**CHAPTER 6 MOTIONS PRACTICE**

by

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# MOTIONS PRACTICE

* + 1. **Filing Deadlines**

Rule 12 motions must be filed prior to trial or are deemed waived. Those include motions “alleging a defect in instituting the prosecution,” motions alleging a defect in the indictment other than failure to allege jurisdiction or state an offense, motions to suppress evidence, motions for severance under Rule 14, and motions for discovery under Rule 16. *See* FED. R. CRIM. P. 12(b)(3). Rule 47, as incorporated by Rule 12(b)(1), sets a deadline of five days prior to the hearing on the motion, which may presumably be at any time prior to trial, but courts often set earlier deadlines either by local rule or judge- or case-specific orders.

Other motions may be made prior to trial, but do not have to be. These include motions *in limine* regarding evidentiary issues, which, by their nature, can be raised through an evidentiary objection at trial instead of through a motion. They also include motions to dismiss an indictment for failure to state

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an offense or establish jurisdiction, though the cases hold that the indictment will be construed far more

liberally if such a motion to dismiss is not made prior to trial.5 One motion that cannot be made before

trial is a motion for judgment of acquittal, or motion to dismiss, based on insufficiency of the evidence, under Rule 29 of the Federal Rules of Criminal Procedure. Such a motion cannot be made before trial even if what the evidence will establish at trial is undisputed,6 though some circuits allow a pretrial ruling if the government does not object, either on a theory of waiver or for judicial efficiency.7 Regardless of whether a challenge to the evidence could be considered pretrial, defense counsel should consider the strategic implications before proceeding in that fashion. On the one hand, waiting until after jeopardy has attached can preclude a government appeal. *See infra* Section 6.07.04, “Rule 29 Judgements of Acquittal and Dismissal”; *see, e.g.*, *United States v. Blanton*, 476 F.3d 767 (9th Cir. 2007). On the other hand, proceeding pretrial and agreeing to a pretrial ruling may facilitate conditional plea negotiations in the event the motion is denied.

# Burdens of Proof

If the defendant is challenging a search or seizure based on a warrant, the burden of proof is on the defendant, but if the defendant is challenging a warrantless search or seizure, the burden of proof is

on the government.8 The defendant still has an initial burden of production in the form of showing that

5 *See United States v. Chesney*, 10 F.3d 641, 644 (9th Cir. 1993) (indictment more liberally construed

if motion to dismiss indictment for failure to state an offense delayed until trial); *United States v. Fogel*, 901 F.2d 23, 25 (4th Cir. 1990) (same where motion delayed until after verdict); *see also United States v. Vitillo*, 490 F.3d 314, 324 (3d Cir. 2007); *United States v. Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995); *United States v. Freeman*,

813 F.2d 303, 304 (10th Cir. 1987); *United States v. Gironda*, 758 F.2d 1201, 1210 (7th Cir. 1985).

6 See, e.g., *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004); *United States v. Ferro*, 252

F.3d 964, 968 (8th Cir. 2001); *United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000); *United States*

*v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996); *United States v. King*, 581 F.2d 800, 802 (10th Cir. 1978); *United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975); *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir. 1973).

7 *See, e.g.*, *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (citing cases); *United States*

*v. Flores*, 404 F.3d 320, 325-26 (5th Cir. 2005). *See also United States v. Donsky*, 825 F.2d 746, 751-52 (3d Cir. 1987), *and cases cited therein* (dismissal or directed verdict may be ordered at conclusion of government’s opening statement if government has made clear concession which would necessarily prevent conviction and government has been given full opportunity to correct any omissions in opening statement); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986), *and cases cited therein* (district court must decide issue raised in pretrial motion if issue is “entirely segregable” from evidence to be presented at trial and may, but is not required to, decide issue which is not “entirely segregable” but “does not require a review of a substantial portion of that evidence”).

8 *United States v. Carhee*, 27 F.3d 1493, 1496 (10th Cir. 1994); *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985); *United States v. Delafuente*, 548 F.2d 528, 533 (5th Cir. 1977). *See, e.g.*, *United States*

*v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001) (reasonable suspicion for investigatory stop); *United*

*States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992) (exigent circumstances); *United States v. Carbajal*, 956 F.2d 924, 930 (9th Cir. 1992) (consent); *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991) (inventory search); *United States v. Rutkowski*, 877 F.2d 139, 141 (1st Cir. 1989) (plain view); *United States v. Wheeler*, 800 F.2d 100, 102 (7th Cir. 1986) (reasonable suspicion justifying frisk during *Terry* stop); *United States v. Longmire*, 761 F.2d at 417-18 (probable cause and/or reasonable suspicion). *See generally Coolidge v. New*

there was a search or seizure that implicated the Fourth Amendment, however.9 With respect to fruits

of the unlawful search or seizure, the defendant has an initial burden of showing a factual nexus or possible taint,10 and the government then has the burden of showing attenuation, an independent source, or inevitable discovery if it chooses to rely on one or more of those doctrines.11

The defendant also has the burden of establishing standing,12 though this burden does not

preclude the defendant from taking an inconsistent position at trial regarding possession.13 And the

defendant may be relieved of his burden in some circumstances. This was suggested by *Steagald v. United States*, 451 U.S. 204 (1981), where the government was not allowed to raise the issue of standing for the first time in the Supreme Court because it had failed to challenge standing at the suppression hearing, had argued at trial that the defendant had a sufficient connection with the house to establish constructive possession, and had acquiesced in court rulings characterizing the house as the defendant's residence. *See id.* at 209-10; *see also United States v. Morales*, 737 F.2d 761, 764 (8th Cir. 1984) (citing *Steagald*). Courts of appeals applying *Steagald* have held, *inter alia*, that the government can waive a challenge to standing if it does not raise the issue in the district court,14 that the government cannot affirmatively argue lack of standing at the evidentiary hearing and then take an inconsistent position

*Hampshire*, 403 U.S. 443, 455 (1971) (“The burden is on those seeking the exception [from the warrant requirement] to show the need for it.” (quoting *United States Jeffers*, 342 U.S. 48, 51 (1951))); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (“The burden rests on the State to show the existence of such an exceptional situation [justifying a warrantless search.]”).

9 *See Nardone v. United States*, 308 U.S. 338, 341 (1939); *Carhee*, 27 F.3d at 1496; *Delafuente*, 548 F.2d

at 533.

10 *See Alderman v. United States*, 394 U.S. 165, 183 (1969); *United States v. Holmes*, 505 F.3d 1288,

1292 (D.C. Cir. 2007); *United States v. Kornegay*, 410 F.3d 89, 93-94 (1st Cir. 2005); *United States v. Nava-*

*Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000); *United States v. Ienco*, 182 F.3d 517, 528 (7th Cir. 1999); *United*

*States v. Finucan*, 708 F.2d 838, 844 (1st Cir. 1983); *United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir.

1980).

11 *See Murray v. United States*, 487 U.S. 533, 540 (1988); *Nix v. Williams*, 467 U.S. 431, 444 (1984);

*Holmes*, 505 F.3d at 1293; *Nava-Ramirez*, 210 F.3d at 1131; *Ienco*, 182 F.3d at 528.

12 *See United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005); *United States v. Gordon*, 168 F.3d 1222, 1226 (10th Cir. 1999); *United States v. Meyer*, 157 F.3d 1067, 1079 (7th Cir. 1998); *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995); *United States v. Wilson*, 36 F.3d 1298, 1302 (5th Cir. 1994); *United States v. Mancini*, 8 F.3d 104, 107 (1st Cir. 1993); *United States v. Rusher*, 966 F.2d 868, 874 (4th Cir. 1992).

13 *See United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984); *United States v. Issacs*, 708 F.2d

1365, 1367 (9th Cir. 1983).

14 *See, e.g.*, *United States v. Pervaz*, 118 F.3d 1, 4-5 (1st Cir. 1997); *United States v. Dewitt*, 946 F.2d

1497, 1499-1500 (10th Cir. 1991); *United States v. Garcia*, 882 F.2d 699, 701 (2d Cir. 1989); *United States v.*

*Amuny*, 767 F.2d 1113, 1122 (5th Cir. 1985)*. But cf. United States v. Braithwaite*, 709 F.2d 1450, 1453 (11th Cir. 1983) (distinguishing *Steagald* and allowing government to raise challenge to standing because argument was being raised at “first level of appeal” (quoting *United States v. Briones-Garza*, 651 F.2d 364, 366 n.1 (5th Cir. 1981))); *United States v. Miller*, 636 F.2d 850, 853-54 (1st Cir. 1980) (pre-*Steagald* case holding defendant could not complain of surprise because existing case law required defendant to prove standing).

regarding possession and control at trial,15 and/or that defendants can rely on an implicit jury finding of

possession and control that is inconsistent with a lack of standing.16 This does not allow the defendant

to simply rely on the government's theory of the case and present no evidence at all, however,17 though some circuits have established a test of whether “facts were adduced [below] from which the government could reasonably have inferred the existence of the defendant's standing,” *United States v. Ponce*, 8 F.3d 989, 994 (5th Cir. 1994) (quoting *United States v. Cardona*, 955 F.2d 976, 982 (5th Cir. 1992))18 and/or suggested that there should be a remand for the defendant to have an opportunity to carry his burden.19

As to motions to suppress a defendant’s statements, there is an allocation of burdens analogous to that for warrantless searches. The government has the burden of showing a knowing, intelligent, and voluntary waiver of *Miranda* rights and the voluntariness of the statement. *See Tague v. Louisiana*, 444

U.S. 469 (1980) (per curiam); *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (voluntariness); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (government bears “heavy burden” of showing suspect who made statement while in custody was informed of and voluntarily waived his rights). It appears the defendant has the burden of showing he or she was in custody and/or subject to interrogation, though there are relatively few cases addressing the issue.20

# Right to an Evidentiary Hearing

The court is required to hold an evidentiary hearing on a motion to suppress evidence if the defendant makes an offer of proof which is “sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.” *United States v. DiCesare*, 765 F.2d 890, 896 (9th Cir. 1985) (quoting *United States v.*

15 *See, e.g.*, *Pervaz*, 118 F.3d at 5; *Morales*, 737 F.2d at 764; *Issacs*, 708 F.2d at 1368; *cf. United States*

*v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992) (noting absence of government conduct such as taking contrary positions or engaging in deliberate strategy shift).

16 *See*, *e.g.*, *United States v. Bagley*, 772 F.2d 482, 489 (9th Cir. 1985); *cf. United States v. Singleton*,

987 F.2d 1444, 1448 (9th Cir. 1993) (distinguishing *Bagley* on ground that jury in *Bagley* had “implicitly found that Bagley possessed a car used in fleeing a bank robbery”); *United States v. Guthrie*, 931 F.2d 564, 569 (9th Cir. 1991) (distinguishing *Bagley* and *United States v. Morales, supra*, because “while the government argued at trial that Guthrie controlled the warehouse, it did not do so successfully; the jury acquitted Guthrie of all charges pertaining to the warehouse”).

17 *See, e.g.*, *United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005); *United States v. Singleton*, 987

F.2d at 1449.

18 *See also United States v. Irizarry*, 673 F.2d 554, 557 (1st Cir. 1982).

19 *See, e.g.*, *United States v. Pervaz*, 118 F.3d at 4; *United States v. Briones-Garcia*, 651 F.2d at 365.

20 *See United States v. Lawrence*, 892 F.2d 80 (Table), 1989 WL 153161, at \*5 (6th Cir. 1989)

(unpublished); *United States v. Davis*, 792 F.2d 1299, 1309 (5th Cir. 1986); *United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984); *United States v. Swanson*, No. CR 2-05-263, 2006 WL 335849 (S.D. Ohio Feb. 13, 2006), at \*5 (unpublished); *United States v. Newton*, 284 F. Supp. 2d 868, 873 (S.D. Ohio 2003); *U.S. v. Bassignani*, 575 F.3d 879, 886-87 (9th Cir. 2009).

*Ledesma*, 499 F.2d 36, 39 (9th Cir. 1974)), *amended*, 777 F.2d 543 (9th Cir. 1985).21 Courts have stated that allegations that are overly vague and conclusory do not require a hearing and that there must be

disputed facts which are material to resolution of the motion.22 Still, a court has discretion to hold a

hearing even if there are no material facts that the defendant specifically disputes. *United States v. Batiste*, 868 F.2d 1089, 1091-92 (9th Cir. 1989).

The Ninth Circuit has upheld a local rule requiring that the offer of proof be made in a declaration under oath by the defendant or some other witness with personal knowledge. *See United*

*States v. Wardlow*, 951 F.2d 1115 (9th Cir. 1991).23 It is unclear whether such a rule could be applied

where the defendant shows that neither he nor any other available declarant had knowledge of the relevant facts, as when officers conduct a warrantless search when no one other than the officers is

present.24 It is also unclear whether the declaration may be offered on just the issue on which the

defendant has the burden, e.g., standing, see *supra* Section 6.01.02, and whether the defendant mayinsist on cross-examining the government witnesses on the issue on which the government has the burden, e.g., justifying the absence of a warrant. *Cf. United States v. Ruth*, 65 F.3d at 604-05 (emphasizing need for affidavit from defendant on question of defendant’s expectation of privacy).

Motions challenging the voluntariness of a confession arguably are distinguishable from Fourth Amendment motions. *See Batiste*, 868 F.2d at 1092 n.5 (noting “the distinction between the Fourth

21 *See also United States v. Juarez*, 454 F.3d 717, 719-20 (7th Cir. 2006); *United States v. Lewis*, 40 F.3d 1325, 1332 (1st Cir. 1994); *United States v. Losing*, 539 F.2d 1174, 1177-78 (8th Cir. 1976) (also quoting *Ledesma* and collecting cases from other circuits); *Cohen v. United States*, 378 F.2d 751, 760-61 (9th Cir. 1967).

22 *United States v. Ramirez-Garcia*, 269 F.3d 945, 947 (9th Cir. 2001); *United States v. Randle*, 966 F.2d 1209, 1212 (7th Cir. 1992); *United States v. Losing*, 539 F.2d at 1178; *Cohen v. United States*, 378 F.2d at 760.

23 *Cf. United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000) (including “whether the defendant

testified . . . at the suppression hearing” in factors relevant to determining whether defendant met burden of showing reasonable expectation of privacy); *United States v. Ruth*, 65 F.3d 599, 604-605 (7th Cir. 1995) (noting defendant bears burden of establishing privacy interest and “without an affidavit or testimony from the defendant it is almost impossible to find a privacy interest because this interest depends, in part, on the defendant’s subjective intent and his actions that manifest that intent”). *But cf. United States v. Terry*, 11 F.3d 110, 113 (9th Cir. 1993) (order requiring declaration from defendant not bar at evidentiary hearing if defendant unaware of order); *Cohen v. United States,* 378 F.3d at 761 (courts can require affidavits by court order or local rule but affidavit not necessary in absence of court order or local rule).

24 *Cf. United States v. Cagle*, 849 F.2d 924, 928 n.6 (5th Cir. 1988) (noting that government’s witnesses provided ample support for defendant’s factual allegations and “those witnesses were the only ones who could attest to the events surrounding the seizure since Cagle was ignorant of the agents’ actions”); *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985) (noting that “[t]he facts allegedly constituting the reasonable suspicion are peculiarly within the knowledge and control of the police” and “[t]o require the defendant to prove the absence of a reasonable suspicion without knowledge of the facts upon which the police based their assessment of the existence of a reasonable suspicion is to place upon him an impossible burden”); *United States*

*v. Diaz*, No. CR 05-00167 WHA, 2006 WL 2990219, at \*1 (N.D. Cal. Sept. 28, 2006) (acknowledging that “certain applications of this rule [requiring a sworn declaration by defendant] would be unfair” and citing examples such as “motions challenging the conduct of officers where defendants were not present or could not be expected to know the key facts”).

Amendment probable cause requirement for warrantless arrests and the Fifth Amendment prohibition against coerced confessions”). The Supreme Court has stated that “[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and voluntariness of his confession are actually and reliably determined.” *Jackson v. Denno*, 378 U.S. 368, 380 (1964), *quoted in Batiste*, 868 F.2d at 1092 n.5. The privilege against self-incrimination that the Fifth Amendment protects is a “fundamental *trial* right,” *Withrow v. Williams*, 507 U.S. 680 (1993) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)) (emphasis added in *Withrow*), which, unlike the Fourth Amendment exclusionaryrule, serves “value[s] [not] necessarilydivorced from the correct ascertainment of guilt,” *Withrow*, 507 U.S. at 692. The more fundamental nature of the Fifth Amendment right makes it appropriate to subject it to less stringent procedural limitations. *Cf. Withrow*, 507 U.S. at 683 (declining to extend preclusion of Fourth Amendment habeas corpus claims in *Stone*

*v. Powell*, 428 U.S. 465 (1976) to Fifth Amendment claims).

Finally, under the general statutory provision governing the duties of magistrate judges, district courts may delegate evidentiary hearings to magistrate judges so long as the district court conducts a *de novo* review of the magistrate’s recommendation. *See United States v. Raddatz*, 447 U.S. 667 (1980)

(construing 28 U.S.C. § 636(b)(1)).25 This does not necessarily require a *de novo* hearing, because the

district court may adopt the factual and credibility findings of the magistrate judge without hearing the witnesses personally. *See Raddatz*, 447 U.S. at 674. The district court is not allowed to *reject* the magistrate judge’s factual findings and/or credibility determinations without hearing the witnesses personally, however, at least in the absence of unusual circumstances.26

# Need to Renew Motions During Trial

Some motions must be renewed at various points during the trial. One such motion, at least in most instances in most circuits, is a motion to sever under Rule 14 of the Federal Rules of Criminal

Procedure, *see infra* Sections 6.12.01.02, 6.12.02.02.27 Most circuits have stated a “general rule” that

25 *See also Campbell v. United States District Court for the Northern District of California*, 501 F.2d

196 (9th Cir. 1994); *Criminal Jurisdiction of Magistrates under Federal Magistrates Act of 1968 (28 U.S.C.A.*

*§ 631, et seq.*), 127 A.L.R. FED. 309, § 30 (1995) (collecting cases).

26 *United States v. Hernandez-Rodriguez*, 443 F.3d 138, 148 (1st Cir. 2006); *United States v. Ridgway*, 300 F.3d 1153, 1157 (9th Cir. 2002); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001); *cf. United States v. Raddatz*, 447 U.S. at 681 n.7 (noting issue not before Court but suggesting that rejection of magistrate’s proposed findings on credibility without seeing and hearing the witnesses “could well give rise to serious questions which we do not reach”). *But cf. United States v. Bailey*, 302 F.3d 652, 657 n.5 (6th Cir. 2002) (noting “it is an open question in this circuit whether a district court can reject a magistrate judge’s credibility determination without holding a new hearing”); *Cofield*, 272 F.3d at 1306 (construing *United States v. Marshall*, 609 F.2d 152 (5th Cir. 1980) as creating exception in “rare case” where “there . . . [is] found in the transcript an articulable basis for rejecting the magistrate’s original resolution of credibility and that basis . . . [is] articulated by the district judge” (quoting *Marshall*, 609 F.2d at 155)); *United States v. Ornelas-Ledesma*, 16 F.3d 714, 720- 21 (7th Cir. 1994) (question left open in *Raddatz* need not be answered in case at bar because “[e]ven if . . . a district judge can reject a magistrate judge’s determinations of credibility without hearing the witness’s testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether”), *vacated on other grounds*, 517 U.S. 690 (1996).

27 Motions based on misjoinder under Rule 8 have been distinguished from motions to sever, at least in the Sixth and Ninth Circuits, on the ground that misjoinder is a question of law while severance is a question of

the motion must be renewed at the close of the government’s case, or the close of the evidence.28 In

many, if not most, circuits, this general rule, sometimes characterized as a “formality,” can be overridden so long as the defendant was diligent and acted in good faith by renewing the motion if and when it might have made a difference.29 The most effective way to make the record – and perhaps even get relief

– is to renew the motion at those points during trial where the evidence or other events illustrate the need for severance. *See, e.g.*, *United States v. Odom*, 888 F.2d 1014, 1017 (4th Cir. 1989) (describing renewal of motion prior to trial, after opening statement, and several times thereafter and eventual grant of motion by district court upon “[s]eeing the storm clouds gathering”); *United States v. Kaplan*, 554 F.2d at 966 (defendant who did not renew motion when witness at issue indicated he would not testify waived challenge but defendants who “pursued diligently the motion to sever, renewing it during trial at the time [the witness] refused to testify, and when the existence of the FBI form [containing allegedly exculpatory statements] became known” preserved issue). Still, in light of the cases stating the general rule that the motion must be renewed at the close of the evidence, counsel should renew the motion both at the close of evidence and at a moment in the trial when the need for severance becomes evident.

court discretion. *See United States v. Chavis*, 296 F.3d 450, 457-58 (6th Cir. 2002); *United States v. Terry*, 911 F.2d 272, 277 (9th Cir. 1990)*; see also United States v. Bova*, 493 F.2d 33, 37 (5th Cir. 1974).

28 *See United States v. Cassano*, 372 F.3d 868, 885 (7th Cir. 2004), *vacated and remanded for*

*reconsideration on other grounds*, 543 U.S. 1109 (2005); *United States v. Vasquez-Velasco*, 15 F.3d 833, 845

(9th Cir. 1994); *United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987); *United States v. Mansaw*, 714 F.2d 785, 790 (8th Cir. 1983). *But see United States v. Lanese*, 890 F.2d 1284, 1289 (2d Cir. 1989) (noting rule in other circuits but describing rule in Second Circuit as “failure to pursue vigorously the severance issue below increases our reluctance to second-guess the trial court’s decision” (quoting *United States v. Lyles*, 593 F.2d 182, 192 (2d Cir. 1979))); *United States v. Means*, 695 F.2d 811, 818 (5th Cir. 1983) (noting Fifth Circuit does not recognize waiver of severance upon non-renewal of the motion at trial but requires showing of “compelling prejudice”); *cf*. *United States v. Inigo*, 925 F.2d 641, 655 n.14 (3d Cir. 1991) (noting rule in other circuits but refusing to consider it in case at bar without briefing by parties).

29 *See*, *e.g.*, *United States v. Mickelson*, 378 F.3d 810, 817 n.2 (8th Cir. 2004)) (defendant does not waive severance claim by failing to renew motion “so long as the district court had the opportunity to consider his motion with full knowledge of the situation” and “nothing at trial changed regarding the reason for severance”); *Vasquez-Velasco*, 15 F.3d at 845 (requirement that motion be renewed is “not an inflexible one”; no waiver when “the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality”; “[t]he guiding principle is whether the defendant diligently pursued the motion” (quoting *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991) and *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir. 1977)); *United States v. Dobin*, 938 F.2d 867, 869 (8th Cir. 1991) (“we consider the actions taken by the defendant in light of the purposes for requiring the motion’s renewal”; motion does not need to be renewed when “there is no material change with respect to what happens at the trial” but does need to be renewed “if events at trial do not correspond to what is expected to occur when the motion is made”); *cf*. *Cassano*, 372 F.3d at 885 (characterizing “the close of evidence” as “the moment when the district court can fully ascertain whether the joinder of multiple counts was unfairly prejudicial to the defendant’s right to a fair trial” (quoting *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002))); *United States v. Smith*, 308 F.3d 726, 736 (7th Cir. 2002) (characterizing defendant’s argument that he did not need to renew motion because evidence could be fully assessed prior to trial as “at least plausible”).

There is also a general rule that motions for acquittal must be renewed at the close of the

evidence, including any evidence that may be put on in a defense case.30 This rule is not flexible like

the rule regarding motions for severance, except there can still be review if the evidence is so weak that the conviction is a miscarriage of justice and/or plain error,31 and the motion does not have to be made in a bench trial.32 The motion does not have to be made at the close of the government’s case in addition to the close of all of the evidence. *See United States v. Tisor*, 96 F.3d 370, 379-80 (9th Cir. 1996); *see also* FED. R. CRIM. P. 29(a) (permitting motion “[a]fter the government closes its evidence *or* after the close of all the evidence” (emphasis added)). Though delay of the motion until the close of the defense's case means the defense's evidence must be considered as well as the government’s evidence. *See United States v. Buras*, 633 F.2d 1356, 1359 (9th Cir. 1980). Most circuits have held it is sufficient to renew the motion, or even make it for the first time, within seven days after the verdict, under Rule 29(c).33

Other motions must be renewed, at least if the issue is to be preserved in its best posture, if, but only if, the facts and/or circumstances on which the motion was based change, new evidence comes to light, or the district court has not made a definitive pretrial ruling. A motion to suppress evidence thus should be renewed when the trial reveals new evidence favorable to the motion that the defense wishes to be considered in evaluating the correctness of the pretrial ruling.34 If the new evidence suggests a new

30 *See United States v. Jordan*, 544 F.3d 656, 670, (6th Cir. 2008); *United States v. Del Rosario*, 388

F.3d 1, 7 (1st Cir. 2004); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1022 (9th Cir. 2000); *United*

*States v. Wadena*, 152 F.3d 831, 853 (8th Cir. 1998); *United States v. Brimley*, 148 F.3d 819, 821 (7th Cir. 1998);

*United States v. Williams*, 144 F.3d 1397, 1402 (11th Cir. 1998); *United States v. Sherod*, 960 F.2d 1075, 1077 (D.C. Cir. 1992) (collecting cases from other circuits).

31 *See United States v. Jordan*, 544 F.3d at 670; *United States v. Allen,* 390 F.3d 944, 947 (7th Cir.

2004); *United States v. Del Rosario*, 388 F.3d at 7; *United States v. Veerapol*, 312 F.3d 1128, 1131 (9th Cir. 2002); *United States v. Wadena*, 152 F.3d at 853; *United States v. Williams*, 144 F.3d at 1402.

32 *See United States v. Grace*, 367 F.3d 29, 34 (1st Cir. 2004); *United States v. South*, 28 F.3d 619, 627 (7th Cir. 1994); *United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc) (collecting cases).

33 *See United States v. Gonzalez*, 528 F.3d 1207, 1210-11 (9th Cir. 2008)*; United States v. Miller*, 527

F.3d 54, 61 (3d Cir. 2008); *United States v. Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003); *United States v. South*,

28 F.3d at 626 n.3; *United States v. Castro-Lara*, 970 F.2d 976, 980 (1st Cir. 1992); *United States v. Allison*, 616

F.2d 779, 784 (5th Cir. 1980). *See also United States v. Bowman*, 302 F.3d 1228, 1237 (11th Cir. 2002) (treating post-verdict motion for judgment of acquittal as sufficient without discussion of fact that defendant did not renew motion at close of evidence); *United States v. Bell*, 28 F.3d 1214 (Table), 1994 WL 362073, at \*9 (6th Cir. 1994) (unpublished); *United States v. Konstenius*, 2 F.3d 1152 (Table), 1993 WL 307088, at \*4 (6th Cir. 1993) (unpublished). *But cf. United States v. Booker*, 436 F.3d 238, 241 (D.C. Cir. 2006) (noting but not deciding question of whether post-verdict motion sufficient when defendant did not renew motion at close of evidence).

34 *See United States v. Quintanilla*, 25 F.3d 694, 698 (8th Cir. 1994); *United States v. Parra*, 2 F.3d

1058, 1065 (10th Cir. 1993); *United States v. Jesus-Rios*, 990 F.2d 672, 675 (1st Cir. 1993); *United States v.*

*Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1993); *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989); *United States v. Longmire*, 761 F.2d 411, 420-21 (7th Cir. 1989). *But cf. United States v. Thomas*, 211 F.3d 1186, 1191-92 (9th Cir. 2000) (noting as an additional ground for reversing district court’s denial of motion to suppress evidence that detective’s claim was “inconsistent with his other testimony at the suppression hearing *and trial*” (emphasis added)).

legal theory, that legal theory should be articulated as well. *See, e.g.*, *United States v. Humphrey*, 208 F.3d 1190, 1203-04 (10th Cir. 2000). Some courts have suggested that trial courts have a duty to correct an erroneous suppression ruling *sua sponte* if the error “is of such a nature that the district court should have immediately realized that its earlier ruling was in error.” *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir. 1993); *see also Longmire*, 761 F.2d at 421 n.5.

Similarly, a motion *in limine* must be renewed when the nature of the evidence which was the subject of the motion differs from what was anticipated in the pretrial hearing on the motion.35 A motion *in limine* must also be renewed if the judge indicates that the pretrial ruling is only tentative and/or

conditional.36 A motion *in limine* does not need to be renewed if the pretrial ruling is “definitive” and

there is no change in the nature of the evidence or the underlying circumstances. FED. R. EVID. 103.37

# Tactical Reasons for Filing Motions

There are reasons for filing motions other than the ultimate hope that the motion will be granted. Questioning witnesses outside the presence of the jury can provide an opportunity to uncover damaging testimony in advance of trial and/or lock in helpful testimony. Consider the latter benefit especially in those cases where law enforcement officer’s incentives at a suppression hearing are the opposite of their incentives at trial. Good examples of this are cases involving consent to a search or the voluntariness of a statement. The officers’ incentive at the hearing will be to emphasize the defendant’s cooperativeness to show that there did not have to be any pressure or coercion, while the officers’

35 *See United States v. Harrison*, 296 F.3d 994, 1002 (10th Cir. 2002) (party objecting to evidence cannot rely on new evidence or difference in evidence at trial if party does not renew objection); *Wilson v. Williams*, 182 F.3d 562, 567-68 (7th Cir. 1999) (en banc) (party could not object to use of evidence which was narrower than use of evidence considered in pretrial ruling, because “[a] pretrial ruling is definitive only with respect to subjects it covers”); FED. R. EVID. 103 advisory committee’s note (2000 amendment) (“[i]f the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike”). *But cf. United States v. Varela-Rivera*, 279 F.3d 1174, 1178 (9th Cir. 2002) (excusing defendant’s failure to renew objection where actual testimony at trial “varied to some extent” because “changing proffers from the government presented [the defendant] with a moving target for his objection”).

36 *Williams*, 182 F.3d at 565-66. *See, e.g.*, *United States v. Galati*, 230 F.3d 254, 259 (7th Cir. 2000).

*Cf.* FED. R. EVID. 103 advisory committee’s note (2000 amendment) (party must renew objection when trial court appears to have reserved ruling or indicated its ruling is provisional); *United States v. McDermott*, 245 F.3d 133, 141 n.3 (2d Cir. 2001) (noting that some rulings involving potentially prejudicial testimony cannot be relied on because trial court might be unable to balance probative and prejudicial value without actual testimony). *But cf. Harrison*, 296 F.3d at 1002 (defendant did not need to renew objection even though pretrial ruling was conditional because “the court made clear to defense counsel that it did not wish to hear repetitive argument on the matter”).

37 *See United States v. Flenoid*, 415 F.3d 974, 976 (8th Cir. 2005); *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002) (noting amendment to Federal Rule of Evidence 103 changed prior law in circuit); *Harrison*, 296 F.3d at 1002; *United States v. Gajo*, 290 F.3d 922, 927 (7th Cir. 2002); *Conwood Co. v. United States Tobacco Co.,* 290 F.3d 768, 791-92 (6th Cir. 2002); *Varela-Rivera*, 279 F.3d at 1177-78; *United States v. McCauley*, 279 F.3d 62, 72 n.7 (1st Cir. 2002); *McDermott*, 245 F.3d at 141 n.3.; *Williams*, 182 F.3d at 565-66.

incentive at trial might be to characterize the defendant as evasive or uncooperative so as to suggest a guilty conscience. Another advantage of a pre-trial hearing is that it offers counsel a preview to a witnesses's demeanor.

A second potential benefit to motions is that the position a judge takes in denying one motion may require or suggest a favorable ruling on another issue at a later time. For example, a judge’s denial of a motion to dismiss based on a statute’s overbreadth, *see infra* Section 6.02.03, “may commit the judge to narrowly construing the statute when it comes to time to consider jury instructions and/or sufficiency of the evidence to support a conviction. *Cf. Jones v. United States*, 526 U.S. 227, 239-40 (1999) (noting and applying rule that statute which is susceptible of two constructions should be construed to avoid difficult constitutional questions). A ruling rejecting an argument that prejudicial effect outweighs probative value under Rule 403 of the Federal Rules of Evidence on a theory that jurors can be expected to follow a limiting instruction and consider evidence only for its legitimate purpose might be used as a basis for convincing the court to reject a government Rule 403 objection to evidence offered by the defense at a later point in the trial. A motion for severance based on misjoinder under Rule 8, *see infra* Section 6.12.01.01, may lead the government to argue that the joinder is proper because the offenses are based on “the same act or transaction” or “two or more acts or transactions connected together or constituting part of a common scheme or plan,” *infra* Section 6.12.01.01, “Joinder Under Rule 8(a),” and thereby provide support for an argument that the counts should be grouped under § 3D1.2 of the Sentencing Guidelines, which uses similar language as a basis for grouping counts. *See*

U.S.S.G. § 3D1.2(a), (b).

There may also be tactical considerations involved in deciding whether to raise an evidentiary objection in a written motion in limine or in some other fashion. Some evidence -- for example, a prior conviction that may be used to impeach the client if he or she testifies -- may be impossible to keep hidden from the jury with just an evidentiary objection to the prosecutor’s question. Other objections may not lend themselves to an off-the-cuff ruling but require more careful briefing and time for the court to consider the issue. Still other objections may seem weaker as they are more carefully briefed and considered so that counsel may prefer an off-the-cuff ruling. Counsel should also consider the possibility that the prosecutor may not think of using the evidence if the possibility is not suggested through a motion, or consider the possibility of an informal discussion of the evidence with the prosecutor that triggers an atmosphere of cooperation, fairness, and “working things out” instead of the adversarial digging in of heels that “motions practice” and “litigation” may trigger.

# MOTIONS TO DISMISS BASED ON CONSTITUTIONALITY OF STATUTE

The following is a discussion of several more general constitutional attacks on criminal statutes. Discussion of specific constitutional attacks in the firearms context based on the Second Amendment and the Interstate Commerce Clause may be found in Chapter 24, Federal Firearms Offenses.

# Subject Matter Jurisdiction: Constitutional Limits on the Court’s Adjudicatory Authority

The term “subject matter jurisdiction” identifies the classes of cases falling within a court’s adjudicatory authority. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). Congress has bestowed on the district courts original jurisdiction or adjudicatory authority, exclusive of the courts of the States, over all offenses against the laws of the United States. 18 U.S.C. § 3231. Although federal district courts

have adjudicatory authority over all offenses against the laws of the United States, Congress’s authority to regulate or criminalize behavior derives solely from the Constitution. *See United States v. Germaine*, 99 U.S. 508, 510 (1878) (“[N]o act of Congress is of any validity which does not rest on authority conferred by [the Constitution].”); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (Congress’s powers are limited to those enumerated in the Constitution.). Absent a constitutional grant of authority to legislate, Congress is powerless to act, and the courts are powerless to adjudicate. A federal court, however, retains jurisdiction to determine the question of whether it has jurisdiction over a case. *United States v. Shipp*, 203 U.S. 563, 573 (1906) (a federal court “necessarily ha[s] jurisdiction to decide whether the case [is] properly before it.”).

A claim of lack of subject-matter jurisdiction, “because it involves a court's power to hear a case, can never be forfeited or waived.” *United States v. Cotton*, 535 U.S. 625, 630 (2002).

# Extraterritorial Jurisdiction

Congress may enforce its laws beyond the territorial boundaries of the United States. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*. Generally, there is no constitutional bar to the extraterritorial application of the penal laws of the United States. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991). International law recognizes six general principles whereby a sovereign may regulate conduct outside its borders: (1) territorial, wherein jurisdiction is based on the place where the offense is committed; (2) national, wherein jurisdiction is based on the nationality or national character of the offender; (3) protective, wherein jurisdiction is based on whether the national interest is injured; (4) universal, which amounts to physical custody of the offender; (5) passive personal, wherein jurisdiction is based on the nationality or national character of the victim; and (6) objective territorial, wherein jurisdiction is based on acts done outside a geographic jurisdiction, but which produce detrimental effects within it. *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1968); *see also United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967).

Despite the breadth of this power, the Supreme Court has “adopted the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.” *Small v. United States*, 544 U.S. 385, 388-89 (2005); *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (extraterritorial application question guided by “general presumption that Acts of Congress do not ordinarily apply outside our borders”); *Arabian Am. Oil Co.*, 499 U.S. at 248 (presumption against extraterritoriality is a longstanding principle of American law and it should be assumed that Congress legislates against the backdrop of this presumption). Whether Congress has in fact exercised its extraterritorial power is a question of statutory construction, subject to the presumption against it. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Thus, “absent clear evidence of congressional intent to apply a statute beyond our borders, the statute will apply only to the territorial United States.” *United States v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000) (internal quotation marks omitted); *see also Arabian Am. Oil Co.*, 499 U.S. at 248 (1991) (“[U]nless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.” (Internal

quotation marks and citations omitted)).38 “Congress generally legislates with domestic concerns in

38 The question of extraterritorial jurisdiction should be distinguished from the exercise of jurisdiction

over crimes committed within the “special maritime and territorial jurisdiction of the United States,” which is defined to include “lands reserved or acquired for use of the United States,” 18 U.S.C. § 7(3). This includes such

mind,” *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993), “so courts can infer from congressional silence that the legislature meant to regulate only activities within the nation’s borders,” *United States*

*v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). This rule protects against “unintended clashes between our laws and those of other nations which could result in international discord.” *Arabian Am. Oil Co.*, 499 U.S. at 248.

In *United States v. Bowman*, 260 U.S. 94 (1922) the Supreme Court carved out an exception to the presumption against extraterritoriality. The Court found that the presumption should not apply to “criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.” *Id.* at

98. In the case of such criminal statutes, the Court reasoned, Congress’s intent to regulate conduct abroad may “be inferred from the nature of the offense.” *Id.* Courts have inferred Congress’s intent and applied statutes extraterritorially in cases involving fraud on the United States or a United States corporation in which the United States is a shareholder,39 violent crimes associated with international drug trafficking,40 accessory after the fact to kidnaping and murder of an American agent,41 attempt and conspiracy to smuggle goods into or out of the United States,42 production of child pornography abroad by an American citizen,43 attempts to bring undocumented aliens into the United States,44 conspiracy to

place a bomb on board a United States airplane,45

sexual contact with a minor,46

and antitrust

lands outside the United States. *See* 18 U.S.C. § 3261, *et seq*. *Cf. Gatlin*, 216 F.3d at 223 (2d Cir. 2000) (pre-§ 3261 case holding 18 U.S.C. § 7(3) did not apply to American military reservations outside United States).

39 *See Bowman*, 260 U.S. at 98.

40 *See United States v. Vasquez-Velasco*, 15 F.3d 833, 839 n.4 (9th Cir. 1994) (murder abroad to further drug trafficking crime); *United States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984) (conspiracy to murder government agents and assault of government agents abroad).

41 *See United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).

42 *See United States v. Plummer*, 221 F.3d 1298, 1305-06 (11th Cir. 2000); *United States v. MacAllister*, 160 F.3d 1304, 1307-08 (11th Cir. 1998); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967); *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980).

43 *See United States v. Harvey*, 2 F.3d 1318, 1329 (3d Cir. 1993); *United States v. Thomas*, 893 F.2d

1066, 1068 (9th Cir. 1990).

44 *See United States v. Villanueva,* 408 F.3d 193, (5th Cir. 2005); *see also United States v. Delgado-*

*Garcia*, 374 F.3d 1337, 1345-46 (D.C. Cir. 2004) (upholding convictions of alien defendants who conspired abroad to induce aliens to illegally enter U.S.); *United States v. Liang*, 224 F.3d 1057, 1060 (9th Cir. 2000) (finding offense of alien smuggling began extraterritorially and continued to the territorial waters of Guam).

45 *See United States v. Yousef*, 327 F.3d 56, 87-88 (2d Cir. 2003).

46 *See United States v. Neil*, 312 F.3d 419, 421-22 (9th Cir. 2002) (upholding conviction of foreign

citizen where conduct occurred on a foreign vessel in Mexico but victim was a United States citizen and cruise began and ended in United States).

violations.47 On the other hand, the Supreme Court in recent years has addressed the issue of

extraterritoriality on numerous occasions and found statutes did not extend,48 and the last case in which

the Court relied on the *Bowman* exception in a majority decision was in the 1950s.49 In light of the

Court’s recent decisions strictly applying the presumption against extraterritoriality, the continuing viability of the *Bowman* exception can be debated.

# Overbreadth

The overbreadth doctrine is normally associated with constitutional attacks based on First Amendment challenges. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. *Virginia*

*v. Black*, 538 U.S. 343, 358 (2003). The Supreme Court has held that the Constitution “gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Under the doctrine, a law may be facially overbroad if its existence could cause individuals to refrain from constitutionally protected speech or conduct. *See Broadrick*, 413 U.S. at 612.

The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is protected, “may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *New York v. Ferber*, 458 U.S. 747, 768 (1982)*.* Thus, the overbreadth doctrine is a “limited exception to the traditional rule of standing,” which requires that the individual sustain an actual injury as a result of the statute prior to challenging it. *Broadrick*, 413 U.S. at 612. Under the overbreadth doctrine, the person attacking the statute does not have to show that the specific speech or conduct being prosecuted is constitutionally protected. *See id.* (“Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”). An overbreadth challenge may be raised even though “the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.” *Ferber*, 458 U.S. at 769; *see also Forsyth County v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (“It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial

47 *See United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997) (activities committed abroad which have substantial and intended effect within United States may form basis for criminal prosecution under Section One of Sherman Act).

48 *See, e.g.*, *Small v. United States*, 544 U.S. at 388-89 (holding that “convicted in any court” element

of federal felon in possession of firearm statute excludes convictions entered in foreign courts); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (under the presumption against extraterritoriality the Court held that U.N. Convention Relating to Status of Refugees (treaty) and Immigration and Nationality Act (statute) did not apply to actions taken by Coast Guard at the President’s directive on the high seas); *Smith*, 507 U.S. at 204

n.5 (holding that Federal Tort Claims Act waiver of sovereign immunity did not apply to claims arising in Antarctica); *Arabian Am. Oil Co.*, 499 U.S. at 248 (Title VII does not apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad), *superseded by statute*; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (exception for non- commercial torts under Foreign Sovereign Immunities Act did not apply to claims arising on high seas).

49 *See Rainwater v. United States*, 356 U.S. 590, 593 (1958).

review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.”).

There are three ways to formulate an overbreadth challenge. The first two methods attack the statute on its face, whereas the third attacks the statute as it applies to the person challenging it. First, a statute can be attacked as facially overbroad if it can be shown that every application of the statute creates an impermissible risk of suppression of ideas. *See Members of the City Council v. Taxpayers*

*for Vincent*, 466 U.S. 789, 796 (1984).50 The basis for allowing this sort of challenge when First

Amendment rights are at stake is a concern that “the statute’s very existence may cause others not before the court to refrain from constitutionally protected conduct.” *Id.* at 799 (quoting *Broadrick v. Oklahoma*, 413 U.S. at 612).

Second, a statute can be attacked as facially overbroad even if it regulates conduct rather than speech, if overbreadth of the statute “is not only real, but substantial as well, as judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615. Under this type of facial overbreadth challenge to the statute, “a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.” *New York v. Ferber*, 458 U.S. at 771 (1982); *see also Taxpayers for Vincent*, 466 U.S. at 800 (1984) (stating that “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge”). The preliminary inquiry in this type of overbreadth attack is whether the statute reaches a substantial amount of protected conduct. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). “The overbreadth claimant bears the burden of demonstrating, ‘from the text of [the law] and from actual fact,’ that substantial overbreadth exists.” *Virginia v. Hicks*, 539

U.S. 113, 122 (2003) (quoting *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988)).

The remedy for substantial overbreadth is to totally forbid any enforcement of the statute at issue unless and until a limiting construction or partial invalidation so narrows it as to remove the seeming

threat to constitutionally protected expression.51 *Broadrick*, 413 U.S. at 613. In the case of a criminal

50 *See, e.g*., *Saia v. New York*, 334 U.S. 558 (1948) (ordinance prohibited use of loudspeaker in public

places without permission of the chief of police whose discretion was unlimited); *Cantwell v. Connecticut*, 310

U.S. 296 (1940) (ordinance required license to distribute religious literature without standards for the exercising of licensing discretion); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (plurality opinion) (statute permitted city to deny permit for a public demonstration subject only to the uncontrolled discretion of the director of public safety); *Schneider v. State*, 308 U.S. 147 (1939) (ordinances prohibited distributing leaflets without a license and provided no standards for issuance of licenses); *Lovell v. Griffin*, 303 U.S. 444 (1938) (local ordinance required license to distribute literature but gave chief of police authority to deny license to abate what he subjectively considered a “nuisance”); *Stromberg v. California*, 283 U.S. 359 (1931) (state statute criminalized display of red flag as emblem of opposition to organized government).

51 In *Massachusetts v. Oakes*, 491 U.S. 576 (1989), five justices of the Supreme Court agreed that a

subsequent *legislative* act curing the substantial overbreadth problem of a statute before completion of the defendant’s direct appeal cannot resuscitate a conviction even if the defendant’s conduct falls within the purview of the revised statute. *See id.* at 586 (Scalia, J., concurring, joined by Justices Blackmun, Brennan, Marshall, and Stevens) (“[I]f *no* conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal[,] then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.”). *But cf. Osborne v. Ohio*, 495 U.S. 103, 115-20 (1990)

defendant, this means that the conviction must be overturned. This is true even if the particular defendant’s conduct was not constitutionally protected expression. *Plummer v. City of Columbus*, 414

U.S. 2, 3 (1973) (per curiam). The Supreme Court has characterized this remedy as “strong medicine” that should be applied “sparingly and only as a last resort.” *Broadrick*, 413 U.S. at 613.

The third type of overbreadth attack is an attack on the statute *as applied* to the facts of the case before the court. “An ordinance which is not overbroad on its face may nevertheless be unconstitutional as applied if it is enforced against a protected activity.” *Felix v. Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). The inquiry in an as-applied challenge is therefore whether the defendant’s actual conduct is constitutionally protected. *See Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 482- 84 (1989) (as-applied challenge attacks the statute not facially, but as it applies to defendant’s conduct); *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (reversing conviction because statute as applied to defendant was unconstitutional).

Ordinarily, the as-applied analysis should be conducted before the substantial overbreadth analysis. *See Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 483-85 (1989) (noting that “the lawfulness of the particular application of the law should ordinarily be decided” before substantial overbreadth is addressed). The substantial overbreadth doctrine should generallybe used only when it is “a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional”; it should not be a means of “mounting gratuitous wholesale attacks upon state and federal laws.” *See id.* at 485. A facial overbreadth challenge is more difficult to resolve than an as- applied challenge because it requires consideration of many more applications of the statute than the one immediately before the court. *Id.* Accordingly, where a defendant contends that his conduct is constitutionally protected, a court should first consider the particular application of the statute before it. *Id.*

Overbreadth attacks have also been allowed when statutes interfere with the freedom of association,52 when statutes regulate expressive or communicative conduct by means of time, place or manner restrictions,53 when statutes give unfettered discretionary power to local functionaries, resulting

(upholding defendant’s conviction where the Ohio Supreme Court narrowed the interpretation of the possession of child pornography statute to avoid the substantial overbreadth problem and defendant’s conduct fell within the narrowed construction).

52 *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (finding legislation aimed at keeping

“subversives” out of teaching profession unconstitutional); *United States v. Robel*, 389 U.S. 258 (1967) (invalidating on freedom of association grounds section of Subversive Activities Control Act that made it unlawful for member of Communist-action organization to engage in employment in defense facility); *Aptheker*

*v. Secretary of State*, 378 U.S. 500 (1964) (holding that the section of the Subversive Activities Control Act making it a felony for a member of a Communist organization to apply for, use or attempt to use a passport is unconstitutional on its face).

53 *See, e.g.*, *Zwickler v. Koota,* 389 U.S. 241 (1967) (invalidating New York penal statute making it

unlawful to distribute anonymous political handbills as facially overbroad); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (invalidating an enactment making it unlawful to loiter or picket outside a business for the purpose of influencing others not to transact with the business).

in virtually unreviewable prior restraints on First Amendment rights,54 and when statutes violate equal

protection.55 *See generally Broadrick v. Oklahoma*, 413 U.S. at 612-13.

# Vagueness

Overbreadth challenges to statutes are often accompanied byvagueness challenges, *see Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982), and so, if a statute is not facially

overbroad, the next inquiry should be whether the statute is void for vagueness, see *id.*56 The Supreme

Court has held that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). More specifically, where a law is “so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” it is unconstitutionally vague. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

Vagueness may invalidate a law for either of two independent reasons. *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (plurality opinion). First, it may “fail[ ] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); *Morales*, 527

U.S. at 56.57 Second, a law may be void for vagueness because it “is so indefinite that ‘it encourages

arbitrary and erratic arrests and convictions.’” *Colautti*, 439 U.S. at 390 (quoting *Papachristou v.*

54 *See, e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (holding unconstitutional an ordinance that made peaceful enjoyment of freedoms guaranteed by Constitution contingent upon uncontrolled will of an official); *Cox v. Louisiana*, 379 U.S. 536 (1965) (finding unwarranted abridgment of defendant's freedom of speech and assembly where local officials had unfettered discretion in regulation of use of streets for peaceful parades and meetings); *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating ordinance making it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner where ordinance did not provide appropriate standards to guide police commissioner’s actions.); *Lovell v. Griffin*, 303 U.S. 444 (1938) (holding unconstitutional a city ordinance prohibiting distribution of circulars, handbooks, advertising, or literature of any kind within city limits without permission from city manager and containing no restrictions or limitations of any kind on his discretion).

