xxx.

3. On_____,_____pled guilty to the information pursuant to a written plea agreement.

4. On_____the defendant filed a motion to continue her sentencing until after the trials of her codefendants in order that she may be able to complete her cooperation.

5. This court granted Ms._____motion and sentencing is now scheduled for_____.

6. To date counsel's fees and expenses in this case total $_____.

7. Counsel does not expect that fees and expenses for the remainder of this case will exceed the statutory limit.

8. Due to the complex nature of this case and its extended duration counsel avers that it would be a financial hardship for her not to receive an interim payment of counsel fees and expenses.

9. Accordingly, counsel is requesting one interim payment in the amount of $_____.

WHEREFORE undersigned counsel respectfully requests that this court grant this motion and permit counsel to submit one interim voucher in the amount of $. The amount of the interim payment together with the final payment will not exceed the statutory threshold requiring approval by the circuit court.

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Motion to Travel Outside of District

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

DEFENSE COUNSEL'S EX-PARTE MOTION TO APPROVE TRAVEL OUTSIDE OF THE EASTERN DISTRICT

AND NOW, this__ day of_____, 20_, comes Defendant, by and through his attorney,_____, Esquire, and requests that this Court grant this Motion to Approve Travel, respectfully representing as follows:

1. Defense counsel is court appointed to represent the defendant in the above captioned case.

2. The Defendant was arraigned on and is charged with_____; in violation of _____

3. The Defendant has (add procedural history here).

4. State reasons why travel is necessary.

5. Defense counsel is requesting approval to travel to XXX_____to meet with her client to discuss the presentence report and determine what, if any, objections should be filed.

6. State how travel will be accomplished. For example: Counsel will travel to XXX in her personal vehicle. The trip will take approximately XXX hours one way from XXX. Because of the extent of travel involved counsel believes that it will be necessary to remain in the XXX area overnight.

7. Counsel requests compensation for travel time, mileage, meals and overnight accommodations.

8. Counsel believes that the proposed visit to the defendant is necessary in order to review the presentence report with her client and determine what, if any, objections should be filed. The travel will be accomplished in the most economical and expeditious fashion possible.

WHEREFORE, undersigned counsel requests that she be allowed to claim, in addition to other compensation which will be set forth on the CJA 20, travel time to and from SCI_____, mileage, overnight hotel accommodations and the cost of meals in connection with a visit to the defendant in this case.

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Motion to Hire Investigator at Government's Expense

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

DEFENDANT'S EX PARTE MOTION FOR APPOINTMENT OF INVESTIGATOR AT GOVERNMENT EXPENSE

Defendant,_____by his undersigned counsel, moves the Court for an order authorizing Defendant's counsel to obtain the services of a licensed, private investigator, to wit: _____, pursuant to the provisions of 18 U.S.C. §3006A(e), for the purpose of assisting in the preparation of the defense in this case.

This motion is made on the grounds that Defendant is financially unable to obtain such investigative services, and that such investigative services are necessary to the preparation by Defendant of an adequate defense to the charges pending against him as more fully appears in the affidavit of defense counsel attached hereto.

Date:

Respectfully submitted,

/s/ ATTORNEY_____
ATTORNEY, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S
EX PARTE MOTION FOR APPOINTMENT OF INVESTIGATOR
AT GOVERNMENT EXPENSE

State of Arkansas:

: ss

County of xxx :

_____, being duly sworn, states:

1. I am the attorney for the Defendant in the above-entitled action, having been appointed to represent the Defendant on_____. This affidavit is submitted in support of Defendant's motion for appointment of_____, a licensed investigator, to assist in the preparation of the defense in this case.

2. Defendant is charged in a multiple count First Superseding Indictment with possession with intent to distribute cocaine base (crack), cocaine and marijuana in violation of 21 U.S.C. §841(a)(1) and possession of a firearm in relation to a drug trafficking felony in violation of 18 U.S.C. §924(c).

3. Pursuant to discovery proceeding, the government has provided defense counsel with information that one_____was a passenger in an Uber car in which the Defendant was seated at the time of the Defendant's arrest on_____, in the vicinity of_____, Arkansas.

4. I have been informed that the suspected controlled substances seized as a result of a search of said Uber car and the premises situate at_____, did not belong to the Defendant, but rather belonged to either_____or other persons known to her.

5. I have been further informed that_____no longer resides at_____,

Pennsylvania, and her current whereabouts are unknown.

6. It is essential to the preparation of an adequate defense that this potential witness be located and interviewed.

7. Due to the fact that the above witness is believed to be currently residing somewhere in Houston, Texas, and due to the fact that expert investigative techniques must be employed to locate such witness, it is necessary for an adequate defense that I be able to obtain the services of a qualified private investigator to assist me in locating and interviewing such witness.

8. Defendant, as is indicated by Defendant's affidavit of financial status on file herein, is financially unable to obtain and pay for the services of such investigator

Date:

Respectfully submitted,

/s/ ATTORNEY_____
ATTORNEY, ESQUIRE

SWORN TO AND SUBSCRIBED BEFORE ME
THIS_____DAY OF_____, 20_.

_____
NOTARY PUBLIC

Motion to Appoint Mitigation Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

DEFENDANT'S EX PARTE MOTION FOR APPOINTMENT OF MITIGATION SPECIALIST AT GOVERNMENT EXPENSE

Defendant,_____, by his undersigned counsel, moves the Court for an order authorizing Defendant's counsel to obtain the services of a sentencing consultant/mitigation expert, to wit:_____, pursuant to the provisions of 18 U.S.C. §3006A(e), for the purposes of investigating Defendant and his family background and investigating all of the mitigating and aggravating factors in this case.

1. This motion is made on the grounds that Defendant is financially unable to obtain such services, and that such services are necessary to the investigation and presentation by Defendant of mitigating circumstances during the sentencing process as more fully appears in the affidavit of defense counsel attached hereto.

Date: Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	(Judge)
	:	
DEFENDANT	:	(Electronically Filed)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S
EX PARTE MOTION FOR MITIGATION EXPERT AT GOVERNMENT EXPENSE

State of Arkansas:

:

County of XXX:

_____, being duly sworn, states:

1. I am the attorney for the Defendant in the above-entitled action, having been appointed to represent the Defendant on_____. This affidavit is submitted in support of Defendant's motion for appointment of a mitigation specialist and/or sentencing consultant to investigate Defendant and his family background and to investigate all of the mitigating and aggravating factors in this case.

2. Defendant is charged in an information with conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §846.

3. It is necessary for effective representation of Defendant during the sentencing process, that I be able to obtain the services of a qualified mitigation specialist to assist me in the investigation and presentation of mitigation evidence at sentencing. A copy of the resume of the proposed mitigation expert,_____, is attached hereto as Exhibit "A".

4. Defendant, as is indicated by Defendant's affidavit of financial status on file herein, is financially unable to obtain and pay for the services of such investigator.

Date:

Respectfully submitted,

/s/ ATTORNEY
ATTORNEY, ESQUIRE

Sworn to and subscribed before me
this_____day of_____, 20 .

_____
NOTARY PUBLIC