55 *See Lawrence v. Texas*, 539 U.S. 558 (2003) (Texas statute making it a crime for two persons of the

same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home).

56 *See also City of Chicago v. Morales,* 527 U.S. 41, 52 (1999) (plurality opinion) (“[E]ven if an

enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” (citing *Koelander v. Lawson*, 461 U.S. 352, 358 (1983)).

57 *See also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”). *But cf. United States*

*v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (standard is lowered “if the statutory prohibition ‘involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class’” (quoting *Precious Metals Assoc., Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 907 (1st Cir. 1980))).

*Jacksonville*, 405 U.S. 156, 162 (1972)). *See also Morales*, 527 U.S. at 56.

There are three rationales behind the vagueness doctrine, which were explained in *Grayned v.*

*City of Rockford*, 408 U.S. 104 (1972):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

*Id.* at 108-09 (internal quotations and footnotes omitted). The Supreme Court has noted that “perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Smith v. Goguen*, 415 U.S. 566, 574 (1974). When a legislature abdicates its responsibility for setting the standards of the criminal law with such a “standardless sweep” as to “allow policemen, prosecutors and juries to pursue their personal predilections,” there is a denial of due process. *Id.* at 575-76.

An enactment is facially vague when it is so utterly devoid of a standard of conduct that it “simply has no core,” *Goguen*, 415 U.S. at 578, and, is “impermissibly vague in all of its applications,”

*Hoffman Estates*, 455 U.S. at 494-95.58 Criminal statutes can be facially invalid even when the statue

could conceivably have had some valid application if the law impinges on fundamental liberties. *See Kolender v. Lawson*, 461 U.S. 352, 358-60, 358-59 n.8 (1983) (First Amendment interests and freedom of movement); *Colautti v. Franklin*, 439 U.S. at 394-401 (1979) (abortion rights). Still, the law must reach[ ] “a substantial amount of constitutionally protected conduct.” *Kolender*, 461 U.S. at 358 n.8

(quoting *Hoffman Estates*, 455 U.S. at 494).59 And in addition, a court must consider any limiting

construction that an enforcement agencyhas proffered, *Hoffman Estates*, 455 U.S. at 494; *Kolender*, 461

U.S. at 355, so a limiting construction can save a flawed statute from unconstitutional vagueness. But once a court determines that a provision is facially vague, the entire provision is voided. *See, e.g.*, *Kolender*, 461 U.S. at 352.

58 *See also United States v. Powell*, 423 U.S. 87, 92 (1975); *Coates v. City of Cincinnati*, 402 U.S. 611, 614-16 (1971).

59 *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (noting that a facial challenge for vagueness may go forward where “the statute's deterrent effect on legitimate expression” is “both real and substantial”).

The degree of vagueness that is constitutionally permissible, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the enactment. *Hoffman Estates,* 455 U.S. at 498. Economic regulations are subject to a less strict vagueness test and the Court has also “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Id.* at 498-99. *But cf. Jordan v. DeGeorge*, 341 U.S. 223, 230-31 (1951) (applying stricter standard in immigration context due to the “grave nature of deportation”). Where First Amendment interests are affected, the void-for-vagueness doctrine

“demands a greater degree of specificity than in other contexts.” *Gougen*, 415 U.S. at 573.60 Where

First Amendment freedoms are not implicated, the statute must be evaluated on an as-applied, rather than on a facial, basis. *Chapman v. United States*, 500 U.S. 453, 467(1991); *United States v. Powell*, 423

U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). *Cf. Colautti v. Franklin*, 439

U.S. 379, 394-401 (1979) (provisions of criminal statute not impinging on First Amendment freedoms held void for vagueness).

A scienter or *mens rea* requirement in a criminal statute may mitigate the law’s vagueness.

*Hoffman Estates*, 455 U.S. at 498-99.61 Statutes lacking a scienter or *mens rea* requirement are thus

more likely to be struck down as being void for vagueness.62 Voluntary conduct alone, without any

specific intent, often suffices to overcome a vagueness challenge, but where the conduct in question is wholly passive, actual knowledge or at least the probability of such knowledge is required before criminal sanctions may be imposed. *See Lambert v. California*, 355 U.S. 225, 228-29 (1957).

In addition, “[a] plaintiff who engages in some conduct that is clearlyproscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Hoffman Estates,* 455 U.S. at 495.63 Thus, before analyzing hypothetical applications of the law, courts will first examine the complainant’s

60 *See also Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997) (special concerns exist where there is a potential chilling effect on free speech); *Hoffman Estates,* 455 U.S. at 499 (more stringent vagueness test should apply where law interferes with right of free speech or association).

61 *See also Mishkin v. United States*, 383 U.S. 502, 510-11 (1966) (proof of scienter can avoid the hazard of self-censorship of constitutionally protected material). *But see United States v. Corrow*, 119 F.3d 796, 804

n.11 (10th Cir. 1996) (recognizing that a scienter requirement alone will not rescue an otherwise vague statute); *Amusement Devices Association v. State of Ohio*, 443 F. Supp. 1040, 1051 (S.D. Ohio. 1977) (recognizing that the Supreme Court has never held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge); *State v. Young*, 406 N.E.2d 499, 504 n.4 (Ohio 1980) (noting that the inclusion of a scienter requirement does not render a statute automatically constitutional).

62 *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979) (absence of scienter requirement was fatal to penal statute prescribing particular abortion procedure if physician determined fetus was potentially viable); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 434-46 (1978) (element of intent in criminal antitrust violations needed to be established by evidence and could not be presumed solely from effect of conduct on prices); *Smith*

*v. California*, 361 U.S. 147, 154-55 (1959) (ordinance imposing strict criminal liability on bookseller possessing obscene material irrespective of knowledge of such material was unconstitutional); *Lambert v. California*, 355

U.S. 225, 228-29 (1957) (felon registration ordinance carrying criminal penalties was unconstitutional as applied to defendant who had no knowledge of duty to register).

63 *See also Parker v. Levy*, 417 U.S. 733, 756 (1974) (“One to whose conduct a statute clearly applies

may not successfully challenge it for vagueness.”).

conduct. *See Hoffman Estates,* 455 U.S. at 495.

# MOTIONS RELATED TO DEFECTIVE INDICTMENTS

* + 1. **The Required Contents of an Indictment**

The indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. FED. R. CRIM. P. 7(c)(1). But an indictment need not be perfect, and it should be read in a practical and common sense, rather than hypertechnical, manner.64

As to what facts are essential, “[a]n indictment must set forth each element of the crime that it charges.” *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998)). However, an indictment that alleges a legal term of art sufficiently charges the component parts of that term. *Resendiz-Ponce*, 549 U.S. at 107-08 (citing *Hamling v. United States*, 418 U.S. 87, 119 (1974)).65 Further, failure to explicitly allege all the statutory elements will not be fatal if the absent elements can be deduced from the language that is actually included in the indictment.66 And the indictment need not anticipate affirmative defenses. *United States v. Sisson*, 399 U.S. 267, 288 (1970).

In the case of an indictment alleging conspiracy, the indictment must allege the illegal object of

the conspiracy. *Wong Tai v. United States*, 273 U.S. 77, 81 (1927).67 It need not allege all of the

elements essential to the commission of the object offense, however. *Wong Tai*, 273 U.S. at 81.68 With respect to aiding and abetting and the other alternative means of committing a substantive offense

64 *United States v. Hoover*, 467 F.3d 496, 500 (5th Cir. 2006); *United States v. Bass*, 411 F.3d 1198,

1202 (10th Cir. 2005); *United States v. Ramsey*, 406 F.3d 426, 430 (7th Cir. 2005); *United States v. Poirier*, 321

F.3d 1024, 1029 (11th Cir. 2003); *United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001); *United States v.*

*Covey*, 232 F.3d 641, 645 (8th Cir. 2000); *United States v. Maney*, 226 F.3d 660, 663 (6th Cir. 2000); *United*

*States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000); *Virgin Islands v. Moolenaar*, 133 F.3d 246, 250 (3d Cir.

1998); *United States v. Matzkin*, 14 F.3d 1014, 1019 (4th Cir. 1994); *United States v. Medina-Garcia*, 918 F.2d

4, 8 (1st Cir. 1990).

65 *See also United States v. Burgos*, 254 F.3d 8, 11 (1st Cir. 2001); *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir. 2000); *United States v. Kovach*, 208 F.3d 1215, 1219 (10th Cir. 2000); *United States v. Wicks*, 187 F.3d 426, 428 (4th Cir. 1999).

66 *United States v. Tykarsky*, 446 F.3d 458, 474 n.10 (3d Cir. 2006); *United States v. Ramsey*, 406 F.3d

426, 430 (7th Cir. 2005); *United States v. Davis*, 336 F.3d 920, 923 (9th Cir. 2003); *United States v. Bieganowski*,

313 F.3d 264, 285 (5th Cir. 2002); *United States v. Woodruff*, 296 F.3d 1041, 1046-47 (11th Cir. 2002); *United*

*States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982).

67 *See also United States v. Douglas*, 398 F.3d 407, 412-13 (6th Cir. 2005); *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000); *United States v. Schramm*, 75 F.3d 156, 163 (3d Cir. 1996); *United States v. James*, 923 F.2d 1261, 1268 (7th Cir. 1991); *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990).

68 *See also Douglas*, 398 F.3d at 412-13; *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002);

*United States v. Eirby*, 262 F.3d 31, 38 (1st Cir. 2001); *Lo*, 231 F.3d at 481; *United States v. Ivey*, 949 F.2d 759,

765 (5th Cir. 1991); *United States v. Werme*, 939 F.2d 108, 112 (3d Cir. 1991); *James*, 923 F.2d at 1268; *Cobb*,

905 F.2d at 791; *United States v. Starr*, 584 F.2d 235, 237 (8th Cir. 1978).

provided for in 18 U.S.C. § 2, neither a citation to § 2 nor a specific allegation of aiding and abetting or the other § 2 alternatives need be included in the indictment; rather, each alternative provided for in § 2 is considered embodied in each count of every federal indictment.69

After the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), there is no longer any distinction between “elements” and what might be called “sentencing factors” or “sentencing enhancement facts.” Rather, any fact other than the fact of a prior conviction that increases the penalty beyond the prescribed statutory maximum sentence must be alleged in the indictment. *Id*. at 476 (citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). Such a fact is “the functional equivalent” of an element of the offense with the greater statutory maximum sentence. *Apprendi*, 530 U.S. at 494 n.19.

The purposes of an indictment are twofold. First, the indictment must provide the defendant with enough information so that he can prepare his defense. *Resendiz-Ponce*, 549 U.S. at 108 (citing *Hamling*

*v. United States*, 418 U.S. at 117). *See also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]”). Second, the indictment must protect against double jeopardy, so it must be specific enough to enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Resendiz-Ponce*, 549 U.S. at 108 (citing *Hamling*, 418 U.S. at 117).

Generally, it is sufficient to use the words of the charging statute, but the indictment must also include sufficient facts to pin down the specific conduct at issue. As put by the Supreme Court in *Hamling*:

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

*Id.* at 117-18 (internal citations and quotation marks omitted). In other words, although the indictment need not allege “every factual nugget necessary for conviction,” it must “provide some means of pinning down the specific conduct at issue.” *United States v. Fassnacht*, 332 F.3d 440, 445 (7th Cir. 2003). Although “an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.” *Resendiz-Ponce*, 549 U.S. at 109 (citing *Hamling,* 418 U.S. at 117); *see also Russell v. United States*, 369 U.S. 749, 764 (1962). “The cases in which an indictment that parrots the statute is held to be insufficient turn on a determination that the factual

69 *United States v. Alexander*, 447 F.3d 1290, 1298 (10th Cir. 2006); *United States v. Wasserson*, 418

F.3d 225, 232 (3d Cir. 2005); *United States v. Keene*, 341 F.3d 78, 84 (1st Cir. 2003); *United States v. Schuh*,

289 F.3d 968, 976 (7th Cir. 2002); *United States v. Howick*, 263 F.3d 1056, 1064-65 (9th Cir. 2001); *United*

*States v. Stein*, 233 F.3d 6, 24 (1st Cir. 2000); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 302 (D.C. Cir.

1991); *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984); *United States v. Kaminski*, 692 F.2d 505,

511 n.10 (8th Cir. 1982); *United States v. Perry*, 643 F.2d 38, 45 (2d Cir. 1981); *United States v. Masson*, 582

F.2d 961, 963 (5th Cir. 1978); *Pigford v. United States*, 518 F.2d 831, 834-35 (4th Cir. 1975); *United States v.*

*Heard*, 443 F.2d 856, 859 (6th Cir. 1971).

information that is *not* alleged in the indictment goes to the very *core of criminality* under the statute.”

*United States v. Kay*, 359 F.3d 738, 756-57 (5th Cir. 2004) (citing cases).

The indictment must also include a citation of the law allegedly violated. *See* FED. R. CRIM. P. 7(c)(1) (“For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.”). But, “[u]nless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation’s omission is a ground to dismiss the indictment or information or to reverse a conviction.” FED.

R. CRIM. P. 7(c)(3). This means that “[a] conviction may be sustained on the basis of a statute or regulation other than that cited.” FED. R. CRIM. P. 7 advisory committee’s note. On the other hand, citation to a statute alone is not sufficient to cure a defective indictment that fails to allege all the elements of an offense.70

Each count is considered separately, or, as the Supreme Court has put it, “is regarded as if it was a separate indictment.” *Dunn v. United States*, 284 U.S. 390, 393 (1932). Thus, generally, each count must stand on its own and cannot depend for its validity on the allegations of any other count not

specifically incorporated.71 However, “[a] count may incorporate by reference an allegation made in

another count.” FED. R. CRIM. P. 7(c)(1).

# Motion to Dismiss for Failure to State an Offense

Where an indictment fails to allege an element, it fails to state an offense. *United States v. Wylie*, 919 F.2d 969, 972 (5th Cir. 1990); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988). Also, an indictment fails to state an offense if the specific facts alleged in it fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation. *United States v. Hediathy*, 392 F.3d 580, 587 (3d Cir. 2004).

While most motions alleging defects in the indictment or information must be raised before trial, there are exceptions for motions to dismiss based on a claim that the indictment or information fails to invoke the court’s jurisdiction or to state an offense; those motions may be raised “at any time while the case is pending.” FED. R. CRIM. P. 12(b)(3)(B). As used in this context, the term “jurisdiction” refers to subject-matter jurisdiction, and, generally, a defective indictment does not deprive a court of such

70 *United States v. Williams*, 429 F.3d 767, 775 (8th Cir. 2005); *United States v. Doe*, 297 F.3d 76, 85

(2d Cir. 2002); *United States v. Henry*, 288 F.3d 657, 661 (5th Cir. 2002); *United States v. Smith*, 223 F.3d 554,

571 (7th Cir. 2000); *United States v. Werme*, 939 F.2d 108, 112 n.1 (3d Cir. 1991); *United States v. Hooker*, 841

F.2d 1225, 1227-28 (4th Cir. 1988). *But see United States v. Martinez*, 981 F.2d 867, 872 (6th Cir. 1992) (“We believe that citation to the statutes informed [defendant] of the elements of the charged offenses”).

71 *United States v. Caldwell*, 302 F.3d 399, 412 (5th Cir. 2002); *United States v. Conley*, 291 F.3d 464, 471 (7th Cir. 2002); *United States v. Stoner*, 98 F.3d 527, 535-36 (10th Cir. 1996); *United States v. Yefsky*, 994 F.2d 885, 894 (1st Cir. 1993); *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991); *United States v. Italiano*, 837 F.2d 1480, 1492 (11th Cir. 1988); *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980). *But see United States v. Staggs*, 881 F.2d 1527, 1531-32 (10th Cir. 1989) (holding that a count alleging a continuing criminal enterprise is not insufficient where other counts allege the violations underlying the CCE count, even if they are not expressly incorporated); *but see id.* at 1537-40 (Ebel, J., dissenting) (arguing that incorporating allegations from other counts is not permitted in absence of express incorporation).

jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630-31 (2002). And an argument that the indictment lacks specificity is *not* an argument that it fails to state an offense, so a motion based on a claim of that type must be brought pretrial or it is waived.72

There is a circuit conflict concerning whether the omission of an element of the offense from an indictment of can constitute harmless error. The First, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have held that such an omission is subject to harmless error analysis.73 The Ninth Circuit, however, has

held that such an omission requires automatic reversal.74 The Supreme Court granted certiorari to

resolve this conflict in *Resendiz-Ponce*, 549 U.S. at 102, but then decided the case without reaching the issue. *See id.* at 116-17 (Scalia, J., dissenting) (indicating that he would find the error to be structural and not subject to harmless error analysis).

Where the failure of the indictment to allege an element was not raised below, the appellate court

will review for plain error.75 And though the claim that the indictment fails to allege an element need

not be raised pretrial in the district court, *see* FED. R. CRIM. P. 12(b)(3)(B), waiting to raise it until after trial has commenced means the indictment will be interpreted liberally and will be upheld unless it is so defective that it does not, byanyreasonable construction, charge an offense.76 Further, simplymoving

72 *United States v. Rodriguez-Marrero*, 390 F.3d 1, 11-12 (1st Cir. 2004); *United States v. Pease*, 240

F.3d 938, 942-43 (11th Cir. 2001); *United States v. Crowley*, 236 F.3d 104, 108-10 (2d Cir. 2000); *United States*

*v. Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995); *United States v. Covelli*, 738 F.2d 847, 862 (7th Cir. 1984);

*United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981). *See also* FED. R. CRIM. P. 12(e).

73 *See United States v. Allen,* 406 F.3d 940, 943-45 (8th Cir. 2005); *United States v. Robinson,* 367 F.3d

278, 285-86 (5th Cir. 2004); *United States v. Higgs,* 353 F.3d 281, 304-07 (4th Cir. 2003); *United States v.*

*Trennell,* 290 F.3d 881, 889-90 (7th Cir. 2002); *United States v. Cor-Bon Custom Bullet Co.,* 287 F.3d 576, 580-

81 (6th Cir. 2002); *United States v. Corporan-Cuevas,* 244 F.3d 199, 202 (1st Cir. 2001).

74 *See United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005).

75 *United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007); *United States v. Sinks*, 473 F.3d 1315,

1321 (10th Cir. 2007); *United States v. Creech*, 408 F.3d 264, 269 (5th Cir. 2005); *United States v. Quinn*, 359

F.3d 666, 672 (4th Cir. 2004); *United States v. Hernandez*, 330 F.3d 964, 977 (7th Cir. 2003). *Cf. United States*

*v. Cotton*, 535 U.S. at 631(plain error applies to *Apprendi* error in indictment). *But see United States v. Hediathy*, 392 F.3d 580, 588-89 (3d Cir. 2004) (rejecting the government’s argument that, under *Cotton*, a defendant who fails to challenge the sufficiency of the indictment in the district court must satisfy the plain-error standard of review on appeal).

76 *United States v. Arnt*, 474 F.3d at 1162; *United States v. Ahmed*, 472 F.3d 427, 431-32 (6th Cir. 2006); *United States v. Quinn*, 359 F.3d at 673; *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003); *United States v. Hathaway*, 318 F.3d 1001, 1010 (10th Cir. 2003); *United States v. Olson*, 262 F.3d 795, 799 (8th Cir. 2001); *United States v. White*, 258 F.3d 374, 380-81 (5th Cir. 2001); *United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001); *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir. 2000); *United States v. Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995); *United States v. Forbes*, 16 F.3d 1294, 1297 (1st Cir. 1994) Many of the appellate cases concerning defective indictments are decided under this extremely deferential standard of review, which does *not* apply if the defects are timely raised in the district court. Such cases may be distinguishable on this basis.

for a bill of particulars – without objecting to the sufficiency of the indictment – does not preserve for review an alleged defect in the indictment.77

# Motions Regarding Duplicity and Multiplicity

* + - 1. **Duplicity**

Duplicity occurs where two or more distinct and separate offenses are joined in a single count.78 Under Federal Rule of Criminal Procedure 8(a), separate offenses must be charged in separate counts.79 But under Federal Rule of Criminal Procedure 7(c)(1), a count may allege that the defendant committed the offense by one or more specified means, and an indictment is not duplicitous if it charges a single offense carried out through many different means.80

The prohibition against duplicitous counts serves multiple purposes. Theyinclude: (1) providing adequate protection against double jeopardyin a subsequent prosecution;81 (2) providing adequate notice to the defendant;82 (3) preventing a conviction produced by a verdict that may not be unanimous as to any one of the crimes charged in a duplicitous count;83 (4) avoiding a general guilty verdict that might

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672 n.2.

*United States v. Hoover*, 467 F.3d 496, 498 n.2 (5th Cir. 2006); *United States v. Quinn*, 359 F.3d at

78 *United States v. Davis*, 471 F.3d 783, 790 (7th Cir. 2006); *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006); *United States v. Savoires*, 430 F.3d 376, 379-80 (6th Cir. 2005); *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005); *United States v. Caldwell*, 302 F.3d 399, 407 (5th Cir. 2002); *United States v. Haber*, 251 F.3d 881, 888 (10th Cir. 2001); *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999); *United States*

*v. Moore*, 184 F.3d 790, 793 (8th Cir. 1999); *United States v. Hubbell*, 177 F.3d 11, 14 (D.C. Cir. 1999); *United States v. Haddy*, 134 F. 542, 548 (3d Cir. 1998; *United States v. Schlei*, 122 F.3d 944, 977 (11th Cir. 1997); *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993).

79 Misjoinder -- the inclusion in a single indictment of offenses or defendants that may not be joined

under Rule 8 -- is a different concept discussed in Sections 6.12.01.01 and 6.12.02.01 of this chapter.

80 *United States v. Davis*, 471 F.3d at 790; *United States v. Stewart*, 433 F.3d 273, 319 (2d Cir. 2006);

*United States v. Damrah*, 412 F.3d 618, 622-23 (6th Cir. 2005); *United States v. Caldwell*, 302 F.3d at 408;

*United States v. Weller*, 238 F.3d 1215, 1219-20 (10th Cir. 2001); *United States v. Moore*, 184 F.3d at 793;

*United States v. Mal*, 942 F.2d 682, 688 (9th Cir. 1991).

81 *United States v. Davis*, 471 F.3d at 790; *United States v. Olmeda*, 461 F.3d at 281; *United States v.*

*King*, 200 F.3d 1207, 1212 (9th Cir. 1999); *United States v. Sharpe*, 193 F.3d 852, 870 (5th Cir. 1999); *Trammell*,

133 F.3d 1343, 1354 (10th Cir. 1998); *Schlei*, 122 F.3d at 977; *United States v. Bruce*, 89 F.3d 886, 890 (D.C.

Cir. 1996); *United States v. Blandford*, 33 F.3d 685, 699 n.17 (6th Cir. 1994); *United States v. Pungitore*, 910

F.2d 1084, 1135 (3d Cir. 1990).

82 *Davis*, 471 F.3d at 790; *Olmeda*, 461 F.3d at 281; *King*, 200 F.3d at 1212; *Sharpe*, 193 F.3d at 870;

*Haddy*, 134 F.3d at 548; *Trammell*, 133 F.3d at 1354 n.1; *United States v. Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996); *United States v. Blandford*, 33 F.3d at 699 n.17; *United States v. Huguenin*, 950 F.2d 23, 26 (1st Cir. 1991).

83 *Davis*, 471 F.3d at 790; *Olmeda*, 461 F.3d at 281; *Savoires*, 430 F.3d at 380; *United States v. Garcia*, 400 F.3d at 819; *Verrecchia*, 196 F.3d at 297; *Sharpe*, 193 F.3d at 870; *Moore*, 184 F.3d at 793; *Trammell*, 133

conceal a finding of guilty as to one of the crimes charged in a duplicitous count and not guilty as to the others;84 (5) providing a basis for appropriate sentencing;85 (6) protecting against prejudicial evidentiary rulings at trial;86 and (7) protecting against limited review on appeal.87

The Second Circuit has held that duplicity is only “impermissible” if the defendant is prejudiced by it. *United States v. Sturdivant*, 244 F.3d 71, 75 & n.3 (2d Cir. 2001). Thus, at least in that jurisdiction, a duplicity objection is properly invoked only where the challenged count implicates the above-described purposes for the prohibition against duplicity. *Olmeda*, 461 F.3d at 281. And, regardless, counsel should consider carefully whether it is in the defendant’s best interest to challenge a duplicitous count. Duplicity may actually inure to a defendant’s benefit by limiting the maximum penalty he might face and by avoiding his portrayal to the jury as the perpetrator of multiple crimes. *See id.*

A duplicitous count is not fatal to an indictment, so it need not be dismissed.88 Rather, the

duplicity problem can be cured by either: (1) an instruction that the jury must agree unanimously on which offense alleged in the duplicitous count the defendant actually committed;89 or (2) a government

election between the different offenses contained in the duplicitous count.90 The government’s ability

F.3d at 1354; *United States v. Schlei*, 122 F.3d at 977; *United States v. Bruce*, 89 F.3d at 890; *United States v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975).

84 *United States v. Starks*, 472 F.3d 466, 470 (7th Cir. 2006); *United States v. Olmeda*, 461 F.3d at 281;

*United States v. Davis*, 306 F.3d 398, 415 (6th Cir. 2002); *United States v. Haddy*, 134 F.3d at 548; *United States*

*v. Correa-Ventura*, 6 F.3d 1070, 1081 (5th Cir. 1993); *United States v. Stanley*, 597 F.2d 866, 871 (4th Cir. 1979); *Gerberding v. United States*, 471 F.2d 55, 59 (8th Cir. 1973).

85 *United States v. Starks*, 472 F.3d at 470; *United States v. Olmeda*, 461 F.3d at 281; *United States v.*

*Haddy*, 134 F.3d at 548; *United States v. Bruce*, 89 F.3d at 890; *United States v. Blandford*, 33 F.3d at 699 n.17;

*United States v. Correa-Ventura*, 6 F.3d at 1081.

86 *United States v. Davis*, 471 F.3d at 790; *United States v. Sharpe*, 193 F.3d at 870; *United States v.*

*Haddy*, 134 F.3d at 548; *United States v. Trammell*, 133 F.3d at 1354; *United States v. Schlei*, 122 F.3d at 977;

*United States v. Blandford*, 33 F.3d at 699 n.17.

87 *United States v. Starks*, 472 F.3d at 470; *United States v. Washington*, 127 F.3d 510, 513 (6th Cir.

1997); *United States v. Correa-Ventura*, 6 F.3d at 1081; *United States v. Pungitore*, 910 F.2d at 1135.

88 *United States v. Damrah*, 412 F.3d 618, 623 (6th Cir. 2005); *United States v. Ramirez-Martinez*, 273 F.3d 903, 915 (9th Cir. 2001); *United States v. Sturdivant*, 244 F.3d 71, 79 (2d Cir. 2001).

89 *United States v. Starks*, 472 F.3d 466, 471 (7th Cir. 2006); *United States v. Ramirez-Martinez*, 273

F.3d at 915; *United States v. Sturdivant*, 244 F.3d at 79; *United States v. Shumpert Hood*, 210 F.3d 660, 663 (6th Cir. 2000); *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999); *Trammell*, 133 F.3d at 1354-55;

*United States v. Nattier*, 127 F.3d 655, 657 (8th Cir. 1997); *United States v. Correa-Ventura*, 6 F.3d 1070, 1081

(5th Cir. 1993).

90 *United States v. Ramirez-Martinez*, 273 F.3d at 915; *United States v. Sturdivant*, 244 F.3d at 79;

*United States v. Shumpert Hood*, 210 F.3d at 663; *United States v. Bowline*, 593 F.2d 944, 947 (10th Cir. 1979);

*United States v. Starks*, 515 F.2d 112, 118 (3d Cir. 1975); *United States v. Untiedt*, 493 F.2d 1056, 1059 (8th Cir.

1974); *United States v. Gaus*, 471 F.2d 495, 498 (7th Cir. 1973).

to cure the defect by election (without going back to the grand jury) is limited, however; if the election constitutes an amendment of form (deletion of surplusage), it is acceptable, but if it constitutes an amendment of substance (altering the nature of the charge), it is not. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985). The election may also prejudice the defendant’s trial preparation if, as a result, he is tried on charges of which he lacked proper notice. *See id.* Given these remedies, the proper way to challenge a duplicitous count is not through a motion to dismiss but through a pretrial motion to compel the government to elect between charges and/or a request for a unanimity instruction at trial.

Federal Rule of Criminal Procedure 12(b)(3) requires that any motion alleging a defect in the indictment -- other than failure to invoke the court’s jurisdiction or state an offense, see Section 6.01.01, *supra* -- must be made pretrial. A motion alleging that a count in an indictment is duplicitous falls

within the scope of this rule, and so must be made pretrial.91 The First, Sixth, and Ninth Circuits have

held that a defendant’s failure to challenge duplicity in the indictment pretrial does not waive his right

to an unanimity instruction.92 But the Tenth Circuit has suggested that the failure to raise the duplicity

issue pretrial does waive the right to a jury instruction to correct the problem.93 However, the Second

Circuit has noted that if the indictment is not duplicitous on its face and a duplicity problem becomes apparent only after the government presents its evidence, the failure to raise the issue pretrial does not constitute waiver.94

91 *United States v. Creech*, 408 F.3d 264, 270 (5th Cir. 2005); *United States v. Technic Services, Inc.*,

314 F.3d 1031, 1040 & n.3 (9th Cir. 2002); *United States v. Haber*, 251 F.3d 881, 888-89 (10th Cir. 2001); *United States v. Sturdivant*, 244 F.3d at 75 & n.3; *United States v. Mathis*, 216 F.3d 18, 25 n.7 (D.C. Cir. 2000); *Verrecchia*, 196 F.3d at 297 ; *United States v. Adesida*, 129 F.3d 846, 849 (6th Cir. 1997); *United States v. Magana*, 118 F.3d 1173, 1189 (7th Cir. 1997); *United States v. Rivera*, 77 F.3d 1348, 1352 & n.4 (11th Cir.

1996); *United States v. Prescott*, 42 F.3d 1165, 1167 (8th Cir. 1994); *United States v. Price*, 763 F.2d 640, 643

(4th Cir. 1985).

92 *United States v. Savoires*, 430 F.3d at 380-81; *United States v. Technic Services, Inc.*, 314 F.3d at 1040 & n.3; *Verrecchia*, 196 F.3d at 297.

93 *United States v. Fredette*, 315 F.3d 1235, 1243 (10th Cir. 2003); *United States v. Haber*, 251 F.3d

at 888-89; *Trammell*, 133 F.3d 1343, 1354 (10th Cir. 1998).

94 *See United States v. Sturdivant*, 244 F.3d at 76.

# Multiplicity

Multiplicity occurs when a single offense is charged in multiple counts.95 The primary vice of

multiplicity is the risk of multiple punishments for a single offense in violation of the Double Jeopardy Clause.96

In *Ball v. United States*, 470 U.S. 856 (1985), the Supreme Court outlined how to deal with an indictment with multiplicitous counts. First, it noted that the Double Jeopardy Clause does not prohibit the government from proceeding with *prosecution* on multiplicitous counts simultaneously, so long as no more than one *punishment* is eventually imposed. *Id.* at 860 & n.7. Therefore, “[i]f upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.” *Id.* at 865.

Notably, simply imposing concurrent custodial sentences is insufficient to cure a multiplicity problem. At the very least, the special assessment that comes with an additional conviction is sufficient to implicate the Double Jeopardy Clause. *Rutledge v. United States*, 517 U.S. 292, 302-03 (1996). Also, a second conviction has potential adverse collateral consequences aside from the current sentence, such as delay for eligibility for parole, a harsher sentence under a recidivist statute for any future offense, credibility impeachment, and societal stigma. *Id.* at 302. Therefore, only one conviction may be entered where a jury finds the defendant guilty on multiplicitous counts. *Id.*

In light of the procedure outlined in *Ball*, there appears to be little, if any, basis for a pretrial

motion on multiplicity grounds.97 Still, some courts suggest that there may be an alternative other

remedy, such as requiring the government to elect between multiplicitous counts before trial or instructing the jury that it may only find the defendant guilty on one of the multiplicitous counts.98 These

95 *United States v. Starks*, 472 F.3d at 468-69; *United States v. McCullough*, 457 F.3d 1150, 1162 (10th Cir. 2006); *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006); *United States v. DeCarlo*, 434 F.3d 447, 454 (6th Cir. 2006); *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005); *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005); *United States v. Reedy*, 304 F.3d 358, 363 (5th Cir. 2002); *United States v. Colton*, 231 F.3d 890, 908; *United States v. Smith*, 231 F.3d 800, 815 (11th Cir. 2000); *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999); *United States v. Haddy*, 134 F.3d 542, 548 n.7 (3d Cir. 1998); *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994).

96 *Starks*, 472 F.3d at 469; *McCullough*, 457 F.3d at 1162; *Jones*, 482 F.3d at 72; *DeCarlo*, 434 F.3d at 454; *Stewart*, 420 F.3d at 1012; *United States v. Chipps*, 410 F.3d at 447; *Reedy*, 304 F.3d at 363; *Colton*, 231 F.3d at 908; *Smith*, 231 F.3d at 815; *Weathers*, 186 F.3d at 951; *Haddy*, 134 F.3d at 548 n.7; *United States v. Fraza*, 106 F.3d 1050, 1053 (1st Cir. 1997).

97 *See, e.g.*, *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006) (citing *Ball* and holding that pretrial dismissal of multiplicitous count was premature); *United States v. Hubbell*, 177 F.3d 11, 14 (D.C. Cir. 1999) (“[M]ultiplicity claims are better sorted out post-trial.”).

98 *See, e.g*., *United States v. Roy*, 408 F.3d 484, 491-92 (8th Cir. 2005) (“Although the prosecutor did

not elect between or consolidate the multiplicitous counts, multiplicitous indictments may be saved at the trial stage if the district court submits an appropriate instruction to the jury.”); *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (“A decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court.”).

remedies seem inconsistent with *Ball*, but they protect against another vice of multiplicity that is unrelated to multiple punishments – the possible psychological effect on the jury of suggesting that the

defendant committed not one but several crimes.99 Obtaining such a pretrial remedy, however, may be

difficult and would probably require a specific, rather than generalized, showing of jury prejudice.100

There is also another reason a pretrial motion should be considered, however, namely the possibility of waiver. Even though, under *Ball*, there will rarely be legitimate grounds for a pretrial challenge to an indictment on multiplicity grounds, courts have repeatedly held that, under Federal Rule of Criminal Procedure 12, a defendant waives his right to challenge a *conviction* on multiplicity grounds

if the issue is not raised pretrial.101 Most circuits hold that a defendant does not waive the right to

challenge multiple *sentences* in the absence of a pretrial multiplicity challenge,102 but the D.C. Circuit has suggested that there might be such a waiver.103

All of these considerations taken together suggest that when there is a multiplicity problem with the indictment, counsel should file a pretrial motion to dismiss the multiplicitous counts or to require the government to elect between them. Even though such a motion will probably not prevail, it will

99 *See United States v. Smith*, 231 F.3d 800, 815 (11th Cir. 2000); *United States v. Johnson*, 130 F.3d

1420, 1425 (10th Cir. 1997); *United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986); *see also United States v. Haddy*, 134 F.3d at 548 n.7 (“Multiplicity may result in multiple sentences for a single offense in violation of double jeopardy, *or otherwise prejudice the defendant*” (emphasis added)).

100 *Cf. United States v. Chipps*, 410 F.3d 438, 449 (8th Cir. 2005) (rejecting argument that multiplicitous counts tainted jury’s deliberations as to all of the charges because jury instructions ensured that verdicts on valid counts were not influenced by the multiplicitous counts); *United States v. Webber*, 255 F.3d 523, 527 (8th Cir. 2001) (“Although in a rare case that risk [of a prejudicial compromise verdict by the jury] might justify requiring the government to elect among or consolidate counts at trial, it does not justify dismissing well-pleaded counts in an indictment.”); *United States v. Kimbrough*, 69 F.3d 723, 730 (5th Cir. 1995) (rejecting request for new trial based on possible jury prejudice from multiplicitous counts where the defendant failed to present specific factual allegations of potential jury confusion).

101 *See, e.g.*, *United States v. Abboud*, 438 F.3d 554, 566-67 (6th Cir. 2006); *United States v. Smith*, 424 F.3d 992, 1000 n.4 (9th Cir. 2005); *United States v. Dixon*, 273 F.3d 636, 642 (5th Cir. 2001); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000); *United States v. Shea*, 211 F.3d 658, 673 (1st Cir. 2000); *United States*

*v. Weathers*, 186 F.3d at 952; *United States v. Wilson*, 983 F.2d 221, 225 (11th Cir. 1993); *United States v. Morehead*, 959 F.2d 1489, 1506 n.11 (10th Cir. 1992); *United States v. Griffin*, 765 F.2d 677, 680-81 (7th Cir. 1985).

102 *See United States v. Abboud*, 438 F.3d at 566-67 (6th Cir. 2006) (but noting intracircuit conflict on

the issue); *United States v. Smith*, 424 F.3d at 999-1000; *United States v. Reedy*, 304 F.3d 358, 364 (5th Cir. 2002); *United States v. Shea*, 211 F.3d at 673; *United States v. Chacko*, 169 F.3d 140, 145-46 (2d Cir. 1999); *United States v. Wilson*, 983 F.2d at 225; *United States v. Morehead*, 959 F.2d at 1506 n.11; *cf. United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992).

103 *See United States v. Weathers*, 186 F.3d at 952-53; *United States v. Harris*, 959 F.2d 246, 250-51 &

n.1 (D.C. Cir. 1992), *abrogated on other grounds*, *United States v. Stewart*, 246 F.3d 728 (D.C. Cir. 2001). *But see United States v. Anderson*, 39 F.3d 331, 354 (Rule 12 inapplicable to sentencing arguments based on multiplicity), *opinion after rehearing en banc granted in part*, 59 F.3d 1323 (D.C. Cir. 1995).

preserve the multiplicity argument in all its forms, entitling the defendant to post-trial104 dismissal of the additional counts, instead of just sentencing relief.

# Determining Whether Offenses are the Same or Separate

Determining whether an indictment charges one offense or separate offenses is a difficult and subtle question. Basically, congressional intent dictates the allowable unit of prosecution, and where there is any ambiguity or doubt as to that intent, the rule of lenity requires that it be resolved in the

defendant’s favor. *See Bell v. United States*, 349 U.S. 81, 81-83 (1955).105 There is also a presumption

“that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense.” *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

Whether two statutory provisions establish the same offense is to be determined through what has come to be known as the “Blockburger test” established in *Blockburger v. United States*, 284 U.S. 299 (1932): “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether

each provision requires proof of a fact which the other does not.” *Id.* at 304.106 Some courts have

indicated that application of the *Blockburger* test is appropriate only if, after applying other traditional methods of statutory construction, Congress’s intent is still unclear,107 while other courts start with the

*Blockburger* test.108 In the end, it does not really matter whether the *Blockburger* test is employed first

or last so long as one recognizes that the test “is a ‘rule of statutory construction,’ and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.” *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

104 Of course, if the defendant plans to enter a guilty plea, he should only enter a plea on one of the

multiplicitous counts.

105 *See also United States v. Wallace*, 447 F.3d 184, 188 (2d Cir. 2006); *United States v. Damrah*, 412

F.3d 618, 622 (6th Cir. 2005); *United States v. Chipps*, 410 F.3d 438, 447-48 (8th Cir. 2005); *United States v.*

*Reedy*, 304 F.3d 358, 365, 367 (5th Cir. 2002); *United States v. Bennafield*, 287 F.3d 320, 323 (4th Cir. 2002);

*United States v. Verrecchia*, 196 F.3d 294, 297-98 (1st Cir. 1999); *United States v. Clark*, 184 F.3d 858, 871

(D.C. Cir. 1999); *United States v. Haddy*, 134 F.3d 542, 548 (3d Cir. 1998); *United States v. Schlei*, 122 F.3d 944,

977 (11th Cir. 1997); *Guam v. Cepeda*, 69 F.3d 369, 374 (9th Cir. 1995); *United States v. Song*, 934 F.2d 105,

108 (7th Cir. 1991); *United States v. Jones*, 841 F.2d 1022, 1023 (10th Cir. 1988).

106 Generally, the *Blockburger* test is inapplicable where a single act or transaction is alleged to have

resulted in multiple violations of the *same* statutory provision. *Reedy*, 304 F.3d at 363-64; *United States v. Stewart*, 256 F.3d 231, 247 n.10 (4th Cir. 2001); *United States v. Weathers*, 186 F.3d 948, 952 (D.C. Cir. 1999);

*United States v. Johnson*, 130 F.3d 1420, 1425 n.2 (10th Cir. 1997); *United States v. Keen*, 104 F.3d 1111, 1118

n.12 (9th Cir. 1996).

107 *See, e.g*., *United States v. Perez-Gonzalez*, 445 F.3d 39, 45 (1st Cir. 2006); *United States v. DeCarlo*, 434 F.3d 447, 455 (6th Cir. 2006); *United States v. Chorin*, 322 F.3d 274, 281 (3d Cir. 2003).

108 S*ee, e.g.*, *United States v. LeMoure*, 474 F.3d 37, 43 (1st Cir. 2007); *United States v. Starks*, 472 F.3d 466, 468-69 (7th Cir. 2006).

# MOTIONS RELATED TO VENUE

* + 1. **Motion to Dismiss for Improper Venue**
       1. **Where Venue is Proper**

There are both constitutional and statutory provisions governing venue. Article III of the Constitution provides: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.” U.S. CONST. art. III, §2, cl. 3. The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]” U.S. CONST. amend. VI. Technically, the latter provision deals with vicinage (the place from which the jurors are to be selected) rather than venue, but that distinction has little, if any, practical effect. *United States v. Brennan*, 183 F.3d 139, 144 n.5 (2d Cir. 1999).

There are also various rules and statutes governing venue. Initially, there is a general provision in Rule 18 of the Federal Rules of Criminal Procedure, stating: “Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.” There are also specific statutes, including statutes that govern venue in capital cases (18 U.S.C. § 3235), statutes that govern venue in murder and manslaughter cases (18 U.S.C. § 3236), statutes that govern venue in certain tax cases (18 U.S.C. § 3237(b)), statutes that govern venue for offenses not committed in any district (18 U.S.C. § 3238), and statutes that govern venue in cases involving espionage and related offenses (18 U.S.C. § 3238). Also, some statutes defining particular crimes include special venue provisions. *See, e.g.*, 8 U.S.C. § 1329 (illegal reentry offenses); 18 U.S.C. § 1073 (flight to avoid prosecution); 18 U.S.C. § 1512(i) (witness tampering); 18 U.S.C. § 1956(i) (money laundering). “If the statute under which the defendant is charged contains a specific venue provision, that provision must be honored (assuming, of course, that it satisfies constitutional minima).” *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004).

The controlling constitutional provisions do require that venue provisions be interpreted narrowly and with due deference to the policies which underlie the constitutional safeguards. *United States v.*

*Johnson*, 323 U.S. 273, 276 (1944).109 The Supreme Court has recognized that “[q]uestions of venue

in criminal cases . . . are not merely matters of formal legal procedure.” *Johnson*, 323 U.S. at 276. “They raise deep issues of public policy” and implicate “the fair administration of criminal justice and the public confidence in it[.]” *Id.*

# Determining Where the Offense Was Committed

The Supreme Court has stated the general test for determining the district in which the offense was committed as follows:

109 *See also United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005) (citing *Johnson*); *Salinas*, 373

F.3d at 165 (citing *Johnson*).

The *locus delicti* [in other words, the place] of the charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it. In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.

*United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (internal quotations, citations, and brackets omitted).

For many years, courts looked to the “key verbs” in the charging statute to determine the conduct constituting the offense for venue purposes. But in *Rodriguez-Moreno*, the Supreme Court noted that “[w]hile the ‘verb test’ certainly has value as an interpretive tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language” because it “unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.” *Id.*, 526 U.S. at 280. The Court instead focused on the “essential conduct elements” to determine venue. *Id.* It distinguished such elements from “circumstance elements” such as, in a money laundering case, the existence of a prior crime which occurs before the money laundering conduct occurs. *Id.* at 280 n.4.110

Thus “[v]enue is proper only where the acts constituting the offense -- the crime’s ‘essential conduct elements’ -- took place.” *United States v. Ramirez*, 420 F.3d 134, 138 (2d Cir. 2005).111 Circumstance elements, in contrast, cannot provide a basis for venue.112 Similarly, “preparatory acts” -- acts that precede and are in preparation for the offense, and are therefore not part of the offense itself -- cannot be used to establish venue.113

Where a defendant is charged as an aider and abettor, most circuits have held that venue lies not only where the defendant’s own acts occurred but also in any district where the principal could be

tried.114 The Ninth Circuit, however, has refused to endorse such “a broad and sweeping theory of

110 In light of this intervening Supreme Court decision, pre-1999 venue cases may no longer be good law. When considering such cases, counsel should consider whether the result might be different in light of the essential conduct elements test.

111 S*ee also United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005) (applying the essential conduct elements test); *United States v. Pace*, 314 F.3d 344, 349-50 (9th Cir. 2002) (same); *United States v. Cryar*, 232 F.3d 1318, 1322 (10th Cir. 2000) (same).

112 *United States v. Strain*, 396 F.3d 689, 694 n.5 (5th Cir. 2005); *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000).

113

Cir. 1999).

*Ramirez*, 420 F.3d at 141; *Strain*, 396 F.3d at 697; *United States v. Tingle*, 183 F.3d 719, 726 (7th

114 *See United States v. Zidell*, 323 F.3d 412, 424 (6th Cir. 2003); *United States v. Carreon-Palacio*, 267 F.3d 381, 393 (5th Cir. 2001); *United States v. Stewart*, 256 F.3d 231, 244 (4th Cir. 2001); *United States v. Smith*, 198 F.3d 377, 382-83 (2d Cir. 1999); *United States v. Romero*, 150 F.3d 821, 827 (8th Cir. 1998); *United States*

*v. Lam Kwong-Wah*, 924 F.2d 298, 302 (D.C. Cir. 1991); *United States v. Long*, 866 F.2d 402, 408 (11th Cir. 1989); *United States v. Jackson*, 482 F.2d 1167, 1178-79 (10th Cir. 1973); *see also United States v. Cabrales*, 524 U.S. 1, 7 (1998) (suggesting that if the defendant had been charged as an aider and abettor venue would have

venue” and instead instructs courts to focus on the facts of the case to determine whether venue is proper under an aider and abettor theory.115

When a crime consists of a single, discrete act, the proper venue is the district where that act is performed. *Ramirez*, 420 F.3d at 139; *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002). But in the case of an offense committed in more than one district or in the case of a continuing offense -- defined by the Supreme Court as “a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force,” *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) -- the prosecution may take place “in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a). However, § 3237(a) must be read with the caveat that, “[a]lthough the Supreme Court has recognized Congress’s power to define offenses as continuing, it has been wary of extending that label too broadly.” *Ramirez*, 420 F.3d at 139.116

The Second Circuit has noted that “[t]he outer limits on how broadly Congress may define a continuing offense and thereby create multiple venues is unclear” and has adopted the following test: “To determine whether the application of a venue provision in a given prosecution comports with constitutional safeguards, a court should ask whether the criminal acts in question bear ‘substantial contacts’ with any given venue.” *United States v. Saavedra*, 223 F.3d 85, 92-93 (2d Cir. 2000) (citing *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)). Although this “does not represent a formal constitutional test,” it “is helpful in determining whether a chosen venue is unfair or prejudicial to a defendant.” *Saavedra,* 223 F.3d at 93. This substantial contacts test “takes into account four main factors: (1) the site of the crime, (2) its elements and nature, (3) the place where the effect of the criminal conduct occurs, and (4) suitability of the venue chosen for accurate factfinding.” *Id.* Although *Reed* predates *Rodriguez-Moreno*’s essential conduct elements test, the Second Circuit has continued to apply the *Reed* test, apparently in addition to the Supreme Court’s test. *See Ramirez*, 420 F.3d at 139.117

A specific offense that presents its own venue issues is conspiracy. In conspiracy cases, venue may lie in the district in which the unlawful agreement was reached or in any district in which an overt act in furtherance of the conspiracy was committed, even if a coconspirator carried out the overt act and the defendant never entered that district. *Whitfield v. United States*, 543 U.S. 209, 218 (2005); *Rodriguez-Moreno*, 526 U.S. at 281-82 (citing *Hyde v. United States*, 225 U.S. 347, 356-67 (1912)). In light of this potentially much broader venue for a conspiracy charge, counsel should look closely at the permissible venues for the related substantive charges, which may well be more limited. *See Saavedra*, 223 F.3d at 89; *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994).

been appropriate where the principal committed the crime).

115 *See United States v. Valdez-Santos*, 457 F.3d 1044, 1047-48 (9th Cir. 2006).

116 Counsel and courts may be tempted to look to statutes of limitations cases, where there is a similar

“continuing offense” concept. One should be careful in doing this, however, for the continuing offense analysis for venue purposes and the continuing offense analysis for statutes of limitations purposes, although “clearly related,” are “obviously different.” *United States v. Dunne*, 324 F.3d 1158, 1166 (10th Cir. 2003).

117 *See also United States v. Williams*, 274 F.3d 1079, 1084-85 (6th Cir. 2001) (applying the substantial contacts test post-*Rodriguez-Moreno* but never citing that case or the essential conduct elements test).

Another more specific venue rule may be found in the second paragraph of 18 U.S.C. § 3237(a), which provides: “Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.” This provision should be interpreted narrowly, however. *See United States v. Morgan*, 393 F.3d 192, 197-201 (D.C. Cir. 2004). The Second Circuit has held it inapplicable to mail fraud, so venue in cases charging that offense exists “only in those districts in which a proscribed act occurs, i.e., in which the defendant ‘places,’ ‘deposits,’ ‘causes to be deposited,’ ‘takes,’ or ‘receives’ mail or ‘knowingly causes’ mail ‘to be delivered.’” *United States v. Brennan*, 183 F.3d 139, 147 (2d Cir.

1999).118 The Sixth Circuit, however, expressly rejected this approach and held that the second

paragraph of § 3237(a) does apply to mail fraud, so venue for mail fraud exists in any district in which the mail is deposited, received, *or moves through*. *United States v. Wood*, 364 F.3d 704, 712-13 (6th Cir. 2004).119

# Objections to Improper Venue

Venue is not jurisdictional,120 so objections to venue are waived if not asserted in a timely

manner.121 The standard for finding a waiver of venue is less rigorous than that for finding a waiver of

other constitutional rights.122 Still, “[t]he constitutional underpinning and importance of proper venue

dictate that waiver of objections to venue should not be readily inferred.” *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006) (internal quotations omitted).123

118 S*ee also United States v. Turley*, 891 F.2d 57, 60 n.2 (3d Cir. 1989) (noting the government’s

concession that § 3237 is not applicable to mail fraud). *But see Ramirez*, 420 F.3d at 144 n.8 (noting that *Brennan*’s holding concerning this second paragraph of § 3237(a) does not impact the first paragraph regarding continuing offenses and offenses committed in multiple districts).

119 S*ee also United States v. Loe*, 248 F.3d 449, 465 (5th Cir. 2001) (without analysis, applying § 3237(a) to mail fraud).

120 *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001); *United States v. Meade*, 110 F.3d 190, 200 (1st Cir. 1997).

121 *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006); *United States v. Greer*, 440 F.3d 1267,

1271 (11th Cir. 2006); *United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005); *United States v. Collins*, 372

F.3d 629, 633 (4th Cir. 2004); *United States v. Ringer*, 300 F.3d 788, 790 (7th Cir. 2002); *United States v. Perez*,

280 F.3d 318, 328 (3d Cir. 2002); *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir. 2000); *United*

*States v. Gaviria*, 116 F.3d 1498, 1517 n.22 (D.C. Cir. 1997); *United States v. Miller*, 111 F.3d 747, 750 (10th

Cir. 1997); *United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979). *See also* 28 U.S.C. §1406(b) (“Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.”).

122 *Perez*, 280 F.3d at 328; *United States v. Carreon-Palacio*, 267 F.3d 381, 391 (5th Cir. 2001); *Miller*, 111 F.3d at 750.

123 *See also Collins*, 372 F.3d at 633; *Carreon-Palacio*, 267 F.3d at 391. *See, e.g.*, *United States v.*

*Stewart*, 256 F.3d 231, 238-39 (4th Cir. 2001) (defendant’s oral statement joining in codefendant’s venue argument was sufficient to preserve issue for appeal); *United States v. Winship*, 724 F.2d 1116, 1124 n.7 (5th Cir.

Several circuits have held that when a defect in venue is apparent on the face of the indictment,

a defendant waives the issue if he fails to object before trial.124 Other circuits have suggested that the

objection may be made during trial if it is made before the government has completed its case.125 Despite this suggestion, an objection probably should still be made pretrial out of an abundance of caution.126 If the allegations in the indictment establish that venue is not proper in the district where the case was filed, the defendant can seek either dismissal or transfer to the proper district. *See* 28 U.S.C. §1406(a) (“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”). Where the indictment has no allegations as to venue whatsoever, the defendant can file a motion for a bill of particulars.127

Where the indictment is facially sufficient as to venue, there appears to be a circuit conflict concerning when a defendant must raise a venue objection. The Second, Fourth, Seventh, and Ninth Circuits have held that, as long as the indictment does not facially present a venue problem, a defendant may raise the issue for the first time in a motion for acquittal at the close of the government’s case.128 The Fifth, Sixth, and Eleventh Circuits have held that where a defendant has actual notice of a defect

in venue, he must still assert his venue objection pretrial.129 The Third and Eighth Circuits, although

never considering whether to adopt the approach of the Fifth, Sixth, and Eleventh Circuits, do use language in their statement of the general rule that might allow them to adopt this position. 130 How this

1984) (“[A]ppellant’s motions for bill of particulars, although not constituting explicit venue objections, preclude any finding of waiver.”).

124 *See Novak*, 443 F.3d at 161; *Strain*, 396 F.3d at 693; *Collins*, 372 F.3d at 633; *Black Cloud*, 590 F.2d

at 272.

125 *See Ringer*, 300 F.3d at 790; *Ruelas-Arreguin*, 219 F.3d at 1060; *United States v. Robinson*, 167 F.3d 824, 829 (3d Cir. 1999).

126 The requirement that the defendant must challenge venue pretrial where a venue defect is apparent

on the face of the indictment seems somewhat inconsistent with the fact that venue need not be alleged in the indictment. *United States v. Votteller*, 544 F.2d 1355, 1361 (6th Cir. 1976); *United States v. Honneus*, 508 F.2d 566, 570 (1974), *overruled on other grounds*, *United States v. Christensen*, 732 F.2d 20 (1st Cir. 1984); *Hemphill*

*v. United States*, 392 F.2d 45, 47 (8th Cir. 1968); *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963).

127 *Winship*, 724 F.2d at 1124 n.7; *Honneus*, 508 F.2d at 570; *Carbo*, 314 F.2d at 733.

128 *See Novak*, 443 F.3d at 161; *Collins*, 372 F.3d at 633; *Ringer*, 300 F.3d at 790; *Ruelas-Arreguin*, 219 F.3d at 1060.

129 *See United States v. Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005); *United States v. Roberts*, 308 F.3d 1147, 1152 (11th Cir. 2002); *United States v. Delgado-Nunez*, 295 F.3d 494, 497 (5th Cir. 2002). *But see id.* at 499-503 (Dennis, J., dissenting) (noting that this position conflicts with most authority on this issue).

130 *See United States v. Perez*, 280 F.3d 318, 328 (3d Cir. 2002) (“Where an indictment alleges venue

on its face without an obvious defect, ‘*the defendant has no notice* that a facially proper allegation of venue is in fact defective, and thus there can be no waiver until the close of the government’s case.” (emphasis added)); *United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979) (“[W]hen an indictment contains a proper allegation of venue so that *a defendant has no notice* of a defect of venue until the government rests its case, the objection is timely if made at the close of the evidence.” (emphasis added)).

is reconciled with the general rule discussed in Section 6.1.01 above -- that a defendant making a pretrial motion to dismiss is prohibited from relying on evidence outside the four corners of the indictment, at least where the government contests the evidence -- is unclear.

# Proof of Venue at Trial

The government has the burden of proving venue by a preponderance of the evidence as to each

count.131 The Third and D.C. Circuits have held that “where the indictment alleges venue without a

facially obvious defect, if: (1) the defendant objects to venue prior to or at the close of the prosecution’s case-in-chief; (2) there is a genuine issue of material fact with regard to proper venue; and (3) the defendant timely requests a jury instruction, venue becomes a jury question and the court must specifically instruct the jury on venue.” *United States v. Perez*, 280 F.3d 318, 334 (3d Cir. 2002); *United States v. Haire*, 371 F.3d 833, 839-40 (D.C. Cir. 2004) (adopting the *Perez* analysis), *vacated on other grounds*, 543 U.S. 1109, *judgment reinstated*, 2005 WL 3279991 (D.C. Cir. 2005). The Ninth Circuit appears to suggest a much lower bar for getting a jury instruction on venue.132

As to the remedy when there is insufficient evidence, the circuits are split. The Fifth and Eighth

Circuits have held that the proper remedy is a judgment of acquittal.133 The Ninth and Tenth Circuits

have held that all the defendant is entitled to is dismissal without prejudice or a transfer of the case to a district with proper venue.134

# Motion for Change of Venue

* + - 1. **Motion Based On Prejudice**

A criminal defendant has a due process right to a fair trial by an impartial jury free from outside influences. *See Sheppard v. Maxwell*, 384 U.S. 333, 349-62 (1966) (due process violation based on

131 *United States v. Johnson*, 462 F.3d 815, 819 (8th Cir. 2006); *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006); *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005); *United States v. Strain*, 396 F.3d 689, 692 n.3 (5th Cir. 2005); *United States v. Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004); *United States v. Chen*, 378 F.3d 151, 159 (2d Cir. 2004); *United States v. Salinas*, 373 F.3d 161, 163 (1st Cir. 2004); *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002); *United States v. Crozier*, 259 F.3d 503, 519 (6th Cir. 2001); *United States v. Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000); *United States v. Tingle*, 183 F.3d 719, 726-27 (7th Cir. 1999).

132 *See, e.g.*, *United States v. Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006) (“In a jury trial, it is not for

the court to determine that venue exists, and it is error for the court to decline to give the instruction.”). *But cf. United States v. Carpenter*, 405 F. Supp. 2d 85, 90 (D. Mass. 2005) (adopting the *Perez* analysis and stating that “the statements indicating that venue must [always] be submitted to the jury seem often the product of reflex or habit, rather than decision”).

133 *See Strain*, 407 F.3d at 380; *United States v. Greene*, 995 F.2d 793, 801 (8th Cir. 1993).

134 *See Ruelas-Arreguin*, 219 F.3d at 1060 n.1; *United States v. Hernandez*, 189 F.3d 785, 792 n.5 (9th

Cir. 1999); *cf. Wilkett v. United States*, 655 F.2d 1007, 1011-12 (10th Cir. 1981) (double jeopardy did not bar new trial in district with proper venue after case was dismissed in another district when the government presented insufficient evidence at trial to establish venue there).

press coverage); *Estes v. Texas*, 381 U.S. 532, 538-52 (1965) (same); *Rideau v. Louisiana*, 373 U.S. 723,

726-27 (1963) (same); *Irvin v. Dowd*, 366 U.S. 717, 721-28 (1961) (same); *but cf. Patton v. Yount*, 467

U.S. 1025, 1031-40 (1984) (no due process violation despite press coverage); *Murphy v. Florida*, 421

U.S. 794, 797-803 (1975) (same). This right is also codified in Rule 21(a) of the Federal Rules of Criminal Procedure, which states: “Upon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” Rule 21(a) mirrors the requirements of due process, so the constitutional standards govern the rule. *United States v. Rewald*, 889 F.2d 836, 862 n.27 (9th Cir. 1989); *United States v. Faul*, 748 F.2d 1204, 1211 (8th Cir. 1984).

To establish that prejudice prevents a defendant from receiving a fair trial and necessitates a

change of venue, he must show either presumed or actual prejudice.135 Prejudice requiring a change of

venue is presumed where widespread, pervasive prejudice against the defendant and/or extensive prejudicial pretrial publicity saturates the community where he is to be tried.136 In determining whether prejudice should be presumed based on pretrial publicity, courts look at the following factors: (1) whether the media accounts have been primarily dispassionate and factual or editorial and inflammatory in nature;137 (2) whether there is a barrage of inflammatorypublicityimmediatelyprior to trial amounting to a huge wave of public passion;138 (3) whether there has been a significant length of time between any inflammatory publicity and the trial;139 (4) whether media accounts contained inflammatory or prejudicial

135 *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc); *United States v. Perez-*

*Gonzalez*, 445 F.3d 39, 46 (1st Cir. 2006); *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006); *Daniels v.*

*Woodford*, 428 F.3d 1181, 1211 (9th Cir. 2005); *United States v. Higgs*, 353 F.3d 281, 307-08 (4th Cir. 2003);

*United States v. Nelson*, 347 F.3d 701, 707-08 (8th Cir. 2003); *Nevers v. Killinger*, 169 F.3d 352, 362-64 (6th Cir. 1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940, 942-43 (6th Cir. 2000); *United States v. O’Keefe*, 722 F.2d 1175, 1179-80 (5th Cir. 1983).

136 *Campa*, 459 F.3d at 1143; *Perez-Gonzalez*, 445 F.3d at 46; *Goss*, 439 F.3d at 628-29; *Daniels*, 428

F.3d at 1211; *Higgs*, 353 F.3d at 307-08; *Nelson*, 347 F.3d at 707; *Nevers*, 169 F.3d at 362-63; *O’Keefe*, 722 F.2d at 1180. Almost all of the cases discussing prejudice involve pretrial publicity, but occasionally defendants have based their Rule 21(a) motions, at least in part, on other alleged prejudice in the community unrelated to publicity about the crime or the trial, such as purported bias against the defendant’s race, religion, or political affiliations. However, at least in the reported cases, these efforts have not generally been successful. *See, e.g.*, *United States*

*v. Campa*, 459 F.3d at 1126-29; *United States v. Granillo*, 288 F.3d 1071, 1075 (8th Cir. 2002); *United States v. Affleck*, 776 F.2d 1451, 1454 (10th Cir. 1985).

137 *See, e.g.*, *Murphy*, 421 U.S. at 800 n.4; *Campa*, 459 F.3d at 1144; *Goss*, 439 F.3d at 629; *White v.*

*Mitchell*, 431 F.3d 517, 531 (6th Cir. 2005); *Daniels*, 428 F.3d at 1211; *Higgs*, 353 F.3d at 308; *United States*

*v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002); *Flamer v. Delaware*, 68 F.3d 736, 754-55 (3d Cir. 1995); *United*

*States v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990); *Grancorvitz v. Franklin*, 890 F.2d 34, 40 (7th Cir. 1989);

*O’Keefe*, 722 F.2d at 1180.

138 *See, e.g.*, *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984); *Henyard v. McDonough*, 459 F.3d 1217,

1242 (11th Cir. 2006); *Goss*, 439 F.3d at 629; *Daniels*, 428 F.3d at 1211.

139 *See, e.g.*, *Patton*, 467 U.S. at 1034; *Randolph v. California*, 380 F.3d 1133, 1142 (9th Cir. 2004);

*Higgs*, 353 F.3d at 308; *United States v. Nelson*, 347 F.3d 701, 709 (8th Cir. 2003); *Flamer*, 68 F.3d at 755;

*United States v. Lehder-Rivas*, 955 F.2d 1510, 1524-25 (11th Cir. 1992); *Grancorvitz*, 890 F.2d at 40; *Willie v.*

information that was not admissible at trial;140 (5) whether the defense is a significant source of the publicity;141 and (6) whether a substantially better panel can be sworn in another place (in other words, whether the publicity is national or local).142 Much of the case law in this area is relatively old and might be distinguishable on that basis; however, as put by one judge: “Given the multiple resources for almost instantaneous communication and the plethora of media extant today, the considerations embraced by the [Supreme] Court in earlier times fail to address [new technological] developments.” *Campa*, 459 F.3d at 1155 (Birch, J., dissenting).

Many appellate cases upholding the denial of a motion despite extensive pretrial publicity have pointed to the efforts that can be taken by the trial court to mitigate the effects of publicity. Such steps include the following: (1) undertaking extensive, careful, and probing voir dire (sometimes including sequestered questioning of individual jurors);143 (2) allowing written juror questionnaires about the publicity;144 (3) granting a continuance if the publicity and/or the prejudice may decrease over time;145

(4) expanding the size of the jury pool and/or the area from which the jury pool is drawn, or excluding from the jury pool people who live in certain areas;146 (5) increasing the number of peremptory strikes for each side;147 (6) being more liberal in sustaining challenges for cause;148 (7) issuing a “gag order” limiting the ability of the participants in the trial to interact with the press;149 (8) sequestering the jury;150

*Maggio*, 737 F.2d 1372, 1387 (5th Cir. 1984).

140 *See, e.g.*, *Daniels*, 428 F.3d at 1211.

141 *See, e.g.*, *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991).

142 *See, e.g.*, *Bakker*, 925 F.2d at 733; *United States v. Chapin*, 515 F.2d 1274, 1289 (D.C. Cir. 1975).

143 *See, e.g.*, *Campa*, 459 F.3d at 1147-48; *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003);

*United States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001); *United States v. Croft*, 124 F.3d 1109, 1116 (9th Cir.

1997); *United States v. Bailey*, 112 F.3d 758, 769-70 (4th Cir. 1997); *United States v. Chambers*, 944 F.2d 1253,

1262 (6th Cir. 1991); *Angiulo*, 897 F.2d at 1183; *Grancorvitz*, 890 F.2d at 40; *United States v. Affleck*, 776 F.2d

1451, 1455 (10th Cir. 1985); *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir. 1982).

144 *See, e.g.*, *Nelson*, 347 F.3d at 708; *Chambers*, 944 F.2d at 1262; *Angiulo*, 897 F.2d at 1183; *Affleck*, 776 F.2d at 1455.

145 *See, e.g.*, *Shepard v. Maxwell*, 384 U.S. 333, 363 (1966); *Campa*, 459 F.3d at 1143 n.189; *United*

*States v. Orlando-Figueroa*, 229 F.3d 33, 43 (1st Cir. 2000); *United States v. Chapin*, 515 F.2d 1274, 1286 (D.C.

Cir. 1975).

146 *See, e.g.*, *Blom*, 242 F.3d at 804.

147 *See, e.g.*, *Campa*, 459 F.3d at 1136; *Blom*, 242 F.3d at 804; *Mills v. Singletary*, 63 F.3d 999, 1008

n.12 (11th Cir. 1995); *Chambers*, 944 F.2d at 1262.

148 *See, e.g.*, *Chambers*, 944 F.2d at 1262.

149 *See, e.g.*, *Campa*, 459 F.3d at 1136; *Orlando-Figueroa*, 229 F.3d at 42.

150 *See, e.g.*, *Mills*, 63 F.3d at 1008 n.12; *United States v. Faul*, 748 F.2d 1204, 1215 (8th Cir. 1984).

and/or (9) moving the case to another division within the district.151 Counsel should consider bringing

a motion for change of venue even if it will probably be denied because these alternative remedies might make selecting an unbiased -- or less biased -- jury more likely.

The presumed prejudice principle is rarely applicable and is reserved for extreme situations.152 Courts do occasionally find that pretrial publicity gives rise to a presumption of prejudice requiring a change of venue, however.153

A change of venue is also appropriate if voir dire reveals that an impartial jury cannot be impaneled due to actual prejudice of the venire members.154 It is not necessary for the jurors to be totally ignorant of the case or to be wholly free from any exposure to pretrial publicity, however, as long as they can lay aside their opinions and render a verdict based on the evidence. *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). Actual prejudice may be shown if a large percentage of the prospective jurors are dismissed for cause because that demonstrates a pattern of prejudice that gives little weight to the remaining jurors’ assurances of impartiality. *See id.* at 727 (prejudice where 62% of potential jurors dismissed for cause).155

The burden is on the defendant to establish prejudice.156 Probably the most important evidence

in support of a motion for change of venue based on pretrial publicity is a compendium of the press coverage.157 But other evidence will often be useful as well. *See, e.g., Campa*, 459 F.3d at 1127-29 (trial court granted defense funds to retain a psychology professor to conduct a poll of a representative sample

151 *See, e.g.*, *Blom*, 242 F.3d at 804.

152 *Campa*, 459 F.3d at 1143; *Goss*, 439 F.3d at 629; *Randolph v. California*, 380 F.3d 1133, 1142 (9th Cir. 2004); *Higgs*, 353 F.3d at 307-08; *Nelson*, 347 F.3d at 707-08; *United States v. Lipscomb*, 299 F.3d 303, 344-45 (5th Cir. 2002); *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995); *United States v. Garza*, 664 F.2d 135, 138 n.1 (7th Cir. 1981).

153 *See, e.g.*, *Daniels*, 428 F.3d at 1210-12; *United States v. McVeigh*, 918 F. Supp. 1467, 1469-74 (W.D. Ok. 1966); *United States v. Tokars*, 839 F. Supp. 1578, 1579-84 (N.D. Ga. 1993); *United States v. Ebens*, 654 F. Supp. 144, 145-46 (E.D. Mich. 1987); *United States v. Engleman*, 489 F. Supp. 48, 49-52 (E.D. Mo. 1980); *United States v. Abrahams*, 466 F. Supp. 552, 556-57 (D. Mass. 1978); *United States v. Mazzei*, 400 F. Supp. 17, 20 (W.D. Pa. 1975); *United States v. Holder*, 399 F. Supp. 220, 225-28 (D. S.D. 1975).

154 *White v. Mitchell*, 431 F.3d 517, 532 (6th Cir. 2005); *Daniels*, 428 F.3d at 1211; *Higgs*, 353 F.3d at

308; *Nelson*, 347 F.3d at 708; *Hale v. Gibson*, 227 F.3d 1298, 1333 (10th Cir. 2000); *Mills v. Singletary*, 63 F.3d

999, 1009 (11th Cir. 1995); *O’Keefe*, 722 F.2d at 1180.

155 *Compare Murphy v. Florida*, 421 U.S. 794, 803 (1975) (no prejudice where 26% of potential jurors dismissed for cause); *Perez-Gonzalez*, 445 F.3d at 46 (no prejudice where less than 14% of potential jurors said they could not be impartial); *United States v. Collins*, 109 F.3d 1413, 1417 (9th Cir. 1997) (no prejudice where 9% of jury panel held fixed opinions of guilt); *United States v. Faul*, 748 F.2d 1204, 1213 (8th Cir. 1984) (no prejudice where 50% of jurors not impartial, but only 27% not impartial due to media coverage).

156 *Campa*, 459 F.3d at 1143; *Nelson*, 347 F.3d at 707-08; *Hale*, 227 F.3d at 1332.

157 *See, e.g.*, *Campa*, 459 F.3d at 1129; *Nelson*, 347 F.3d at 708.

of the population); *United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990) (defense presented expert testimony on subject of publicity and jury selection).

As to timing of the motion, “[a] motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.” FED. R. CRIM. P. 21(d). But even when the motion is made long before trial, some courts have expressed a preference for holding the motion in abeyance

until voir dire to see if an impartial jury can actually be empaneled.158 Some courts have held that the

failure to renew the motion for change of venue or otherwise challenge the impartiality of the panel at the conclusion of voir dire waives the issue.159

As amended in 1966, Rule 21(a) expressly provided that a court granting a motion for change of venue in a district where prejudice precludes a fair trial could transfer the case “to another district whether or not such district is specified in the defendant’s motion[.]” The commentary to that amendment confirmed that “the court may select the district to which the transfer may be made.” FED.

R. CRIM. P. 21 advisory committee’s note (1966 amendment). Consistent with this commentary, court decisions interpreting the rule held that once a defendant moves for transfer of venue, the decision about where to transfer is within the discretion of the trial court. *See, e.g.*, *Angiulo*, 497 F.2d at 441. The defendant may move to withdraw his motion for change of venue and ask the court to vacate the transfer order if he does not prefer the district chosen by the court, but the court does not necessarily abuse its discretion by denying that motion to withdraw. *Id.*; *United States v. Marcello*, 423 F.2d 993, 1005 (5th Cir. 1970).

In 2002, however, Rule 21(a) was amended again and the “whether or not such district is specified in the defendant’s motion” language was removed. Although this seems to be a significant change, the commentary to this amendment indicates that the changes to Rule 21 were “intended to be stylistic only.” *See* FED. R. CRIM. P. 21 advisory committee’s note (2002 amendment). It is thus unclear whether a district court still has the authority to transfer a case to a district that is not specified in the defendant’s motion.

# Motion Based On Convenience of Parties and Witnesses and the Interests of Justice

Rule 21(b) provides that a defendant may also move for change of venue based on “the convenience of the parties and witnesses and in the interests of justice.”160 In *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964), the Supreme Court listed the following factors as relevant

158 *See, e.g.*, *Campa*, 459 F.3d at 1146-47; *United States v. Peters*, 791 F.2d 1270, 1296 (7th Cir. 1986);

*United States v. Williams*, 523 F.2d 1203, 1209 n.10 (5th Cir. 1975); *United States v. Chapin*, 515 F.2d 1274,

1286 & n.7 (D.C. Cir. 1975).

159 *See, e.g.*, *Campa*, 459 F.3d at 1147-48 (noting that the defendant’s failure to use all his peremptory

challenges indicates the absence of juror prejudice); *Yousef*, 327 F.3d at 155 (where defendant did not renew motion for a change of venue after voir dire, court interpreted it as an indication that counsel was satisfied that the voir dire resulted in a jury that had not been tainted by publicity).

160 The language of Rule 21(b) was taken from 28 U.S.C. §1404(a) and therefore decisions construing

that statute provide helpful analogies for understanding Rule 21(b). *In re United States*, 273 F.3d 380, 383 (3d Cir. 2001).

to a motion to transfer under Rule 21(b): (1) location of the defendant; (2) location of possible witnesses;

(3) location of events likely to be in issue; (4) location of documents and records likely to be involved;

(5) disruption of defendant’s business if case not transferred; (6) expenses of the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket conditions of each potential district; and

(10) any other special elements which might affect the transfer. *Id.* at 243-44. Lower courts have

applied these factors in considering Rule 21(b) motions.161 The lower courts have also considered

additional factors including: (1) whether granting a motion for change of venue will result in multiple trials in multiple districts;162 (2) any inconvenience to the government and its witnesses;163 and (3) prejudice falling short of that necessary to justify a transfer under Rule 21(a).164 Factors a court may *not*

consider include a defendant’s hope that he can get a better result in another district165 and,

correspondingly, speculation that the government might not be able to obtain an impartial jury in another district.166

The burden is on the defendant to establish that a transfer is justified under Rule 21(b). *In re United States*, 273 F.3d 380, 388 (3d Cir. 2001). However, the defendant is not required to show truly compelling circumstances for change of venue, but rather that all relevant things considered, the case would be better off transferred to another district. *Id.* at 383; *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995). Although transfers under Rule 21(b) are not as rare as transfers under Rule 21(a), they are still uncommon, and the cases granting Rule 21(b) transfers are obviously very fact specific.167

Though the text of Rule 21(b) has never expressly provided that the district court may transfer the case to a district other than the one specified in the defendant’s motion, the 1966 commentary to the rule suggests that it can. FED. R. CRIM. P. 21 advisory committee’s note (1966 amendment) (“Here, as in subdivision (a), the court may select the district to which the transfer is to be made.”). *But see United States v. Griesa*, 481 F.2d 276, 282 n.6 (2d Cir. 1973) (Timbers, J., concurring in part and dissenting in part) (“Presumably, under Rule 21(b), the district judge to whom the transfer motion is addressed has no discretion in selecting the district to which the transfer is to be made; if there is to be a transfer at all, it must be to the district court specified in the motion.” (citing WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 345 (1969))). If the defendant does not prefer the district chosen by the court over the

161 *See, e.g.*, *In re United States*, 273 F.3d 380, 387-88 (3d Cir. 2001); *United States v. Jordan*, 223 F.3d 676, 685 (7th Cir. 2000); *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990).

162 *See United States v. Morrison*, 946 F.2d 484, 489-90 (7th Cir. 1991).

163 *See Jones v. Gasch*, 404 F.2d 1231, 1241 (D.C. Cir. 1967).

164 *See Jordan*, 223 F.3d at 685. *But see Jones*, 404 F.2d at 1237-39 (precluding consideration of

prejudice under Rule 21(b)).

165 *See Jordan*, 223 F.3d at 685-86.

166 *See Platt*, 376 U.S. at 246 (Harlan, J., concurring).

167 *See, e.g.*, *United States v. Ferguson*, 432 F. Supp. 2d 559, 561-71 (E.D. Va. 2006); *United States v.*

*Valdes*, No. 05-CR-156 (KMK), 2006 WL 738403, at \*3-13 (S.D.N.Y. March 21, 2006); *United States v. Lopez*, 343 F. Supp. 2d 824, 825-26 (E.D. Mo. 2004); *United States v. Lopez*, No. 02-40021-02-RDR, 2002 WL

31498984, at \*1-4 (D. Kan. Sept. 5, 2002); *United States v. Coffee*, 113 F. Supp. 2d 751, 753-59 (E.D. Pa. 2000).

original district, he may move to withdraw his motion for change of venue and ask the court to vacate the transfer order, but the court may not have to allow withdrawal of the motion. *Cf. United States v. Anguilo,* 497 F.2d 440, 441 (1st Cir. 1974) (so holding with respect to Rule 21(a)).

As to who can make the motion, both Rule 21(a) and Rule 21(b) expressly provide that the court may order a transfer only upon the defendant’s motion. In part, this is because a criminal defendant has a constitutional right to a trial in the district where the offense was committed, see Section 6.04.01.01, *supra*, and only he can waive venue. *See* FED. R. CRIM. P. 21 advisory committee’s note. Thus, the government cannot move for a transfer and the court cannot transfer the case on its own motion. *In re Briscoe*, 976 F.2d 1425, 1428 (D.C. Cir. 1992). Indeed, it is debatable whether even retransfer back to the original district is permissible without a defense motion. *See id.* at 1428-29.168

# Assignment / Transfer of Cases Within Districts Containing Multiple Divisions

Rule 18 of the Federal Rules of Criminal Procedure provides that “[t]he court must set the place of trial within the district with due regard for the convenience of the defendant, any victims, and the witnesses, and the prompt administration of justice.” FED. R. CRIM. P. 18. There is, however, no constitutional right to a trial within a particular division of a district. *United States v. Wattree*, 431 F.3d 618, 620 (8th Cir. 2005); *United States v. Lipscomb*, 299 F.3d 303, 339 (5th Cir. 2002). Many district courts have local rules pertaining to assignment and/or transfer of cases within the district.

Although Rule 18 refers only to “convenience” and “the prompt administration of justice,” a court considering a motion to transfer a case to another division may also consider other relevant factors, including docket management, courthouse space and security, and pretrial publicity. *Lipscomb*, 299 F.3d at 340-48; *United States v. Scholl*, 166 F.3d 964, 970 (9th Cir. 1999). In particular, “[i]f the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where such prejudice does not exist.” FED. R. CRIM. P. 18 advisory committee’s note (1966 amendment).

# MOTIONS TO CLEAN UP THE INDICTMENT

* + 1. **Motions to Strike Surplusage**

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that the indictment “be a plain, concise and definite written statement of the essential facts constituting the offense charged.” FED. R. CRIM. P. 7(c)(1). Rule 7(d) provides that, upon motion by a defendant, a court “may strike surplusage from the indictment . . . .” FED. R. CRIM. P. 7(d). A motion to strike surplusage is designed to “protect a defendant against ‘prejudicial or inflammatory allegations that are neither relevant nor material to the charges.’” *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988). Where the indictment alleges facts that are irrelevant or immaterial, particularly when those facts might prove prejudicial, counsel

168 The government does have to be given the opportunity to object to the transfer, *In re United States*,

273 F.3d at 387, and both it and the defense may seek appellate review through a writ of mandamus, see, e.g., *id.* at 384-85; *In re Balsimo*, 68 F.3d at 186; *In re Briscoe*, 976 F.2d at 1427. However, mandamus relief will rarely be granted in such circumstances. *In re United States*, 273 F.3d at 385; *Balsimo*, 68 F.3d at 187.

should move to strike them.169 discretion.170

The denial of a motion to strike surplusage is reviewed for abuse of

A motion to strike surplusage is proper to redact those extraneous allegations and prejudicial adjectives which the government included in the indictment merely to instill fear or prejudice in the jury, or to reinforce its broad theory of the case to the jury in writing. As such, a motion is based on the language appearing on the face of the indictment, is not contingent on receipt and review of extensive discovery, and can be filed early in the course of a case. If the motion is granted, it may serve to disrupt the manner in which the government’s theory is presented to the jury, at least in written form. If the motion is denied, counsel may consider bringing a motion for a bill of particulars in an effort to force the government to reveal additional facts and theories regarding those portions of the indictment which it opposed being stricken.

# Motion for Bill of Particulars

Rule 7(f) of the Federal Rules of Criminal Procedure gives a court the authority to direct the filing of a bill of particulars by the government. In 1966, Rule 7(f) was amended to eliminate any requirement that the defendant make a showing of cause. *See* FED. R. CRIM. P. 7 advisory committee’s note (1966 amendment). This amendment was “designed to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases.” *Id.* A number of opinions have recognized the liberalizing effect of the 1966 amendment.171

A bill of particulars is “intended to supplement the indictment by providing more detail of the facts upon which the charges are based.” *United States v. Inryco, Inc.*, 642 F.2d 290, 295 (9th Cir. 1981). By providing a defendant with the specifics of the charge, a bill of particulars serves three purposes: (1) to aid a defendant in preparing for trial; (2) to eliminate surprise at trial; and (3) to protect against double jeopardy. *United States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985); *United States v. Schembari*, 484 F.2d 931, 934-35 (4th Cir. 1973). Close issues should be resolved in favor of additional disclosure. As the court stated in *United States v. Manetti*, 323 F. Supp. 683 (D. Del. 1971):

[T]he bill of particulars is designed to fill any gap between the facts disclosed by the indictment and that “set of facts” which will permit [the defendant] the opportunity of preparation. What constitutes this “set of facts” in a given case, however, is a somewhat elusive concept. Obviously, it is something other than the minimum which would apprise the defendant of the charges against him and, therefore, be sufficient to sustain

169 *See United States v. Williams,* 445 F.3d 724, 733 (4th Cir. 2006); *United States v. Hedgepeth*, 434

F.3d 609, 612 (3d Cir. 2006); *United States v. Bissell*, 866 F.2d 1343, 1355-57 (11th Cir. 1989); *United States*

*v. Hughes*, 766 F.2d 875, 879 (5th Cir. 1985).

170 *United States v. Blanchard*, 542 F.3d 1133, 1140 (7th Cir. 2008); *United States v. Michel-Galaviz*,

415 F.3d 946, 948 (8th Cir. 2005); *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988); *U.S. v. Poore*,

594 F.2d 39, 41 (4th Cir. 1979).

171 *See, e.g.*, *Nesson v. United States*, 388 F.2d 603, 604 (1st Cir. 1968); *United States v. Rogers*, 617

F. Supp. 1024, 1028 (D. Colo. 1985); *United States v. Boffa*, 513 F. Supp. 444, 484-85 (D. Del. 1980); *United*

*States v. Thevis*, 474 F. Supp. 117, 124 (N.D. Ga. 1979), *aff’d*, 665 F. 2d 616 (5th Cir. 1982).

an indictment. Otherwise, there would be no purpose of a bill of particulars In the

grey areas, the doubt must be resolved in favor of disclosure and the conflicting concerns must yield to paramount public interest in affording the accused a reasonable foundation for mounting a defense.

*Id.* at 696.

The motion must be filed “before or within 10 days after arraignment or at a later time if the court permits.” FED. R. CRIM. P. 7(f). The motion can be filed at this early stage because, like a motion for surplusage, it is based on the language appearing on the face of the indictment. The decision whether to grant or deny a defendant’s motion for bill of particulars lies within the court’s broad discretion. *Will v. United States*, 389 U.S. 90, 98-99 (1967).

A bill of particulars can eliminate uncertainties as to the government’s theory of the case. *United States v. Giese*, 597 F.2d 1170, 1181 (9th Cir. 1979); *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965). Defense counsel should consider bringing a motion for bill of particulars to force the government to reveal, and commit to writing, details regarding its theory of the case prior to trial.172 By elucidating the important details of a case, a bill of particulars can be a useful tool where the government attempts to bury the relevant evidence within thousands of pages of irrelevant discovery.

# MOTIONS RELATED TO PRE- AND POST-ACCUSATION DELAY

There are several constitutional and statutory provisions that protect a defendant from the

government’s delay in instituting a prosecution and/or bringing a case to trial.173 Pre-accusation, the

defendant’s primary protection is the statute of limitations, although the Due Process Clause of the Fifth Amendment also offers limited protection. Post-accusation, the Sixth Amendment right to a speedytrial, the Speedy Trial Act of 1974, the Interstate Agreement on Detainers Act, and Federal Rule of Criminal Procedure 48(b) offer various protections against government delay. Although some form of prejudice to the defendant is a factor in all contexts, the definition of prejudice differs, as does the importance of showing prejudice.

# Pre-Accusation Delay

The primary protection against the government’s delay in instituting a prosecution is the statute of limitations, which protects the defendant against the possibility of prejudice in the prosecution of overly stale criminal charges. Still, even when prosecution is instituted within the statute of limitations,

172 *See, e.g.*, *United States v. Roth*, 669 F. Supp. 1386, 1389 (N.D. Ill. 1987), *aff’d*, 860 F.2d 1382 (7th

Cir. 1988) (RICO defendant entitled to bill of particulars specifying judges he allegedly attempted to corrupt); *United States v. Kole*, 442 F. Supp. 852, 854 (S.D.N.Y. 1977) (conspiracy defendant entitled to bill of particulars disclosing names of politicians to whom he allegedly paid money); *United States v. Earnhart*, 683 F. Supp. 717, 718-19 (W.D. Ark. 1987) (court ordered bill of particulars regarding the amounts alleged to have been unreported and their source to enable the defendant to meet the charges presented against him).

173 For a discussion of the suppression of statements due to unnecessary delay, see Chapter 5,

Suppression of Statements.

the Due Process Clause may offer limited protection if the defendant can show actual prejudice resulted from the government’s delay. The Sixth Amendment right to a speedy trial is not triggered until a defendant is indicted or arrested, however.

# Statutory Protections: Statutes of Limitations

Statutes of limitations are said to represent legislative assessments of the relative interests of the government and the defendant in administering and receiving criminal justice and to protect the defendant against possible, as opposed to actual, prejudice from the prosecution of overly stale criminal charges. *United States v. Marion*, 404 U.S. 307, 322 (1971). Because the purpose of a statute of limitations is to limit exposure to criminal prosecutions to a certain time period following the occurrence of a criminal act, they are to be liberally interpreted in favor of repose. *Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. Habig*, 390 U.S. 222, 227 (1968).

# Statutory Provisions

The statutes of limitations for most federal offenses are found at 18 U.S.C. § 3281, *et seq.* There is no statute of limitations for capital offenses. *See* 18 U.S.C. § 3281. For most non-capital offenses, the statute of limitations is five years. *See* 18 U.S.C. § 3282.

Some statutes carry their own statutes of limitations, however, see, e.g., 18 U.S.C. § 1031(f) (providing for seven-year statute of limitations for cases brought under Major Frauds Act), and there are also several more focused provisions in the statute of limitations chapter of Title 18, so counsel should always check the statute for more specific provisions. For example, proceedings for criminal contempt under 18 U.S.C. § 402 must begin within one year. 18 U.S.C. § 3285. Ten-year statutes of limitations apply to certain offenses involving nationality, citizenship, and passports, 18 U.S.C. § 3291; arson, 18

U.S.C. § 3295; trafficking, slavery, and involuntary servitude, 18 U.S.C. § 3298; and certain enumerated financial institution offenses, 18 U.S.C. § 3293, as well as fraud offenses that “affect” a financial institution, see *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992) (holding that ten-year statute of limitations applies to wire fraud where financial institution is affected, even where that is not the object of the fraud).

Title 18 U.S.C. § 3286 extends the statute of limitations for certain enumerated offenses deemed related to “terrorism.” These include not only the “federal crimes of terrorism” listed at 18 U.S.C. § 2332b(g)(5)(B), but a variety of other offenses, including misdemeanor damage to government property in violation of 18 U.S.C. § 1361. And there is no statute of limitations at all for listed federal crimes of terrorism “if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.” 18 U.S.C. § 3286.

For offenses involving the abuse or kidnaping of a child, prosecutions may be instituted during the life of the child, or for ten years after the offense, whichever is longer. 18 U.S.C. § 3282. But there is no statute of limitations for offense involving child abduction and child sex offenses, including child pornography offenses. 18 U.S.C. § 3299.

Finally, 18 U.S.C. §§ 3288 and 3289 provide for a six-month grace period in some cases where an indictment or information is dismissed for reasons other than a statute of limitations defect. *See* 18

U.S.C. §§ 3288, 3289. In addition, 18 U.S.C. § 3290 tolls the statute of limitations while a person is fleeing from justice, though this provision does not apply when a fugitive is making a good faith effort to surrender. *United States v. Gonsalves*, 675 F.2d 1050, 1055 (9th Cir. 1982). Also, Congress can extend a statute of limitations period after an offense is committed, without violating the Ex Post Facto

Clause, so long as it does so before the original limitations period has expired.174 But amending the

statute after the original statute of limitations has already expired cannot save a dead prosecution. *See Stogner v. California*, 539 U.S. 607 (2003) (holding extension of statute of limitations *after* it has expired violates Ex Post Facto Clause, but leaving undisturbed cases allowing extension *before* expiration).

# “Continuing” Offenses and “Schemes”

In most cases, an offense is committed, and the statute of limitations begins to run, as soon as each element of the offense has occurred. *Toussie v. United States*, 397 U.S. 112, 114 (1970). The exception to this rule is where the offense is considered a “continuing offense,” in which case the statute of limitations does not begin to run until the offense ends. *Id.* A continuing offense is one that continues beyond the defendant’s illegal act, in the sense that “each day brings a renewed threat of the evil Congress sought to prevent.” *Id.* at 122. Whether an offense is continuing thus “turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue.” *United*

*States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991).175 Because the purpose of a statute of limitations is

to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of the offense, and because construing an offense as “continuing” has the effect of extending the period of exposure, the Supreme Court has held that the doctrine of continuing offenses should be applied only in limited circumstances and only when the explicit language of the substantive criminal statute compels that conclusion or the nature of the crime is such that Congress must have intended that it be treated as a continuing one. *See Toussie*, 397 U.S. at 122-23.

For example, the statutory provision that applies to concealment of assets in bankruptcy cases provides that concealment shall be deemed continuing until the debtor is finally discharged or a discharge has been denied. 18 U.S.C. § 3284. The offense of “escape” has been deemed to continue

174 *See, e.g.*, *United States v. De La Mata*, 266 F.3d 1275, 1286 (11th Cir. 2001); *United States v.*

*Grimes*, 142 F.3d 1342, 1351 (11th Cir. 1998); *United States v. Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993);

*United States v. Michel-Galaviz*, 415 F.3d 946, 948 (8th Cir. 2005); *United States v. Taliaferro*, 979 F.2d 1399,

1402-03 (10th Cir. 1992); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992); *United States v. Madia*,

955 F.2d 538, 539-40 (8th Cir. 1992); *United States ex rel Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir.

1982); *United States v. Richardson,* 512 F.2d 105, 106 (3d Cir. 1975); *Clements v. United States*, 266 F.2d 397,

399 (9th Cir. 1959).

175 *See also United States v. Yashar*, 166 F.3d 873, 877 (7th Cir. 1999); *United States v. Jaynes*, 75 F.3d 1493, 1506 n.12 (10th Cir. 1996). When considering whether a specific offense is a continuing offense, counsel should note that cases establishing the continuing nature of an offense for venue purposes do not necessarily dictate that the offense is continuing for statute of limitations purposes. *Toussie*, 397 U.S. at 121 n.16. *See also* the discussion in Section 6.04.01.02.

until the escapee is returned to custody or makes a bona fide attempt to surrender.176 A conspiracy is said to continue for statute of limitations purposes so long as actions are taken in furtherance of the

conspiracy, because it is the agreement itself that is the crime.177 Some courts have held that fraudulent

“schemes” continue until each overt act constituting the scheme has occurred.178

Even where the offense is deemed a continuing offense, counsel should carefully investigate the factual record to determine when the offense may have ended. For example, in prosecutions of aliens for being “found in” the United States after deportation, in violation of 8 U.S.C. § 1326, defenses based on the statute of limitations may exist where counsel can demonstrate that the defendant was “found” more than five years ago. Although all circuits consider the offense to continue past the date of a surreptitious illegal entry into the country, the circuits are split as to whether the offense ends when the immigration authorities actually find the alien, or whether it ends when immigration authorities should

have found the alien.179 In circuits where the offense is said to conclude when the immigration

authorities should have found the alien, all contacts between the alien and law enforcement and immigration authorities should be investigated. Even in circuits where the offense is not deemed to be concluded until the immigration authorities actuallyfind the alien, counsel should review the defendant’s immigration, criminal, jail, and prison records because they may lead to discovery of facts documenting that the alien was actually “found in” the United States much earlier than the government alleges.

176 *See, e.g.*, *United States v. Gonzalez*, 495 F.3d 577, 580-81 (8th Cir. 2007) (discussing *United States v. Bailey*, 444 U.S. 394, 408 (1980)).

177 *See United States v. Kissel*, 218 U.S. 601 (1910); *United States v. Cuervo*, 354 F.3d 969, 992 (8th Cir. 2004) (holding that possessing a firearm in furtherance of a drug trafficking conspiracy is continuing offense).

178 *See, e.g.*, *United States v. Najjor*, 255 F.3d 979, 983-84 (9th Cir. 2001). *Contra United States v.*

*Reitmeyer*, 356 F.3d 1313 (10th Cir. 2004) (holding that execution of a scheme under 18 U.S.C. § 1031(a) is not a continuing offense).

179 *Compare United States v. Gordon*, 513 F.3d 659, 664 (7th Cir. 2008) (actual finding), *with United*

*States v. Rivera-Ventura*, 72 F.3d 277, 281-82 (2d Cir. 1995) (knew, or with the exercise of diligence typical of law enforcement authorities, could have discovered); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (in sentencing context, deported alien is “found in” the United States when his physical presence is discovered by immigration authorities and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities); *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994) (statute of limitations begins when immigration could have discovered the violation, using diligence typical of law enforcement authorities); *and United States v. Clarke*, 312 F.3d 1343, 1347-48 (11th Cir. 2002) (statute of limitations starts when immigration authorities could have discovered alien’s illegal presence). *Cf*. *United States v. DeLeon*, 444 F.3d 41, 52-53 (1st Cir. 2006) (holding that, even if constructive knowledge terminates offense, government cannot be charged with constructive knowledge where alien’s deception caused government not to have knowledge); *United States v. Lennon*, 372 F.3d 535 (3d Cir. 2004) (statute of limitations for illegal reentry begins when alien enters the United States though an official INS port of entry using his true name, but does not begin until he is actually discovered when he enters surreptitiously); *United States v. Hernandez*, 189 F.3d 785, 789-90 (9th Cir. 1999) (holding, in context of venue, that offense ends when alien is “found,” without defining term, and citing cases from Second, Fifth, and Eighth Circuits that adopt constructive knowledge).

Additionally, in conspiracy prosecutions, although acts of concealment done in furtherance of the main criminal objectives of a conspiracy are said to continue the conspiracy, acts of concealment done *after* the central objectives have been attained, for the sole purpose of covering up after the crime do not continue the conspiracy. *Grunewald v. United States*, 353 U.S. 391 (1957). In a related vein the government sometimes indicts offenses involving fraudulent conduct as “schemes” in order to cure a statute of limitations problem, or to sweep in earlier conduct in cases involving repeated acts of fraud, and counsel should consider whether this raises statute of limitations issues. *See, e.g.*, *United States v. Reitmeyer*, 356 F.3d 1313 (10th Cir. 2004) (rejecting various arguments that Major Frauds Act indictment was brought within statute of limitations); *United States v. Anderson*, 188 F.3d 886, 888-91 (7th Cir. 1999) (holding that bank fraud is complete when defendant places bank at risk of financial loss, and not necessarily when the loss itself occurs, and that in this case, the execution of the fraudulent scheme was complete upon movement of assets from the financial institution).

# Procedural Issues

Because most circuits hold that the running of the statute of limitations is an affirmative defense, which the defendant can waive either expressly or by failing to assert it, a statute of limitations defense

must be raised at or before trial.180 Whether a statute of limitations defense may, or must, be raised in

a pretrial motion to dismiss will depend on the nature of the defense. In many cases where the facts triggering the statute of limitations are stated in the indictment or easily isolated from the merits of the charge, the district court may rule on the statute of limitations question in response to a pretrial motion

to dismiss.181 And the Eleventh Circuit has held that a statute of limitations defense apparent from the

face of the indictment *must* be raised pretrial.182

There will, of course, be cases where the question of whether the statute of limitations has run may not be easily separable from the factual questions presented by the charge, and thus must be a jury

question.183 Of course, where such a fact-based defense is not curable by the government, counsel may

180 *See United States v. Spector*, 55 F.3d 22, 24 (1st Cir. 1995); *United States v. Walsh*, 700 F.2d 846,

855 (2d Cir. 1983); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986); *United States v. Williams*, 684

F.2d 296, 299 (4th Cir. 1982); *United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997); *United States v.*

*Meeker*, 701 F.2d 685, 687 (7th Cir. 1983); *United States v. Chung Lo*, 231 F.3d 471, 480 (9th Cir. 2000); *United*

*States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Najjar*, 283 F.3d 1306, 1308-09 (11th Cir. 2002); *United States v. Wilson*, 26 F.3d 142, 155 (D.C. Cir. 1994). *But cf. United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) (holding that statute of limitations may be waived by an *explicit* waiver, but otherwise presents a bar to prosecution that can be raised for the first time on appeal).

181 *See, e.g.*, *United States v. Craft*, 105 F.3d 1123, 1126-27 (6th Cir. 1997); *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005).

182 *See United States v. Ramirez*, 324 F.3d 1225, 1227-28 (11th Cir. 2003).

183 *See, e.g.*, *United States v. DeLeon*, 444 F.3d 41, 51-53 (1st Cir. 2006) (holding district court does

not err in denying a pretrial motion to dismiss for violation of statute of limitations when a jury could reasonably have concluded from the evidence that the limitations period had not run); *United States v. Fuchs*, 218 F.3d 957, 962 (9th Cir. 2000) (holding that failure to instruct jury regarding statute of limitations is reviewable for plain error where defendants raised the issue in a pretrial motion to dismiss, but did not request a jury instruction).

choose to advise the government of the defense pretrial to avoid an unnecessary trial or to aid in plea negotiations.

# Constitutional Protections: Due Process Clause of the Fifth Amendment

Even if an indictment is brought within the statute of limitations, there may be grounds for dismissal, because preindictment delay that prejudices a defendant violates the Due Process Clause of

the Fifth Amendment.184 To prevail on such a due process claim, the defendant must show that: (1) he

has suffered actual, non-speculative prejudice from the delay; and (2) when weighed against the reasons for the delay, the delay offends “those fundamental conceptions of justice which lie at the base of our civil and political institutions.” *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977). S*ee also United States v. Marion*, 404 U.S. 307, 325-26 (1971); *United States v. Automated Medical Laboratories, Inc*, 770 F.2d 399, 404 (4th Cir. 1985); *United States v. Mays*, 549 F.2d 670, 675-78 (9th Cir. 1977). Some courts have held that a higher showing of prejudice is required where the delay was negligent, as opposed to intentional or reckless. *See, e.g.*, *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

The actual prejudice which must be shown “will inevitably be the loss of witnesses and/or physical evidence or the impairment of their use, e.g., dimming of the witness’s memory.” *Mays*, 549 F.2d at 677. The defendant must demonstrate not only that evidence was lost, but that the loss of the evidence was harmful to the defense.185 Although courts have been extremely reluctant to find prejudice sufficient to establish a due process violation,186 it is not impossible.187

Actual prejudice does not *require* dismissal on due process grounds, moreover. *Lovasco*, 431

U.S. at 789 (“*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, . . . . “). The reasoning is that short and necessary delays, even if they are detrimental to the defendant’s case, do not violate due process if the prosecution is instituted within the statute of limitations. *Lovasco,* 431 U.S. at 789-90 (quoting *Marion*, 404 U.S. at 324-25). The court must balance the length of the delay against the reasons for it. Although some courts hold that once the defendant shows actual prejudice, the burden shifts to the government to show that the purpose of the

184 The Sixth Amendment right to a speedy trial may not be invoked preindictment unless a defendant

is arrested. *United States v. MacDonald*, 456 U.S. 1, 6 (1982).

185 *United States v. McMutuary*, 217 F.3d 477, 481-82 (7th Cir. 2000); *United States v. Rogers*, 118 F.3d 466, 475 (6th Cir. 1997); *United States v. Nichols*, 937 F.2d 1257, 1261 (7th Cir. 1991); *United States v. Comosona*, 848 F.2d 1110, 1113-14 (10th Cir. 1988); *Mays*, 549 F.2d at 677. *But see United States v. Barket*, 530 F.2d 189, 196 (8th Cir. 1976) (holding that government bore burden of proving that missing witnesses did not possess exculpatory evidence).

186 *See, e.g.*, *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997) (holding that defendant’s

assertion that potential exculpatory witnesses had died during eight-year delay and remaining witnesses’ memories had deteriorated was too speculative to show actual prejudice).

187 *See, e.g.*, *United States v. Foxman*, 87 F.3d 1220, 1222-23 (11th Cir. 1996); *United States v. Sowa*,

34 F.3d 447, 450 (7th Cir. 1994).

delay was not to gain a tactical advantage,188 most hold that the defendant has the burden of showing that

there was no valid reason for the delay.189 The ultimate inquiry is “whether the Government’s action in

prosecuting after substantial delay violates ‘fundamental conceptions of justice’ or ‘the community’s sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790).

Intentional government delayintended to harass or gain tactical advantage, or even reckless delay with disregard for the likelihood that a defendant will suffer prejudice, will violate due process, regardless of the length of the delay, so long as actual prejudice has been proved. *Lovasco*, 431 U.S.

at 789-90. On the other side of the coin, mere investigative delay will not be sufficient.190 falling somewhere between these two will be examined on a case by case basis.191

Purposes

Claims that a defendant’s due process rights have been violated by preaccusation delay are generallybrought as pretrial motions to dismiss. Because the defendant must show actual prejudice from the delay, the usual remedy for a due process violation is dismissal with prejudice.*192*

# Post-Accusation Delay

Once a defendant has been arrested or indicted, other significant constitutional and statutory provisions come into play. The Sixth Amendment protects a defendant’s right to a speedy trial. In addition, the Speedy Trial Act of 1974, 18 U.S.C. § 3161, *et seq.*, was enacted to give substance to the Sixth Amendment. Finally, the Interstate Agreement on Detainers Act, the Juvenile Delinquency and Justice Act, and Rule 48 of the Federal Rules of Criminal Procedure provide limited protections against post-accusation delay. Whereas the primary inquiry for whether pre-accusation delay violates a defendant’s due process rights is whether the defendant suffered actual prejudice, the primary inquiry for whether post-accusation delay violates a defendant’s speedy trial rights focuses on the length of the delay and the reason for it. Although prejudice is a relevant consideration in some speedy trial contexts, prejudice in this context is not limited to harm to the defendant’s ability to defend at trial, but includes harms caused by the restraints on a criminal defendant’s liberty as well as the anxiety caused by pending criminal charges. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972).

188 *See, e.g.*, *McMutuary*, 217 F.3d at 481-82.

189 *See, e.g.*, *Rogers*, 118 F.3d at 476-77.

190 *See, e.g.*, *Sowa*, 34 F.3d at 451; *cf. Moran*, 759 F.2d at 783 (due process not violated where delay

caused by government’s investigation of new evidence and its decision to try all the counts in one trial).

191 *See Foxman*, 87 F.3d at 1223 & n.2 (noting that, where the government intentionally acts to secure

tactical advantage and those actions result in prejudicial delay, a due process violation may be found); *Howell*

*v. Barker*, 904 F.3d 889, 895 (4th Cir. 1990) (due process violated where state conceded actual prejudice and “convenience” was only justification state gave for delay).

192 *Cf. United States v. Marion*, 404 U.S. at 324 (1971) (noting government concession that dismissal

would be required if pre-indictment delay caused substantial prejudice and delay “was an intentional device to gain tactical advantage over the accused”). *But cf. Howell,* 904 F.2d at 896 (remanding for district court to set date for retrial, where parties expressed belief that defendant could get a fair retrial).

# Constitutional Protection: Sixth Amendment Speedy Trial Right 6.06.02.01.01 Nature of the Right

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The concerns underlying the Sixth Amendment speedy trial guarantee include “‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *Doggett v. United States*, 505 U.S. 647, 654 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).193 Where a defendant shows a violation of his Sixth Amendment right to a speedy trial, the remedy is dismissal with prejudice. *Strunk v. United States*, 412 U.S. 434 (1973).

Given the interests protected, the Sixth Amendment speedy trial right does not attach before a defendant is “indicted, arrested, or otherwise officially accused,” whichever comes first. *United States*

*v. MacDonald*, 456 U.S. 1, 6 (1982); *Dillingham v. United States*, 423 U.S. 64, 65 (1975). As a result, no speedy trial rights attach to the following events: detention and search of the defendant, even when coupled with *Miranda* warnings;194 being required to appear before a grand jury;195 issuance of a warrant

for the defendant’s arrest;196 or arrest on state charges.197 The Supreme Court has also held that, where

the government dismisses pending charges, the time between the dismissal and a subsequent indictment is not considered in determining whether any delay in bringing the defendant to trial violated Sixth Amendment. *MacDonald*, 456 U.S. at 8-9, n.1. The Court reasoned that after charges are dismissed, “the formerly accused is, at most, in the same position as any other subject of a criminal investigation.” *Id.* at 9. *See also United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) (holding that, where court dismisses indictment and government takes appeal, the time between dismissal and reinstatement of indictment does not weigh toward a speedy trial claim).

# Factors to Be Considered

In determining whether a defendant’s Sixth Amendment right to a speedy trial has been violated, courts generally consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether, when, and how the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. *Doggett v. United States*, 505 U.S. 647, 651 (1992) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). The Supreme Court has stated that none of these four “*Barker* factors” is either necessary or sufficient individually to support a finding that a defendant’s speedy trial right has been violated. *Barker*, 407 U.S. at 533. Rather, the factors are related and “must be considered together

193 Given the enactment in 1974 of the Speedy Trial Act of 1974, motions regarding the Sixth

Amendment right to a speedy trial will often involve the period between indictment and arrest, which is not covered by the Act.

194 *Fagan v. United States*, 545 F.2d 1005, 1007-08 (5th Cir. 1977).

195 *United States v. Kopel*, 552 F.2d 1265, 1276 (7th Cir. 1977).

196 *United States v. Ramos*, 586 F.2d 1078, 1079 (5th Cir. 1978).

197 *United States v. Taylor*, 240 F.3d 425, 428 (4th Cir. 2001).

with such other circumstances as may be relevant.” *Id*. The Supreme Court has recognized that its approach requires an “ad hoc” balancing of factors. *Id*. at 530. Still, the balancing “must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.” *Id*. at 533.

# Length of Delay

The first, and threshold, *Barker* factor is the length of the delay. Despite the Supreme Court’s statement that none of the factors is necessary, the existence of some delay is a “triggering mechanism,” or, as put by the Court in *Barker*, “until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *Barker*, 407 U.S. at 530. S*ee also United States v. Parker*, 586 F.2d 422, 430 (5th Cir. 1978) (where five-month delay was not unreasonable, no further inquiry required). Courts have continued to use the term “presumptively

prejudicial” to refer to delays sufficient to trigger a Sixth Amendment speedy trial inquiry, and the Supreme Court has noted: “Depending on the nature of the charges, the . . . courts have generally found post-accusation delay ‘presumptively prejudicial’ at least as it approaches one year.” *Doggett*, 505 U.S. at 652 n.1 (citation omitted).

If the accused makes a showing of a delay sufficient to trigger a Sixth Amendment inquiry, the court then considers, as one of the *Barker* factors, “the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Doggett,* 505 U.S. at 652. As discussed below, where a delay is especially lengthy, the court may presume that the delay has prejudiced the defendant in satisfaction of the fourth *Barker* factor. *Doggett,* 505 U.S. at 652.

# Reason for Delay

The second *Barker* factor is the reason for the delay. Reasons for delay fall along a continuum from inevitable and wholly justifiable delay, like delays caused by the need for the government to “collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down,” *Doggett*, 505 U.S. at 656; *see also Barker*, 407 U.S. at 533-34 (noting that the illness of a key prosecution witness was a “strong excuse” for delay), to intentional, bad faith delay intended to gain tactical advantage at trial, *Doggett*, 505 U.S. at 656; *Barker*, 407 U.S. at 531. Most cases, of course, will fall somewhere in between.

In *Doggett*, the Supreme Court considered negligent delay caused by the government’s failure to locate the defendant after his indictment. The defendant had, at one point, been in jail in Panama pending trial. The Marshal’s Service asked Panamanian authorities to expel him back to the United States after they were done with him, but the Panamanian authorities did not do so. The defendant traveled to Colombia, where he stayed with relatives for a few months, and then returned to the United States, where he got married, earned a college degree, found a steady job, lived openly under his own name, and stayed within the law. He was eventually found -- eight and a half years after he had been indicted -- through a routine credit check. *Id.* at 648-650. This established negligence, which “falls on

the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.” *Id.* at 657.198

In *United States v. Loud Hawk*, 474 U.S. 302 (1986), the United States Supreme Court held that an interlocutory appeal will ordinarily be a valid reason justifying delay. *See id.* at 315-17. In *Loud Hawk*, the Supreme Court reversed the Ninth Circuit’s decision affirming a speedy trial dismissal on the grounds that the extremelylong period consumed byappellate proceedings violated the defendants’ right to a speedy trial; the irony of the case is that the Ninth Circuit’s slow appellate proceedings accounted for the bulk of the delay.

Finally, the Supreme Court has held that delay caused by a defendant’s attorney weighs against the defendant in determining whether his right to a speedy trial has been violated. *See Vermont v. Brillon*, 129 S. Ct. 1283, 1290-91 (2009). This is because the defendant’s attorney is his agent when acting, or failing to act, in furtherance of the litigation. *Id.* In *Brillon*, the Supreme Court specifically held that the same principle applies whether counsel is privately retained or publicly appointed. *Id.* at 1291-92. In other words, public defenders and other appointed attorneys are not the government. The Supreme Court also held that the defendant’s own disruptive behavior -- including firing his first appointed attorney and threatening his third -- should be considered in the overall balance. *Id.* at 1292. The Supreme Court did acknowledge, however, that the government could be held responsible for time periods where the defendant lacked an attorney if the gaps resulted from the trial court’s failure to appoint replacement counsel promptly, and that a “systemic breakdown in the public defender system” could be charged to the Government. *Id.* at 1287, 1292 & nn.8,9.

# Assertion of Right

The third *Barker* factor is the defendant’s assertion of the right to a speedy trial. The Supreme Court discussed at length in *Barker* why the speedy trial right differs from those rights that we assume a criminal defendant asserts unless a knowing, voluntary, and intelligent waiver is shown. *See Barker*, 407 U.S. at 519-30, 534-36. The facts of *Barker* demonstrate that sometimes a defendant will believe that there are benefits from a delay, and in such cases will not be heard to complain when the delay occurs. *Id*. at 536. Nevertheless, the Supreme Court expressly rejected a bright-line rule that a defendant who fails to demand a speedy trial forever waives this right; the Court held only that “the defendant’s assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.” *Id*. at 528. In *Doggett*, the Supreme Court weighed this factor in favor of the defendant where the evidence indicated that he was not aware of his indictment until his arrest, and he asserted his right when he was arrested by moving to dismiss the indictment on speedy trial grounds. *See* 505 U.S. at 653.

198 *See also United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008) (government negligent in pursuing defendant where agent made no effort to contact defendant when indicted, and only placed a warrant in law enforcement database); *Rashad v. Walsh*, 300 F.3d 27, 37 (1st Cir. 2000) (noting that authorities’ failure to lodge detainer was negligent and cut in favor of petitioner’s speedy trial claim). *But cf. United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1115 (9th Cir. 2007) (government not negligent where it took additional steps beyond entering defendant’s arrest warrant into law enforcement database and district court specifically found that government had been diligent in pursuing the defendant).

# Prejudice

The final *Barker* factor is prejudice to the defendant. While prejudice is necessary to a Fifth Amendment due process claim, it is not a requirement for a Sixth Amendment speedy trial claim. *See Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Barker*, 407 U.S. at 533. It is merely a factor to be considered.

In addition, although prejudice to the defendant’s ability to defend at trial -- the sole consideration in the due process context -- is relevant to a speedy trial claim, it is not the only form of prejudice that is relevant. Rather, courts assess prejudice “in the light of the interests of defendants which the speedy trial right was designed to protect[:] . . . (i) to prevent oppressive pretrial incarceration;

(ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Barker*, 407 U.S. at 532.

Any significant delay while a defendant is incarcerated or on bond can be said to cause prejudice in the form of incarceration or anxiety. *Moore*, 414 U.S. at 27; *Barker*, 407 U.S. at 532-33; *Marion*, 404

U.S. at 320. And, although the Supreme Court has at times suggested that those are the primary concerns at which the Sixth Amendment is directed, Sixth Amendment prejudice may also be made out by harm to the defense caused by the delay. In *Doggett*, the defendant was neither arrested nor aware of his indictment. Nevertheless, the Supreme Court rejected the government’s suggestion that “the Speedy Trial Clause does not significantly protect a criminal defendant’s interest in fair adjudication.” 505 U.S. at 654. Indeed, in *Barker* itself, the Supreme Court explained that the possibility that the defense will be impaired is the “most serious” prejudice, “because the inabilityof a defendant adequately to prepare his case skews the fairness of the entire system.” 407 U.S. at 532.

Further, the Supreme Court held in *Doggett* that delay may be so lengthy that it “presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” 505 U.S. at 655. Thus, in *Doggett*, the eight and a half year delay was deemed “presumptively prejudicial” in a qualitatively different manner than the initial “presumptively prejudicial” delay that triggers a Sixth Amendment speedy trial inquiry. In *Doggett*, the excessively long delay was considered, without any specific showing of any form of prejudice, to satisfy the fourth *Barker* factor. *Id*.; *see also United States v. Mendoza*, 530 F.3d 758, 764-65 (9th Cir. 2008).

# Statutory Protections 6.06.02.02.01 Speedy Trial Act

The Speedy Trial Act of 1974, codified at 18 U.S.C. § 3161, *et seq*., was Congress’s attempt to quantify an individual’s and society’s right to a speedy trial. *See Zedner v. United States*, 547 U.S. 489, 500-502 (2006). Because the statute is lengthyand detailed, counsel should studythe specific provisions of the Act before filing a motion to dismiss, and, for that matter, before agreeing to government requests for trial continuances. In brief, the Act requires that an individual arrested or served with a summons for a criminal offense be indicted within 30 days, 18 U.S.C. § 3161(b), and brought to trial within 70 days of indictment, or appearance before a judicial officer, whichever is later, 18 U.S.C. § 3161(c)(1). In addition, the Act provides for a 30-day preparation period before trial. *See* 18 U.S.C. § 3161(c)(2).

To provide some flexibility outside these strict deadlines, the Act contains generous provisions for “excludable time,” which is not counted against the time limits. *See* 18 U.S.C. § 3161(h).

Although § 3162(a) requires dismissal where the specific time limits in § 3161 are not met, the liberal use in most courts of “excludable time” findings means the Speedy Trial Act is rarely a source of meritorious motions practice. And because dismissals may be granted with or without prejudice, 18

U.S.C. § 3162(a)(1), (2), Speedy Trial Act victories often ring hollow. Despite this, familiarity with the Act will assist counsel in pushing cases to a speedy trial when that is desired, properly delaying trial consistent with the provisions of the Act where that serves the best interest of the client, and, in rare but rewarding instances, creative motions practice.

# Time Periods

The Act has been interpreted to apply only to individuals who have been charged by complaint with an offense and arrested or served with a summons, not individuals who are arrested and quickly

released without being charged.199 Section 3161 also generally does not apply to individuals who are

arrested by state or civil authorities,200 though it may apply where federal law enforcement authorities collude with state or civil officials to detain a defendant as a mere ruse for later federal prosecution.201 Generally, therefore, the Speedy Trial Act is triggered when the accused is arrested or served with a

summons in connection with a federal complaint.202 If a federal detainer is lodged against an inmate at

a state or local institution, the provisions of the Interstate Agreement on Detainers come into play. *See*

Section 6.06.02.02.02, *infra*.

Once the Act is triggered, § 3161(b) requires that an information or indictment be filed within 30 days of an individual’s arrest or service with a summons. Because the Act is not triggered until an individual is arrested or summoned on the federal charges, because the government generally does indict within the 30-day time period set by the Act, and because the Act contains a specific provision for excludable time where timely indictment is not reasonable, see 18 U.S.C. § 3161(h)(8)(A), (B)(iii), violations of this provision are rare. Nevertheless, there may be interesting and effective motions involving the arrest-to-indictment period, especially in unusual circumstances, such as an invalid waiver of the protections of the Act, see, e.g., *United States v. Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000), or where the government files a late superseding indictment adding charges that were contained in the complaint. *See, e.g.*, *United States v. Palomba*, 31 F.3d 1456, 1462-64 (9th Cir. 1994).

199 *See United States v. Salgado*, 250 F.3d 438 (6th Cir. 2001); *United States v. Bloom*, 865 F.2d 485,

490 (2d Cir. 1989).

200 *See United States v. Thomas*, 55 F.3d 144 (4th Cir. 1995); *United States v. Ortiz-Lopez*, 24 F.3d 53, 94 (9th Cir. 1994); *United States v. De La Pena-Juarez*, 214 F.3d 594 (5th Cir. 2000); *United States v. Pasillas- Castanon*, 525 F.3d 994 (10th Cir. 2008); *United States v. Mills*, 964 F.2d 1186, 1189 (D.C. Cir. 1992).

201 *See Pasillas-Castanon*, 525 F.3d at 997 (collecting cases).

202 *United States v. Mills*, 964 F.2d 1186, 1188-89 (D.C. Cir. 1992); *United States v. Boyd*, 214 F.3d

1052, 1056-57 (9th Cir. 2000).

Once a defendant is indicted, other provisions of the Act come into play. At one end, § 3161(c)(2) creates a floor, by providing a mandatory 30-day time period from the date when defendant first appears through counsel to the commencement of trial. This section is meant to ensure that the defense has adequate time for pretrial preparation. *United States v. Mers*, 701 F.2d 1321, 1333 (11th Cir. 1983). In *United States v. Rojas-Contreras*, 474 U.S. 231, 234-37 (1985), the Supreme Court held that the Speedy Trial Act does *not* require that defendant be granted another 30-day preparation period upon the filing of a superseding indictment. But the Court did note that the district court had broad discretion to grant a continuance when necessary to serve the “ends of justice.” *Id.* at 236 (citing 18 U.S.C. § 3161(h)(8)).

At the other end, § 3161(c)(1) places a ceiling on the time period for trial. This provision requires that a defendant be brought to trial within 70 days of either the filing of the indictment or information, or the defendant’s first appearance before a judicial officer of the court in which the charge is pending, whichever occurs last. The bulk of litigation concerning the period from indictment to trial involves what constitutes “excludable time.” *See* Section 6.06.02.02.01.02, *infra*.

When an indictment is dismissed on motion of the defendant, and the defendant is thereafter reindicted, the 30- and 70-day clocks begin to run anew. 18 U.S.C. § 3161(d)(1). When an indictment is dismissed on motion of the government, and the defendant is thereafter reindicted, both clocks continue to run from the first indictment, although the period during which no indictment is outstanding is excluded. 18 U.S.C. § 3161(h)(6). Similarly, when a superseding indictment is filed, the clocks generally continue to run from the original indictment, at least for the original charges and any charges required to be joined with the original charges. *Rojas-Contreras*, 474 U.S. at 234-37 (30-day period); *United States v. Clymer*, 25 F.3d 824, 827 n.2 (9th Cir. 1994) (70-day period); *United States v. Karsseboom*, 881 F.2d 604 (9th Cir. 1989) (70-day period). But where the new indictment adds a new defendant, and no motion to sever has been granted, the superseding indictment “generally” restarts the clocks, so long as any delay is reasonable. *E.g.*, *United States v. King*, 483 F.3d 969, 973-74 (9th Cir. 2007); 18 U.S.C. § 3161(h)(7).

# Excludable Time

The Supreme Court has held that defendants may not prospectively waive application of the Act. *Zedner v. United States*, 547 U.S. 489, 501 (2006). This conclusion was based on the language, the purposes, and the legislative history of the Act. *Id*. at 500-03. Of primary concern was that the Act was designed not just to benefit defendants, but also to serve the public interest. *Id.* at 501-02.

Both the government and defendants may seek trial continuances based on “excludable time,” however. Section 3161(h) enumerates a number of specific “periods of delay” that “shall be excluded” in computing either the 30-day time period to indictment or the 70-day time period to trial. For example, the Act excludes “delay resulting from other proceedings concerning the defendant,” 18 U.S.C. § 3161(h)(1); “delay resulting from the absence or unavailability of the defendant or an essential witness,” 18 U.S.C. § 3161(h)(3); “delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial,” 18 U.S.C. § 3161(h)(4); and “a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted,” 18 U.S.C. § 3161(h)(7).

A major, and often problematic, source of excludable time is the period of time consumed by pretrial motions. If either party makes a pretrial motion, both the time from filing to the conclusion of the hearing, and a reasonable period not to exceed 30 days after the motion is actually taken under advisement by the court, is excludable. 18 U.S.C. §§ 3161(h)(1)(F), (J). In *Henderson v. United States*, 476 U.S. 321, 330 (1986), the United States Supreme Court held that § 3161(h)(1)(F) excludes “all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding the hearing is ‘reasonably necessary.’” The Court further held that any time after the hearing on the motion, but before the district court receives all the submissions from counsel that are needed to decide that motion, is also excluded. *Id*. at 330-31. The time period when the motion is actually under advisement, not to exceed 30 days, is also excluded. 18 U.S.C. § 3161(h)(1)(J).

Finally, the broadest category of excludable time is the “ends of justice” provision in § 3161(h)(8). Section 3161(h)(8)(A) provides for the exclusion of

[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A).

Although this provision is extremely broad, there are some limitations, both substantive and procedural. First, ends-of-justice continuances cannot be granted based on “general congestion of the court’s calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.” 18 U.S.C. § 3161(h)(8)(C). In addition, the district court must make findings on-the-record and must consider certain factors in making those findings. *See Zedner, 5*47 U.S. at 507-509; 18 U.S.C. § 3161(h)(8)(A), (B). Given the mandatory and categorical nature of the requirements of § 3161(h), the Supreme Court has held that a district court’s failure to make findings on the record to support an ends-of-justice continuance, at least by the time it rules on a defendant’s motion to dismiss, is not subject to harmless error analysis. *Zedner*, 547 U.S. at 508.

# Remedies

**Dismissal With or Without Prejudice**

Failing to move for a dismissal prior to trial or entry of a guilty plea waives a Speedy Trial Act violation. 18 U.S.C. § 3162(a)(2); *see also United States v. Spagnuolo*, 469 F.3d 39, 44 (1st Cir. 2006) (collecting cases). Otherwise, § 3162 requires the district court, on the defendant’s motion, to dismiss charges not indicted within the 30-day limit, and to dismiss indictments or informations not tried within the 70-day limit (not including excludable time). 18 U.S.C. § 3162(a)(1), (2). This sanction is mandatory and categorical. *See United States v. Taylor*, 487 U.S. 326, 332 (1988) (“The state admits no ambiguity in its requirement that when such a violation has been demonstrated, ‘the information or indictment shall be dismissed on motion of the defendant.’” (quoting § 3162(a)(2))). *See also Zedner v. United States*, 547 U.S. 489, 507-08 (2006).

Although the Act requires dismissal when there is a violation, the dismissal may be with or without prejudice to refiling the charge. In choosing between those alternatives, courts must consider, among others, three specific factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. The “decision to dismiss with or without prejudice [is] left to the guided discretion of the district court” and “neither remedy [is] given priority.” *Taylor*, 487 U.S. at 335. The district court must, however, consider the factors set forth in the Act and explain how they factor into its decision. *Id*. at 336-37. In addition, although not specified in the statute, the presence or absence of prejudice to the defendant is a relevant factor for the court’s consideration, *see id*. at 341, as is the length of the delay and what, if any, responsibility the defendant has for the delay, *see id*. at 339-41. Delays caused by the defendant’s attorney will likely be attributed to the defendant. *Cf. Vermont v. Brillon,* 129 S. Ct. 1283, 1290-92 (2009) (so attributing delays caused by defendant’s attorney for Sixth Amendment speedy trial analysis).

In *Taylor*, the Supreme Court reversed the Ninth Circuit’s affirmance of a dismissal with prejudice. 487 U.S. at 344. Although the district court had acknowledged the “seriousness” of the offense, it did not articulate how it had weighed this factor. *See id.* at 343. Further, the court had characterized the government’s approach as “lackadaisical,” without explanation, see *id.* at 338-39, and simply opined that the Speedy Trial Act would have no meaning if indictments were not dismissed with prejudice, see *id*. at 342. Given the short delay, the lack of prejudice to the defendant, and the defendant’s own responsibility for delaying the case, the Supreme Court held that the district court had abused its discretion when it dismissed the indictment with prejudice. *Id*. at 344. The Court did note, however, that “when the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court’s judgment of how opposing considerations balance should not lightly be disturbed.” *Id.* at 337. This suggests that counsel who is successful in convincing a court to dismiss an indictment with prejudice should ensure that there is a statement of reasons clearly articulating the factual findings supporting the court’s conclusions, as well as demonstrating consideration of the statutorily enumerated factors.

# Release for Detained Persons

Section 3164 provides a separate time clock for the trial of “persons detained or designated as being of high risk.” The trial of these individuals is to be “accorded priority,” and their trials “shall commence not later than 90 days following the beginning of [their] detention” awaiting trial. 18 U.S.C.

§ 3164(a), (b). As amended in 1979, this 90-day time clock excludes the periods of delay enumerated in § 3161(h). 18 U.S.C. § 3164(b). The failure to commence trial within the time required “through no fault of the accused or his counsel . . . shall result in the automatic review by the court of the conditions of release,” and “no detainee . . . shall be held in custody pending trial after the expiration of such ninety- day period required for the commencement of his trial.” 18 U.S.C. § 3164(c).

While the interplay between the speedy trial requirements of §§ 3161 and 3164 may appear to render the relief provided in § 3164 moot, what is reasonable excludable time under the two statutes may differ. *See United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986). In *Theron*, a multidefendant case, the defendant sought a severance, did not file any motions, and repeatedly sought to commence trial on time. *Id.* at 1512. In this circumstance, the Tenth Circuit held that the district court abused its discretion in granting an “ends of justice” continuance based on the codefendants’ need for more trial

time, see *id.* at 1513-14, and that the only basis for excludable time was § 3161(h)(7)'s provision for “a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted,” *id.* at 1514-16. The court held that what may be a reasonable period for the delay of a trial is not necessarily a reasonable period of detention pending trial and ordered that the defendant either be tried within thirty days or released on bond. *See id.* at 1516.

# Interstate Agreement on Detainers Act

If a defendant is brought into federal custody from another jurisdiction (for instance, state custody), counsel should investigate whether the speedy trial requirement of the Interstate Agreement

of Detainers Act (IADA), 18 U.S.C. App. 2, is in play.203 The IADA is a compact entered into by 48

states, the federal government, and the District of Columbia to establish procedures for resolution of one jurisdiction’s outstanding charges against a prisoner of another jurisdiction. *New York v. Hill*, 528 U.S. 110, 111 (2000). The provisions of the IADA are not triggered by the mere fact of an outstanding charge or warrant but are triggered only when a detainer is lodged against the prisoner. The IADA then provides for two different mechanisms, with two different time clocks, for the prisoner to be brought from the “sending State” to the “receiving State,” IADA, Art. II. One is initiated by the prisoner; the other by the receiving State.

# Prisoner Demand

When a detainer has been lodged, the prisoner must be promptly notified of that fact and of the

right to “request” a “final disposition.” IADA, Art. III(c).204 If the defendant makes the request (often

called a speedy trial demand), then the trial must begin within 180 days, IADA, Art. III(a), and if the trial does not begin within 180 days, the charges must be dismissed, IADA, Art. V(c).

Counsel will generally be alerted to the applicability of this provision of the IADA by the client. This is because, for the 180-day time clock to commence, the prisoner must “cause to be delivered” the speedy trial demand. IADA, Art. III(a). To make such a demand, the prisoner must give the request to the warden of the prison, and the warden must promptly forward it, along with a certificate by the warden, to the prosecutor and the court by registered or certified mail, with return receipt requested. IADA, Art. III(a), (b). It is not until all the documentation is received by the prosecutor and the court that the 180-day clock commences to run. *Fex v. Michigan*, 507 U.S. 43 (1993). Thus, by the time counsel is appointed to represent the defendant in federal court, the client has already been required to comply with the complex requirements of the statute.

The 180-day time clock may be waived by the defendant or counsel, and agreement to a trial date outside the time period is deemed a waiver. *New York v. Hill*, 528 U.S. 110 (2000). In addition, “for

203 This section covers only the time requirements of the IADA. It does not cover the antishuttling

provision of the IADA, see *id.,* Art. III(d), IV(e).

204 As noted above the IADA is a compact which is codified at 18 U.S.C. App. 2. The substance is

contained in § 2 of 18 U.S.C. App. 2 and is divided into Articles.

good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.” IADA, Art. III(a). Finally, the time is “tolled whenever and for so long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter,” and neither the provisions nor the remedies of the IADA apply to anyone “adjudged to be mentally ill.” IADA, Art. VI. The courts of appeals are divided about what constitutes being “unable to stand trial.” The Fifth Circuit holds that a defendant must be physically or

mentally incapacitated.205 The Second, Fourth, and Ninth Circuits apply a broader rule by adopting the

excludable time provisions of the Speedy Trial Act, 18 U.S.C. § 3161(h).206 The Seventh and Eighth

Circuits apply what appears to be the broadest rule, holding that a prisoner is unable to stand trial whenever he is not “legally or administratively available.”207

Although the general sanction for violations of the IADA is dismissal with prejudice, *see* IADA, Art. V(c), a special section added in 1988 provides that, where the United States is the receiving State, dismissal may be with or without prejudice, see 18 U.S.C. App. 2 § 9. In determining whether to dismiss with or without prejudice, the court is required to consider, among other factors, the following: (1) the seriousness of the offense; (2) the facts and circumstances of the case that led to the dismissal; and (3) the impact of reprosecution on the administration of the IADA and the administration of justice. *Id.* These are the same factors that courts are required to consider when determining whether to dismiss with or without prejudice for a violation of the Speedy Trial Act. *See* Section 6.06.02.02.01.03.01, *supra*.

# State Demand

The receiving State may, at its own discretion, make a “written request for temporary custody.” IADA, Art. IV(a). Where the State has lodged a detainer, any such request will trigger the requirements of the IADA, even if styled as a writ of habeas corpus ad prosequendum. *United States v. Mauro*, 436

U.S. 340 (1978). Where the State makes the demand, trial must commence within 120 days of the prisoner’s arrival in the receiving State. IADA, Art. IV(c). As with the 180-day time period for prisoner demands, the 120 days may be extended “for good cause shown in open court, the prisoner or his counsel being present,” IADA, Art. IV(c); the running of time is tolled when the prisoner is “unable to stand trial,” IADA, Art. VI(a); and, presumably, the defendant may waive his rights, *cf. New York v. Hill*, 528

U.S. 110, 114 (2000) (holding that defendant may waive time under Article III of the IADA); *Alabama*

*v. Bozeman*, 533 U.S. 146, 156-57 (2001) (holding that defendant may waive protections under anti- shuttling provision of Article IV).

# Federal Juvenile Delinquency Act

Title 18 U.S.C. § 5036 requires dismissal of an information if an alleged juvenile delinquent is detained for more than 30 days “unless the Attorney General shows that additional delay was caused by

205 *See Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993).

206 *See United States v. Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States v. Cephas*, 937 F.2d 816, 819 (2d Cir. 1991); *United States v. Odom*, 674 F.2d 228, 231 (4th Cir. 1982).

207 *United States v. Roy*, 830 F.2d 628, 635 (7th Cir. 1987) (quoting and following *Young v. Mabry*, 596 F.2d 339, 343 (8th Cir. 1979)).

the juvenile or his counsel, or would be in the interest of justice in the particular case.” Delays caused by court congestion are not in the interest of justice. 18 U.S.C. § 5036. “Except in extraordinary circumstances,” dismissals are to be with prejudice. *Id.208*

# Rule 48(b) of the Federal Rules of Criminal Procedure

Finally, Rule 48(b) of the Federal Rules of Criminal Procedure provides that:

“[t]he court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to the grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.” This rule affords the court discretion to dismiss an indictment due to unnecessary delay even where no violation of the Sixth Amendment or the Speedy Trial Act has occurred.209

FED. R. CRIM. P. 48(b)

Although the district court has the discretion to dismiss cases for “unnecessary delay,” and may dismiss cases with prejudice, the courts of appeals have warned that district courts should exercise caution in granting dismissals under Rule 48(b)210 and that dismissals with prejudice are a “harsh” remedy, which should not be exercised without a finding of prosecutorial misconduct and/or “demonstrable prejudice [to the defendant] or substantial threat thereof.”211 The Ninth Circuit requires the court to warn the government that dismissal is imminent.212 “Prejudice” in this context is not limited to the defendant’s inability to defend his case, but includes the same interests protected by the Sixth Amendment speedy trial guarantee: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility that the defense will be impaired.213

208 For further discussion of juvenile proceedings in federal court, *see* Chapter 29, Juvenile Cases in

Federal Court.

209 *See United States v. Watkins*, 339 F.3d 167, 180 (3d Cir. 2003) (Nygard, J., concurring); *United States v. Goodson*, 204 F.3d 508, 513-14 (4th Cir. 2000); *United States v. De Luna*, 763 F.2d 897, 923 (8th Cir. 1985); *United States v. Hattrup*, 763 F.2d 376, 377 (9th Cir. 1985).

210 *See, e.g.*, *United States v. Sears, Roebuck & Co.*, 877 F.2d 734, 738-39 (9th Cir. 1989).

211 *Goodson,* 204 F.3d at 514-16 (prejudice or threat of prejudice required); *Hattrup*, 763 F.2d at 378

(prosecutorial misconduct and actual or substantial threat of prejudice required).

212 *See Hattrup*, 763 F.2d at 377.

213 *Goodson*, 204 F.3d at 515-16 (citations omitted).

# MOTIONS TO DISMISS BASED ON DOUBLE JEOPARDY AND RELATED CONCEPTS

* + 1. **General Principles**

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. This provision creates three protections, which have been articulated by the Supreme Court as follows: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see also Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.1 (1984); *Ohio*

*v. Johnson*, 467 U.S. 493, 498 (1984). The protection against multiple prosecutions is intended both to protect the defendant’s “valued right to have his trial completed by a particular tribunal,” *Arizona v. Washington*, 434 U.S. 497, 503 (1978); *see also Crist v. Bretz*, 437 U.S. 28, 36 (1978), and prevent “the State with all its resources and power” from “mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187-88 (1957); *see also Washington*, 434 U.S. at 504 n.13. The purpose of the protection against multiple punishment is “to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.” *Jones v. Thomas*, 491 U.S. 376, 381 (1989). *See also Johnson*, 467 U.S. at

499. *Cf. Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (“Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”) (quoting *Albernaz v. United States*, 450 U.S. 333, 344 (1981))).

# When Jeopardy Attaches

The Supreme Court has held that jeopardy attaches in a jury trial when the jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978). This protects the interest of the accused in retaining a chosen jury, an integral part of the Fifth Amendment guarantee against double jeopardy. *See id*. at 35. In a bench trial, jeopardy attaches when the first witness is sworn. *Serfass v. United States*, 420 U.S. 377, 388 (1975); *Crist*, 437 U.S. at 37 n.15. The Supreme Court has not yet decided exactly when jeopardy attaches in the context of a guilty plea, but has indicated that jeopardy attaches “at least” at the time of sentencing on the plea of guilty. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). Some courts have

held that jeopardy attaches upon the trial court’s acceptance of a guilty plea.214 But other courts have

criticized this rule as inconsistent with the Supreme Court’s decision in *Ohio v. Johnson*, 467 U.S. 493 (1984), and reasoned that the concerns behind the Double Jeopardy Clause are not automatically

214 *See, e.g.*, *United States v. Patterson,* 381 F.3d 859, 864 (9th Cir. 2004); *Dawson v. United States*,

77 F.3d 180, 182 (7th Cir. 1996); *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995), *rev’d on other*

*grounds*, 518 U.S. 267 (1996); *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990); *Fransaw v.*

*Lynaugh*, 810 F.2d 518, 523-24 (5th Cir. 1987); *United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir.

1979).

implicated by the trial court’s mere acceptance of a guilty plea.215 The Tenth Circuit held in a pre-

*Johnson* case that jeopardy did not attach until the formal entry of judgment because “[u]ntil entry of judgment and sentencing on the accepted guilty plea, defendant had not been formally convicted.” *United States v. Combs*, 634 F.2d 1295, 1298 (10th Cir. 1980) (citation omitted).

# What Constitutes the “Same Offense”

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court held that an accused may be prosecuted and punished under more than one criminal statute for the same actions if each statute requires proof of at least one fact that the other does not. *Id.* at 304. Although *Blockburger* involved a case of simultaneous multiple punishment in the same case, the Supreme Court has determined that the *Blockburger* test is also to be applied to cases of successive prosecutions for the same criminal conduct. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). When punishment has been imposed under two statutes that do not satisfy the *Blockburger* test, and Congress has not authorized consecutive punishment, the remedy is to vacate and remand for re-sentencing under one of the two statutes.216

There is a split in the circuits regarding whether the “elements” of an offense in a *Blockburger*

analysis are simply to be drawn from the statute codifying the offense, or whether the charging

documents at issue may also be considered.217 Similarly, there is disagreement about whether, when

215 *See, e.g.*, *United States v. Santiago Soto*, 825 F.2d 616, 619 (1st Cir. 1987) (“[T]he Court seems to

have overruled our double jeopardy analysis in *Cruz*” that jeopardy attaches upon acceptance of a guilty plea.); *Gilmore v. Zimmerman*, 793 F.2d 564, 571 (3d Cir. 1986) (“[W]hatever value [the old rule] may retain in other contexts, in light of *Ohio v. Johnson*, it can no longer be read to suggest that double jeopardy interests are implicated in a case like this.”); *cf. Bally v. Kemna*, 65 F.3d 104, 108 (8th Cir. 1995) (noting that several courts have criticized the rationale of cases holding that jeopardy attaches upon acceptance of a guilty plea and “declin[ing] to fashion a rule concerning when jeopardy attaches to a guilty plea”); *see also United States v. Patterson*, 406 F.3d 1095, 1097-1099 (9th Cir. 2005) (Kozinski, J., dissenting from denial of rehearing en banc) (collecting cases and criticizing rule that jeopardy automatically attaches upon acceptance of guilty plea).

216 *See, e.g.*, *United States v. Agofsky*, 458 F.3d 369, 372 (5th Cir. 2006) (applying *Blockburger* and

holding federal murder and murder by a federal prisoner statutes could not support separate sentences); *United States v. DeCarlo*, 434 F.3d 447, 456 (6th Cir. 2006) (applying modified *Blockburger* analysis and concluding that under facts of case at bar violation of interstate travel with the intent to have sex with a child younger than twelve and interstate travel for the purpose of engaging in illicit sexual conduct could not support multiple punishment); *United States v. Carpenter*, 422 F.3d 738, 747 (8th Cir. 2005) (applying *Blockburger* and holding that conviction for both 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 860 violated double jeopardy); *United States v. Corona*, 108 F.3d 565, 567 (5th Cir. 1997) (applying *Blockburger* analysis and holding that imposing separate sentences for arson, conspiracy to commit arson and using fire to commit conspiracy to commit arson violated double jeopardy).

217 *Compare United States v. Adams*, 1 F.3d 1566, 1574 (11th Cir. 1993) (“We hold that in consecutive prosecution double jeopardy analysis, the *Blockburger* test is to be applied to the statutory elements underlying each indictment, or count, not to the averments that go beyond the statutory elements.”), *with United States v. DeCarlo*, 434 F.3d 447, 456 (6th Cir. 2006) (“Considering the two statutes together, it appears that proof of section 2241(c) as charged in the indictment in *this* case would necessarily require conviction under 2423(b). Applying the *Blockburger* test as subsequently modified, we must conclude that the jury’s verdict of guilt on both counts of the indictment constituted multiple convictions for the “same offense.”), *and United States v. Liller*,

there are alternative ways of violating a particular statute, the prosecution’s theory as to the particular manner in which that statute was violated can be taken into account in a *Blockburger* analysis.218

A mere overlap of proof between two prosecutions does *not* establish a double jeopardy violation. *United States v. Felix*, 503 U.S. 378 (1992). The defendant in *Felix* was involved in methamphetamine manufacture in both Oklahoma and Missouri. He was prosecuted first in Missouri for attempting to buy precursor chemicals there, and evidence of the Oklahoma activity came in under Rule 404(b) of the Federal Rules of Evidence to prove intent. After his conviction in Missouri, he was charged with conspiracy and substantive offenses in Oklahoma. In holding that the prosecutions did not violate double jeopardy, the Supreme Court pointed out that “the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.” *Id*. at 387. A substantive offense and conspiracy to commit that offense are also separate offenses for purposes of double jeopardy. *Id*. at 388.

# Rule 29 Judgments of Acquittal and Dismissals

A judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure based on insufficiency of the evidence precludes retrial -- and hence a government appeal -- just as much as a not guilty verdict. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573-74 (1977). This is so even if the judgment that the evidence was insufficient is based on an erroneous legal conclusion. *Smith v. Massachusetts*, 543 U.S. 462, 473 (2005); *Smalis v. Pennsylvania*, 476 U.S. 140, 144-45 n.7 (1986);

*Sanabria v. United States*, 437 U.S. 54, 75 (1978); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam). The one circumstance in which such an erroneous legal ruling can be appealed is where the judgment of acquittal is entered after the verdict so that all that needs to be done if there is a reversal is to reinstate the verdict. *See United States v. Wilson*, 420 U.S. 332, 353 (1975). Dismissal for reasons other than sufficiency of the evidence does not preclude retrial and/or a government appeal, however. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 95 (1978) (dismissal of indictment for preindictment delay). 219 It is the substance of the ruling that controls, however, not the label or characterization placed upon it by the judge. *See Scott*, 437 U.S. at 96 (quoting *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971) (opinion of Harlan, J.)); *see also Martin Linen Supply Co.*, 430 U.S. at 571; *Serfass v. United*

999 F.2d 61, 63 (2d Cir. 1993) (“In certain circumstances, including where one of the statutes covers a broad range of conduct, it is appropriate under *Blockburger* to examine the allegations of the indictment rather than only the terms of the statutes.”). *See also Davis v. Herring*, 783 F.2d 511, 517 (5th Cir. 1986); *Pandelli v. United States*, 635 F.2d 533, 536-38 (6th Cir. 1980) (discussing *Whalen v. United States*, 445 U.S. 684 (1980) and

*Illinois v. Vitale*, 447 U.S. 410 (1980)).

218 *See United States v. Hatchett*, 245 F.3d 625, 637 (7th Cir. 2001) (surveying relevant Supreme Court precedent and discussing individual justices’ views as to “how one should define the elements of the crimes under scrutiny for purposes of the lesser-included-offense analysis.”).

219 *See also United States v. Council*, 973 F.2d 251, 254 (4th Cir. 1992) (dismissal based on violation

of discovery rule); *United States v. Dahlstrum*, 655 F.2d 971, 974 (9th Cir. 1981) (dismissal based on “governmental misconduct”); *United States v. Gonzales*, 617 F.2d 1358, 1362 (9th Cir. 1980) (dismissal of indictment based on unavailability of potential material witnesses); *United States v. Appawoo*, 553 F.2d 1242, 1244-45 (10th Cir. 1977) (dismissal based on constitutional invalidity of statute); *United States v. Kehoe*, 516 F.2d 78, 83 (5th Cir. 1975) (dismissal for failure of indictment to state offense).

*States*, 420 U.S. 377, 392 (1975) (“The word [‘acquittal’] itself has no talismanic quality for purposes of the Double Jeopardy Clause”). A “judgment of acquittal” that is really a dismissal does not bar retrial,220 and a “dismissal” that is really a judgment of acquittal does bar retrial.221 The ultimate question is whether “the ruling of the judge, whatever its label, actually represents a resolution [in the defendant’s favor], correct or not, of some or all of the factual elements of the offense charged.” *Scott*, 437 U.S. at 97 (quoting *Martin Linen Supply Co.*, 430 U.S. at 571).

Retrial is also barred by a finding of insufficiency of the evidence on appeal, *Burks v. United States*, 437 U.S. 1 (1978), and so an appellate court must consider sufficiency of the evidence on appeal

even if it might find error and remand for a new trial based on other grounds.222 But the appellate court

must consider all of the evidence, including any evidence found to be erroneously admitted. *See Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). There is no right to appeal the sufficiency of the evidence after a hung jury. *Richardson v. United States*, 468 U.S. 317, 323-25 (1984).

# Dismissals with Prejudice

A dismissal with prejudice can be a bar to a subsequent prosecution for the same offense if the dismissal represented a resolution of some or all of the factual elements of the offense by the court.223 Even a dismissal without prejudice can create a double jeopardy bar to reprosecution for the same offense if it can be argued that the dismissal was on the merits.224

220 *See, e.g.*, *United States v. Lachman*, 387 F.3d 42, 50 (1st Cir. 2004); *Council*, 973 F.2d at 253-54;

*United States v. Affinito*, 873 F.2d 1261, 1264 (9th Cir. 1989); *United States v. Hylton*, 710 F.2d 1106, 1110 (5th

Cir. 1983); *Gonzales*, 617 F.2d at 1362; *Appawoo*, 553 F.2d at 1244-45.

221 *See, e.g.*, *United States v. Baptiste*, 832 F.2d 1173, 1174-75 (9th Cir. 1987); *United States v. Hospital Monteflores, Inc.,* 575 F.2d 332, 333 n.1 (1st Cir. 1978); *see also Martin Linen Supply Co.*, 430 U.S. at 1355 n.9 (“The Court must inquire whether ‘the ruling in (defendant’s) favor was actually an “acquittal” even though the District Court characterized it otherwise.’” (quoting *United States v. Wilson*, 420 U.S. at 326)).

222 *See Patterson v. Haskins*, 470 F.3d 645, 651-52 (6th Cir. 2006), *and cases cited therein; United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005); *United States v. Bishop*, 959 F.2d 820, 828-29 (9th Cir. 1992); *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990); *Palmer v. Grammar*, 863 F.2d 588, 592 (8th Cir. 1988) (collecting cases).

223 *See, e.g.*, *United States v. Black Lance*, 454 F.3d 922, 924 (8th Cir. 2006) (dismissal with prejudice

“was the functional equivalent of an acquittal” because it was a resolution of one or more of the factual elements of the offense charged); *United States v. Mintz*, 16 F.3d 1101, 1106 (10th Cir. 1994) (dismissal with prejudice a bar to subsequent prosecution on interdependent conspiracy). *But see United States v. Comeaux*, 954 F.2d 255, 260 (5th Cir. 1992) (dismissal did not “represent a resolution in defendant-appellants’ favor” and was not a bar to further prosecution); *United States v. Castiglione*, 876 F.2d 73, 76 (9th Cir. 1988) (dismissal with prejudice did not bar further prosecution because “[a] judge’s ruling does not bar further prosecution if it does not represent a resolution in favor on some or all of the factual elements of the offense charged” (citing *United States v. Scott*, 437 U.S. 82, 97 (1978))).

224 *See, e.g.*, *United States v. Transfiguracion*, 442 F.3d 1222, 1236 (9th Cir. 2006) (“Although this

dismissal was not specified as ‘with prejudice,’ it is evident that the district court was contemplating a dismissal on the merits, which ‘precludes a trial on a reindictment of the same charge.’”) (citation omitted).

# Mistrials

* + - 1. **“Manifest Necessity”**

Where there is “manifest necessity” for terminating a trial prior to verdict, either at the request of the prosecution or sua sponte by the court, the defendant may not invoke double jeopardy to ward off a retrial. A hung jury is the “prototypical example” of manifest necessity. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). The concept of manifest necessity does “not describe a standard that can be applied mechanically or without attention to the problem confronting the trial judge.” *Arizona v. Washington*, 434 U.S. 497, 506 (1978). A determination of whether manifest necessity required a mistrial involves, among other factors, an inquiry into whether there were alternatives to a mistrial*,* see *United States v. Jorn*, 400 U.S. 470, 487 (1971) (holding no manifest necessity for mistrial because trial judge gave “no consideration” to alternatives to declaring a mistrial), whether the trial court allowed defense counsel to explain his position on a mistrial, see *Washington*, 434 U.S. at 515-16, and whether the granting of the mistrial denied the defendant the right to “retain primary control of the course to be followed at trial,” *United States v. Dinitz*, 424 U.S. 600, 609 (1976). Termination of trial by the court in the absence of manifest necessity, or without an adequate record supporting the finding of manifest necessity, will create a bar to retrial for the same offense.225

# Defendant's Motion for a Mistrial

Where a defendant seeks termination of the trial, as with a motion for a mistrial, there is no double jeopardy protection unless the prosecution’s “conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.” *Oregon v. Kennedy*, 456

U.S. 667, 679 (1982). Courts have narrowly construed this exception.226 Courts have taken differing

225 *See, e.g.*, *Walck v. Edmondson*, 472 F.3d 1227, 1239-40 (10th Cir. 2007) (trial court erred in declaring mistrial after one of the prosecution’s witnesses became unavailable because of emergency Cesarean procedure because trial court failed to consider alternatives to mistrial); *United States v. Rivera*, 384 F.3d 49, 58 (3d Cir. 2004) (holding that retrial was barred because district court improperly found manifest necessity because of unavailability of key prosecution witness without considering alternatives to a mistrial); *United States v. Toribio- Lugo*, 376 F.3d 33, 39 (1st Cir. 2004) (district court’s finding of manifest necessity because only eleven jurors remained was erroneous because court failed to adequately explore the alternative of proceeding with eleven jurors); *United States v. Bonas*, 344 F.3d 945, 951 (9th Cir. 2003) (holding that retrial was barred because district court did not create an adequate record for manifest necessity that four jurors could not continue to serve because of financial hardship after the trial had commenced and jeopardy attached); *Long v. Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999) (no manifest necessity because trial court failed to consider “available and viable alternatives to mistrial”); *United States v. Stevens*, 177 F.3d 579, 588 (6th Cir. 1999) (holding that retrial was barred because district court improperly found manifest necessity after key prosecution witness refused to testify); *United States*

*v. Sammaripa*, 55 F.3d 433, 435 (9th Cir. 1995) (no manifest necessity for mistrial when prosecution claimed defense counsel had exercised peremptories in discriminatory manner after the jury had been sworn and jeopardy attached).

226 *See, e.g.*, *United States v. Williams*, 472 F.3d 81 (3d Cir. 2007) (reversing the district court’s order

granting defendant’s motion to dismiss on double jeopardy grounds under *Kennedy*); *United States v. Gonzalez*, 248 F.3d 1201 (10th Cir. 2001) (same).

approaches to when an evidentiary hearing is necessary after a claim that the prosecutor deliberately caused the mistrial has been made.227

Some courts have suggested that the rationale of *Kennedy* should be extended to situations where the prosecutor engages in covert misconduct to prevent an acquittal. *See, e.g.*, *United States v. Wallach*,

979 F.2d 912, 916 (2d Cir. 1992).228 These courts reason that there is no justification for a distinction

between the situation where “a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict.” *Wallach*, 979 F.2d at 916.

# Conviction of Lesser Included Offense

It is a general rule that conviction of a lesser included offense bars trial or retrial on the greater offense (and vice versa). *Brown v. Ohio*, 432 U.S. 161, 168 (1977). This is true even if the conviction of the lesser offense is vacated on appeal, on the theory that there has been an implied acquittal of the greater offense and/or jeopardy has terminated as to the greater offense. *See Price v. Georgia*, 398 U.S. 323 (1970). This bar may not exist if the instructions permit the jury to consider the lesser offense without having to reach a verdict on the greater offense,229 especially where the jury has expressly said it could not reach a verdict on the greater offense.230

227 *See United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993) (analogizing inquiry to that conducted into whether prosecutor exercised a peremptory challenge in a racially-motivated manner); *United States v. Wentz*, 800 F.2d 1325, 1328 (4th Cir. 1986) (hearing required “if there existed a genuine question in the mind of the court about whether the prosecutor had deliberately goaded” the defense into moving for a mistrial). *See also United States v. Tafoya*, 557 F.3d 1121, 1128 (10th Cir. 2009); *United States v. Hagege*, 437 F.3d 943, 952- 53 (9th Cir. 2006); *United States v. Curry*, 328 F.3d 970, 974 (8th Cir. 2003); *United States v. Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993); *United States v. White*, 914 F.2d 747, 752 n.1 (6th Cir. 1990) (adopting approach in *Wentz*).

228 *See also United States v. Lewis*, 368 F.3d 1102, 1108-09 (9th Cir. 2004) (noting reasoning in *Wallach*, and holding that even if *Kennedy* were extended as envisioned by *Wallach* the prosecutorial misconduct at issue was not sufficient to bar retrial); *United States v. Catton*, 130 F.3d 805, 807 (7th Cir. 1997) (noting the “considered dictum” in *Wallach* that *Kennedy* should be extended to situations where “the prosecutor commits a covert error for the same purpose that he might have committed an overt error” to provoke a mistrial, but leaving open whether the Court would adopt the dictum in *Wallach*); *Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995) (“[W]e leave for another day whether this Court will follow *Wallach* ”).

229 At least some circuits give the defendant the right to choose between a jury instruction which tells

the jury to consider the lesser offense only once it has unanimously acquitted the defendant of the greater offense or an instruction that the jury should consider the lesser offense if it is unable to reach a verdict on the greater offense. *See United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Pharr v. Israel*, 629 F.2d 1278, 1282 (7th Cir. 1980); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 345-46 (2d Cir. 1978).

230 *See United States v. Bordeaux*, 121 F.3d 1187, 1190-93 (8th Cir. 1997); a*ccord United States v.*

*Williams*, 449 F.3d 635, 645 (5th Cir. 2006); *United States v. Rivas,* No. 03-CR-00188-MSK, 2006 WL 2471889, at \*2-3 (D. Colo. Aug. 23, 2006); *Padilla v. McGrath*, No. C012158 MJJ (PR), 2003 WL 22889419, at \*5 n.4

The Supreme Court has suggested exceptions to the general rule in two other circumstances, moreover. One exception occurs when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun. *Brown*, 432 U.S. at 169 n.7; *Jeffers v. United States*, 432 U.S. 137, 151 (1977).231 A second exception that the Court has suggested is the circumstance where “the facts necessary to the greater [offense] were not discovered despite the exercise of due diligence before the first trial.” *Jeffers*, 432 U.S. at 152; *Brown*, 432 U.S. at 169 n.7.232

# Guilty Pleas and Waiver

A guilty plea may waive a double jeopardy claim in some circumstances. In *United States v. Broce*, 488 U.S. 563 (1989), the defendant pled guilty to two separate conspiracy counts. *See id.* at 565. The defendant, in a collateral attack, argued that there was only one conspiracy, not two, and the conviction on both counts violated the double jeopardy prohibition against multiple punishments for the

(N.D. Cal. Dec. 1, 2003); *cf. Panero v. Verdini*, 295 F. Supp. 2d 184, 189 (D. Mass. 2003) (suggesting question could be decided either way but denying habeas relief because this made state court finding of no double jeopardy violation “not unreasonable (even though it might have been incorrect)”), *aff’d*, 123 Fed. App’x 410 (1st Cir. 2005). *But cf. Brazzel v. Washington,* 491 F. 3d 976, 482-85 (9th Cir. 2007) (not clear error by state court to conclude jury silence on greater offense an “implied acquittal” when jury given an “inability to agree” instruction); *Stow v. Murashige*, 389 F.3d 880, 890 (9th Cir. 2004) (noting “the principle of precluding appellate courts from scrutinizing jury verdicts”); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978) (stating in dictum that reprosecution would be barred by Double Jeopardy Clause even if instruction given to jury allowed it to consider lesser offense without reaching verdict on greater offense).

231 *See, e.g.*, *Garrett v. United States*, 471 U.S. 773, 791 (1985) (applying exception where continuing

criminal enterprise offense had not been completed at time defendant was indicted for arguably included conspiracy offense); *Diaz v. United States*, 223 U.S. 442, 448-49 (1912) (conviction of assault and battery did not create double jeopardy bar to prosecution for homicide where victim had not died at time of assault and battery prosecution).

232 *See Whittlesey v. Conroy*, 301 F.3d 213, 218-19 (4th Cir. 2002) (state court’s application of due

diligence exception based on *Brown v. Ohio*, 432 U.S. 161 (1977), not unreasonable application of federal law under 28 U.S.C. § 2254(d)(1)); *Robertson v. Morgan*, 227 F.3d 589, 595 (6th Cir. 2000) (noting “the due diligence exception,” but “not reach[ing] the issue” because no double jeopardy exception is needed here,” though further noting, “we are not impressed with the purported diligence on the state’s part”); *United States v. Tolliver*, 61 F.3d 1189, 1211 (5th Cir. 1995) (finding due diligence exception applicable and so rejecting defendant’s double jeopardy claim); *United States v. Maza*, 983 F.2d 1004, 1009-10 (11th Cir. 1993) (recognizing due diligence exception but noting government’s concession that its evidence was not newly discovered); *United States v. Rosenberg*, 888 F.2d 1406, 1415 (D.C. Cir. 1989) (ruling that government must be given opportunity to argue for existence of due diligence exception on remand and to demonstrate that it exercised due diligence); *United States v. Stearns*, 707 F.2d 391, 393 (9th Cir. 1983) (recognizing due diligence exception and rejecting defendant’s double jeopardy claim). *But cf. Whittlesey*, 301 F.3d at 219 (Stapleton, J., concurring) (agreeing that state court’s application of federal law was not “unreasonable” under 28 U.S.C. § 2254(d)(1) but expressing view that such a rule “imposes far too great a burden on the interests protected by the Double Jeopardy Clause and would not be endorsed by the Supreme Court of the United States if presented to it”); *United States v. Aguilar*, 849 F.2d 92, 100 (3d Cir. 1988) (acknowledging that Supreme Court has suggested due diligence exception “may exist” but noting that Court “has on no occasion . . . delineated the boundaries of that exception, or otherwise instructed as to its application” and not reaching issue in case at bar).

same criminal act. In rejecting that claim, the Supreme Court held, “[j]ust as the defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.” *Id*. at 570.

*Broce* thus established a rule of waiver that a defendant who pleads guilty to a criminal charge may not subsequently assert a claim of multiple punishment in violation of the Double Jeopardy Clause unless “the violation is apparent on the face of the indictment or record.” *United States v. Pollen*, 978

F.2d 78, 84 (3d Cir. 1992) (citation omitted).233 If an indictment does not raise double jeopardy

concerns on its face, and the defendant who previously pled guilty would only be able to demonstrate a double jeopardyviolation through an evidentiaryhearing on direct appeal or collateral attack, then such claim will be rejected. *Pollen*, 978 F.2d at 84.

An accused may not plead to some counts of an indictment, over the prosecution’s objection, and then invoke double jeopardy as a bar to prosecution on the remaining counts. In *Ohio v. Johnson*, 467

U.S. 493 (1984), the defendant was charged with four offenses: grand theft, involuntary manslaughter, aggravated robbery, and murder. *See id.* at 497. Johnson pled guilty to involuntary manslaughter and grand theft, but pled not guilty to murder and aggravated robbery. The trial court accepted the plea over the prosecution’s objection, and pursuant to a motion by defense counsel dismissed the murder and aggravated robbery charges reasoning that further prosecution was barred by the Double Jeopardy Clause. *Id*. In reversing, the Supreme Court noted that “[n]o interest protected by the Double Jeopardy Clause [was] implicated” by further prosecution because Johnson had not “been exposed to conviction on the charges to which he pled not guilty” and there was “none of the governmental overreaching that double jeopardy is supposed to prevent.” *Id*. at 501-02. The Court held: “Notwithstanding the trial court’s acceptance of respondent’s guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.” *Id*. at 502. Courts of appeals have applied the rationale of *Johnson* to hold that pleading guilty to an original indictment, over the prosecution’s objection, with the knowledge that a superseding indictment is being filed cannot be used as a double jeopardy sword against the new charges. *See, e.g.*, *United States v. Quinones*, 906 F.2d 924, 927-28 (2d Cir. 1990); *cf*. *Bally v. Kemna*, 65 F.3d 104, 106 (8th Cir. 1995) (declining to reach whether *Johnson* would be a bar where “prosecutor had charged Bally in two separate indictments and had not objected to acceptance of the plea.”).

# Conspiracies

The government cannot divide a single conspiracyinto multiple charges and then pursue multiple prosecutions or multiple sentences. In determining whether separate conspiracy charges are in fact the same offense, courts have rejected a “same evidence” test in favor of a “totality of the circumstances” test which focuses on factors which the Fifth Circuit has labeled the *“Marable* factors,” after the case of that name. *See, e.g.*, *United States v. Goff*, 847 F.2d 149, 166 (5th Cir. 1988) (citing *United States*

*v. Marable*, 578 F.2d 151 (5th Cir. 1978)). Those factors include: (1) the periods of time covered by the

233 *Accord United States v. Smith,* 532 F.3d 1125, 1127-29 (11th Cir. 2008)*; United States v. Brown*, 155 F.3d 431, 434 (4th Cir. 1998); *Thomas v. Kerby*, 44 F.3d 884, 888 (10th Cir. 1995); *United States v. Makres*, 937 F.2d 1282, 1286 (7th Cir. 1991); *Taylor v. Whitley*, 933 F.2d 325, 327 (5th Cir. 1991); *United States v. Quinones*, 906 F.2d 924, 927 (2d Cir. 1990); *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989).

alleged conspiracies; (2) the places where the alleged conspiracies occurred; (3) the alleged participants in the alleged conspiracies; (4) the overt acts alleged or the nature and scope of the activities charged;

and (5) the statutes alleged to have been violated.234 The Third Circuit has rejected the factor of whether

the same statutory offenses are charged in each indictment.235 Not every factor must favor the defendant in any event.236

The Supreme Court has held conspiracy is a lesser included offense of maintaining a continuing criminal enterprise. *See Rutledge v. United States*, 517 U.S. 292, 300 (1996). This means that the foregoing analysis applies to successive continuing criminal enterprise and conspiracy prosecutions just as it does to successive conspiracy prosecutions alone. *See, e.g.*, *United States v. Harvey*, 78 F.3d 501, 505 (11th Cir. 1996).

# Sentencing and Multiple Punishment

Whether multiple punishment violates the Double Jeopardy Clause is guided initially by the test established in *Blockburger v. United States*, 284 U.S. 299 (1932), discussed in Section 6.03.03.02 and Section 6.07.03 above. But the *Blockburger* test does no more than create a presumption of legislative intent. *See Whalen v. United States*, 445 U.S. 684, 691-92 (describing *Blockburger* test as “a rule of statutory construction” based on “[t]he assumption . . . that Congress ordinarilydoes not intend to punish the same offense under two different statutes”). The presumption is not controlling when there is a clear

234 *United States v. Stoddard,* 111 F.3d 1450, 1454 (9th Cir. 1997); *United States v. Nyhuis*, 8 F.3d 731, 736 (11th Cir. 1993); *United States v. Dortch*, 5 F.3d 1056, 1061 (7th Cir. 1993); *United States v. Garcia-Rosa*, 876 F.2d 209, 228 (1st Cir. 1989); *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988); *United States*

*v. Liotard*, 817 F.2d 1074, 1078 (3d Cir. 1987) (collecting cases); *United States v. Thomas,* 759 F.2d 659, 662 (8th Cir. 1985); *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983); *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *Marable*, 578 F.2d at 154 (citing *United States v. Arnold*, 336 F.2d 347 (9th Cir. 1964) and *United States v. Short*, 91 F.2d 614, (4th Cir. 1937)); *cf. United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985) (including additional factors of “similarity of operation,” “common objectives,” and “the degree of interdependence between alleged distinct conspiracies”); *United States v. Thornton*, 972 F.2d 764, 767 (7th Cir. 1992) (noting other opinions in addition to original Seventh Circuit opinion in *Castro* that include “such factors as whether the conspiracies mutually support each other, whether the modus’ operandi are similar, and the specific nature of the objective embodied in each conspiracy”). *But cf*. *United States v. Sasser*, 974 F.2d 1544, 1549-50 & n.4 (10th Cir. 1992) (noting urging of appellants in *United States v. Puckett*, 692 F.2d 663 (10th Cir. 1982) to adopt “totality of the circumstances” test adopted in other circuits and not deciding question).

235 *See Liotard*, 817 F.2d at 1078-79 n.7. *Contra United States v. Bennett,* 44 F.3d 1364, 1370 (8th Cir. 1995) (distinguishing other cases because “the present case involved alleged violations of separate and distinct conspiracy statutes”); *United States v. Powell*, 894 F.2d 895, 898 (7th Cir. 1990) (quoting list of factors from *Castro*, 629 F.2d at 461, and noting with apparent approval that “[o]ther circuits also have considered whether the indictment (or the different counts thereof) charged the same statutory offenses”) (citing *Sinito*, 723 F.2d at 1256)).

236 *See United States v. Maslin*, 356 F.3d 191, 196 (2d Cir. 2004) (“the *Korfant* list is not exhaustive,

and every case must be assessed on its own terms”); *United States v. Cihak*, 137 F.3d 252, 258 (5th Cir. 1998) (“[n]o one factor of the *Marable* analysis is determinative; rather all five factors must be considered in combination”); *Stoddard*, 111 F.3d at 1456-57 (“we do not focus on one single factor, but consider all of the factors together”); *Castro*, 629 F.2d at 898 (conspiracy is separate “[w]here several of these factors are present”).

legislative intent to impose multiple punishment. *Missouri v. Hunter*, 459 U.S. 359, 367-68 (1983);

*Albernaz v. United States*, 450 U.S. 333, 337-38 (1981).237 On the other hand, legislative intent against

multiple punishment may be found even when the *Blockburger* test is not satisfied; such intent frequently is found where crimes have different elements, but are necessarily factually related.238

What constitutes “punishment” for purposes of the Double Jeopardy Clause has also been addressed in a number of cases. Under *Hudson v. United States*, 522 U.S. 93 (1997), “[a] court must first ask whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’” *Id.* at 99 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). Where the legislature has indicated an intent to establish a civil penalty, the court must ask “‘whether the statutory scheme [is] so punitive either in purpose or effect’ as to ‘transfor[m] what [is] clearly intended as a civil remedy into a criminal penalty.’” *Hudson*, 522 U.S. at 99 (quoting *Ward*, 448 U.S. at 248-49 (1980)). In determining this, the court must consider the following seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as a punishment; (3) whether the sanction can be imposed only upon a finding of scienter; (4) whether the operation of the sanction will promote the traditional aims of punishment, i.e., retribution and deterrence; (5) whether the behavior to which the sanction applies is already criminal; (6) whether there is an alternative purpose to which the sanction may be rationally connected; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. *Hudson*, 522 U.S. at 99-100. The Supreme Court stated in *Hudson* that “‘[o]nly the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 100 (quoting *Ward*, 458 U.S. at 249).

The vast majority of sanctions which have been challenged have been held not to be criminal

punishment under this test. This includes prison disciplinary sanctions,239 government employee

237 *See, e.g.*, *United States v. Bishop*, 66 F.3d 569, 573-74 (3d Cir. 1995), *and cases cited therein* (double punishment under 18 U.S.C. § 924(c) and 18 U.S.C. § 2119 permissible because of clear legislative intent); *United States v. Hartley*, 678 F.2d 961, 991-92 (11th Cir. 1982) (acknowledging that multiple punishment for RICO violation and underlying predicate offenses might run afoul of *Blockburger* test but noting “clear indication” of legislative intent that there be multiple punishment).

238 *See, e.g.*, *Milanovich v. United States*, 365 U.S. 551 (1961) (no multiple punishment allowed for theft of government property and receiving stolen government property); *Heflin v. United States*, 358 U.S. 415 (1959) (no multiple punishment for bank robbery and possession of proceeds of bank robbery); *Prince v. United States*, 352 U.S. 322 (1957) (no multiple punishment for bank robbery and entry with intent to commit bank robbery); *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1170-71 (9th Cir. 1989) (no multiple punishment allowed for bringing aliens into the country and transporting aliens within the country); *United States v. Podell*, 869 F.2d 328, 332 (7th Cir. 1989) (no multiple punishment for altering vehicle identification number and removing and tampering with identification number); *United States v. Palafox*, 764 F.2d 558, 562 (9th Cir. 1985) (en banc), *and cases cited therein* (no multiple punishment allowed for possession with intent to distribute controlled substance and distribution of controlled substance). *Compare Albernaz*, 450 U.S. at 341-42 (concluding from structure of statutes that Congress did intend multiple punishment for conspiracy to import and conspiracy to distribute controlled substances). *See generally Costo v. United States*, 904 F.2d 344, 347 (6th Cir. 1990) (describing *Blockburger* as creating “continuing impulse/single bargain test” for offenses such as drug offenses).

239 *See United States v. Simpson*, 546 F.3d 394, 398 (6th Cir. 2008) (collecting cases).

discipline,240 student discipline,241 civil penalties for tax fraud,242 civil penalties and/or fines imposed by administrative agencies,243 disqualification for federal benefits pursuant to 21 U.S.C. § 862a,244 driver’s license revocation,245 disbarment and/or revocation of occupational licenses,246 termination of parental

rights,247

and civil forfeiture.248

The one sanction which some courts in some instances have

characterized as criminal punishment for purposes of the Double Jeopardy Clause has been a “drug tax” which exists in some states.249 But note that a *state* drug tax will generally not bar a *federal* prosecution, under the dual sovereignty doctrine discussed *infra* Section 6.07.11.250

240 *See United States v. Camacho*, 413 F.3d 985, 989-91 (9th Cir. 2005).

241 S*ee Students for Sensible Drug Policy v. Spellings*, 523 F.3d 896 (8th Cir. 2008).

242 *See Morse v. Commissioner,* 419 F.3d 829, 835 (8th Cir. 2005); *Louis v. Commissioner*, 170 F.3d

1232, 1235 (9th Cir. 1999).

243 *See United States v. Van Waeyenberghe*, 481 F.3d 951, 958-59 (7th Cir. 2007); *Noriega-Perez v.*

*United States*, 179 F.3d 1166, 1174 (9th Cir. 1999); *United States v. Perry*, 152 F.3d 900, 904 (8th Cir. 1998);

*United States v. Lippert*, 148 F.3d 974, 977 (8th Cir. 1998); *Grossfeld v. CFTC*, 137 F.3d 1300, 1304 (11th Cir.

1998); *S.A. Healy Co. v. OSHA*, 138 F.3d 686, 688 (7th Cir. 1998); *SEC v. Palmisano*, 135 F.3d 860, 866 (2d Cir.

1998); *Cole v. U.S. Dept. of Agriculture*, 133 F.3d 803, 807 (11th Cir. 1998).

244 *See Turner v. Glickman*, 207 F.3d 419, 431 (7th Cir. 2000).

245 *See Brewer v. Kimel*, 256 F.3d 222, 230 (4th Cir. 2001); *Rivera v. Pugh*, 194 F.3d 1064, 1069 (9th

Cir. 1999); *Herbert v. Billy*, 160 F.3d 1131, 1139 (6th Cir. 1998).

246 *See Matter of Caranchini*, 160 F.3d 420, 423-24 (8th Cir. 1998); *LaCrosse v. CFTC*, 137 F.3d 925,

932 (7th Cir. 1998).

247 *See Smith v. Dinwiddie*, 510 F.3d 1180, 1188-90 (10th Cir. 2007).

248 *See United States v. $273,969.04 U. S. Currency*, 164 F.3d 462, 465 (9th Cir. 1999) (following *United States v. Ursery*, 518 U.S. 267 (1996) even after *Hudson*). *But cf*. *Ursery,* 518 U.S. at 289 n.3 (“[N]evertheless, where the ‘[c]learest proof’ indicates that an *in rem* civil forfeiture is ‘so punitive either in purpose or effect’ as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause.” (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984))).

249 *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994); *Dye v. Frank*, 355 F.3d 1102, 1108 (7th Cir. 2004); *Lynn v. West,* 134 F.3d 582, 592 (4th Cir. 1998). *But cf. Simpson v. Bouker,* 249 F.3d 1204, 1211 (10th Cir. 2001) (state court decision distinguishing Kansas drug tax from Montana drug tax in *Kurth Ranch* not “unreasonable application” of *Kurth Ranch* as required for habeas corpus relief); *Vick*

*v. Williams*, 233 F.3d 213, 217-22 (4th Cir. 2000) (not “unreasonable application” of Supreme Court law to distinguish North Carolina drug tax from Montana drug tax; distinguishing *Lynn* as not a habeas corpus case using the “unreasonable application” standard); *Padavich v. Thalacker*, 162 F.3d 521, 523 (8th Cir. 1998) (distinguishing Montana drug tax in *Kurth Ranch* and finding Iowa drug tax not a criminal punishment for purposes of the double jeopardy clause).

250 *See, e.g.*, *Lynn*, 134 F.3d at 593.

Even some forms of custody have been held not to be punishment giving rise to double jeopardy protection. This includes revocation of parole, probation, and/or supervised release.251 It also includes civil commitment of sex offenders, even when the purported mental condition of the offender is not treated or treatable. *See Kansas v. Hendricks*, 521 U.S. 346, 365-67 (1997). Finally, the Supreme Court has held that use of conduct to enhance a sentence does not create a double jeopardy bar to a separate prosecution for the conduct, see *Witte v. United States*, 515 U.S. 389 (1995), though this case may be on arguably shaky ground after *United States v. Booker*, 543 U.S. 220 (2005). *See id.* at 240 (noting that no Sixth Amendment argument was presented in *Witte*).

# Dual Sovereignty Doctrine

Under the “dual sovereignty doctrine,” prosecution by one jurisdiction, or sovereign, does not create a bar to prosecution by another, independent, jurisdiction. *See Heath v. Alabama*, 474 U.S. 82 (1985) (different state governments); *United States v. Wheeler*, 435 U.S. 313 (1978) (Indian tribe and federal government); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (federal government and state government). However, based on language in *Bartkus* a majority of circuits has recognized a “sham prosecution” exception to the dual sovereigntydoctrine: double jeopardymayattach where a subsequent state prosecution is merely a cover for a federal prosecution, and thereby in essential fact another federal

prosecution. 252 The exception is rarely applied, however, and very difficult to prove.253

251 *See United States v. Woods*, 127 F.3d 990, 992-93 (11th Cir. 1997); *United States v. Wyatt*, 102 F.3d 241, 244 (7th Cir. 1996); *United States v. Woodrup*, 86 F.3d 359, 361-62 (4th Cir. 1996); *United States v. Soto- Olivas*, 44 F.3d 788, 789-90 (9th Cir. 1995); *United States v. Hanahan*, 798 F.2d 187, 189-90 (7th Cir. 1986); *United States v. Miller*, 797 F.2d 336, 340 (6th Cir. 1986) *and cases cited therein*.

252 *See United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005); *United States v. Guzman*, 85 F.3d

823, 826-27 (1st Cir. 1996); *United States v. All Assets of G.P.S. Automotive Corp*., 66 F.3d 483, 494 (2d Cir. 1995); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991); *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 587-88 (6th Cir. 1991); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990); *United*

*States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). *But cf. United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004) (“[W]e have never explicitly held that the *Bartkus* exception applies to subsequent federal prosecutions.”); *United States v. Angleton*, 314 F.3d 767, 773-74 (5th Cir. 2002) (“[T]he *Bartkus* Court’s failure to identify a particular instance of a sham prosecution may mean that the exception does not exist.”); *United States v. Berry*, 164 F.3d 844, 847 & n.3 (3d Cir. 1999) (noting that “we have never applied the exception to overturn a second state or federal prosecution” and “[a]t least one circuit has questioned whether the Court even intended to create an exception in *Bartkus*” (citing *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993))); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997) (“[T]his circuit has expressed doubts about ‘whether *Bartkus* truly meant to create such an exception, and we have uniformly rejected such claims.’” (quoting *Brocksmith*, 991 F.2d at 1366)); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) (noting that “twice before we declined to address the question” and concluding that “[o]nce again, we need not decide whether the exception is valid”).

253 *See United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) (suggesting that “there is some

room for debate over whether the *Bartkus* exception is just narrow or whether it is indeed real” and noting that “so for as this circuit is concerned, it is an exception that has yet to affect that outcome of a single case”); *United States v. Barrett,* 496 F.3d 1079, 1119 (10th Cir. 2007) (opining that the facts of *Bartkus* themselves “suggest[

] that the sham exception exists, if at all, only in the rarest of circumstances” (quoting *Angleton,* 314 F.3d at 773- 74)); *United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir. 2000) (“[S]everal courts have stressed that the

Despite the lack of a general *constitutional* bar, there is a Department of Justice policy, known as the *Petite* policy, after the case of that name, *Petite v. United States*, 361 U.S. 529 (1960), that prevents successive federal prosecutions in most instances. In particular, the policy “precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act[s] or transaction[s]” unless (1) the matter “involve[s] a substantial federal interest”; (2) the prior prosecution “left that interest demonstrably unvindicated”; and (3) there is sufficient evidence to sustain a conviction of a federal offense, by an unbiased trier of fact.” United States Attorneys’ Manual § 9-2.031 (Jan. 2000); *see also Rinaldi v. United States*, 434 U.S. 22 (1977). This *Petite* policy is not enforceable by a defendant, however.254

There are also similar protections in many states, in the form of statutes which create a statutory equivalent of double jeopardy protection when there has been a prosecution by a separate sovereign.255 While counsel cannot use these statutes in a federal prosecution, they may be relevant to advising clients about exposure to duplicative state prosecution.

# Collateral Estoppel

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that double jeopardyprinciples require the application in criminal cases of the doctrine of collateral estoppel, i.e., the principle that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot

*Bartkus* exception is a narrow one and difficult to prove.”); *United States v. Trammell*, 133 F.3d 1343, 1349 (10th Cir. 1998) (“[T]his exception is ‘an extremely narrow one’ and is rarely applied.” (quoting *United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990))); *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991) (“[A]s a practical matter, however, under the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government.”). *But cf. United States v. Coker*, 433 F.3d 39, 46 (1st Cir. 2005) (suggesting that *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002) might be based in part on “interconnectedness of the tribal and federal investigations”); *All Assets of G.P.S. Automotive Corp.*, 66 F.3d at 495-96 (remanding after “conclud[ing] that, without further fact-finding, we cannot exclude the possibility that the *Bartkus* exception might apply”); *United States v. Bernhardt*, 831 F.2d 181, 183 (9th Cir. 1987) (reversing district court application of *Bartkus* exception and remanding but only because “it is *possible* that the involvement of the federal authorities . . . may be sufficient to remove this case from the ‘sham’ and ‘cover’ that *Bartkus* reaches” (emphasis added)); *United States*

*v. Belcher*, 762 F. Supp. 666, 670-71 (W.D. Va. 1991) (applying exception and dismissing indictment).

254 *See United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005); *United States v. Basile*, 109 F.3d 1304, 1308 (8th Cir. 1997); *United States v. McCoy*, 977 F.2d 706, 712 (1st Cir. 1992); *United States v. Schwartz*, 787 F.2d 257, 267 (7th Cir. 1986); *United States v. Hyder*, 732 F.2d 841, 843 n.3 (11th Cir. 1984); *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983); *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir. 1979); *United States v. Howard*, 590 F.2d 564, 567-68 (4th Cir. 1979); *United States v. Frederick*, 583 F.2d 273, 274 (6th Cir. 1978); *United States v. Thompson*, 579 F.2d 1184, 1188 (10th Cir. 1978) (en banc); *United States v. Nelligan*, 573 F.2d 251, 255 (5th Cir. 1978); *see also* United States Attorneys’ Manual § 9-2.031(F) (noting that “[a]ll of the federal circuit courts that have considered the question have held that a criminal defendant cannot invoke the Department’s policy as a bar to federal prosecution” (citing cases)).

255 *See, e.g.*, N.J. Rev. Stat. § 2C:1-11, *quoted in United States v. Grimes*, 641 F.2d 96, 101 n.17 (3d Cir. 1981); *see generally* Annot., *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts -- Modern View*, 97 A.L.R. 5th 201 (2002) (collecting state statutes).

again be litigated between the same parties in any future lawsuit.” *Id.* at 443. The Court further stated that the doctrine “is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.” *Id.* at 444. The court must “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Id.* (quoting Daniel K. Mayers and Fletcher L. Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39). As put by the courts of appeals, the question is whether an issue was “necessarily decided” at a prior trial.256

In order to determine whether collateral estoppel applies, a court must examine what the real issue or issues were at the first trial. Collateral estoppel cannot be avoided by hypothesizing that the jury disbelieved substantial uncontradicted and uncontested evidence or relied on some completely far- fetched and irrational theory. *Ashe*, 397 U.S. at 444 n.9. Examples of courts applying this aspect of the rule include cases in which the only real defense offered at a prior trial was identity,257 cases in which amounts of drugs were so great that no reasonable jury could have found the drugs were intended for personal use,258 cases in which other elements could not have been disputed as a practical matter,259 cases in which elements the government suggested as a possible basis for the prior acquittal were not actually disputed by the defendant,260 cases in which the instructions given at the first trial made it clear that there

256 *See United States v. Ford*, 371 F.3d 550, 555 (9th Cir. 2004); *United States v. Chestaro,* 197 F.3d

600, 609 (2d Cir. 1999); *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997); *United States v. Salerno*,

108 F.3d 730, 741 (7th Cir. 1997); *United States v. Morris*, 99 F.3d 476, 481 (1st Cir. 1996); *United States v.*

*Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996); *United States v. Fiel*, 35 F.3d 997, 1007 (4th Cir. 1994); *United*

*States v. Bailey*, 34 F.3d 683, 688 (8th Cir. 1994); *United States v. Console*, 13 F.3d 641, 654 (3d Cir. 1993);

*United States v. Rogers,* 960 F.2d 1501, 1508 (10th Cir. 1992); *United States v. Jenkins*, 902 F.2d 459, 462 (6th

Cir. 1990).

257 *See, e.g.*, *Ashe*, 397 U.S. at 445-46.

258 *See, e.g.*, *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997); *United States v. Mespoulede*,

597 F.2d 329, 333 (2d Cir. 1979).

259 *See, e.g.*, *United States v. Stoddard*, 111 F.3d 1450, 1459 (9th Cir. 1997) (prior acquittal indicated

jury must have found defendant had not owned money because “[i]f the jury. . . concluded that [defendant] did own the $74,000, we have no doubt the jury would also have found that [defendant] agreed to and knew about the conspiracy”); *Buck v. Maschner*, 878 F.2d 344, 347 (10th Cir. 1989) (collateral estoppel applied because “[w]e cannot understand how a rational jury could have grounded a verdict in the later trial upon an issue other than the two essential issues in contention -- whether a touching occurred, whether the touching was intentional -- both of which the State sought to establish in the earlier trial”); *Johnson v. Estelle*, 506 F.2d 347, 350-52 (5th Cir. 1975) (rejecting the State’s attempt to avoid collateral estoppel through various theoretical possibilities, characterizing state’s theories as “fantastic hypotheticals,” and concluding that “the alternative grounds hypothecated by the State are not of the sort which could move a rational jury, on its own, to acquit”).

260 *See, e.g.*, *United States v. Obayhon*, 483 F.3d 1281, 1287 (11th Cir. 2007) (noting knowledge was

issue parties focused on and that “[t]here was no other factual issue”); *United States v. Frazier*, 880 F.2d 878, 885-86 (6th Cir. 1989) (collateral estoppel applied regarding defendant’s intent because parties “essentially agreed at first trial” that defendant made loan for other’s benefit and “the only disputed evidence focused on the issue of intent to defraud”); *United States v. Ashley Transfer & Storage Co., Inc.*, 858 F.2d 221, 227 (4th Cir.

was only one thing on which the jury could have based its verdict,261 and trials for perjury during testimony in an earlier trial where the court concluded that an acquittal in the first trial meant the jury

must have believed the defendant.262 Still, the burden is on the defendant to show the issue in question

was necessarily decided in the prior trial. *Schiro v. Farley*, 510 U.S. 222, 233 (1994); *Dowling v. United States*, 493 U.S. 342, 350 (1990) (collecting court of appeals cases).

Collateral estoppel cannot be used to invalidate an actual guilty verdict that is inconsistent with a not guilty verdict on another count in the same trial. *See United States v. Powell*, 469 U.S. 57, 68-69

(1984).263 On the other hand, the collateral estoppel doctrine does apply when there is an acquittal on

one count accompanied by a hung jury on another count which the government then seeks to retry. *See United States v. Yeager*, 129 S. Ct. 2360, 2368 (2009) (holding that “consideration of hung counts has

1998) (collateral estoppel could not be avoided on theory that jury might have acquitted in first trial on interstate commerce element where “the government presented substantial evidence on the interstate commerce issue which the defendants did not even attempt to controvert”); *Rice v. Marshall*, 816 F.2d 1126, 1132 (6th Cir. 1987) (collateral estoppel applied to question of whether defendant possessed firearm where defendant had been acquitted of felon in possession of firearm and had stipulated to prior felony conviction, so that “the only issue presented by the weapons charge was whether [the defendant] did in fact have a weapon in his possession”); *United States v. Larkin*, 605 F.2d 1360, 1370-71 (5th Cir. 1979) (government could not avoid collateral estoppel on the theory that coconspirator did not commit crimes during course of conspiracy where that fact “was amply established [in first trial] by extensive direct testimony and documentary evidence none of which was controverted by the appellant”); *cf. United States v. Griggs*, 651 F.2d 396, 400 (5th Cir. 1981) (collateral estoppel applied in second trial for passing second counterfeit bill because acquittal in first trial must have been based on lack of knowledge when defendant admitted that he had passed the bill at issue in first trial); *United States v. Leach*, 632 F.2d 1337, 1340-41 (5th Cir. 1980) (government could not avoid collateral estoppel on theory that jury in first trial might have found that defendant was not part of conspiracy where defense defendant actually presented “was a classic swearing contest”).

261 *See, e.g.*, *Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (looking to jury instructions in first trial to

reject state’s theory about possible alternative basis for prior acquittal); *cf. Johnson*, 506 F.2d at 350-52 (using instructions to help interpret jury verdict).

262 *Compare United States v. Whitaker*, 702 F.2d 901, 904-06 (11th Cir. 1983) (analyzing evidence at

first trial on substantive offense and concluding that collateral estoppel applied in trial for perjury where acquittal in prior trial must have been based on jury believing defendant’s testimony); *United States v. Castillo-Basa*, 483 F.3d 890, 898-99 (9th Cir. 2007) (same); *and United States v. Hernandez*, 572 F.2d 218 (9th Cir. 1978) (same), *with United States v. Dipp*, 581 F.2d 1323, 1326 (9th Cir. 1978) (distinguishing *Hernandez* and concluding jury in first trial did not necessarily need to have believed defendant’s testimony because conflicting government witness testimony was about different conspiracy and admitted only to show defendant’s knowledge and intent); *cf. United States v. Brown*, 547 F.2d 438, 442-43 (8th Cir. 1977) (analyzing evidence in prior perjury prosecution and concluding that jury must have believed defendant’s testimony that he did not have discussion with alleged coconspirator about bank robbery conspiracy for which defendant prosecuted in second case).

263 *See also Evanchyk v. Stewart*, 340 F.3d 933, 942 (9th Cir. 2003); *Nesbitt v. Hopkins*, 86 F.3d 118,

121 (8th Cir. 1996); *United States v. Console*, 13 F.3d at 665 n.28; *United States v. Citron*, 853 F.2d 1055, 1059

(2d Cir. 1988); *Hoffer v. Morrow*, 797 F.2d 348, 352 (7th Cir. 1986); *United States v. Fesler*, 781 F.2d 384, 390 (5th Cir. 1986). *But cf*. *Pettaway v. Plummer*, 943 F.2d 1041, 1048 (9th Cir. 1991) (applying collateral estoppel “where it is not clear that there was simply an inconsistent verdict in the first trial”), *overruled on other grounds*, *Santamaria v. Horsley*, 133 F.3d 1242, 1245-47 (9th Cir. 1998) (en banc).

no place in the issue-preclusion analysis,” following court of appeals cases holding “that a jury’s failure to reach a verdict on some counts should play no role in determining the preclusive effect of an

acquittal,” and distinguishing *Powell*).264 Nonetheless, a hung jury on some counts may have the

potential for silently affecting the analysis of what the jury necessarily decided on the acquitted counts. *Cf. Yeager*, 129 S. Ct. at 2370 (declining to “engage in a fact-intensive analysis of the voluminous record” and remanding with invitation for court of appeals to “[i]f it chooses, . . . revisit its factual analysis”).

Collateral estoppel also does not apply in non-criminal proceedings where there is a lesser standard of proof than the standard in a criminal case, such as civil forfeiture cases,265 and probation,

parole and supervised release revocation hearings.266 If the proceeding with a lower standard of proof

takes place first, and the government loses in that proceeding, there may arguably be a collateral estoppel bar in a later criminal case, however.267

264 *See also United States v. Ohayon*, 483 F.3d at 1288-90, *cited with approval in Yeager*, 129 S. Ct. at

2365; *United States v. Romeo*, 114 F.3d at 144, *cited with approval in Yeager*, 129 S. Ct. at 2365; *United States*

*v. Bailin*, 977 F.2d 270, 276-80 (7th Cir. 1992), *cited with approval in Yeager*, 129 S. Ct. at 2365; *United States*

*v. Frazier*, 880 F.2d at 883, *cited with approval in Yeager*, 129 S. Ct. at 2365; *United States v. Larkin*, 605 F.2d at 1370 n.26; *United States v. Mespoulede*, 597 F.2d at 336-37; *Green v. United States*, 426 F.2d 661 (D.C. Cir. 1970).

265 *See One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972); *see also Dowling v. United States*, 493 U.S. at 349 (1990).

266 *See Whitehead v. United States Parole Commission*, 755 F.2d 1536, 1537 (11th Cir. 1985); *Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977); *cf. United States v. Smith*, 571 F.2d 370, 373 (7th Cir. 1978) (fact of acquittal in state court did not preclude revocation of federal probation because burden of proof in state case was higher); *United States v. Chambers*, 429 F.2d 410, 411 (3d Cir. 1970) (same). *But cf. Bledsoe v. State of Washington Board of Prison Terms and Paroles*, 608 F.2d 396 (Ely, J., concurring) (expressing “deep conviction” that *Standlee* was wrongly decided); *United States v. Granelli*, 558 F.2d 1042, 1043 (1st Cir. 1977) (noting defendant’s argument and district court opinions in *Standlee* and *Barrows v. Hogan*, 379 F. Supp. 314 (M.D. Pa. 1974) but declining to consider question); *Standlee v. Rhay*, 403 F. Supp. 1247, 1252-53 (E.D. Wash. 1975), *rev’d*, 557 F.2d 1303 (9th Cir. 1977); *People v. Anzures*, 670 P.2d 1258, 1260 (Colo. 1983) (finding reasoning of district court in *Standlee* “persuasive”).

267 *See, e.g.*, *United States v. Weems*, 49 F.3d 528, 532 (9th Cir. 1995) (applying collateral estoppel in

criminal case where government had lost in prior civil forfeiture action); *see also Bies v. Bagley*, 535 F.3d 520, 526-27 (6th Cir. 2008) (Clay, J., concurring on denial of rehearing en banc) (citing and discussing *Weems* with apparent approval); *State v. Chase*, 588 A.2d 120, 122 (R.I. 1991) (noting split of authority in state courts regarding whether adverse finding at probation revocation hearing creates collateral estoppel bar against government in later criminal prosecution), *overruled by State v. Gautier*, 871 A.2d 347, 358-60 (R.I. 2005). *Contra Stringer v. Williams*, 161 F.3d 259, 262-63 (5th Cir. 1998) (finding against government in parole revocation hearing does not have collateral estoppel effect at later criminal prosecution); *Showery v. Samaniego*, 814 F.2d 200, 203 (5th Cir. 1987) (finding against government in bond violation hearing does not have collateral estoppel effect in later criminal prosecution); *United States v. Miller*, 797 F.2d 336, 341 (6th Cir. 1986) (finding against government in probation revocation hearing does not have collateral estoppel effect against government in later criminal prosecution).

Finally, because collateral estoppel applies only to “ultimate issues” determined beyond a reasonable doubt and because of the lesser foundational standard necessary for the mere introduction of evidence, collateral estoppel does not preclude the introduction of evidence in the trial of another offense involving different “ultimate issues.” *Dowling v. United States*, 493 U.S. 342, 348-50 (1990) (noting holding regarding foundational standard for Federal Rule of Evidence 404(b) in *United States v. Huddleston*, 485 U.S. 681, 689 (1988)).268 The prior acquittal may affect in limine rulings and/or create a need for limiting instructions, however.269

# MOTIONS RELATED TO GOVERNMENT MISCONDUCT

* + 1. **Extreme Investigative Methods**

Outrageous government misconduct during the investigatory stage of a criminal case that violates a defendant’s right to due process can lead to the dismissal of criminal charges under the Fourth, Fifth, and/or Fourteenth Amendments. *See United States v. Russell*, 411 U.S. 423, 431-32 (1973) (holding out the possibility that courts “may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction”). While the term “outrageous government misconduct” lacks a precise definition, the Supreme Court has pointed to shocking acts of physical brutality by law enforcement against a suspect as one example. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (vacating defendant’s conviction because police obtained evidence by breaking into the defendant’s house and forcibly extracting his stomach contents in violation of his Fourth Amendment rights, methods the Court called “too close to the rack and the screw to permit of constitutional differentiation”); *see also Huguez v. United States*, 406 F.2d 366, 381 (9th Cir, 1969) (finding a due process violation where agents forcibly extracted narcotics from defendant’s rectal cavity while other agents held him down, handcuffed and spreadeagled, on a table).

The Court has also indicated, however, that the drastic remedy of dismissal is difficult to come by absent evidence of violent, conscience-shocking tactics such as those used by law enforcement in *Rochin*. *See Hampton v. United States*, 425 U.S. 484, 495 & n.7 (1976) (Powell, J., concurring) (stating that, in the entrapment context, “[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction”). And while lower courts have recognized that extreme psychological coercion by the state and its agents could warrant dismissal of criminal charges, that remedy remains more theoretical than actual. *See United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994) (noting that “only one appellate court has employed *Russell* to bar a prosecution” and that court

268 *See also United States v. Yearwood,* 518 F.3d 220, 228-30 (4th Cir. 2008); *Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998); *United States v. Gil*, 142 F.3d 1398, 1402 & n.5 (11th Cir. 1998); *Santamaria*, 133 F.3d at 1247; *Morris*, 99 F.3d at 482 n.4; *Wright v. Whitley*, 11 F.3d 542, 545-46 (11th Cir. 1994) (noting that *Dowling* rejected broader application of collateral estoppel in some pre-*Dowling* cases); *Bailin*, 977 F.2d at 280; *United States v. Salamone*, 902 F.2d 237, 240 (3d Cir. 1990) (noting remand by Supreme Court for reconsideration of pre-*Dowling* case law).

269 *See, e.g.*, *Morris*, 99 F.3d at 482 n.4.

later disavowed its holding). While appellate courts may express discomfort with some of the more unsavory tactics employed by law enforcement, they are loath to impose the ultimate sanction.270

On the other hand, in light of widespread reports -- and lately, videotaped confirmation -- of extreme methods used by the government to obtain confessions from suspects in terrorism cases, the holding of the *Rochin* case may resonate more forcefully with courts today than it has in the past. Recently, four members of the Supreme Court, led by Justice Stevens, dissenting from a decision to dismiss the habeas petition of alleged terrorist and United States citizen terrorist Jose Padilla, decried the government’s use of extreme methods to obtain information from suspects:

[Executive detention] may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

*Rumsfield v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

# The Knowing Presentation of False Evidence

The Supreme Court has held that “a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Napue*

*v. Illinois*, 360 U.S. 264, 269 (1959). When this happens, reversal of the defendant’s conviction is a near certainty because courts do not employ a strict materiality test or a harmless error analysis. *See Alcorta*

*v. Texas*, 355 U.S. 28 (1957) (reversing conviction and death sentence where sole eyewitness lied about his romantic involvement with the victim -- lies the government condoned and covered up); *see also United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975) (holding that prosecutor’s culpability in covering up a witness’s lies “will mandate a virtual automatic reversal of a criminal conviction”).

The presentation of false evidence in a courtroom is intolerable because it perpetrates a fraud on the judge and the jury and undermines the “rudimentary demands of justice.” *Mooney v. Holohan*, 294

U.S. 103, 112 (1935). The fraud is also insupportable because of its corrosive effect on the judicial process and because the instrument of deceit is a prosecutor, “whose obligation . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

270 *See, e.g.*, *United States v. Simpson*, 813 F.2d 1462, 1464-65 (9th Cir. 1987) (overturning district

court’s dismissal of indictment because the prosecution’s knowing use of a fugitive informant who was an active drug user and prostitute, and who engaged in sexual relations with defendant as a means of obtaining evidence against him, was not sufficiently “outrageous”); *United States v. Kelly*, 707 F.2d 1460, 1461-62 (D.C. Cir. 1983) (stating that dismissal of indictment was not warranted where FBI established an “elaborate hoax” that depended upon cooperating con men who attracted targets by offering bribes); *United States v. Alexandro*, 675 F.2d 34, 40 (2d Cir. 1982) (finding no due process violation where FBI agents bribed an INS agent as part of effort to obtain evidence against him).

A prosecutor is powerful not only because of his ability to initiate a process that may well end with the taking of another person’s liberty, but also because the public views him as a paragon of virtue and integrity. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (“Within the federal system, for example, we have said that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”) (internal citation and quotation marks omitted). With this unique power, comes a unique responsibility: “to assure that defendants receive fair trials.” *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). In short, “[t]he prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules.” *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

Generally, courts respond to the knowing presentation of false evidence by reversing the defendant’s conviction and remanding for a new trial. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97 (1976) (“[T]he court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentallyunfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”); *see also United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (“Indeed, if it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic.” (internal citation and quotation marks omitted)). *Compare United States v. Bagley*, 473 U.S. 667, 682 (1985) (reversal warranted for *Brady* violation only if failure to disclose evidence undermines confidence in outcome). Still, at least one appellate court has indicated that dismissal of the indictment may be the more appropriate remedy if the perjury is pervasive and the prosecutor’s tactics particularly reprehensible. *See Kojayan*, 8 F.3d at 1325 (stating that where the false or withheld evidence “contaminated the trial” and the government’s misbehavior was egregious, dismissal of the indictment with prejudice is an appropriate remedy).

# Vouching and Other Conduct Unbecoming a Prosecutor

To serve justice, the prosecutor must play fairly, “staying well within the rules.” *United States*

*v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Because of the esteem in which a prosecutor is held and because of power a prosecutor wields, breaking the rules is misconduct which, if sufficiently pervasive, renders a trial fundamentally unfair in violation of the Constitution.

Prosecutorial misconduct can take many forms, including: (1) vouching for the credibility of a

prosecution witness by wrapping the witness in the prestige of the state;271 (2) vouching for the

credibility of a prosecution witness by implying that the witness’s testimony is supported by evidence outside the record;272 (3) commenting on the exercise of a privilege;273 (4) misstating the evidence or

271 *See, e.g.*, *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) (“An attorney may not express

his own opinions as to the credibility of the witnesses.”).

272 *See, e.g.*, *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (holding that improper vouching occurs when the prosecutor “indicate[s] that information not presented to the jury supports the witness’ testimony”).

273 *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1997) (“The Sixth Amendment’s assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceedings.” (internal citations and quotation marks omitted)).

making arguments unsupported bythe evidence;274 (5) misstating the law;275 (6) making improper attacks on the credibility of defense witnesses;276 (7) denigrating the defense;277 and (8) behaving in a generally rude, intemperate, and unprofessional manner.278

Any one of these instances of misconduct, viewed individually, may so infect the trial with

unfairness as to require reversal.279 In cases where the prosecutor’s errors are multiple, their steady

accumulation may rise by accretion to the level of reversible and prejudicial error.280

# Suppression of Favorable Evidence - *Brady* Violations

Outrageous government misconduct can also result in a violation of due process when the government suppresses evidence at trial that is “material either to guilt or punishment.” *Brady v. Maryland*, 373 U.S. 83, 86 (1963). Whether the government acted in good or bad faith is irrelevant to the analysis, for *Brady* is concerned not with prosecutorial intent, but with the defendant’s right to a fair

274 *See, e.g.*, *United States v. Watson*, 171 F.3d 695, 699 (D.C. Cir. 1999) (“It is error for counsel to make statements in closing argument unsupported by the evidence, to misstate evidence, or to misquote a witness’ testimony.”).

275 *See, e.g.*, *Derden v. McNeel*, 978 F.2d 1453, 1460 (5th Cir. 1992) (“The prosecutor admittedly

overstepped his bounds under Mississippi law when in voir dire he tried to commit the jury to evaluate the co- conspirators’ testimony like any other.”).

276 *See, e.g.*, *Hodge v. Hurley*, 426 F.3d 368, 382-83 (6th Cir. 2005) (finding that the prosecutor’s

accusations constituted misconduct because they “generally assume the truth of any statement made by the prosecution’s expert witnesses and accuse [the defense expert] of acting wrongfully and unethically or even perjuring himself, for any statements he made contradicting the testimony of the prosecution’s expert witness”).

277 *See, e.g.*, *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999) (holding that “denigrating

the defense as a sham” is prosecutorial misconduct).

278 *See, e.g.*, *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1978) (“Rules of fair play apply to all

counsel and are to be observed by the prosecution and defense alike. No counsel is to throw rocks at opposing counsel.”).

279 *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (“The relevant question is whether the

prosecutor’s comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, (1974))); *United States v. Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972) (holding that reversible error occurred where prosecutor told the jury that he “firmly believed” and “kn[e]w” that his witnesses were telling the truth).

280 *Berger v. United States*, 295 U.S. 78, 88 (1935) (reversing defendant’s conviction where prosecutorial misconduct “was pronounced and persistent, with a probable cumulative effect on the jury which cannot be disregarded as inconsequential”); *Hodge*, 426 F.3d at 384 (stating that “each instance of prosecutorial misconduct

-- and each failure to object thereto -- must not be considered in isolation”); *Watson*, 171 F.3d at 700 (“The court determines how the prosecutor’s misstatements prejudiced [the defendant] in light of the evidence presented, asking not whether the evidence was sufficient to convict notwithstanding the error, but rather whether the court can say that the error did not affect the jury’s verdict; if in ‘grave doubt,’ the court cannot affirm [the defendant’s] conviction.” (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946))).

trial. *Id*. at 87 (“The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”).

While the facts in *Brady* involved substantive exculpatory evidence, later cases have made clear that a *Brady* violation may also occur when the government fails to turn over impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence, however, as well as exculpatoryevidence, falls within the *Brady* rule.”). The prosecution’s obligation to turn over any *Brady* evidence in its possession exists regardless of whether the defendant requested the evidence. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Indeed, the prosecutor in charge of trying the case “has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

In *Strickler v. Greene*, 527 U.S. 263 (1999), the Supreme Court set forth the three essential components of a Brady prosecutorial misconduct claim: “The evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-

82. For prejudice to exist, the suppressed, favorable evidence must be “material.” *Brady*, 373 U.S. at

87. Under the materiality standard set forth in *Brady*, the accused is entitled to a new trial “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles*, 514 U.S. at 433-34.

In *Kyles*, the Supreme Court emphasized four aspects of the materiality test. *Id*. at 434. First, the Court explained that “a reasonable probability of a different result” does not require a defendant to prove “that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Id*. at 434. The burden on the defendant is less onerous: to obtain relief, he must show that because of the absence of the favorable evidence, the verdict at trial is not “worthy of confidence.” *Id*.

Second, the defendant is not required to show that, “in light of the undisclosed evidence, there would not have been enough left to convict.” *Id*. at 434-35. The Court explained that: “One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id*. at 435.

Third, a defendant who proves a *Brady* violation need not show prejudice because Brady’s materiality test folds in a prejudice analysis. *Id*. at 435-46 (“Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding might have been different, necessarily entails the conclusions that the suppression must have had [a] substantial and injurious effect or influence in determining the jury’s verdict.”) (internal citations and quotation marks omitted). In short, if the favorable evidence suppressed by the government was “material,” then it is by definition prejudicial.

Fourth, the prejudicial effect of the suppressed evidence is “considered collectively, not item by item.” *Id*. at 436. The Court indicated that this “collective” standard should encourage prosecutors to resolve close questions about the materiality of evidence in its possession in favor of disclosure. *Id*. at 439 (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose

a favorable piece of evidence.”). A government policy favoring disclosure, the Court reasoned, underscores the prosecutor’s role as a seeker of truth and justice rather than a competitor intent on winning at all costs: “It will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.” *Id*. at 439-40.

Relying on this line of precedent, and particularly on the *Kyles* decision, lower courts have

reversed convictions for *Brady* violations of all kinds.281 While most *Brady* cases deal with the

suppression of evidence relating to government witnesses or evidence presented in the government’s case-in-chief, *Brady* error may occur outside of those confines. At least one appellate court has held that the government’s discovery obligation to produce impeachment evidence may exist even if the witness is proffered by the defense. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999) (finding a *Brady/Giglio* violation where the prosecutor failed to disclose impeachment on a government informant called as a witness by the defense).

# Selective Prosecution

A claim of selective prosecution alleges that the government has charged the defendant for reasons that violate a fundamental right to equal treatment under the law. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). A selective prosecution claim falls under the equal protection clause of the Fourteenth Amendment, which forbids prosecutors from targeting an individual based upon “an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

The government is not required to provide discovery regarding selective prosecution claims unless and until the defendant establishes a prima facie case. *See Armstrong*, 517 U.S. at 456. Making out a prima facie case requires that the defendant overcome, with “clear evidence to the contrary,” the presumption that prosecutors act with good faith and integrity when seeking indictments. *Armstrong*, 517 U.S. at 464 (internal citation omitted). Clear evidence to contradict this “presumption of regularity,” consists of proof that the prosecutorial decision at issue “had a discriminatory effect and that it was

281 *See, e.g.*, *Conley v. United States*, 415 F.3d 183, 189-91 (1st Cir. 2005) (prosecution’s suppression

of “highly impeaching” FBI memorandum in which key witness “suggested he be hypnotized to ‘truly recall’” deemed material “because if disclosed and used effectively, it may make the difference between conviction and acquittal”); *Hayes v. Brown*, 399 F.3d 972, 978 & 986 (9th Cir. 2005) (en banc) (state’s suppression of its agreement to dismiss pending felony charges against a coconspirator turned state witness whose “testimony and credibility were crucial to the State’s case” was *Brady/Bagley* error requiring reversal); *Monroe v. Angelone*, 323 F.3d 286, 290-91 (4th Cir. 2003) (vacating conviction after concluding that the prosecution’s suppression of “a wealth of exculpatory evidence . . . including impeachment material, leads implicating other suspects, official documents labeling [the victim’s] death a suicide, and statements suggesting that [the victim] may have been suicidal” rose to level of a *Brady* violation); *United States v. Scheer*, 168 F.3d 445, 449-50 & 457-58 (11th Cir. 1999) (lead prosecutor’s undisclosed threat to key witness that “you are going to come through for us” or go to jail was material because “the value of [the witness’] testimony would have been considerably diminished” if the jury knew of the intimidation).

motivated by a discriminatory purpose.” *Id.* at 465 (internal citation omitted). The proof must amount to “a credible showing of different treatment of similarly situated persons.” *Id*. at 470.282

To establish that the government acted with a discriminatory purpose, the defendant must show that his prosecution “was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights.” *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006). For example, if a defendant is African American, he must show that the actions of law enforcement were racially motivated. *See, e.g.*,United *States v. Jones*, 159 F.3d 969, 977 (6th Cir. 1998) (finding discriminatory intent where arresting officer mailed the defendant a postcard “of an African American woman with bananas on her head”). To show discriminatory effect, the defendant must provide “some evidence” that the government declined to prosecute similarly situated individuals outside of the protected group to which the defendant belongs. *See, e.g.*, *id*. at 977-78 (finding that the defendant “has set forth ‘some evidence’ tending to show the existence of discriminatory effect that warrants discovery on his selective prosecution claim”).

What the Court meant by “some evidence” of discriminatory effect was open to interpretation until the Supreme Court issued a brief per curiam opinion in *United States v. Bass*, 536 U.S. 862, 863 (2002). In *Bass*, the Court held that a prima facie case of discriminatory effect cannot consist of “raw statistics” involving general charging practices. Rather, the defendant’s evidence of discriminatory effect must pertain to the specific charging practices at play in defendant’s case and in the cases of others like him. The Court stated: “Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decision makers in respondent’s case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.” *Id*.

# Vindictive Prosecution

The Due Process Clause protects defendants from vindictive treatment based on the exercise of a constitutional or statutory right. “Vindictiveness in this context means the desire to punish a person for exercising his rights.” *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006) (citing *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). “[A] superseding indictment supports a presumption of vindictiveness when the additional charges are based on the same conduct that was the subject of the first indictment, when the same sovereign was involved, and most importantly, when the decision to file increased charges directly followed the assertion of a procedural right.” *United States v. Garza-Juarez*, 992 F.2d 896, 907 (9th Cir. 1993) (citing *Adamson v. Ricketts*, 865 F.2d 1011, 1018 (9th Cir. 1983) (en banc)). “It is hornbook law that a federal court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness sufficient to establish a due process violation, or if he

282 Many commentators and practitioners have complained that the showing commanded by *Armstrong* makes it nearly impossible for any defendant to prevail on a selective prosecution claim. *See, e.g.*, Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1098 (1997[)](http://web2.westlaw.com/find/default.wl?tf=-1&amp;rs=WLW7.07&amp;referencepositiontype=S&amp;serialnum=0107954459&amp;fn=_top&amp;sv=Split&amp;tc=-1&amp;findtype=Y&amp;referenceposition=1098&amp;db=1086&amp;vr=2.0&amp;rp=%2ffind%2fdefault.wl&amp;mt=Westlaw) (“By requiring the defendant to produce specific evidence of an unprosecuted control group before granting discovery, the Court subjects the defendant to a ‘Catch 22': the defendant needs discovery to obtain the information necessary to entitle the defendant to discovery.”).

demonstrates a likelihood of vindictiveness sufficient to justify a presumption.” *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997) (internal citations omitted).

Vindictiveness is far easier to demonstrate in the post-trial context. For example, “[a] prosecutor’s decision to seek heightened charges after a defendant successfully appeals his conviction for the same conduct is presumed to be vindictive.” *Barner*, 441 F.3d at 1315-16 (citing *Blackledge v. Perry*, 417 U.S. 21 (1974)). The presumption arises because there is an “institutional bias against the retrial of a decided question,” and because the prosecutor “is likely to have had a personal stake in the first trial and to be tempted to engage in self-vindication.” *Id*. (citing *Goodwin*, 457 U.S. at 383).

Vindictive prosecution claims are “evaluated differently when the additional charges are added during pretrial proceedings, particularly when plea negotiations are ongoing, than when they are added during or after trial.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). No “institutional bias” is presumed to exist because it is assumed that a defendant will invoke a variety of procedural rights before trial and because it is more likely that a prosecutor’s view of the case will evolve for non-vindictive reasons earlier in the process, i.e., before the trial has commenced. *Goodwin*, 457 at 381-83. Thus, in the pretrial context, the prosecutor’s decision making is afforded a “presumption of regularity,” and it is the defendant’s burden to show otherwise by “clear evidence to the contrary.” *United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006) (internal citations and quotation marks omitted).

Vindictive prosecution is particularly difficult to prove where a prosecutor brings more serious charges after a defendant refuses to plead guilty to a less serious charge. Because of the paramount importance of the traditional “give and take” of plea bargaining, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), courts have uniformly held that “vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant’s exercise of a right.”

*Gamez-Orduno*, 235 F.3d at 462.283 Nonetheless, the Supreme Court has expressly left open the

possibility that a defendant could prevail on a vindictiveness claim in the pretrial context by proving “objectively that the prosecutor’s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.” *Goodwin*, 457 U.S. at 384.

# Destruction of Evidence

The constitutional guarantee of due process affords criminal defendants the right to a fair trial, and that includes access to evidence that allows them “to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 485 (1984). “To safeguard that right, the Court has developed ‘what might loosely be called the area of constitutionally guaranteed access to evidence.’” *Id*. (quoting *United States*

*v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). A due process violation may arise where the state loses or destroys such evidence. *Arizona v. Youngblood*, 488 U.S. 51, 55-58 (1988). To prevail on a

283 S*ee also United States v. Gastelum-Almeida*, 298 F.3d 1167, 1172 (9th Cir. 2002) (recognizing that no vindictive prosecution lies where prosecutors “threaten increased charges during the course of plea negotiations and, if a guilty plea is not forthcoming, make good on that threat” (citing *Gamez-Orduno*, 235 F.3d at 462-63)); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001) (“The fact that the prosecution eventually charged [the defendant] under § 1326, after [he] refused to plead guilty [to a lesser charge of 8 U.S.C. § 1325], does not create a presumption of vindictiveness.”).

destruction or loss of evidence claim, the defendant must show three things: (1) the government acted in bad faith when it destroyed or lost the evidence; (2) the lost or destroyed evidence possessed an apparent exculpatory value; and (3) the evidence is irreplaceable. *See Youngblood*, 488 U.S. at 58; *Trombetta*, 467 U.S. at 488-89. If the defendant can clear these hurdles, he may obtain a reversal of his conviction and a new trial. *See, e.g.*, *United States v. Dumas*, 207 F.3d 11, 17-18 (1st Cir. 2000).

To prove bad faith on the part of the government, the defendant must show that police had “knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” *Youngblood*, 488 U.S. at 56 n.\*.284 This showing can be made where “the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” *Youngblood*, 488 U.S. at 58. It is not enough that specific instructions to preserve evidence “were carried out very poorly,”285 or that the government’s agents acted negligently,286 or that evidence was destroyed in violation of an unequivocal

court directive.287 The loss or destruction of the evidence must be intentional and must occur with

knowledge that the evidence was favorable to the defendant. *See Youngblood*, 488 U.S. at 58; *Henry*

*v. Page*, 223 F.3d 477, 481 (7th Cir. 2000). “Thus, in missing evidence cases, the presence or absence of bad faith by the government will be dispositive.” *United States v. Ossai*, 485 F.3d 25, 28 (1st Cir. 2007) (internal citations and quotations omitted).

The requirement that the evidence have exculpatoryvalue demands a showing of materiality, i.e., a showing by the defendant that the evidence was “material to his defense.” *Henry*, 223 F.3d at 481. The “mere possibility” that the lost or destroyed evidence is exculpatory does not meet the materiality standard. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976). The defendant must show more, what has been described as “a colorable claim” that the discarded evidence “contained exculpatory material to his claim of innocence or to the applicable punishment.” *United States v. Griffin*, 659 F.2d 932, 939

(9th Cir. 1981).288 The exculpatory value of the evidence must have been apparent before it was lost or

destroyed. *Trombetta*, 467 U.S. at 489. A defendant may demonstrate the materiality of the lost or destroyed evidence “bywayof examination of the agents, interviewees, and other available documentary evidence.” *Griffin*, 659 F.2d at 939.

Finally, the defendant must show that the lost or destroyed evidence is irreplaceable, that is, “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 489. If the lost or destroyed evidence is “cumulative to the testimony of available witnesses,” *Valenzuela-Bernal*, 458 U.S. at 873, or defendant has “alternative means of demonstrating [his] innocence,” then the evidence is not irreplaceable and no due process violation has been proved. *Trombetta*, 467 U.S. at 490.289

284 S*ee also In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1997).

285 *United States v. Revolorio-Ramo*, 468 F.3d 771 (11th Cir. 2006).

286 *See Tyler v. Purkett*, 413 F.3d 696, 702 (8th Cir. 2005).

287 S*ee United States v. Ramos*, 27 F.3d 65, 66-71 (3d Cir. 1994).

288 *See also Ramos*, 27 F.3d at 71 (following *Griffin)*.

289 S*ee also Grisby v. Blodgett*, 130 F.3d 365, 371-72 (9th Cir. 1997); *Revolorio-Ramo*, 468 F.3d at 774.

# Use of Supervisory Powers to Punish Government Misconduct

If government misconduct does not rise to the level of a constitutional violation, a federal court is nonetheless permitted to dismiss the indictment in an exercise of its supervisory powers if the misconduct is sufficientlyegregious. *See United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991). The supervisory power allows federal courts “within limits, [to] formulate procedural rules not specifically required by the Constitution or the Congress.” *United States v. Williams*, 504 U.S. 36, 45 (1992) (internal citation and quotation marks omitted). These judge-made rules are designed “to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and finally, as a remedy designed

to deter illegal conduct.” *United States v. Tucker*, 8 F.3d 673, 674-76 (9th Cir. 1993).290 The Supreme

Court has emphasized, however, that courts should proceed “with some caution” and with an eye toward “balancing the interests involved” before using the supervisory power to put an end to a criminal prosecution. *United States v. Hasting*, 461 U.S. 499, 506-07 (1983) (quoting *United States v. Payner*, 447 U.S. 727, 734-36 (1980) (exercise of supervisory power to overturn convictions was error where prosecutorial misconduct did not warrant so drastic a remedy and court failed to take into account trauma to victims of a retrial)). Appellate courts have stressed the high standard that must be met before criminal charges can be dismissed with prejudice under a court’s supervisory power.291

Animating the supervisory power of the judiciary is the overarching principle that “judges exercise substantial discretion over what happens *inside* the courtroom.” *Simpson*, 927 F.2d at 1090-91. It is important to note, however, that the misconduct need not have occurred during the trial itself. The exercise of a court’s supervisory power is intended “to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules governing matters apart from the trial itself.” *Williams*, 504 U.S. at 46.

290 Other purposes have been recognized, however. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32,

46 (1991) (district courts have inherent power to punish bad faith conduct by awarding attorneys’ fees to the other side); *Thomas v. Arn*, 474 U.S. 140, 142, 146-47 (1985) (circuit courts have inherent power to establish a rule that “the failure to file objections to the magistrate’s report waives the right to appeal the district court’s judgments”); *United States v. W.R. Grace*, 526 F.3d 499, 511 n.9 (9th Cir. 2008) (en banc) (district court had authority to issue pretrial order requiring government to disclose finalized list of witnesses more than a year in advance of trial).

291 *See, e.g.*, *United States v. Stokes*, 124 F.3d 39 (1st Cir. 1997) (“Such a drastic step is reserved for

cases of serious and blatant prosecutorial misconduct that distorts the integrity of the judicial process.” (internal citation and quotation marks omitted)); *United States v. Goodson*, 204 F.3d 508 (4th Cir. 2000) (holding “that there must be a show of prejudice to the defendant or a substantial threat thereof before a court may dismiss an indictment with prejudice”); *United States v. Johnson*, 26 F.3d 669, 682-83 (7th Cir. 1994) (noting that dismissal of an indictment pursuant to the supervisory power is “an extreme sanction” that is inappropriate where government’s misconduct, if any, did not prejudice the defendant); *United States v. Ross*, 372 F.3d 1097, 1110 (9th Cir. 2004) (to warrant dismissal, the misconduct at issue must be both “flagrant” and “substantially prejudicial to the defendant”).

# MOTIONS RELATED TO DISCOVERY

* + 1. **Motion to Compel Discovery**

The starting point for most discovery motions is an informal request for discovery, usually in a letter or memorandum to the prosecutor. Indeed, some judges require that counsel seek to resolve discovery requests informally prior to making a discovery motion. Some of the government’s discovery obligations are not triggered unless and until a request is issued. Finally, written requests document exactly what the defense has requested so there can be no dispute -- or at least less of a dispute -- about what has been requested.

Discovery requests should be framed as “continuing requests” to remind the government that its obligation continues up until, and during, trial. *See* FED. R. CRIM. P. 16(c). Rule 16(c) requires the Government to reveal the existence of discoverable material the moment it is discovered, regardless of whether it is in the Government’s possession.

Many defense lawyers use boilerplate discovery request letters which request all discovery to which counsel is entitled under the Federal Rules of Criminal Procedure, the Jencks Act, and the United States Constitution. Using a boilerplate discovery letter can be a good practice as it ensures that the government will not fail to produce discovery on the ground that it was not requested. More targeted discovery requests tailored to the needs of each case may also be useful, however. After reviewing the initial discovery sent bythe prosecutor, defense counsel should supplement the initial request byseeking:

(1) materials referred to but not produced; and (2) material that may support a defense that the initial discovery, or independent defense investigation, suggests.

Keep in mind that requests for discovery from the government can trigger a reciprocal discovery obligation for the defense. *See* FED. R. CRIM. P. 16(b)(1)(A), (B), (C)(i). Prior to requesting discovery under Rule 16, defense counsel should be satisfied that producing reciprocal discovery would not prejudice the client, or that the prejudice would be outweighed by the value of the discovery sought.

Where informal efforts to obtain pretrial discovery fail, defense counsel should file a written motion identifying the material sought and the legal authority that requires its production. Discovery motions must be made in writing under most circumstances, FED. R. CRIM. P. 47(b), and must be made prior to trial, FED. R. CRIM. P. 12(b)(3)(E). Judges have discretion to set deadlines for the filing and hearing of pretrial discovery motions under Federal Rule of Criminal Procedure 12(c). When a judge is assigned to the case, counsel should check the local rules and the judge’s standing order to determine how the judge prefers to handle pretrial motions.

# Order Compelling Production of Discovery

In most cases the appropriate order to seek in a discovery motion is an order compelling the government to produce the requested discovery. Rule 16(d)(2)(A) allows the court to “order [the government] to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions.” Defense counsel can use Rule 16(d)(2)(A) not only as a means of obtaining discovery, but also as a means of precluding last-minute production of discovery. If the

government fails to produce the requested discovery by the deadline set by a court order, counsel can request that the evidence be excluded at trial. *See* FED. R. CRIM. P. 16(d)(2)(C).

With the exception of Rule 16(a)(1)(D), which requires the government to “furnish the defendant with a copy of the defendant’s criminal record,” neither Rule 16 nor any other rule requires the government to make photocopies of discoverable materials, see *United States v. Freedman*, 688 F.2d 1364, 1366 (11th Cir. 1982); rather it need only make the material available for copying, see FED. R. CRIM. P. 16(a)(1)(B) (government must “make available for inspection, copying, or photocopying” defendant’s statements); FED. R. CRIM. P. 16(a)(1)(E) (government “must permit the defendant to inspect and to copy or photograph” documents and objects). Disputes may arise where the government has voluminous discovery and refuses to pay the cost of making copies. Courts have discretion to require the government to produce copies of voluminous discovery to indigent defendants. *United States v. Jordan*, 316 F.3d 1215, 1249 n.79 (11th Cir. 2003).292

In child pornography cases, the government may resist producing copies of the actual child pornography -- usually in the form of computer media -- or require defense counsel to inspect the material under closely regulated conditions. Title 18 U.S.C. § 3509(m) requires trial courts to deny a defense request for a copy of child pornography pursuant to Rule 16 “so long as the government makes the property or material reasonably available to the defendant.” 18 U.S.C. § 3509(m)(2)(A). Where an expert needs to conduct a thorough forensic analysis of the material outside the presence of government agents, defense counsel should consider seeking an order challenging § 3509(m) and/or requiring that copies of the material be provided on the ground that the material would not otherwise be “reasonably available” to the defendant. Most courts addressing this issue have upheld § 3509(m) against constitutional challenges and used it to deny a defense motion for such discovery,293 but some courts have ordered a copy provided where it cannot be, or has not been, made reasonably available.294

Defense counsel may also request a pretrial order compelling the government to produce a

witness list, which is not required by Rule 16, but may be ordered by a court in its discretion.295 Defense

counsel must show that a witness list is material to preparing a defense and that failing to order

292 *See, e.g.*, *United States v. Lino*, No. 00 CR. 632 (WHP), 2001 WL 8356, at \*18-19 (S.D.N.Y. Jan.

2, 2001); *United States v. Green*, 144 F.R.D. 631, 637 (W.D.N.Y. 1992).

293 *See, e.g.*, *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008); *United States v. Spivack*, 528

F. Supp. 2d 103 (E.D.N.Y. 2007); *United States v. Flinn*, 521 F. Supp. 2d 1097 (E.D. Cal. 2007); *United States*

*v. Doane*, 501 F. Supp. 2d 897 (E.D. Ky. 2007); *United States v. O’Rourke*, 470 F. Supp. 2d 1049 (D. Ariz. 2007); *United States v. Johnson*, 456 F. Supp. 2d 1014 (N.D. Iowa 2006).

294 *See, e.g.*, *United States v. Knellinger*, 471 F. Supp. 2d 640 (E.D. Va. 2007); *cf. United States v. Hill*, 322 F. Supp. 2d 1081, 1091-92 (C.D. Cal. 2004) (Kozinski, J.) (pre-3509(m) case requiring government to provide copy of computer materials, with sample protective order in appendix).

295 *See, e.g.*, *United States v. W. R. Grace,* 526 F.3d 499, 513 (9th Cir. 2008) (en banc); *United States*

*v. Fletcher*, 74 F.3d 49, 54 (4th Cir. 1996); *United States v. Napue*, 834 F.2d 1311, 1331 (7th Cir 1987 ); *United States v. Armstrong*, 621 F.2d 951, 954-55 (9th Cir. 1980); *United States v. Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975).

production of a witness list would prejudice the defendant.296 Courts are more likely to use their

discretion to order production of a government witness list where the defense can show that the traditional reasons for allowing the government to conceal the names of its witnesses prior to trial -- a risk that the government’s witnesses would be threatened or less likely to testify if their names were

disclosed -- is not present in a given case.297 Courts have also ordered the early production of exhibit

lists in complex cases where voluminous discovery has been produced and providing an exhibit list would promote an efficient and fair trial.298

While the government’s obligation to produce the prior statements of its witnesses under the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedures does not arise until after the witness has testified, see FED. R. CRIM. P. 26.2; 18 U.S.C. § 3500, counsel may wish to negotiate early

production of Jencks material.299 Where such an agreement is negotiated, courts can enforce it despite

the fact that neither the statute nor the rule require it.300 Courts also encourage early production of

Jencks statements even though it is not required, to avoid delays during trial.301 If the government does

not produce Jencks statements until after a witness testifies, defense counsel should request a continuance to review the statements and prepare for cross-examination. *See* FED. R. CRIM. P. 26.2(d) (“Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.”); 18 U.S.C. § 3500(c) (same).

*Brady* and *Giglio* material, discussed in more detail in Chapter 3, Discovery, may or may not have to be produced in advance of trial. Courts have held that *Brady* material must be produced in such a way that ensures it “can be effectively presented at trial and the defendant is not prevented by lack of time to make needed investigation.” *United States v. Kaplan*, 554 F.2d 577, 580 (3d Cir. 1977). Defense counsel should seek a court order for pre-trial production of *Brady* and *Giglio* material on the ground that in order for the disclosure of exculpatory material to be meaningful, counsel must have

296 *See United States v. Richter*, 488 F.2d 170, 175 (9th Cir. 1973).

297 *See, e.g.*, *United States v. Falkowitz*, 214 F. Supp. 2d 365, 392-93 (S.D.N.Y. 2002) (ordering

government to provide witness list 30 days before trial where four defendants were tried together, case was complex and document intensive, and there was no indication that producing witness list would lead to witness tampering or make witnesses less likely to testify).

298 *See, e.g.*, *Falkowitz,* 214 F. Supp. 2d at 392-93.

299 In some districts, the government routinely produces all or most Jencks statements in advance of trial,

sometimes with and sometimes without an agreement by the defense to do likewise.

300 *See United States v. Lopez*, 147 F.3d 1, 5 (1st Cir. 1998); *United States v. Mavrokordatos*, 933 F.2d

843 (10th Cir. 1991).

301 *See United States v. Minsky*, 963 F.2d 870, 876-80 (6th Cir. 1992) (“[T]he better practice – and that followed in most federal courts today – is for the government to produce such material well in advance of trial

. . . .”).

access to it with enough time to conduct additional investigation and incorporate the material into trial preparation.302

# Motion for Sanctions for Violation of Discovery Order

When the Court resolves a discovery dispute in favor of the defense and the government fails to comply, counsel should move for sanctions under Rule 16(d)(2). Counsel need not limit the relief sought to the remedies specifically listed in Rule 16(d) because courts have broad discretion to “enter any other order that is just under the circumstances.” FED. R. CRIM. P. 16(d)(2)(D).

When determining the appropriate sanction, courts generally consider: (1) whether the government acted in bad faith; (2) the extent to which the defendant is prejudiced by the nondisclosure

of evidence; and (3) whether the prejudice can be cured by a continuance.303 Courts are required to

impose the least restrictive sanction necessary to cure prejudice to the defendant and ensure compliance with their discovery orders.304

One of the sanctions or remedies provided for in Rule 16(d) is a continuance of the trial. *See*

FED. R. CRIM. P. 16(d)(2)(B). Where granting a continuance is thought to be sufficient to alleviate

prejudice to the defense, courts generally do that rather than impose more severe sanctions.305 Defense

counsel should generally request this as an alternative remedy even if it is less desirable, because appellate courts have held that failure to request a continuance waives the argument that the late disclosure of the evidence was prejudicial.306

Still, where a discovery violation is particularly severe or interferes with trial preparation -- or where a continuance is also prejudicial defense counsel should request an order excluding the evidence. *See* FED. R. CRIM. P. 16(d)(2)(c). Courts are more likely to exclude evidence where it was withheld willfully and in bad faith.307 Courts have also justified excluding evidence as a discovery sanction where

302 *See, e.g.*, *United States v. Aiken*, 76 F. Supp. 2d 1339, 1344 (S.D. Fla 1999) (ordering government

to produce *Giglio* material in capital case ten days prior to trial); *United States v. Beckford*, 962 F. Supp. 780, 793 (E.D. Va. 1997) (ordering government to produce all *Brady* material three days prior to jury selection and certain other evidence even earlier).

303 *United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006); *United States v. Wicker*, 848 F.2d 1059

(10th Cir. 1988); *see, e.g.*, *United States v. Lanoue*, 71 F.3d 966, 977 (1st Cir. 1995) (defendant “was prejudiced because the failure to disclose his statements deprived him of the opportunity to effectively prepare for trial and to design an intelligent trial strategy”).

304 *United States v. Bishop*, 469 F.3d 896, 905 (10th Cir. 2006).

305 *See, e.g.*, *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002); *United States v.*

*Marshall*, 132 F.3d 63, 69 (D.C. Cir. 1998).

306 *See, e.g.*, *United States v. Warren*, 454 F.3d 752, 760-61 (7th Cir. 2006); *United States v. Stevens,*

380 F.3d 1021, 1026 (7th Cir. 2004); *United States v. Janis*, 387 F.3d 682, 690 (8th Cir. 2004); *United States v.*

*Wilson*, 160 F.3d 732, 741 (D.C. Cir. 1998).

307 *See, e.g.*, *United States v. Muessig*, 427 F.3d 856, 864 (10th Cir. 2005) (exclusion of government

exhibit as sanction for failure to produce it prior to trial pursuant to FED. R. CRIM. P. 16(a)(1)(E)); *United States*

granting a continuance would unduly disrupt the trial schedule or interfere with the court’s docket.308 And in rare cases, courts have imposed the ultimate sanction of dismissal for willful refusal by the government to satisfy its discovery obligations.309

# Freedom of Information Act Requests (5 U.S.C. § 552)

The Freedom of Information Act (“FOIA”), codified at 5 U.S.C. § 552, provides for public access to government documents unless certain exceptions apply. Counsel should consider whether information helpful to preparing for a criminal case can be obtained through a FOIA request. *See United States v. Wahlin*, 384 F. Supp. 43, 47 (W.D. Wis. 1974) (“[J]udicial economy and basic fairness demand that a defendant in a criminal action have available to him the information he is entitled to as an ordinary member of the public.”) *But see United States v. United States Dist. Court, Cent. Dist.*, 717 F.2d 478, 481 (9th Cir. 1983) (“[I]n criminal cases the Freedom of Information Act does not extend the scope of discovery permitted under Rule 16.”). A FOIA request should be issued to the federal agency in possession of the information sought. If the request is denied, there is an administrative appeal procedure which must be exhausted prior to litigating the issue in federal court. 5 U.S.C. § 552(a)(6)(A)(i), (C).

A common obstacle to obtaining information through FOIA that is relevant in a defense case is 5 U.S.C. § 552(b)(7)(A), which exempts “investigatory records compiled for law enforcement purposes” where disclosure of the records would interfere with a federal investigation, be an unwarranted invasion of privacy, reveal a confidential government source, reveal federal law enforcement techniques, or endanger any person. Counsel should craft FOIA requests carefully to avoid the application of this provision.

# MOTIONS RELATED TO PRODUCTION OF WITNESSES AND EVIDENCE

* + 1. **Rule 17 Subpoenas**

Rule 17(b) of the Federal Rules of Criminal Procedure provides that the court shall order the issuance of a subpoena if the defendant: (1) makes a satisfactory showing of financial inability to pay the fees of the witness; and (2) demonstrates “the necessity of the witness’s presence for an adequate

*v. Danielson*, 325 F.3d 1054, 1075 (9th Cir. 2003); *United States v. Davis*, 244 F.3d 666, 673 (8th Cir. 2001) (government “acted in reckless disregard of the discovery deadline” when it produced DNA evidence only two days before trial was set to commence and it “offered no explanation for its failure to comply.”); *United States v. Cruz-Velasco*, 224 F.3d 654, 665 (7th Cir. 2000).

308 *See United States v. Iskander*, 407 F.3d 232, 239 (4th Cir. 2005); *Davis*, 244 F.3d at 670-673; *United States v. Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001); *United States v. Russell*, 109 F.3d 1503, 1511 (10th Cir. 1997).

309 *See, e.g.*, *Virgin Islands v. Fahie*, 419 F.3d 249, 258 (3d Cir. 2005) (trial court may dismiss

indictment for violation of Rule 16 under its inherent supervisory power); *United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) (noting that courts can dismiss actions where government attorneys have “willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice” (quoting *United States v. Nat’l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir. 1986))).

defense.” FED. R. CRIM. P. 17(b). Counsel should remember that there are also constitutional rights underlying the rule, namely, the Sixth Amendment right to compulsory process and the Fifth Amendment right not to be subject to disadvantages in the criminal justice system because of financial

status.310 At least some circuits have held that this places limits on the trial court’s exercise of

discretion.311

# Subpoenas for Witnesses

Several circuits have articulated the showing of “the necessity of the witness’s presence for an adequate defense” which Rule 17(b) requires as follows: “The accused avers facts which, if true, would be relevant to any issue in the case, . . . unless the averments are inherently incredible on their face, or unless the government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.” *United States v. Sims*, 637 F.2d 625,

627 (9th Cir. 1980) (quoting *Greenwell v. United States*, 317 F.2d 108, 110 (D.C. Cir. 1963)).312 There

are limits, however; an application for a subpoena may be denied when the request is untimely, when the testimony sought is cumulative, when the defendant has failed to make a satisfactory showing as required by the rule, or when the requested subpoena would be oppressive and unreasonable. *Sims*, 637 F.2d at 629 (citing cases).

As for the geographic reach of subpoenas, the subpoena power of a federal court in a criminal case is much broader than in civil cases or in state court. Subsection (e)(1) of Rule 17 provides that a subpoena may be served “at any place within the United States.” FED. R. CRIM. P. 17(e)(1). A witness in custody may be brought to court to testify pursuant to a writ of habeas corpus ad testificandum,313

310 *See United States v. Cruz-Jimenez*, 977 F.2d 95, 99-100 (3d Cir. 1992); *United States v. Sims*, 637

F.2d 625, 629 (9th Cir. 1980); *United States v. Barker*, 553 F.2d 1013, 1019 (6th Cir. 1977); *Welsh v. United*

*States*, 404 F.2d 414, 417 (5th Cir. 1968); *cf. United States v. Greschner*, 802 F.2d 373, 378 (10th Cir. 1986) (“In our view, the Fifth and Sixth Amendments require that the trial court give due consideration to the constitutional rights involved.”); *see also Thor v. United States*, 574 F.2d 215, 218 (5th Cir. 1978) (because right to subpoena witnesses afforded by Rule 17 “rests ultimately upon the Sixth Amendment guarantee of compulsory process,” violation of right may be cognizable in habeas petition).

311 *See Cruz-Jimenez*, 977 F.2d at 100-01; *Sims*, 637 F.2d at 629; *Barker*, 553 F.2d at 1019; *Welsh*, 404 F.2d at 417. *But cf. Greschner*, 802 F.2d at 378 (recognizing “the constitutional rights involved” but declining to follow *Sims* and other cases); *United States v. Wyman*, 724 F.2d 684, 686 (8th Cir. 1984) (reviewing court should not reverse trial court’s refusal to issue subpoenas, “unless the exceptional circumstances of the case indicate that the defendant’s right to a complete, adequate and fair trial is jeopardized”).

312 *See also Cruz-Jimenez*, 977 F.2d at 103; *Barker*, 553 F.2d at 1020; *Welsh*, 404 F.2d at 417. *But cf. Greschner*, 802 F.2d at 378 (“Despite such statements in [*Sims* and other opinions], we consider the circumstances and correctness of the rulings on subpoenas under the abuse of discretion standard.”); *Wyman*, 724 F.2d at 686 n.3 (“declin[ing] to adopt the narrower standard adopted in some circuits limiting the trial court’s discretion in granting or denying Rule 17(b) motions”).

313 *See Cruz-Jimenez*, 977 F.2d at 100-01 (applying Rule 17(b) standards to motion for writ of habeas

corpus ad testificandum); *United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991) (same); *United States v. Rinchack*, 820 F.2d 1557, 1567 (11th Cir. 1987) (same); *United States v. Rigdon*, 459 F.2d 379, 380 (6th Cir. 1972) (same); *see also United States v. Garmany*, 762 F.2d 929, 934 n.4 (11th Cir. 1985) (“Presumably, Rule

though courts have suggested additional considerations of security and expense in the case of inmate witnesses.314

As for witnesses in foreign countries, subsection (e)(2) of Rule 17 references 28 U.S.C. § 1783, which gives federal courts the power to issue subpoenas for “a national or resident of the United States

who is in a foreign country.” 18 U.S.C. § 1783.315 If a foreign witness is not subject to subpoena

pursuant to 28 U.S.C. § 1783, but the witness is willing to come voluntarily, there are procedures for paying the witness’s travel expenses through a Department of Justice office known as the Special Authorizations Unit, which is separate from the Department’s criminal prosecution arm. *See* U.S. Dept. of Justice, U.S. Marshals Service, Public Defender’s Handbook 10 (USMS Pub. No. 74 Sept. 1997). If the witness is not willing to come, but will give a deposition in the foreign country, that may be an option. *See infra*, Section 6.10.02 .316

Finally, applications for subpoenas under Rule 17(b) may be made ex parte, under a 1966 amendment to the rule. *See* FED. R. CRIM. P. 17(b) (“Upon a defendant’s ex parte application, ”).317

17's procedural considerations would apply to issuance of a writ of habeas corpus ad testificandum”). For general discussions of writs of habeas corpus ad testificandum and/or their history, see *United States v. Moussaoui*, 382 F.3d 453, 464-65 (4th Cir. 2004), and *Ballard v. Spradley*, 557 F.2d 476, 479-80 (11th Cir. 1977).

314 *See United States v. Wright*, 63 F.3d 1067, 1070 (11th Cir. 1995) (courts should consider additional

factors such as security risks and expense of transportation); *Smith*, 924 F.2d at 896 (courts may consider “the difficulties in securing a prisoner’s testimony versus the actual need for testimony”); *Rigdon*, 459 F.2d at 380 (courts may consider “the expense to the government and more particularly the danger to the public inherent in transporting inmates over these distances”).

315 *See also Blackmer v. United States*, 284 U.S. 421 (1932) (upholding constitutionality of statute).

*Compare United States v. Theresius Filippi*, 918 F.2d 244, 246 n.2 (1st Cir. 1990) (foreign nationals residing outside United States not subject to subpoena power of federal courts); *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) (same).

316 In theory, a foreign witness may be *compelled* to give a deposition, at least in some countries in some circumstances, through what are known as letters rogatory. *See, e.g.*, *United States v. Sensi*, 879 F.2d 888, 899 (D.C. Cir. 1989); *United States v. Bastanipour*, 697 F.2d 170, 178 n.3 (7th Cir. 1982); *cf. United States v. Mejia*, 448 F.3d 436, 445 (D.C. Cir. 2006) (noting defense could have asked district court to issue letters rogatory to Costa Rican court to obtain any tapes or transcripts that may have existed); *United States v. Yousef*, 327 F.3d 56, 113 n.46 (2d Cir. 2003) (noting defendant could have asked district court to issue letters rogatory to obtain documentary evidence in foreign country pursuant to 28 U.S.C. § 1781); *see generally United States v. Steele*, 685 F.2d 793, 809 (3d Cir. 1982); *United States v. Reagan*, 453 F.2d 165, 171-73 (6th Cir. 1971). This is an extremely cumbersome and difficult process, however. *See, e.g.*, *United States v. Croft*, 124 F.3d 1109, 1118 (9th Cir. 1997) (referencing “the delay that would have attended the usual process employing letters rogatory”); *Bastanipour*, 697 F.2d at 178 (noting delay of trial to allow time for letters rogatory to be transmitted and returned and eventual commencement of trial without response because of delay). *See generally* 1 BRUNO RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 3-3-5 (2000 rev.) (“This author knows of no instance where a Letter of Request issued by an American court, transmitted through the diplomatic channel, was successfully executed and led to the production of admissible evidence abroad without the aid of foreign counsel.”).

317 *See also United States v. Scott*, 223 F.3d 208, 211 (3d Cir. 2000); *United States v. Estrada*, 829 F.2d 1127 (table), 1987 WL 44857, at \*3 (6th Cir. Sept. 24, 1987); *Greschner*, 802 F.2d at 379-80; *United States v.*

“Ex parte” in this context has the traditional meaning of an application made in the absence of the other

party.318 The right to apply ex parte presumably also applies to applications for writs of habeas corpus

ad testificandum for inmate witnesses, since the other provisions of Rule 17(b) are applied to applications for such writs.319

# Subpoenas for Documents

Under Rule 17(c), subpoenas may require the production of documents as well as the appearance of witnesses. A subpoena for documents must satisfy three requirements: (1) that the documents subpoenaed be relevant; (2) that the documents subpoenaed be admissible; and (3) that the subpoena be

specific. *United States v. Nixon*, 418 U.S. 683, 700 (1974).320 There need not be certainty regarding

these requirements, however, since the defense does not yet have the documents and may not be sure of their contents. *See Nixon*, 418 U.S. at 700 (subpoena for tape recordings of conversations proper where “sufficient likelihood” that tapes contained relevant conversations and “sufficient preliminary showing” that tapes contained admissible evidence).321

Rule 17(c) also provides that a court may, but does not have to, order production of subpoenaed records prior to trial and allow counsel to inspect them at that time. The Supreme Court has stated that

*Espinoza*, 641 F.2d 153, 158 (4th Cir. 1981); *United States v. Meriwether*, 486 F.2d 498, 505-06 (5th Cir. 1973);

*Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968); *cf. United States v. Eskridge*, 456 F.2d 1202, 1204 (9th Cir. 1972) (describing trial court procedure of ordering FBI to secure statements from witnesses in advance of issuance of defense subpoenas as practice that “might seem to be questionable”); FED. R. CRIM. P. 17 advisory committee’s note (1966 amendment) (noting criticism of requirement that indigent defendant disclose theory of defense in order to obtain subpoenas at government expense and noting change in rule to allow ex parte application instead of requiring motion supported by affidavit). *But cf. United States v. Smith*, 436 F.2d 787, 790 (5th Cir. 1971) (“fully approv[ing]” of district court’s direction that all witnesses be interviewed by government agents; “that an ex parte application may be made by a defendant does not . . . require the court to accept what is said in the application as gospel and forbid resorting to other sources to test the veracity of the averments.”); *United States v. Panczko*, 429 F.2d 683, 689 (7th Cir. 1970) (district court did not violate Rule 17(b) by requiring general information about what the witnesses would testify about and presence of government attorneys did not prejudice defendant; distinguishing *Holden* because “[w]hat was requested was not discovery of defendant’s evidence”).

318 *See Meriwether*, 486 F.2d at 505-06; *Holden*, 393 F.2d at 278.

319 *See Scott*, 223 F.2d at 210-11 (noting, with apparent approval, district court’s use of ex parte

procedure in Rule 17(b) for transfer of witness from state prison, but not reaching question of whether government’s discovery and interview of witness was violation of rule).

320 *See also United States v. Morris*, 287 F.3d 985, 991 (10th Cir. 2002); *United States v. Hardy*, 224

F.3d 752, 755 (8th Cir. 2000); *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992); *United States v.*

*Hughes*, 895 F.2d 1135, 1145-46 (6th Cir. 1990); *In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988);

*United States v. Larouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988); *United States v. Reed*, 726 F.2d 570,

577 (9th Cir. 1984).

321 *See also Larouche Campaign*, 841 F.2d at 1179 (quoting *Nixon* and placing emphasis on “sufficient likelihood” and “sufficient preliminary showing”).

this provision is not intended as an additional discovery device, but is a means of obtaining evidence and “expedit[ing] the trial by providing a time and place before trial for the inspection of subpoenaed

materials.” *Nixon*, 418 U.S. at 698-99.322 The defense does not need to be certain that the documents

will be admissible, so long as “the application is made in good faith and is not intended as a general ‘fishing expedition.’” *Nixon*, 418 U.S. at 700.323

The defense must also show that: (1) the subpoenaed documents “are not otherwise procurable reasonably in advance of trial by exercise of due diligence” and; (2) the defendant “cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain

322 *See also Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 & n.5 (1951); *United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996); *Arditti*, 955 F.2d at 345; *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). *But cf. United States v. Nachamie*, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000) (“Rule 17(c) may well be a proper device for discovering documents in the hands of third parties); *United States v. Tomison*, 969 F. Supp. 2d 587, 593 n.14 (E.D. Cal. 1997) (same).

323 *See also Bowman Dairy*, 341 U.S. at 219-20 (“That is not to say that the materials thus subpoenaed

must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence.”); *Cuthbertson*, 630 F.2d at 144 (“The test for enforcement is whether the subpoena constitutes a good faith effort to obtain identified evidence rather than a general ‘fishing expedition’ that attempts to use the rule as a discovery device.”); *see, e.g.*, *In re Martin Marietta Corp.*, 856 F.2d at 622; *In re Irving*, 600 F.2d 1027, 1034 (2d Cir. 1979); *cf. United States v. McGrady*, 508 F.2d 13, 18 (8th Cir. 1974) (court should not have quashed subpoena duces tecum on ground that subpoenaed evidence was merely cumulative but ought to have allowed defendant the opportunity to examine material to determine for himself). *Compare United States v. Bueno*, 443 F.3d 1017, 1026 (8th Cir. 2006) (subpoena properly quashed where defendant conceded that “he did not know the precise nature of the information sought by the subpoena”); *Morris*, 287 F.3d at 991 (where defendant was “unable to specify what the items he requests contain” and “unable to verify the requested material even exists,” request for entire file was “impermissible fishing expedition”); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (rejecting defendants’ argument that there was “chicken or egg” dilemma because they could not establish elements for their proposed necessity defense “unless they were allowed their fishing expedition”); *Hardy*, 224 F.3d at 755-56 (Rule 17(c) requirements not satisfied where defendant “cannot set forth what the subpoenaed materials contain” but simply “speculates that the tapes would establish whether or not the [confidential informant] was present at the attempted narcotics transaction”); *Hang*, 75 F.3d at 1283 (Rule 17(c) subpoena cannot be issued based upon “mere hope” that documents will produce favorable evidence (quoting *Cuthbertson*, 630 F.2d at 146)); *Arditti*, 955 F.2d at 346 (where defendant “has not set forth what the subpoena’s materials contain,” it appeared defendant was attempting “to use subpoena to gain knowledge he could not obtain under [discovery rules]” and so subpoena properly quashed); *Reed*, 726 F.2d at 577 (subpoena properly quashed where defendants “did not request specific documents, but sought entire arson investigation files”). *But cf. Thor v. United States*, 574 F.2d 215, 221 (5th Cir. 1978) (assuming court possesses power to subpoena address book “if only to determine to a certainty whether the witnesses who had relevant testimony . . . could be located”). In considering these cases, counsel should keep in mind that the reported cases usually affirm whatever the district court decision was, based on the broad discretion granted to the trial judge because he or she “is on the firing line and has acquired a special ‘feel’ for the case” and so “is uniquely equipped to synthesize the competing demands and factors.” *United States v. Nivica*, 887 F.2d 1110, 1118 (1st Cir. 1989). *See also United States v. Gonzalez- Costa*, 989 F.2d 384, 389 (10th Cir. 1993) (affirming district court ruling because it “was not ‘arbitrary, capricious, whimsical, or manifestly unreasonable’” (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991) and *United States v. Cardenas*, 864 F.2d 1528, 1530 (10th Cir. 1989))). This means that a court of appeals opinion affirming a district court ruling does not preclude a different district court from ruling differently.

such inspection may tend unreasonably to delay the trial.” *Nixon*, 418 U.S. at 699 (citing test suggested

in *United States v. Ionia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).324 The possibility that the documents

may be admissible to impeach a witness is not enough by itself to justify pretrial production, *Nixon*, 418

U.S. at 701,325 but this may be a contributing factor to a court’s decision to order pretrial production. *See Nixon*, 418 U.S. at 701-02 (noting that “[g]enerally the need for evidence to impeach witnesses is insufficient to require its production in advance of trial,” but “[h]ere there are other valid potential

evidentiary uses for the same material).326 With respect to procedure, most, if not all, courts have held

that an application for a subpoena duces tecum for records, like the application for a witness subpoena, can be made ex parte, though there is only one court of appeals opinion on the question.327 Some courts have distinguished subpoenas duces tecum requiring pretrial production from subpoenas duces tecum requiring production at trial, however, and held that the former may not be applied for ex parte, at least in general.328

There is also the additional question of whether the pretrial inspection of the documents which is permitted by Rule 17(c) may be by defense counsel alone or whether the documents must be made

324 *See also Morris*, 287 F.3d at 991; *Tokash*, 282 F.3d at 971; *Hughes*, 895 F.2d at 1146; *Larouche*

*Campaign*, 841 F.2d at 1179; *Cuthbertson*, 630 F.2d at 145.

325 *See also Hardy*, 224 F.3d at 756; *United States v. Fields*, 663 F.2d 880, 881 (9th Cir. 1981);

*Cuthbertson*, 630 F.2d at 144.

326 *See also Larouche Campaign*, 841 F.2d at 1180 (acknowledging that material subpoenaed was

intended solely for impeachment use and the Supreme Court’s limiting statement about that in *Nixon* but holding not abuse of discretion to order pretrial production “under the circumstances of this case, where a putative key witness, whose general testimony is already known, is scheduled to testify”).

327 *See United States v. Hang*, 75 F.3d 1275, 1281-82 (8th Cir. 1996); *United States v. Beckford*, 964

F. Supp. 1010, 1020 (E.D. Va. 1997); *United States v. Jenkins*, 895 F. Supp. 1389, 1395 (D. Haw. 1995); *United States v. Florack*, 838 F. Supp. 77, 79 (W.D.N.Y. 1993); *see also In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997) (citing *Hang* with approval).

328 *See, e.g.*, *United States v. Fox*, 275 F. Supp. 2d 1006, 1009-12 & n.4 (D. Neb. 2003) (distinguishing *Hang* and *Florack* as cases dealing only with *trial* subpoenas, collecting and categorizing district court opinions, and adopting “majority view”); *Beckford*, 964 F. Supp. at 1025-30 (noting split in district court opinions, collecting cases, and holding ex parte application for issuance of pretrial subpoenas “[o]rdinarily . . . unnecessary and thus inappropriate” and permissible only in “exceptional circumstances”); *United States v. Urlacher*, 136

F.R.D. 550, 555-58 (W.D.N.Y. 1991); *see also United States v. Hart*, 826 F. Supp. 380, 381 (D. Colo. 1993) (holding application for subpoena duces tecum with pretrial production of documents not properly filed ex parte and drawing no distinction between subpoenas directing pretrial production and subpoenas directing production at trial). *Contra United States v. Daniels*, 95 F. Supp. 2d 1160, 1162-63 (D. Kan. 2000) (ex parte application permitted where pleading contains information that is considered “trial strategy,” though must be evaluated “on a case-by-case basis”); *United States v. Tomison*, 969 F. Supp. at 589-95 (ex parte application permitted where defendant cannot make showing necessary for pretrial production without revealing trial strategy); *Jenkins*, 895

F. Supp. at 1395-97 (criticizing *Urlacher* and establishing rule permitting ex parte applications in general without any apparent qualifications). *See also Florack*, 838 F. Supp. at 80 (distinguishing *Urlacher* on ground that it involved pretrial production but noting that even in case of pretrial production ex parte procedure would not necessarily be superfluous).

available to both counsel. The district courts that have held ex parte applications permissible have held that the court’s discretion whether to allow any pretrial inspection at all includes discretion whether to allow inspection only by the party who subpoenaed the documents.329

To avoid some of the foregoing issues, counsel may wish to consider serving a subpoena duces tecum that does not require pretrial production and then persuade the subject of the subpoena to voluntarily provide the documents early. Counsel could suggest that the subject might thereby be able to avoid appearing in court, either because the defense might decide not to use the documents (recall that documents may be subpoenaed without ultimately being used), and/or because the defense might be able to obtain a foundational stipulation from the prosecutor regarding whatever documents it does decide to use.

# Rule 15 Depositions

Rule 15 of the Federal Rules of Criminal Procedure authorizes depositions in criminal cases when there are “exceptional circumstances” and a deposition is “in the interest of justice.” FED. R. CRIM. P. 15(a)(1). “Exceptional circumstances” exist when the witness is unavailable to testify at trial and the testimony is material and/or such that its absence would result in an injustice,330 though the Eleventh Circuit has suggested that even then there may be “countervailing factors.”331

329 *See Daniels*, 95 F. Supp. 2d at 1162; *Tomison*, 969 F. Supp. at 591, 597; *United States v. Reyes*, 162

F.R.D. 468, 471 (S.D.N.Y. 1995) (“[T]he Court exercises its discretion on a case-by-case basis to determine whether subpoenaed material should be deposited with the Court and whether this material should be disclosed to the adverse party”). *But cf. Florack*, 838 F. Supp. at 80 (possibly assuming that pretrial examination would have to be by both attorneys).

330 *See United States v. Liner*, 435 F.3d 920, 924 (8th Cir. 2006); *United States v. Cohen*, 260 F.3d 68,

78 (2d Cir. 2001); *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998); *United States v. Kelley*, 36

F.3d 1118, 1124-25 (D.C. Cir. 1994); *United States v. Ismaili*, 828 F.2d 153, 159 (3d Cir. 1987); *cf. United States*

*v. Drogoul*, 1 F.3d 1546, 1553 (11th Cir. 1993) (unavailability of witness need not be certain); *United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1995) (same); *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978) (“When the question is close a court may allow a deposition in order to preserve a witness’ testimony, leaving until trial the question of whether the deposition will be admitted as evidence.”); *but cf. United States v. Fuentes- Galindo*, 929 F.2d 1507, 1509 (10th Cir. 1991) (“Although these factors are no longer dispositive when reviewing a trial court’s decision, some courts still consider them” and so “we will consider those factors in part.”); *United States v. Johnson*, 752 F.2d 206, 209-10 (6th Cir. 1985) (describing unavailability as “but one factor,” though acknowledging that “other circuits have apparently assumed the continued vitality of the physical unavailability requirement”); *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (magistrate could order depositions and allow deportation of material witnesses who were being held in custody where witnesses had engaged in hunger strike and local authorities refused to continue to house witnesses).

331 *See United States v. Drogoul*, 1 F.3d at 1552, 1554-57 (holding that unavailability and potential

injustice sufficient “absent significant countervailing factors which would render the taking of the deposition unjust” and then discussing and rejecting various countervailing factors suggested by defense in opposing government depositions); *see also United States v. Ramos*, 45 F.3d 1519, 1522-23 (11th Cir. 1995) (citing *Drogoul* and rejecting various countervailing factors suggested by government in opposing defense depositions).

Criminal depositions may not be conducted for discovery purposes; rather, the purpose of a deposition under Rule 15 is to obtain or preserve evidence.332 Common examples of circumstances in which courts may grant motions for depositions include witnesses who are ill and might die before trial or be unable to travel to court to testify333 and witnesses who live in foreign countries and will not

voluntarily come to the United States to testify.334 There is language in some older cases suggesting a

defendant may not depose a fugitive, but the “modern tendency” is to allow depositions of fugitives and leave a witness’s fugitive status as a factor for the jury to consider in assessing the witness’s credibility.335

Simply because a deposition may be taken does not mean it is admissible at trial, however. The

proponent must show that the witness is still unavailable at the time of trial.336 If the witness dies, he

or she is obviously unavailable,337 and sometimes serious illness is enough.338 If the witness is beyond

the court’s subpoena power, the proponent of the deposition must make a diligent effort to convince the

332 *United States v. Edwards*, 69 F.3d 419, 437 (10th Cir. 1995); *Kelley*, 36 F.3d at 1124; *United States v. Cutler*, 806 F.2d 933, 936 (9th Cir. 1986); *United States v. Fischel*, 686 F.2d 1082, 1091 (5th Cir. 1982); *United States v. Steele*, 685 F.2d 793, 809 (3d Cir. 1982); *United States v. Adcock*, 558 F.2d 397, 406 (8th Cir. 1977). *But cf. United States v. Carrigan*, 804 F.2d 599, 602-05 (10th Cir. 1986) (district court did not clearly abuse its discretion in ordering witness depositions as sanction for government interference with witnesses; court had authority to make order under its inherent power even though it did not have authority to make order under Rule 15).

333 *See, e.g.*, *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984); *Furlow v. United States*, 644 F.2d 764, 767 (9th Cir. 1981).

334 *See, e.g.*, *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998); *Ramos*, 45 F.3d at 1523;

*United States v. Farfan-Carreon*, 935 F.2d 678, 680 (5th Cir. 1991); *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984); *United States v. Wilson*, 601 F.2d 95, 98 (3d Cir. 1979); *see also United States v. Acevedo- Ramos*, 842 F.2d 5, 8 (1st Cir. 1988) (witness properly found unavailable when he was in state custody and in midst of state trial); *Johnson*, 752 F.2d at 210 (exceptional circumstances where witness might have refused to testify at trial and government would then have had to proceed without witness because jeopardy already would have attached).

335 *Territory of Guam v. Ngirangas*, 806 F.2d 895, 897 (9th Cir. 1986) (collecting cases). *See also*

*Farfan-Carreon*, 935 F.2d at 680 & n.3.

336 *Sines*, 761 F.2d at 1439; *see also Drogoul*, 1 F.3d at 1553; *Mann,* 590 F.2d at 366-67.

337 S*ee* FED. R. CRIM. P. 15(f) (providing that party may use deposition “as provided by the Federal Rules of Evidence”); FED. R. EVID. 804(a)(4) (including death of witness in definition of “unavailability”).

338 S*ee, e.g.*, *United States v. Donaldson*, 978 F.2d 381, 393 (7th Cir. 1992) (witness had recently

delivered baby, had been hospitalized with chest pain day before she was scheduled to testify and had experienced chest pain again when she attempted to get up day her testimony was scheduled); *United States v. Campbell*, 845 F.2d 1374, 1377-78 (6th Cir. 1988) (“several elderly witnesses whose health-related problems prevented them from traveling to Cincinnati”); *Keithan*, 751 F.2d at 12 (“physical infirmities which prevented [witnesses] from leaving their home which was sixty miles from the courthouse”); *see generally* FED. R. EVID. 804(a)(4) (including “then existing physical or mental illness or infirmity” in definition of “unavailability”).

witnesses to come testify in person.339 Defense counsel may consider making Confrontation Clause

objections even if the witness is unavailable,340 though the courts have rejected such objections in the general case.341

Undocumented alien witnesses held in custody as material witnesses pursuant to 18 U.S.C. § 3144 present a special situation, because, at least in some circumstances, § 3144 gives the witness a right to be deposed and be deported or released if he or she cannot satisfy the conditions of a bond. *See* 18

U.S.C. § 3144. *See also Torres-Ruiz v. District Court*, 120 F.3d 933, 935-36 (9th Cir. 1997). Courts can order depositions under this statute and Rule 15 so the witnesses can be released from custody and sent home.342 The court is still obliged to consider the Rule 15 factors, however, and there may be some

circumstances in which depositions should not be allowed.343 And at least some circuits have held that

the government may not actually *use* the deposition at trial unless it makes the same effort to convince the material witness to return to testify in person that it must make with any other foreign witness.344

339 *See, e.g.*, *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1088 (9th Cir. 2000) (distinguishing *United States v. Winn*, 767 F.2d 527 (9th Cir. 1985) because “the government’s failure to make *any* effort to contact [the witness] when it had his address in hand was per se unreasonable”); *Ismaili*, 828 F.2d at 160 (insufficient evidence of good faith efforts to have witnesses appear at trial for live testimony where witnesses “may well have believed that they would be required to pay their own expenses if they traveled to the United States to trial”); *Mann*, 590 F.2d at 367-68 (questioning whether perfunctory efforts evidenced by (1) request that consular officer do no more than secure proof of witness’s unavailability and (2) explanation of standard procedure for offering transportation expenses that “leaves some doubt as to whether this witness was ever informed of the availability of such funds” sufficient). *Compare Siddiqui*, 235 F.3d 1318, 1324-25 (11th Cir. 2000) (government’s efforts sufficient where it offered to pay travel expenses and sent witnesses letter explaining that case against defendant would be much stronger if they attended trial); *Johnpoll*, 739 F.2d at 709-10 (government not required to meet witness demands that they be paid greater daily subsistence fee, additional daily fee for time away from business, and/or airfare and legal fees of attorney).

340 *See, e.g.*, *United States v. Yates*, 438 F.3d 1307, 1312-18 (11th Cir. 2006) (en banc) (sustaining

objections to form of deposition in part on Confrontation Clause grounds); *United States v. King*, 552 F.2d 833, 841-44 (9th Cir. 1976) (noting various Confrontation Clause objections made by defendants but rejecting arguments).

341 *See, e.g.*, *United States v. McKeeve*, 131 F.3d 1, 9 (1st Cir. 1997) (collecting cases); *Johnpoll*, 739

F.2d at 710; *King*, 552 F.2d at 840; *see also United States v. Abu Ali*, 528 F.3d 210, 242-43 n.12 (4th Cir. 2008) (distinguishing and rejecting *Yates*).

342 *See Torres-Ruiz*, 120 F.3d at 935-36; *United States v. Allie*, 978 F.2d 1401, 1404-06 (5th Cir. 1992); *cf. Terrazas-Montano*, 747 F.2d at 469 (without citing § 3144, holding that trial court could order deposition of material witnesses who were engaged in hunger strike and whom state authorities would not continue to house).

343 *See Torres-Ruiz*, 120 F.3d at 935 (witness must be deposed and released “[a]bsent a ‘failure of

justice’” (quoting § 3144)); *Fuentes-Galindo*, 929 F.2d at 1510 (standing order requiring that material witnesses be deposed did not justify depositions when “[t]here is no indication that the particular circumstances of this case were considered” and “no showing of ‘exceptional circumstances’ presented”).

344 *See United States v. Aguilar-Tamayo*, 300 F.3d 562, 565-66 (5th Cir. 2002) (no showing of witness unavailability where government “took no steps to secure the presence of [the material] witnesses;”

# Transcripts of Prior Proceedings

An indigent defendant may be entitled to a transcript of prior proceedings when the transcript is necessary to an effective defense, such as for trial preparation and/or impeachment of witnesses who testified in the prior proceeding and may testify again at the defendant’s trial. *Britt v North Carolina*, 404 U.S. 226 (1971), held that the transcript of a prior trial that has ended in a mistral is presumed necessary to an effective defense and that the defendant need not show a particularized need in his

individual case. *Id.* at 228.345 The courts of appeals have extended *Britt* to transcripts of pretrial

evidentiary hearings, at least in general.346 *Britt* is not so readily extended to trials in unrelated cases or

trials of third parties, though it may extend if the defendant can point to common testimony and the absence of adequate alternatives to a transcript.347

distinguishing prior case in which government had “taken numerous steps to ensure that the deported witnesses would return for trial including providing witness fees and travel cost reimbursements, giving the witnesses a subpoena and letter to facilitate their reentry into the U.S., calling them in Mexico, getting assurance from the

U.S. that they would return, apprising border inspectors of their expected arrival and issuing checks to be given to the witness upon their reentry into the U.S. at time of trial”); *Fuentes-Galindo*, 929 F.2d at 1510-11 (noting that Rule 15 and Federal Rule of Evidence 804(a)(5) require proponent of deposition to demonstrate “good faith effort” to obtain witness’s presence at trial and government did not demonstrate such good faith in case at bar). *But cf. United States v. Rivera*, 859 F.2d 1204, 1209 (4th Cir. 1988) (rejecting defendant’s suggestions as to how presence of illegal aliens could have been assured at trial as “all unrealistic and totally lacking in merit”); *Terrazas-Montano*, 747 F.2d at 469 (concluding without any discussion of reasons that it was “evident that the witnesses were unavailable” and “[t]o require the government to show that it was unable to procure the attendance of the witnesses . . . would compel a useless act”).

345 *See also Kennedy v. Lockyer*, 379 F.3d 1041, 1049 (9th Cir. 2004) (transcript of complete trial must be provided, not just transcript of testimony); *Riggins v. Rees*, 74 F.3d 732, 735 (6th Cir. 1996); *Turner v. Malley*, 613 F.2d 264, 266 (10th Cir. 1979); *United States v. Jonas*, 540 F.2d 566, 570-71 (7th Cir. 1976) (collecting cases). *But cf. United States v. Williams*, 264 F.3d 561, 573 (5th Cir. 2001) (trial court not obliged to continue trial so defendant could obtain transcript, at least where defendant did not show how inability to obtain complete transcript affected right to fair trial); *Sargent v. Armontrout*, 841 F.2d 220, 223-24 (8th Cir. 1988) (trial court not obliged to continue trial and order court reporter to prepare transcript where that might have delayed defendant’s trial as much as year and reporter would have been prevented from performing other important court work).

346 *See*, *e.g.*, *United States v. Devlin*, 13 F.3d 1361, 1364 (9th Cir. 1994) (transcript of suppression

hearing); *United States v. Vandivere*, 579 F.2d 1240, 1243 (10th Cir. 1978) (transcript of preliminary examination); *see also Roberts v. LaVallee*, 389 U.S. 40 (1967) (per curiam) (transcript of preliminary hearing). *But cf. United States v. Rosales-Lopez*, 617 F.2d 1349, 1356 (9th Cir. 1980) (suggesting that courts have been less willing to find error in failure to provide transcript of preliminary proceeding), *aff’d on other grounds*, 451

U.S. 182 (1981); *Faison v. Zahradnick*, 563 F.2d 1135, 1136 (4th Cir. 1977) (indigent defendant did not have right to transcript of preliminary hearing where even non-indigent defendant would not have had ability to obtain transcript because state law provided for preparation of transcript only if ordered by judge).

347 *See Harris v. Stovall*, 212 F.3d 940, 944-45 (6th Cir. 2000) (rejecting habeas petitioner’s claim that rights were violated by failure to provide copies of transcripts from prior trial of codefendants because state court’s reasoning was “not an unreasonable application of clearly established federal law as determined by the Supreme Court”); *Fisher v. Hargett*, 997 F.2d 1095, 1097-99 (5th Cir. 1993) (defendant’s rights not violated by failure to provide transcript of trial on different charge where only three witnesses testified in prior trial, testimony of those witnesses played only a minor role in the second trial, and defendant had full discovery and

*Britt* did indicate that production of a transcript might not be required where there were “alternative devices that would fulfill the same functions as the transcripts.” *Id.*, 404 U.S. at 227. The Court found that there was an adequate alternative in *Britt* because the petitioner conceded he had an alternative that was “substantially equivalent” to a transcript when the trial took place in a small town where the court reporter was a good friend of all the local lawyers and would have read back his notes to the defendant’s attorney at any time before the second trial. *See id.* at 229-30. The exception suggested by *Britt* is a narrow one, however, as indicated by *Britt*’s own suggestion that neither notes from the first trial nor “limited access to the court reporter during the course of the second trial” would be sufficient. *See Britt*, 404 U.S. at 434 (citing *United States ex rel. Wilson v. McCann*, 408 F.2d 896, 897 (2d Cir. 1969)).348 Other alternatives that have been found to be inadequate include tape recordings

transcript of preliminary hearing); *Sargent*, 841 F.2d at 223-24 (court reporter’s notes adequate alternative to transcript of prior proceedings when prior proceedings were in codefendant’s case rather than defendant’s case); *Jefferies v. Wainwright*, 794 F.2d 1516, 1518-19 (11th Cir. 1986) (acknowledging value of transcript of codefendant’s suppression hearing because it would have impeached important government witness but finding adequate alternative); *McAllister v. Garrison*, 569 F.2d 813, 815 (4th Cir. 1978) (transcript of prior, unrelated trial did not need to be provided where judge was not advised of any common testimony witnesses might give; “there is nothing in *Britt* which requires a trial court to procure for a prisoner a free transcript of a separate, unrelated trial unless the prisoner has made a reasonable demonstration in the trial court that the transcripts will be of some value in the ongoing trial”); *see also United States v. Kirk*, 844 F.2d 660, 662-63 (9th Cir. 1988) (declining to reach issue of whether *Britt* requires court to provide transcript of third party’s trial because any error was harmless); *United States v. Bamberger,* 482 F.2d 166, 168 (9th Cir. 1973) (same).

348 *See also United States v. Devlin*, 13 F.3d at 1364 (“Courts have repeatedly recognized that counsel’s memory or notes and access to the court reporter at trial are not adequate substitutes for a transcript.”); *United States v. Pulido*, 879 F.2d 1255, 1257 (5th Cir. 1989) (“[O]nly infrequently will we conclude that defendant had an adequate substitute for a transcript.”); *United States v. Talbert*, 706 F.2d 464, 469 (4th Cir. 1983) (noting that “[t]he circuit court decisions since *Britt* have interpreted narrowly the ‘adequate alternative’ exception” and collecting cases); *Turner*, 613 F.2d at 266 (emphasizing Supreme Court characterization of “narrow circumstances” in *Britt*); *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1972) (describing *Britt* as “a narrow exception to the rule laid down by *Griffin v. Illinois*, 351 U.S. 12 (1956)] and its progeny”). *But cf. Lindsey v. Smith*, 820 F.2d 1137, 1148 (11th Cir. 1987) (finding *Britt* exception satisfied, at least in habeas case where presumption of correctness accorded to state court findings when same attorneys represented defendant at both trials, same court reporter recorded testimony, and attorneys had access to portions of the actual transcripts of the first trial); *United States v. Gaither*, 527 F.2d 456, 458 (4th Cir. 1975) (trial court’s offer of its notes of first trial as well as “specified portions of the transcript” adequate alternative where preparation of transcript would have taken court reporter twenty-eight days of non-stop work).

of the prior trial,349 the trial judge’s notes,350 witness statements,351 “open file” discovery provided by the prosecutor,352 and even a key witness’s admission that she had testified falsely in the first trial.353

There is a split in the circuits regarding the application of harmless error analysis to the erroneous denial of a transcript. The Fourth Circuit has applied the standard for non-constitutional error established in *Kotteakos v. United States*, 328 U.S. 750 (1946), to wit, whether there is “grave doubt” that the error had a “substantial influence” on the result.354 But the Ninth Circuit has applied the beyond

a reasonable doubt standard for constitutional error.355 declined to apply harmless error analysis at all.356

# Motions for Appointment of Experts

And the Fifth Circuit has, in at least one case,

The Criminal Justice Act, codified in 18 U.S.C. § 3006A, provides that an indigent defendant is entitled to have the government, through the court, pay for investigative, expert, or other services necessary for an adequate defense. *See* 18 U.S.C. § 3006A(e)(1). A commonly used test is whether “a reasonable attorney would engage such services for a client having the independent financial means to pay for them.” *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (citing *United States v. Theriault*, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring)).357 This reflects constitutional

349 *See*, *e.g.*, *Riggins,* 74 F.3d at 737 (distinguishing between case at bar, where there had been two prior mistrials, a period of five months had passed since last trial, and six different prosecution witnesses testified at all three trials, from example of one-day, two-witness trial that had occurred just three weeks previously); *United States v. Jonas*, 540 F.2d at 570 (“Making only the tape recording available during court hours, in the office of the court reporter, placed an unreasonable demand on counsel, requiring them to listen to the tape of a two day trial and to attempt to record the verbatim statements of witnesses for effective impeachment at the second trial.”); *but cf. Vandivere*, 579 F.2d at 1243 (tape recording adequate alternative to transcript of preliminary examination)*.*

350 *See, e.g.*, *Jonas*, 540 F.2d at 573.

351 *See*, *e.g.*, *Tague v. Puckett*, 874 F.2d 1013, 1015 (5th Cir. 1989).

352 *See*, *e.g.*, *Talbert*, 706 F.2d at 469-70.

353 *See United States v. Germany*, 613 F.2d 262, 264 (10th Cir. 1979).

354 *See United States v. Tyler*, 943 F.2d 420, 423 (4th Cir. 1991).

355 *See*, *e.g.*, *Devlin*, 13 F.3d at 1364-65 (finding error was not harmless beyond a reasonable doubt);

*United States v. Rosales-Lopez*, 617 F.2d at 1356 (finding error was harmless beyond a reasonable doubt).

356 *See United States v. Pulido*, 879 F.2d at 1259 (declining to apply harmless error analysis in case at

bar, in part because “it would be somewhat anomalous to interpret *Britt* . . . to dispense with the need to prove that a transcript would be valuable but to reincorporate these same considerations into our test by way of an after- the-fact prejudice analysis”).

357 *See also United States v. Greschner*, 802 F.2d 373, 377 n.3 (10th Cir. 1986); *United States v. Alden*,

767 F.2d 314, 318 (7th Cir. 1984); *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976); *Brinkley v. United*

*States*, 498 F.2d 505, 509 (8th Cir. 1974).

requirements established by the Supreme Court decision of *Ake v. Oklahoma*, 470 U.S. 68 (1985), in which the Supreme Court held that a state must provide access to expert psychiatric services when the defendant makes a sufficient preliminary showing that his sanity is likely to be a significant factor at trial. *See Ake*, 470 U.S. at 83.358

The defendant is entitled to make the request for expert services ex parte. *See* 18 U.S.C. §

3006A(e)(1).359 As with subpoenas, see *supra* Section 6.10.01.01, this means the prosecutor may not

be present at any hearing on the application.360

# Jury View of Crime Scene

A defendant may also move the court to allow the jury to view the scene of the crime or any other relevant location. Courts have inherent power to permit such a jury view, and the decision on whether to allow it is entrusted to the discretion of the trial court. *United States v. Triplett*, 195 F.3d 990, 999 (8th Cir. 1999); *United States v. Passos-Paternina*, 918 F.2d 979, 986 (1st Cir. 1990) (collecting cases). Factors that courts may consider include: (1) whether other evidence such as photographs, diagrams,

358 *See also United States v. Rodriguez-Felix*, 450 F.3d 1117, 1127-28 (10th Cir. 2006) (indigent

defendants entitled to “basic tools of an adequate defense;” factors to be considered are: (1) defendant’s private interest in accuracy of trial; (2) burden on government’s interest if services provided; and (3) “the probable value of the additional service and the risk of error in the proceeding if such assistance is not offered” (quoting *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001))); *Page v. Lee*, 337 F.3d 411, 415 (4th Cir. 2003) (accepting test established by North Carolina Supreme Court that defendant entitled to expert if either (1) “he will be deprived of a fair trial without the expert assistance” or (2) “there is a reasonable likelihood that it will materially assist him in the preparation of his case” (quoting *State v. Moore*, 321 N.C. 327, 335, 364 S.E. 2d 648 (1988))); *Williams v. Collins*, 989 F.2d 841, 845-46 (5th Cir. 1993) (defendant entitled to assistance of psychiatrist when “there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial” (quoting *Moore*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc))); *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987) (en banc) (defendant entitled to assistance of expert when there is “a reasonable possibility that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial”); *Moore v. Kemp*, 809 F.2d at 712 (defendant entitled to expert assistance when “there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial” (footnote omitted)). *But cf. Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (defendant was not entitled to fingerprint and ballistic experts where he “offered little more than undeveloped assertions that the requested assistance would be beneficial”); *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993) (suggesting different test for non-psychiatric expert that requires defendant to show that “the evidence is ‘both “critical” to the conviction and subject to varying expert opinion’” (quoting *Scott v. Louisiana,* 934 F.2d 631, 633 (5th Cir. 1991))).

359 *See also United States v. Abreu*, 202 F.3d 386, 389 (1st Cir. 2000); *Lawson v. Dixon*, 3 F.3d 743, 751 (4th Cir. 1993); *United States v. Greschner*, 802 F.2d at 379; *United States v. Lawson*, 653 F.2d 299, 304 (7th Cir. 1981); *Mason v. State of Arizona*, 504 F.2d 1345, 1352 (9th Cir. 1974); *United States v. Chavis*, 476 F.2d 1137, 1144 (D.C. Cir. 1973); *United States v. Sutton*, 464 F.2d 552, 553 (5th Cir. 1972); *Theriault*, 440 F.2d at 715.

360 *See Abreu*, 202 F.3d at 390; *Greschner*, 802 F.2d at 379-80; *Mason v. State of Arizona*, 504 F.2d

at 1352; *Sutton*, 464 F.2d at 553.

and/or testimony is available and sufficient;361 (2) whether the average juror has familiarity with the type of location in question and/or could understand it from photographs, diagrams, and other such evidence;362 (3) logistics and/or safety considerations;363 and (4) whether there has been a change in

conditions or there is uncertainty regarding other factors.364 If there is a jury view, the cases have

suggested that certain procedural protections are desirable, if not mandated, including the presence of counsel at the jury view365 and the presence of a judge and court reporter.366

# MOTIONS TO EXCLUDE EVIDENCE

* + 1. **Fourth Amendment, Fifth Amendment, and Other Suppression Motions**

The most common types of motions to exclude evidence are motions to suppress evidence based on Fourth and/or Fifth Amendment violations. These are discussed in depth in Chapter 4, Challenging Illegal Searches and Seizures, and Chapter 5, Suppression of Statements. Motions to suppress evidence and/or for other relief may also be based on government misconduct of various types, as discussed more fully in Section 6.08.

# Kastigar Hearings

If a defendant has been compelled to provide testimony and/or a statement, *Kastigar v. United States*, 406 U.S. 441 (1972), requires a hearing, sometimes known as a “*Kastigar* hearing,” at which the government must establish that its evidence is untainted by the compelled testimony or statement and comes from a source independent of the testimony or statement. *See Kastigar*, 441 U.S. at 461-62.367

361 *See, e.g.*, *Triplett*, 195 F.3d at 999; *United States v. Crochiere*, 129 F.3d 233, 236 (1st Cir. 1997);

*Passos-Patereina*, 918 F.2d at 986; *United States v. Johnson*, 767 F.2d 1259, 1273 (8th Cir. 1985); *United States*

*v. Martinez*, 763 F.2d 1297, 1305 (11th Cir. 1985); *United States v. Gallagher*, 620 F.2d 797, 802 (10th Cir. 1980); *Hughes v. United States*, 377 F.2d 515, 516 (9th Cir. 1967); *United States v. Pagano*, 207 F.2d 884, 885 (2d Cir. 1953).

362 *See, e.g.*, *Crochiere*, 129 F.3d at 236 (noting that “[t]he average juror has not seen a jail cell block,

and might have difficulty understanding the layout”).

363 *See, e.g.*, *Crochiere*, 129 F.3d at 236; *United States v. Williams*, 44 F.3d 614, 619 (7th Cir. 1995);

*Passos-Paternina*, 918 F.2d at 986; *United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987); *United States*

*v. Pinna*, 229 F.2d 216, 219 (7th Cir. 1956).

364 *See*, *e.g.*, *Culpepper*, 834 F.2d at 883; *United States v. Lopez*, 475 F.2d 537, 541 (7th Cir. 1973);

*Pinna*, 229 F.2d at 219.

365 *See Arnold v. Evatt*, 113 F.3d 1352, 1361 (4th Cir. 1997) (citing *Clemente v. Carnicon-Puerto Rico*

*Management Assoc.*, 52 F.3d 383, 386 (1st Cir. 1995)).

366 *See Devin v. DeTella*, 101 F.3d 1206, 1210 (7th Cir. 1996); *Clemente*, 52 F.3d at 386.

367 *See also United States v. Smith*, 452 F.3d 323, 337 (4th Cir. 2006); *United States v. Jimenez*, 256 F.3d 330, 348 (5th Cir. 2001); *United States v. Anderson*, 79 F.3d 1522, 1526 (9th Cir. 1996); *United States v. Eliason*, 3 F.3d 1149, 1151-52 (7th Cir. 1993); *United States v. North*, 910 F.2d 843, 854 (D.C. Cir. 1990) (hereinafter

The taint the government must dispel includes any taint of the grand jury’s decision to indict,368 as well as any use of the compelled testimony or statement to identify witnesses or persuade witnesses to

testify.369 It also includes taint resulting from the witnesses’ exposure to the compelled testimony or

statement, independent of whether the government caused the exposure.370 Courts are divided on

whether *Kastigar* extends to non-evidentiary use such as “assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross- examination, and otherwise generally planning trial strategy.” *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989) (quoting *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973)).371 But note that “certain ‘investigatory’ uses that could reasonablybe considered nonevidentiary” are considered bysome courts to be evidentiary and thus barred. *United States v. North*, 910 F.2d 843, 859 (D.C. Cir. 1990) (citing *United States v. Hampton*, 775 F.2d 1479, 1490-91 & n.53 (11th Cir. 1985)).372

“*North I”)*; *United States v. Garrett*, 797 F.2d 656, 664 (8th Cir. 1986); *United States v. Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985); *United States v. Beery*, 678 F.2d 856, 863 (10th Cir. 1982).

368 *See United States v. Bartel*, 19 F.3d 1105, 1110-11 (6th Cir. 1994); *United States v. North*, 920 F.2d

940, 947 (D.C. Cir. 1990) (hereinafter “*North II”)*; *Garrett*, 797 F.2d at 660; *Hampton*, 775 F.2d at 1489; *United*

*States v. Zielezinski*, 740 F.2d 727, 732-33 (9th Cir. 1984); *cf. United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976) (going farther than other circuits and establishing per se rule requiring dismissal of indictment where indicting grand jury exposed to immunized testimony).

369 *See North I*, 910 F.2d at 865 (“One forbidden use of the immunized testimony is the identification

of a witness.”); *Hampton*, 775 F.2d at 1488 (testimony of coconspirator who enters into cooperation agreement with government because of immunized testimony of defendant); *United States v. Kurzer*, 534 F.2d 511, 517 (2d Cir. 1976) (testimony of cooperating defendant).

370 *See North II*, 920 F.2d at 941-42; *but cf. id.* at 955 & n.4 (Wald, J., dissenting) (suggesting district

court instruction to witnesses not to testify about “anything that you learned because you heard, read or listened to any portion of [the immunized] testimony”).

371 *See also United States v. Daniels*, 281 F.3d 168, 181-82 (5th Cir. 2002) (noting other circuits’

disagreement with *McDaniel* and *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983), and following other circuits); *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992) (same); *North I*, 910 F.2d at 857 (noting split in circuits and collecting cases). *But cf. United States v. Crowson*, 828 F.2d 1427, 1430-31 (9th Cir. 1987) (characterizing two lines of cases from other circuits as based on different conclusions about whether government carried its burden).

372 *See also United States v. Harris*, 973 F.2d 333, 337 n.2 (4th Cir. 1992) (“[U]se of compelled

testimony as an ‘investigatory lead’ to obtain or explicate evidence that is subsequently used against the immunized witness is an evidentiary use of the testimony.”); *North I*, 910 F.2d at 860 (“[T]he use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes *indirect evidentiary* not *non-evidentiary* use.”); *United States v. Schwimmer*, 882 F.2d 22, 25-26 (2d Cir. 1989) (holding *Kastigar* precludes “use as an investigatory lead, or the means of focusing an investigation on the witness” and going on to express concern about use that “might assist the prosecutor in focusing additional investigation, planning, cross-examination, or otherwise generally mapping a strategy for retrial”); *cf. Pillsbury Co. v. Conboy*, 459 U.S. 248, 284-85, 286 (1983) (Stevens, J., dissenting) (use of immunized testimony as basis for questions in subsequent proceeding impermissible derivative use of immunized testimony).

The most basic situation in which *Kastigar* applies is in cases like *Kastigar* itself where

testimony was compelled after a formal grant of immunity.373 Courts have also applied *Kastigar* to

statements given under informal immunityagreements, however.374 And the Ninth Circuit has suggested an extension to involuntary statements in general, by broadly stating that “[i]f a defendant’s statements were compelled in violation of the fifth amendment, he is entitled to a *Kastigar* hearing.” *United States*

*v. Anderson*, 79 F.3d 1522, 1526 (9th Cir. 1996).375 If the Ninth Circuit view is correct, it suggests a

burden greater than the ordinary “fruit of the poisonous tree” analysis discussed in Chapter 5, Suppression of Statements.

# Motions Regarding Eyewitness Identification Evidence

* + - 1. **Pretrial Identifications**

The first cases addressing defendants’ rights in conjunction with identification evidence dealt with the right to counsel. The Supreme Court held that a defendant has a right to counsel when placed in a lineup, see *United States v. Wade*, 388 U.S. 218, 236-37 (1967), and that any identification made during a lineup must be excluded if counsel is not provided, see *Gilbert v. California*, 388 U.S. 263, 272-273 (1967). The impact of this right has been minimized by the later holdings in *Kirby v. Illinois*, 406 U.S. 682 (1972), and *Simmons v. United States*, 390 U.S. 377 (1968), however. *Kirby* held that the right to counsel did not attach to pre-indictment lineups even when the defendant has been arrested and is in custody, see *Kirby*, 406 U.S. at 690, and *Simmons* held that the right did not attach during a photospread identification procedure, see *Simmons*, 390 U.S. at 384, which is the identification procedure most commonly used in federal investigations.

373 *See, e.g.*, *United States v. Hubbell*, 530 U.S. 27, 31 (2000); *North I*, 910 F.2d at 851.

374 *See*, *e.g.*, *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995); *United States v. Palumbo*, 897 F.2d 245, 248-49 (7th Cir. 1990); *United States v. Williams*, 809 F.2d 1072, 1082 (5th Cir. 1987).

375 *See also Chavez v. Martinez*, 538 U.S. 760, 769-70 (2003) (plurality opinion) (defendants subjected to coercive police interrogations have protection “from the use of their involuntary statements (*or evidence derived from their statements*) in any subsequent criminal trial;” “[t]his protection is, in fact, coextensive with the use *and derivative use* immunity mandated by *Kastigar*” (emphasis added)); *Kastigar*, 406 U.S. at 461 (statutory immunity provided for in 18 U.S.C § 6002 “analogous to the Fifth Amendment requirement in cases of coerced confessions;” defendant against whom incriminating evidence obtained through grant of immunity in stronger position than defendant who asserts Fifth Amendment coerced confession claim only because latter defendant “must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible”); *United States v. Serrano*, 870 F.2d at 18 (noting “the analogy *Kastigar* drew between the prohibition against the use of immunized testimony and cases involving coerced confessions”). *But cf. Lam*

*v. Kelchner*, 304 F.3d 256, 269 (3d Cir. 2002) (noting that “the Supreme Court has not recognized the right to suppress evidence discovered as a result of an involuntary statement” and so state court’s failure to apply such a rule not an unreasonable application of Supreme Court precedent justifying habeas corpus relief); *North II*, 920 F.2d at 946 n.7 (distinguishing involuntary statement cases and *Kastigar* cases and suggesting that “the causation analysis will prove to be somewhat different in an immunity case than in determining whether evidence is a fruit of a Fourth or Fifth Amendment violation”); *Kurzer*, 534 F.2d at 516 n.8 (“a coerced confession differs from immunized testimony”).

More significant in federal practice are due process cases addressing the question of whether and when a court must exclude identifications that are the product of suggestive identification procedures. The key Supreme Court cases are *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409

U.S. 188 (1972). Those cases hold that there is no per se rule that identifications resulting from suggestive identification procedures must be excluded. *See Manson*, 432 U.S. at 113-14; *Biggers*, 409

U.S. at 199. Instead, the trial court must inquire into whether there is “a very substantial likelihood of

. . . misidentification.” *Biggers*, 409 U.S. at 198 (quoting *Simmons*, 390 U.S. at 384). *See also Manson*, 432 U.S. at 116. Factors a court should consider in making this determination include: (1) the witness’s opportunity to view the person committing the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s description of the person committing the crime; (4) the witness’s level of certainty in the identification; and (5) the time that passed between the crime and the identification. *Manson*, 432 U.S. at 114-15; *Biggers*, 409 U.S. at 199-200. Then, “[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself.” *Manson*, 432 U.S. at 114.

The courts of appeal have construed *Manson* and *Biggers* to require the foregoing inquiry into reliability only if there is a threshold finding that the identification procedure was impermissibly

suggestive.376 And even one-person showups may be found not impermissibly suggestive in some

circumstances,377 though there is language in the case law recognizing the inherent suggestiveness of such showups378 and recognizing that suggestiveness is permissible or necessary in some circumstances

and not in others.379 It is the rare case in which the appellate courts have found both impermissible

376 *See, e.g.*, *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997); *United States v. Sleet*, 54 F.3d

303, 309 (7th Cir. 1995); *Romero v. Tansy*, 46 F.3d 1024, 1032 (10th Cir. 1995); *United States v. Gray*, 958 F.2d

9, 14 (1st Cir. 1992); *Landano v. Rafferty*, 856 F.2d 569, 571 (3d Cir. 1988); *United States v. Bagley*, 772 F.2d

482, 493 (9th Cir. 1985).

377 *See, e.g.*, *United States v. Hawkins*, 499 F.3d 703, 707-08 (7th Cir. 2007); *United States v. King*, 148 F.3d 968, 970 (8th Cir. 1998); *United States v. Watson*, 76 F.3d 4, 6 (1st Cir. 1996); *United States v. Bautista*, 23 F.3d 726, 730 (2d Cir. 1994); *United States v. Johnson*, 817 F.2d 726, 729 (11th Cir. 1987); *Bagley*, 772 F.2d at 492.

378 *See, e.g.*, *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (“The practice of showing suspects singly to

persons for the purpose of identification, and not as part of a lineup, has been widely condemned.”); *United States v. Funches*, 84 F.3d 249, 254 (7th Cir. 1996) (“[A] showup is inherently suggestive because the witness is likely to be influenced by the fact that the police appear to believe the person brought in is guilty, since presumably the police would not bring in someone that they did not suspect had committed the crime.”); *United States v. Watkins*, 741 F.2d 692, 694 (5th Cir. 1984) (“One-on-one showups are inherently more suggestive than lineups and we have purposely not encouraged their use.”); *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 403 (7th Cir. 1975) (Stevens, J.) (“Without question, almost any one-to-one confrontation between a victim of crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty.”); *see also Allen v. Estelle*, 568 F.2d 1108, 1112 & n.7 (5th Cir. 1978) (noting “reluctance to encourage the use of showups” and quoting language from other circuits’ opinions regarding suggestiveness of showup procedures).

379 C*ompare United States v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998) (questioning need for

suggestive showup where its use was based on “simple convenience rather than extraordinary urgency”), *and Funches*, 84 F.3d at 254 (“strong argument” could be made that showup was impermissibly suggestive where there were no exigent circumstances such as possibility of losing witness, no reason lineup could not be arranged,

suggestiveness and unreliability, but it does happen on occasion.380 In light of research by psychologists since *Manson* and *Biggers* that suggests that some or all of the factors identified in these cases are not scientifically relevant to the reliability of an identification, and that other factors may be more relevant, *see* discussion in Section 6.11.03.03, *infra*, defense counsel should take an expansive approach in arguing for the suppression of identification.

A more fruitful avenue for excluding evidence of pretrial identifications may lie in efforts to show that the identifications are fruits of some Fourth Amendment violation. In that circumstance, the

identifications may be excluded under the “fruit of the poisonous tree” doctrine.381 *See generally* the

discussion of the “fruit of the poisonous tree” doctrine in Chapter 4, Challenging Illegal Searches and Seizures, and Chapter 5, Suppression of Statements.

# In-Court Identifications

A number of circuits have recognized that in-court identifications where a witness is asked to make an identification while the defendant is sitting alone at counsel table with his attorneyare, like one-

person showups, inherently suggestive.382 It follows that an in-court identification should be subject to

and no other interest warranting “the inherently suggestive procedure”), *with Watson*, 76 F.3d at 6 (“[s]howups that take place immediately after the offense has been committed may be necessary in order to avoid the mistaken apprehension of the wrong person”); *Bautista*, 23 F.3d at 730 (showup identification procedure not unnecessarily suggestive because could have prevented mistaken arrest of innocent persons); *and Johnson*, 817 F.2d at 729 (showup not unnecessarily suggestive because “immediate confrontations allow identification before the suspect has altered his appearance and while the witness’ memory is fresh, and permit the quick release of innocent persons”); *see also Stovall*, 388 U.S. at 302 (immediate showup “was imperative” because no one knew how long victim might live and she was only person who could possibly exonerate defendant).

380 *See, e.g.*, *Raheem v. Kelly*, 257 F.3d 122, 133-42 (2d Cir. 2001); *United States v. Rogers*, 126 F.3d

655, 657-59 (5th Cir. 1997); *United States v. Emanuele*, 51 F.3d 1123, 1129-31 (3d Cir. 1995); *Watkins*, 741 F.2d

at 694-95; *Velez v. Schmer*, 724 F.2d 249, 251-53 (1st Cir. 1984); *Mata v. Sumner*, 696 F.2d 1244, 1251-55 (9th

Cir.), *vacated as moot*, 464 U.S. 957 (1983); *United States v. Field*, 625 F.2d 862, 865-70 (9th Cir. 1980).

381 *See United States v. Crews*, 445 U.S. 463, 472 (1980) (noting government concession that pretrial

identification was properly excluded as fruit of unlawful seizure of defendant); *Gregory v. Wyrick*, 730 F.2d 542, 543 (8th Cir. 1984) (Heaney, J., concurring); *United States v. Fisher*, 702 F.3d 372, 379 (2d Cir. 1983); *United*

*States v. Chamberlin*, 644 F.2d 1262, 1268-69 (9th Cir. 1980); *United States v. Humphries*, 636 F.2d 1172, 1181 (9th Cir. 1981). *But cf. United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975) (“[w]hether [identification] testimony is admissible does not depend upon the validity of the arrest but upon whether the confrontation was ‘so unnecessarily suggestive and conductive [sic] to irreparable mistaken identification that (appellants were) denied due process of law’” (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967))).

382 *See, e.g.*, *United States v. Curtis*, 344 F.3d 1057, 1063 (10th Cir. 2003); *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997); *United States v. Davis*, 103 F.3d 660, 670 (8th Cir. 1996); *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986); *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir.), *modified*, 756 F.2d 223 (2d Cir. 1984); *cf. Moore v. Illinois*, 434 U.S. 220, 222-223 (1977) (describing suggestive identification procedure at preliminary hearing).

the same reliability analysis as impermissibly suggestive pretrial identifications, and most circuits have so held, or at least suggested some comparable test.383

There are some cases suggesting the possibility of an “in-court lineup.”384 Most circuits have

held that an in-court lineup is not *required*,385 though the Second Circuit’s decision in *United States v. Archibald* suggests that such procedures are required when the defendant requests them prior to trial and there has been no pretrial identification, see *id.*, *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir.), *modified*, 756 F.2d 223 (2d Cir. 1984).386 Trial courts certainly *can* order an in-court lineup, however,387 so counsel should consider requesting one, while keeping in mind that if an identification is then made, the less suggestive circumstances will make it harder to attack in argument to the jury.388

383 *See McFowler v. Jaimet*, 349 F.3d 436, 448-49 (7th Cir. 2003); *Kennaugh v. Miller*, 289 F.3d 36, 46- 47 (2d Cir. 2002) (collecting cases). *But cf. United States v. Thompson*, 524 F.3d 1126, 1135 (10th Cir. 2008) (stating that authorities concerning pre-trial identification procedures not controlling in review of in-court identification challenge); *United States v. Robertson*, 19 F.3d 1318, 1322-23 (10th Cir. 1994) (suggesting some disagreement in circuits); *Domina*, 784 F.2d at 1369 (rejecting direct application of pretrial identification reliability factors to in-court identifications, though acknowledging requirement that in-court identification procedure not be so “unnecessarily suggestive and conducive to irreparable misidentification as to amount to a denial of due process of law” (internal quotation marks omitted)).

384 *See, e.g.*, *Domina*, 784 F.2d at 1368-69; *United States v. Sebetich*, 776 F.2d 412, 420 (3d Cir. 1985);

*Archibald*, 734 F.2d at 941; *United States v. Williams*, 436 F.2d 1166, 1168 (9th Cir. 1990); *cf. United States*

*v. Bennett*, 675 F.2d 596, 598 (4th Cir. 1982) (“Such a procedure in many instances may be desirable to ensure a fair trial “).

385 *See United States v. Perez-Gonzalez*, 445 F.3d 39, 48 (1st Cir. 2006); *Curtis*, 344 F.3d at 1063;

*Davis*, 103 F.3d at 670; *Domina*, 784 F.2d at 1369; *Sebetich*, 776 F.2d at 420; *Bennett*, 675 F.2d at 598. *But cf. United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir. 1999) (“We therefore think it advisable to attempt to utilize procedures which minimize this prejudicial effect.”); *Williams*, 436 F.2d at 1168 (“‘[W]here the question of guilt or innocence hangs entirely on the reliability and accuracy of the in-court identification, the identification procedures should be as lacking in inherent suggestiveness as possible.”).

386 *But cf. United States v. Campbell*, 300 F.3d 202, 215-16 (2d Cir. 2002) (request properly denied

where defendant had history of escape, none of in-court identifications were to be made by persons who had only fleeting glimpses of defendant, and trial court weighed possibility of suggestiveness against possibility defendant might attempt to escape); *Bond v. Walker*, 68 F. Supp. 2d 287, 300-04 (S.D.N.Y. 1999) (questioning whether *Archibald* remains good law, especially in habeas case), *adhered to on reconsideration*, 2000 WL 460592 (S.D.N.Y. 2000) (granting certificate of appealability because “[w]hether *Archibald* applies in a case brought under 28 U.S.C. § 2254" is a debatable issue), *aff’d*, 242 F.3d 364 (table), 2000 WL 1804557 (2d Cir. Dec. 7, 2000) (unpublished) (noting that *Archibald* “is not Supreme Court precedent and is not so squarely based on Supreme Court precedent that the requirements of § 2254(d) are satisfied”).

387 *See, e.g.*, *United States v. Thompson*, 524 F.3d 1126, 1136 (10th Cir. 2008) (noting that district court offered in-court lineup, but defendant did not take advantage of offer).

388 *Cf. Smith v. Black*, 904 F.2d 950, 979 (5th Cir. 1990) (ineffective assistance of counsel case

recognizing that defense attorney’s failure to object to defendant wearing jail clothing might have been sound trial strategy because it enabled attorney to “call into question the in-court identification of [defendant]”).

Counsel may also suggest less logistically difficult alternatives to reduce the suggestiveness of the typical in-court identification procedure, such as allowing the defendant to sit somewhere in the courtroom other than at counsel table or even to waive his or her presence at trial.389 Several courts have held that a defendant does not have a *right* to waive his presence,390 but courts may have discretion to

allow the waiver if its purpose is to avoid suggestiveness.391 Even if such a motion is denied, it could

serve as leverage for insisting on an in-court procedure that eliminates, or at least reduces, suggestiveness.392

Finally, in-court identifications, like pretrial identifications, may be precluded as the product of prior constitutional violations, including Fourth Amendment violations,393 violations of the right to counsel at a lineup,394 and impermissibly suggestive pretrial identification procedures that fail the due process test established by *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409 U.S. 188 (1972).395 The analysis in the last of these types of cases directly mirrors the test established by *Manson*

and *Biggers*, and discussed in Section 6.11.03.01 above.396 In the first two types of cases -- a prior

violation of the Fourth Amendment or of the Sixth Amendment right to counsel -- the Supreme Court

389 *See United States v. Matthews*, 20 F.3d 538, 547 (2d Cir. 1994) (suggesting alternatives of “asking

. . . to be seated somewhere other than at the counsel table, or not to be present, or to be placed in a lineup prior to the in-court identification”); *Domina*, 784 F.2d at 1368-69 (suggesting procedures of “an in-court line-up, or having the defendant sit somewhere in the courtroom other than the defense table”); *cf. Moore*, 433 U.S. at 230

n.5 (1977) (suggesting that counsel could have asked that victim be excused from courtroom while charges were read and let petitioner be seated with other people in audience when victim attempted an identification).

390 *See United States v. Lumitap*, 111 F.3d 81, 83-84 (9th Cir. 1997); *United States v. Durham*, 587 F.2d 799, 800 (5th Cir. 1979); *United States v. Moore*, 466 F.2d 547, 548 (3d Cir. 1972); *United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970).

391 *See Lumitap*, 111 F.3d at 84 (holding only that district court “does not abuse its discretion” when it

denies defendant’s request to waive presence, though also stating that “[i]t is well-settled that a defendant may be compelled to submit to some form of identification procedure” and that prior cases “support the district court’s view that the Government can compel a defendant’s presence at trial for identification purposes”); *Matthews*, 20 F.3d at 547 (suggesting that defendant can avoid suggestive identification procedure by “ask[ing] . . . not to be present”). *But cf. United States v. Cannatella*, 597 F.2d 27 (2d Cir. 1979) (stating that normally judge can and should compel defendant to be present at all stages of felony trial, though “there is a residue of judicial discretion in unusual circumstances” such as where there is health risk to defendant due to illness).

392 *Cf. Matthews*, 20 F.3d at 547 (suggesting alternatives of lineup prior to in-court identification,

defendant sitting elsewhere in courtroom, or defendant not being present).

393 *See United States v. Crews*, 445 U.S. 463, 472 (1980).

394 *See United States v. Wade*, 388 U.S. 218, 240-41 (1967).

395 *See, e.g.*, *United States v. Honer*, 225 F.3d 549, 553 (5th Cir. 2000); *United States v. Wisniewski*, 741 F.2d 138, 143 (7th Cir. 1984); *Williams v. Lockhart*, 736 F.2d 1264, 1266-67 (8th Cir. 1984); *United States v. Burnette*, 698 F.2d 1038, 1045 (9th Cir. 1983).

396 *See Honer*, 225 F.3d at 553; *Wisniewski*, 741 F.2d at 143; *Lockhart*, 736 F.2d at 1267; *Burnette*,

698 F.2d at 1045.

has incorporated the “fruit of the poisonous tree” test adopted in *Wong Sun v. United States*, 371 U.S. 471 (1963), but directed the courts to factors comparable to those listed in *Manson* and *Biggers*.397

# Eyewitness Identification Experts

Research by psychologists over the last thirty years has developed some interesting and compelling evidence regarding the reliability -- or lack thereof -- of eyewitness identification

testimony.398 While some state courts have held it is an abuse of discretion and reversible error to

exclude expert testimony by a psychologist on this question, at least in certain circumstances,399 the federal courts have generally declined to find an abuse of discretion in exclusion of such evidence.400 Still, especially after the Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509

U.S. 579 (1993), there have been suggestions that “such evidence warrants a more hospitable reception,” *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995), and a recognition that it “has been allowed in with increasing frequency where the circumstances include ‘cross-racial identification, identification after a long delay, identification after observation under stress, and [such] psychological phenomena as . . . unconscious transference,’”

*Langan*, 263 F.3d at 621 (quoting *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993)).401 The

397 *See Crews*, 445 U.S. at 470, 472-73 & n.18 (citing *Wong Sun*, *Wade*, and incorporating factors

enumerated in *Wade*); *Wade*, 388 U.S. at 241 (citing test in *Wong Sun* and stating that “[a]pplication of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant’s actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification”).

398 *See generally* ELIZABETH F. LOFTUS AND JAMES M. DOYLE, EYEWITNESS TESTIMONY (3d ed. 1997), *cited in United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123-24 (10th Cir. 2006); *see also United States v. Brownlee*, 454 F.3d 131, 141-42 (3d Cir. 2006) (collecting studies on misidentification); *United States v. Smithers*, 212 F.3d 306, 312 n.1 (6th Cir. 2000) (collecting authorities); U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (Oct. 1999).

399 *See, e.g.*, *People v. McDonald*, 690 P.2d 709, 726 (Cal. 1984).

400 *See, e.g.*, *Rodriguez-Felix*, 450 F.3d at 1126-27; *United States v. Carter*, 410 F.3d 942, 950 (7th Cir. 2005); *United States v. Stokes*, 388 F.3d 21, 27 (1st Cir. 2004); *United States v. Langan*, 263 F.3d 613, 625 (6th Cir. 2001); *United States v. Lumpkin,* 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996); *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994). *But cf. United States v. Brownlee*, 454 F.3d at 144 (finding error in exclusion of testimony and remanding for new trial at which testimony should be admitted); *United States v. Mathis*, 264 F.3d 321, 342-43 (3d Cir. 2001) (finding error in exclusion of testimony, albeit harmless).

401 *See also Rodriguez-Felix*, 450 F.3d at 1123-24 (discussing merits of expert testimony on eyewitness identification and also quoting *Harris*); *Smithers*, 212 F.3d at 311 (noting that trend “shifted with a series of decisions in the 1980s, with the emerging view that expert testimony may be offered, in certain circumstances, on the subject of the psychological factors which influence the memory process”); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (pre-*Daubert* opinion noting that “[r]ecent decisions . . . indicate a new willingness to uphold a trial judge’s admission of such testimony and a willingness to evaluate the adequacy of reasons for justifying exclusion of such testimony in particular cases” and that “the conclusions of the

vast majority of circuits now reject a per se rule excluding such testimony,402 and so counsel should consider making a motion to present such testimony in an appropriate case. If a motion is made, the proffer which is made in support of it may be critical, so counsel should make as detailed and case- specific a proffer as possible.403

# MOTIONS RELATED TO JOINDER AND SEVERANCE

Rule 8 of the Federal Rules of Criminal Procedure permits “joinder” of offenses or defendants in a single indictment or information in order to promote judicial economy. Joinder that is not explicitly permitted under Rule 8 is called “misjoinder.” Rule 14 of the Federal Rules of Criminal Procedure provides an additional layer of protection by permitting “severance” of offenses or defendants that are otherwise properly joined under Rule 8 when the joinder results in prejudice. The decision whether to grant severance is discretionary -- even upon a showing of prejudice, see *Zafiro v. United States*, 506

U.S. 534, 538-39 (1993) (“Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court’s sound discretion.”) -- and denial of a motion is reviewed only for abuse of discretion, see, e.g., *United States v. Najjar*, 300 F.3d 466, 473 (4th Cir. 2002).

psychological studies are largely *counter-intuitive*, and serve to ‘explode common myths about an individual’s capacity for perception’” (quoting *United States v. Smith*, 736 F.2d 1103, 1105 (6th Cir. 1984))).

402 *See Rodriguez-Felix*, 450 F.3d at 1124-25 (collecting cases); *United States v. Welch*, 368 F.3d 970, 975 (7th Cir. 2004) (“We emphasize that expert testimony regarding eyewitness identification, memory, and perception is not per se unhelpful.”), *vacated and remanded on other grounds*, 543 U.S. 1112 (2005); *Smithers*, 212 F.3d at 318 (improper to exclude evidence without conducting hearing under *Daubert* and remanding for such a hearing). *But cf. Langan*, 263 F.3d at 623-25 (upholding exclusion of testimony where district court did conduct *Daubert* hearing). The one circuit which appears to have possibly retained a per se rule of exclusion is the Eleventh Circuit, see *United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997), cited in *Felix- Rodriguez*, 450 F.2d at 1124-25, though that circuit’s controlling decision has been questioned by at least one subsequent panel, see *United States v. Smith*, 148 Fed. App’x 867, 872-73 n.8 (11th Cir. 2005); see also *Moore*, 786 F.2d at 1312 (construing prior Fifth Circuit authority upon which Eleventh Circuit relied as leaving discretion in district courts).

403 *See, e.g.*, *Brownlee*, 454 F.3d at 140 & n.5, 143; *Mathis*, 264 F.3d at 333-34. *Compare Rodriguez-*

*Felix*, 450 F.3d at 1126 (noting that expert report “fails to sufficiently reference specific and recognized scientific research” and that “[t]he requirements of *Daubert* are not satisfied by casual mention of a few scientific studies”); *Stokes*, 388 F.3d at 27 (“Without any information regarding the reliability and helpfulness of the proposed expert testimony and without any indication of the existence of a special circumstance, the district court could not conclude that the proposed testimony would ‘assist the trier of fact to understand the evidence.’” (quoting FED.

R. EVID. 702)); *Brien*, 59 F.3d at 277-78 (noting that “the district judge made clear his need for some proffer of data or literature underlying the expert’s assumptions and conclusions, and the defense offered practically nothing” and that “*Daubert*, as well as common prudence, entitled the judge to require such underlying information”).

# Joinder and Severance of Offenses

* + - 1. **Joinder Under Rule 8(a)**

Rule 8(a) governs the joinder of multiple offenses in a single indictment or information. It allows joinder in three circumstances: (1) when the offenses “are of the same or similar character;” (2) when the offenses are “based on the same act or transaction;” and (3) when the offenses are “connected with or constitute parts of a common scheme or plan.” The rule is broadly construed in favor of joinder,404 but that does not mean there can never be a successful claim of misjoinder.

For example, in *United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996), the defendant succeeded in a challenge to joinder based on the “same or similar character” prong of Rule 8(a). The court had before it a 101-count indictment and found that the government had improperly joined 97 counts of mislabeling and adulterating shrimp with four counts of tax fraud, explaining that “it is very hard to describe adulterating or mislabeling shrimp as offenses ‘similar’ to tax fraud -- except at a level of generality so high as to drain the term of any real content.” *Id.* at 628. Similarly, in *United States v. Chavis*, 296 F.3d 450 (6th Cir. 2002), the court held that a 1999 possession of cocaine base charge was improperly joined with a 1997 charge of illegal purchase of a handgun because the indictment did not allege that the “illegal acquisition of the firearm was related to drug activity in any way.” *Id.* at 458.405

Similarly, there are examples of successful challenges to joinder based on the “same act or transaction” prong of Rule 8(a). In *Chavis*, the court concluded that drug and firearm offenses, which were committed two years apart, were impermissiblyjoined because the government did not demonstrate that the crimes were part of the same act or transaction. *Id.* at 458. In *United States v. Richardson*, 161 F.3d 728 (D.C. Cir. 1998), the court held that joinder of firearm and ammunition counts to a count of threats to injure another could not be joined because “there was no overlap of issues or evidence between the weapons and threats offenses.” *Id.* at 733-34. Courts do read this second prong of Rule 8(a) liberally, however, requiring only that the charged offenses be temporally or logically connected.406

404 *See, e.g.*, *United States v. Graham*, 275 F.3d 490, 494 (6th Cir. 2001) (“The district court may, to the extent it is consistent with due process principles, construe the Rule broadly to promote the goals of trial convenience and judicial efficiency.”) (citations and internal quotations omitted); *United States v. Singh*, 261 F.3d 530, 533 (5th Cir. 2001) (“Joinder of charges is the rule rather than the exception.”).

405 *Compare United States v. Bowker,* 372 F.3d 365, 384 (6th Cir. 2004) (permitting joinder of mail theft charge and stalking and harassment charges), *vacated on other grounds*, 543 U.S. 1182 (2005), *reinstated on remand,* 125 F. App’x 701 (6th Cir. 2005); *United States v. Lanas,* 324 F.3d 894, 898-900 (7th Cir. 2003) (permitting joinder of seemingly disparate mail fraud charges); *United States v. Melendez*, 301 F.3d 27, 35 (1st Cir. 2002) (permitting joinder of two drug counts because both counts involved the same drug); *United States*

*v. Tubol,* 191 F.3d 88, 95 (2d Cir. 1999) (permitting joinder of gun possession and robbery charges because witnesses testified that the robber had gun and “same evidence [would] support both joined counts”).

406 *See, e.g.*, *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005) (permitting joinder of tax and

related counts because they “cover[ed] the same time period and involve[d] the same evidence”); *United States*

*v. Price*, 265 F.3d 1097, 1105 (10th Cir. 2001) (permitting joinder of weapon and drug charges); *United States*

*v. Nguyen*, 88 F.3d 812, 815-18 (9th Cir. 1996) (permitting joinder of conspiracy charges with felon in possession charge because all arose from sale of guns to a specific investigator); *United States v. Gorecki*, 813 F.2d 40, 42

Finally, there are examples of successful challenges to joinder based on the “connected with or part of a common scheme or plan” prong of Rule 8(a). In *United States v. Mackins*, 315 F.3d 399 (4th Cir. 2003), the court held that the joinder of counterfeiting and drug conspiracy charges was improper because the indictment contained no allegation of a connection between the charges. *Id.* at 413. In *United States v. Singh*, 261 F.3d 530 (5th Cir. 2001), the court held that joinder of firearms counts with harboring counts was improper because the government had presented “no significant evidence that [defendant] used the gun described in the indictment to intimidate the aliens.” *Id.* at 533.407

Violations of Rule 8(a) are always subject to harmless error review, requiring a showing of actual prejudice that affected the jury verdict.408

# Severance Under Rule 14

Under Rule 14, a trial judge has discretion to order severance of counts even if the counts are properly joined under Rule 8(a), to avoid undue prejudice.409 This decision may be made before or even during trial, but the motion must be renewed at the close of evidence to preserve the issue for appeal. *See* discussion at Section 6.01.04.

The First Circuit has established a frequently-employed test in which the court identified three types of possible prejudice that may result from joinder of offenses:

1. [T]he defendant may become embarrassed or confounded in presenting separate defenses;
2. proof that defendant is guilty of one offense may be used to convict him of a second offense, even though such proof would be inadmissible in a separate trial for the second offense; and (3) a defendant may wish to testify in his own behalf on one of the offenses

(3d Cir. 1987) (permitting joinder of gun and drug charges because “it is reasonable to assume that the firearm could have been used as a vital part of a plan to possess and distribute drugs”).

407 *See also United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990) (holding that joinder of drug and

firearm counts was improper because the crimes were distinct, had no evidentiary overlap, and had no commonality geographically or temporally). *Compare Bowker*, 372 F.3d at 384 (permitting joinder of mail theft charges to stalking and harassment charges because they were part of a “common scheme to harass and threaten [the victim]”); *United States v. Fenton*, 367 F.3d 14, 21 (1st Cir. 2004) (permitting joinder of narcotics sales and pipe bomb charges because the bomb was used “during and in furtherance of the drug-trafficking conspiracy” and because the charges “linked as elements of a common scheme or plan”).

408 *See United States v. Edgar*, 82 F.3d 499, 503 (1st Cir. 1996); *United States v. Terry*, 911 F.2d 272,

277 (9th Cir. 1990).

409 *See, e.g.*, *United States v. McCarter*, 316 F.3d 536, 538 (5th Cir. 2002) (finding joinder of felon in

possession and drug counts prejudicial because of the likelihood that the jury would be influenced by the evidence attached to the felon in possession charges); *United States v. Adkinson*, 135 F.3d 1363, 1374 (11th Cir. 1998) (finding joinder prejudicial where defendants were charged in a “far-flung series of events . . . which no amount of evidence at trial could establish”).

but not another, forcing him to choose the unwanted alternative of testifying as to both or testifying as to neither.

*United States v. Jordan*, 112 F.3d 14, 16 (1st Cir. 1997) (quoting *United States v. Scivola*, 766 F.2d 37,

41-42 (1st Cir. 1985)).

A critical consideration in the prejudice calculus is whether the jury will independently consider

each count.410 As to the second prong of the test set forth above, courts have held that severance is not

appropriate merely because evidence as to one count is more substantial than the proof associated with

the remaining count.411 Under the third prong of the test, joinder of two sets of counts has been found

to be prejudicial and an abuse of discretion where the defendant made a particularized showing that he wanted to testify as to only one set of the counts.412 Nonetheless, to obtain severance on this ground, the defendant bears a substantial burden of showing prejudice.413

# Joinder and Severance of Counts

* + - 1. **Joinder Under Rule 8(b)**

Rule 8(b) governs the charging and joinder of multiple defendants in the same indictment or information. It provides for joinder of defendants whenever the defendants “are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” FED. R. CRIM. P. 8(b). Unlike Rule 8(a), Rule 8(b) does not contemplate or permit joinder of defendants simply because the charged offenses are of the same or similar character. Rather, there must be a logical relationship between the offenses joined, even though the rule does not require that each defendant be charged with each offense, see FED. R. CRIM. P. 8(b).

Courts generally require that the government show a logical connection between the offenses. In *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999), in which the court found joinder was

410 *See, e.g.*, *United States v. Melendez*, 301 F.3d 27, 36 (1st Cir. 2002) (finding joinder of offenses

nonprejudicial because judge instructed jury to consider each charge separately); *United States v. Chavis*, 296 F.3d at 462 (misjoinder nonprejudicial because limiting instructions “significantly reduced the potential for prejudice to the defendant”); *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998) (finding joinder nonprejudicial because trial judge adequately instructed jury to consider individual counts separately).

411 *See, e.g.*, *United States v. Moyer*, 313 F.3d 1082, 1085 (8th Cir. 2002) (finding no prejudicial joinder where evidence was stronger on one count than another); *United States v. Wiseman*, 172 F.3d 1196, 1212 (10th Cir. 1999) (same); *United States v. Manganellis*, 864 F.2d 528, 543 (7th Cir. 1988) (holding that joinder was not prejudicial where proof as to one count was very substantial whereas proof of other counts was less compelling where defenses were nearly identical as to each count).

412 *See United States v. Sampson*, 385 F.3d 183, 193 (2d Cir. 2004); *Cross v. United States*, 335 F.2d

987, 989 (D.C. Cir. 1964) (holding joinder prejudicial where defendant, who testified at trial, would have chosen not to testify about one, of two, separate robberies had severance been granted).

413 *See, e.g.*, *United States v. Saadey,* 393 F.3d 669, 679 (6th Cir. 2005); *United States v. Moyer*, 313

F.3d 1082, 1085 (8th Cir. 2002); *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir. 1992).

improper because the counts did not “naturally flow” from each other and there was no substantial overlap in evidence, the court explained:

“[T]ransactions” has a flexible meaning and . . . the existence of a “series” depends upon the degree to which the events are related. Mere factual similarity of events will not suffice. Rather, there must be some greater “logical relationship” between the occurrences. Such a logical relationship may be shown by the existence of a common plan, scheme, or conspiracy.

*Id.* at 976 (quoting *United States v. Ford*, 632 F.2d 1354, 1371-72 (9th Cir. 1980)).414

In determining whether the strictures of Rule 8(b) have been met, trial judges should generally

look only to the face of the indictment.415 indictment, however.416

In limited circumstances, judges may look beyond the

# Severance Under Rule 14

As with offenses, a court may order severance of defendants under Rule 14(a) even though the initial joinder under Rule 8(b) was proper. *See* FED. R. CRIM. P. 14(a) (“If the joinder of offenses *or defendants* in an indictment, an information or a consolidation for trial appears to prejudice a defendant

. . . , the court may . . . sever the defendants’ trials. . . .” (emphasis added.)) The defendant bears the burden of showing prejudice, see, e.g., *United States v. Souffront*, 338 F.3d 809, 828 (7th Cir. 2003), which burden the Ninth Circuit has described as follows:

The moving party must show more than that a separate trial would have given him a better chance for acquittal. He must also show violation of one of his substantive rights

414 *See also United States v. Mackins*, 315 F.3d 399, 413 (4th Cir. 2003) (invalidating joinder of

defendants charged with counterfeit check offenses and money laundering and drug conspiracies because indictment contained no evidence of connection between or among them); *United States v. Cortinas*, 142 F.3d 242, 248-49 (5th Cir. 1998) (holding that joinder was improper because defendants were not associated with codefendants’ criminal organization).

415 *See United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003) (“[W]hether there was misjoinder under Rule 8 is determined by looking solely at the allegations in the indictment; it is thus irrelevant what was shown by the proof at trial.”); *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990) (“[V]alidity of the joinder is determined solely by the allegations in the indictment.”).

416 *See, e.g.*, *United States v. Chavis*, 296 F.3d at 458 (finding improper joinder because there was “no

indication in the indictment *or elsewhere in the record* that Chavis possessed or used any weapons, including the handguns cited in Count One” (emphasis added)); *United States v. McGill*, 964 F.2d 222, 242 (3d Cir. 1992) (“Where representations made in pretrial documents other than the indictment clarify factual connections between the counts, reference to those documents is permitted.”); *United States v. Dominguez*, 226 F.3d 1235, 1241 (11th Cir. 2000) (holding that the “indictment only” rule applies to justify joinder, but that failure to satisfy the rule does not necessarily invalidate joinder); *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1997) (per curiam) (“Rule 8(b) can be satisfied either by the indictment alone . . . or by ‘[s]ubsequent pretrial representations.’”).

by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant. In other words, the prejudice must have been of such magnitude that the defendant was denied a fair trial.

*United States v. Douglass*, 780 F.2d 1472, 1478 (9th Cir. 1986) (quoting *United States v. Escalante*, 637 F.2d 1197) (9th Cir. 1980)). This iteration of the prejudice requirements is typically distilled into three categories of prejudice, resulting from: (1) the defendants’ antagonistic or mutually exclusive defenses;

(2) a codefendant’s refusal to give exculpatory testimony in a joint trial, owing to the potential for self- incrimination; or (3) the introduction of a codefendant’s extrajudicial confession that incriminates the defendant, even when introduced only against the codefendant.

# Antagonistic or Mutually Exclusive Defenses

In *Zafiro v. United States*, 506 U.S. 534 (1993), the Supreme Court articulated a general rule that “mutually antagonistic defenses are not prejudicial *per se*.” *Id.* at 538.417 The Supreme Court explained in *Zafiro* that severance is warranted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro*, 506 U.S. 534, 539 (1993). Still, courts have occasionally been receptive to claims of antagonistic defense owing to the bad behavior of a codefendant’s attorney.418

As for claims that severance is required to prevent the evidence against one codefendant from spilling over onto others, courts have rejected such claims in most cases,419 including cases where the

evidence is much stronger against one codefendant than the others.420 But there are cases in which

417 *See also United States v. Sarracino*, 340 F.3d 1148, 1156 (10th Cir. 2003) (finding no prejudice

where all defendants asserted self-defense in murder case); *United States v. Serafino*, 281 F.3d 327, 330 (1st Cir. 2002) (finding no prejudice where defendant denied master-minding money laundering scheme while codefendants claimed to be unwitting participants).

418 *See, e.g.*, *United States v. Odom*, 888 F.2d 1014, 1018 (4th Cir. 1989) (finding severance proper

where defendant’s counsel continuously attacked codefendant and discussed prior, marginally relevant prior bad acts of codefendant); *De Luna v. United States*, 308 F.2d 140, 141-43 (5th Cir. 1962) (finding severance proper where codefendant’s counsel commented on defendant’s invocation of his right not to testify). *But cf. United States v. Naijar*, 300 F.3d 466, 474 (4th Cir. 2002) (holding that severable behavior must “rise above mere finger pointing”).

419 *See, e.g.*, *United States v. Spinelli*, 352 F.3d 48, 55-56 (2d Cir. 2003) (upholding denial of severance because spillover was not prejudicial, as evidence from codefendant’s charge was not overwhelming and jury instructions cured any error); *United States v. Cross*, 308 F.3d 308, 317 (3d Cir. 2002) (explaining that prejudicial spillover occurs “only if the evidence introduced to support the reversed count would have been inadmissible at a trial on the remaining count”).

420 *See, e.g.*, *United States v. Walls*, 293 F.3d 959, 966 (6th Cir. 2002) (finding no spillover effect

because evidence of codefendant’s methamphetamine manufacturing would have been admissible against defendant in separate trial).

severance has been required because the spillover evidence would not have been admissible absent joinder.421

Courts will occasionally cure any problems with respect to potential spillover or mutually antagonistic defenses by impaneling separate juries for separate defendants and allowing the separate juries to hear only the evidence related to their particular defendants. Without a specific showing of prejudice, this procedure generally has been upheld.422

# Codefendant’s Exculpatory Testimony

Another potential ground for severance of defendants is one defendant’s need for exculpatory testimony from another defendant who will not testify at his own trial. A defendant seeking to sever for this purpose must make a threshold showing of: (1) a bona fide need for the testimony; (2) the substance of the requested testimony; (3) the exculpatory nature of the testimony; and (4) the likelihood that the codefendant would, in fact, testify at a separate trial. This threshold showing often proves to be a significant obstacle.423

If and when a threshold showing has been made, a court must then: (1) examine the significance of the testimony in relation to the defendant’s theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider the effects on judicial administration and economy; and

(4) give weight to the timeliness of the motion. This four-part test also often serves as a substantial

hurdle to relief.424 Another hindrance to prevailing on a severance theory based upon exculpatory

421 *See, e.g.*, *United States v. Baker*, 98 F.3d 330, 335 (8th Cir. 1996) (denial of severance abuse of

discretion because the prejudicial evidence could not have been admitted against the defendant absent joinder and because jury instructions could not adequately allay the risk of substantial prejudice); *United States v. Breinig*, 70 F.3d 850, 852-53 (6th Cir. 1995) (holding that the denial of severance constituted an abuse of discretion where ex-wife, charged with tax evasion jointly with her ex-husband, testified to his abusiveness and philandering); *United States v. Davidson*, 936 F.2d 856, 861 (6th Cir. 1991) (finding spillover-based prejudice where absent codefendant’s tax returns stating codefendant’s income was derived, in part, from gambling and narcotics were introduced against defendant, in trial for conspiracy to possess with intent to distribute cocaine). *But cf. United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004) (upholding denial of severance because joinder “did not affect the jury’s ability to evaluate each defendant’s culpability individually”); *United States v. Feyrer*, 333 F.3d 110, 115 (2d Cir. 2003) (upholding denial of severance because prejudice could be cured by jury instructions); *United States v. Montgomery*, 262 F.3d 233, 245 (4th Cir. 2001) (upholding denial of severance because codefendant’s testimony did not deny other defendants a specific trial right).

422 *See, e.g.*, *Mack v. Peters*, 80 F.3d 230, 236 (7th Cir. 1996); *United States v. Lewis*, 716 F.2d 16, 19

(D.C. Cir. 1983).

423 *See, e.g.*, *United States v. Smith*, 223 F.3d 554, 575 (7th Cir. 2001) (upholding denial of severance

because there was no showing that codefendant would, in fact, testify in a separate trial); *United States v. Elder*, 90 F.3d 1110, 1120 (6th Cir. 1996) (same). *But see United States v. Cobb*, 185 F.3d 1193, 1198 (11th Cir. 1999) (finding error where district court refused to sever where testimony was exculpatory and would have “contradicted the only evidence” against defendant).

424 *See, e.g.*, *United States v. Kayode*, 254 F.3d 204, 211 (D.C. Cir. 2001).

codefendant testimony is the fact that the codefendant generally cannot condition his testimony upon the codefendant being tried first.425

# Codefendant’s Confession

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court announced that the Confrontation Clause of the Sixth Amendment forbids the admission of a non-testifying codefendant’s confession in a joint trial, even where the jury has been given a limiting instruction. *See id.* at 137. The Court has held this bar applies even when there is an “interlocking” confession by the defendant himself. *Cruz v. New York*, 481 U.S. 186, 192-93 (1987). There is no *Bruton* violation, however, where the codefendant testifies and so is subject to cross-examination at trial. *See, e.g.*, *Moore v. Casperson*, 345 F.3d 474, 489 (7th Cir. 2003).

There is also no *Bruton* violation if the defendant is not directly implicated by the codefendant’s out-of-court confession, and the confession may be redacted to eliminate references to the defendant. *See Richardson v. Marsh*, 481 U.S. 200, 208-09 (1987).426 Still, the redaction must be nonsuggestive. In *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001), for example, the court found a *Bruton* violation where the codefendant’s statement incriminated himself and his “friend” because the defendant

-- notwithstanding efforts to conceal the identity of the “friend” -- was easily identified as the friend. *See id.* at 341. Similarly, in *United States v. Doherty*, 233 F.3d 1275 (11th Cir. 2000), the court found a *Bruton* violation even with a limiting instruction where the nontestifying codefendant identified and linked the defendant to illegal transactions*. See id.* at 1282.427

# MOTIONS IN LIMINE

As suggested in Section 6.01.05, “Tactical Reasons for Filing Motions,” objections to evidence based on evidentiary rules may be raised in written motions in limine, though they do not have to be raised in such motions. Potential motions in limine are as varied as the rules of evidence and/or the evidence that may be offered under those rules, but common motions in limine counsel may consider making in a federal criminal case include the following:

1. Motions to exclude evidence of “other bad acts” under Rule 404(b) of the Federal Rules of Evidence.

425 *See, e.g.*, *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir. 1992) (upholding denial of severance when codefendant offer to testify was conditioned upon a demand that he be tried first). *But see Taylor v. Singletary*, 122 F.3d 1390, 1393 (11th Cir. 1997) (holding that defendant was denied a fair trial where codefendant agreed in affidavit to provide exculpatory testimony following conclusion of his own trial).

426 *See also United States v. Yousef*, 327 F.3d 56, 150 (2d Cir. 2003) (finding no *Bruton* violation where codefendant’s statement was redacted of defendant’s name and alias and “[n]othing in the redacted statement, standing by itself, implicated [defendant] or made the fact of redaction obvious”).

427 S*ee also United States v. Macias*, 387 F.3d 509, 517-22 (6th Cir. 2004) (finding a *Bruton* violation); *United States v. Sarracino*, 340 F.3d 1148, 1161 (10th Cir. 2003) (same); *United States v. Mayfield*, 189 F.3d 895, 902 (9th Cir. 1999) (same).

1. Motions to exclude evidence of prior convictions under Rule 609 of the Federal Rules of Evidence.
2. Motions to exclude inflammatory evidence, such as tattoos, gang membership, gang monikers, and/or other prejudicial evidence under Rule 403 of the Federal Rules of Evidence.
3. Motions to exclude law enforcement testimony about “drug courier profiles,” the practices of drug traffickers, and/or other characteristics of the defendant which approach being no more than opinions about the defendant’s guilt.428
4. Motions to exclude testimony by law enforcement “experts” -- or other unusual experts -- on the ground that it fails to satisfy the test for admissibility of expert testimony established by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).429
5. Motions to *admit* testimony from *defense* experts outside traditional areas of expertise and/or in areas where there may be controversy, such as the eyewitness identification expert testimony discussed in Section 6.11.03.03.430

428 *See, e.g.*, *United States v. Mendoza-Medina*, 346 F.3d 121, 127-29 (5th Cir. 2003) (collecting cases); *United States v. Vallejo*, 237 F.3d 1008, 1015-18 (9th Cir.), *amended*, 246 F.3d 1150 (9th Cir. 2001); *United States v. Lim*, 984 F.2d 331, 334-35 (9th Cir. 1993); *United States v. Williams*, 957 F.2d 1238, 1241 (5th Cir. 1992); *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990); *United States v. Quigley*, 890 F.2d 1019, 1023-24 (8th Cir. 1989); *cf*. *United States v. Hernandez- Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (“denounc[ing] the use of drug courier profile evidence as substantive evidence of a defendant’s innocence or guilt” but reviewing only for plain error because of lack of defense objection and finding error did not require reversal under that standard).

429 *See, e.g.*, *United States v. Grinage*, 390 F.3d 746, 750-51 (2d Cir. 2004); *United States v. Cruz*, 363

F.3d 187, 194-96 (2d Cir. 2004); *United States v. Dukagjini*, 326 F.3d 45, 52-56 (2d Cir. 2003); *United States*

*v. Conn*, 297 F.3d 548, 554-56 (7th Cir. 2002); *United States v. Hankey*, 203 F.3d 1160, 1167-73 (9th Cir. 2000); *cf. United States v. Pree*, 408 F.3d 855, 870 (7th Cir. 2005) (noting district court would have had to conduct *Daubert* hearing if defendant had objected to law enforcement officer expert testimony but reviewing only for plain error because defendant did not object); *United States v. Solorio-Tafolla*, 324 F.3d 964, 965 (8th Cir. 2000) (also reviewing only for plain error where defendant did not object to officer’s expert testimony based on *Daubert)*; *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995) (testimony by officer about nexus between drug trafficking and possession of weapons not expert opinion testimony but lay opinion testimony).

430 *See, e.g.*, *United States v. Vesey*, 338 F.3d 913, 916-18 (8th Cir. 2003) (convicted drug trafficker and confidential informant offered as drug trafficking expert; held error, albeit harmless, for district court to exclude testimony); *United States v. Mamah*, 332 F.3d 475, 476-78 (7th Cir. 2003) (anthropologist and sociologist offered to testify to cultural factors that could have led Ghanian citizen to give false confession; “acknowledg[ing] that social scientists frequently testify as experts and their opinions are ‘an integral part of many cases’” (quoting *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996)), but testimony properly excluded in case at bar); *Hall*, 93 F.3d at 1341, 1344-45 (same social psychologist as in *Mamah* offered as expert on false confessions and psychiatrist offered regarding defendant’s mental condition and susceptibility to give answers interrogator seeking; held error to exclude testimony); *United States v. Dorsey*, 45 F.3d 809, 812, 814-15 (4th Cir. 1995)

In analyzing the case law in these and other areas, counsel should keep in mind that trial court evidentiary rulings are generally reviewed only for abuse of discretion and so are more likely to be affirmed whichever way the decision has gone. The mere fact that a reported decision found it was not an abuse of discretion for the trial court to admit evidence offered by the government or exclude evidence offered by the defense does not mean a district court must rule that way in another case, even if the circumstances are identical.431

# MOTION TO COMPEL PERFORMANCE OF PLEA AGREEMENT

* + 1. **General Principles of Construction of Plea Agreements**

Courts have stated that plea agreements “are contractual in nature,” and so usually are interpreted in accord with general contract law standards,432 though the extension of contract law principles is not

absolute.433 This qualification is necessary because, first, “the defendant’s underlying ‘contract’ right

(forensic anthropologists who compared defendant to surveillance photographs; held not error to exclude testimony under *Daubert*); *United States v. Rahm*, 993 F.2d 1405, 1409, 1415 (9th Cir. 1993) (testimony of psychologist that defendant had “difficulty with visual perception” and had overall personality style that might be marked by lack of insight offered to support defense that defendant did not realize currency was counterfeit; held error to exclude testimony); *United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1995) (testimony of psycholinguistics professor offered to explain how defendant might have interpreted questions in way that would make his answers not false; held not abuse of discretion to exclude testimony, but “a close question”).

431 *See, e.g., United States v. Welch*, 368 F.3d 970, 975 (7th Cir. 2004) (“the usefulness of [eyewitness

identification expert] evidence in a particular case is best decided by the district court and given great deference by this Court”); *United States v. Cunningham*, 194 F.3d 1186, 1195 (11th Cir. 1999) (not abuse of discretion to exclude test results, even though “[h]ad we been sitting as district court judges, we might have allowed [the defendant] to introduce the . . . test results”); *United States v. White*, 890 F.2d 1012, 1014 (8th Cir. 1989) (noting “great deference” given to trial court evidentiary rulings and declining to find abuse of discretion in admission of law enforcement officer expert testimony regarding modus operandi of drug dealers, but noting that “[t]his finding does not indicate any belief that the district court followed the best course in admitting all of the evidence that was admitted, or that we favor admission of such evidence in general”).

432 *United States v. Schwartz*, 511 F.3d 403, 405 (3d Cir. 2008); *United States v. Sanchez*, 508 F.3d 456, 460 (8th Cir. 2007); *United States v. Harris*, 473 F.3d 222, 225 (6th Cir. 2006); *United States v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988); *see also United States v. Asset*, 990 F.2d 208, 215 n.6 (5th Cir. 1993) (collecting cases); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986).

433 S*ee, e.g.*, *United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir. 1992) (noting that “the contract

law analogy has limits” and declining to apply contract principles regarding reformation); *Kingsley v. United States*, 968 F.2d 109, 115 (1st Cir. 1992) (citing *United States v. Garcia*, 956 F.2d 41, 43-44 (4th Cir. 1992), for proposition that “parol evidence rule is not rigidly applied in construing plea agreements”); *United States v. Olesen*, 920 F.2d 538, 541-42 (8th Cir. 1990) (declining to apply contract principles to support district court’s reformation of contract); *Partida-Parra*, 859 F.2d at 634 (noting that “[t]he contract analogy is imperfect” and declining to apply contract rules regarding mutual mistake of law); *see generally United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993) (“[T]he analogy of a plea agreement to a traditional contract is not complete or precise, and the application of ordinary contract law principles to a plea agreement is not always appropriate.”); *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (“This analogy [to contract law] should not be taken too far.”).

is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law,” and, second, there is an additional concern “for the ‘honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.’” *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)).434 In part because of this and in part because of the unequal bargaining power of the parties, plea agreements are to be strictly construed and ambiguities in plea agreements are to be resolved against the government.435

The government may withdraw a plea offer at any time prior to entry of the plea, on the theory that there is no enforceable agreement until the defendant enters and the court accepts the plea.436 The general rule is subject to an exception when the defendant has detrimentallyrelied on the plea agreement,

however.437 And some courts have held that failure of a defendant’s attorney to communicate a plea

434 *See also United States v. Copeland*, 381 F.3d 1101, 1106 (11th Cir. 2004) (noting necessity of

“keeping in mind that ‘the validity of a bargained guilty plea depends finally on the voluntariness and intelligence with which the defendant – and not his counsel – enters the bargained plea’” (quoting *Harvey*, 791 F.2d at 301)); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) (noting that application of contract principles “is tempered by the constitutional implications of a plea agreement” (quoting *Margalli-Olvera v. INS*, 43 F.3d 345, 351 (8th Cir. 1994))); *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999) (en banc) (noting that “the analogy [to contract law] is not perfect” because “[a] plea bargain is not a commercial exchange” but “is an instrument for the enforcement of the criminal law,” and “[w]hat is at stake for the defendant is his liberty”); *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (quoting *Harvey* and also noting that “[p]lea agreements

. . . are unique contracts ‘in which special due process concerns for fairness and the adequacy of procedural safeguards obtain’” (quoting *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992) and *United States v. Ataya*, 864 F.2d 1324, 1329 (7th Cir. 1988))); *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (“Plea agreements, however, are ‘unique contracts’ and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant’s right to fundamental fairness under the Due Process Clause.”); *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988) (recognizing “the unique nature of a plea agreement”).

435 *See, e.g.*, *Copeland*, 381 F.3d at 1105-06; *Andis*, 333 F.3d at 890; *United States v. Gebbie*, 294 F.3d 540, 551-52 (3d Cir. 2002) (collecting cases); *Ready*, 82 F.3d at 559; *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992), *amended*, 990 F.2d 1163 (9th Cir. 1993); *Giorgi*, 840 F.2d at 1026; *Harvey*, 791 F.2d at 300.

436 *United States v. Norris*, 486 F.3d 1045, 1049 (8th Cir. 2007) (collecting cases); *United States v.*

*Savage*, 978 F.3d 1136, 1138 (9th Cir. 1992); *United States v. Molina-Iguado*, 890 F.2d 1452, 1456 (5th Cir. 1990); *United States v. Papaleo*, 853 F.2d 16, 18-19 (1st Cir. 1988); *Government of Virgin Islands v. Scotland*, 614 F.2d 360, 362 (3d Cir. 1980); *see also Mabry v. Johnson*, 467 U.S. 504 (1984). *But cf. United States v. Wells*, 211 F.3d 988, 994 n.3 (6th Cir. 2000) (noting division in courts about whether signed plea agreement may be binding on government prior to acceptance by court); *United States v. Mozer*, 828 F. Supp. 208, 214-16 (S.D.N.Y. 1993) (refusing to let government withdraw from plea agreement).

437 *Wells*, 211 F.3d at 994 n.3; *Savage*, 978 F.2d at 1138; *Papaleo*, 853 F.2d at 18; *see, e.g.*, *United*

*States v. McGovern*, 822 F.2d 739, 744 (8th Cir. 1987) (“In an agreement that contemplates the defendant’s pre- plea cooperation as well as his plea of guilty, the government must, unless and until the court rejects the plea, honor in good faith its obligations under the agreement.”); *United States v. Ocanus*, 628 F.2d 353, 358 (5th Cir. 1980) (“A showing that the government gained some unfair advantage over [the defendants] as a result of their reliance might have justified a departure from the general rule.”).

offer to the defendant can constitute ineffective assistance of counsel that requires reinstatement of the plea offer.438

# Conduct Constituting a Breach and the Remedy for Breach

Conduct constituting a breach can vary to the same extent as the terms of plea agreements can vary, though some terms are more prone to breach than others. One area that has given rise to litigation is a government promise to make a certain sentencing recommendation. The Supreme Court has held that the promised recommendation need not be made enthusiastically, so long as it is made. *See United States v. Benchimol*, 471 U.S. 453 (1985). Still, the government cannot mouth the required recommendation and then affirmatively undercut it.439

If there is a breach, the remedy may be either withdrawal of the plea or specific performance.440 While the courts have stated that the determination of remedy lies in the discretion of the court rather

438 *See, e.g.*, *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 n.7 (6th Cir. 2006); *United States v. Blaylock*, 20 F.3d 1458, 1468-69 (9th Cir. 1994).

439 *See, e.g.*, *United States v. E.V.*, 500 F.3d 747, 754 (8th Cir. 2007) (introducing evidence contrary to

stipulation that guidelines enhancement did not apply a breach even where prosecutor disavowed seeking enhancement); *United States v. Cachucha*, 484 F.3d 1266, 1270-71 (10th Cir. 2007) (breach of plea agreement where prosecutor recommended sentence within guideline range as agreed but complained such a sentence “way too low” and guidelines did not “make sense”); *United States v. Gonczy*, 357 F.3d 50, 53-54 (1st Cir. 2004) (finding breach where initial recommendation “was undercut, if not eviscerated, by the AUSA’s substantive argument to the district court”); *United States v. Johnson*, 187 F.3d 1129, 1135 (9th Cir. 1999) (finding breach where prosecutor introduced victim impact statement and court could “see no way to view the introduction of [the] statement other than as an attempt by the prosecutor to influence the court to give a higher sentence than the prosecutor’s recommendation”); *United States v. Nolan-Cooper*, 155 F.3d 221, 238-39 (3d Cir. 1998) (finding breach where government comments about offense and defendant “could [not] possibly be construed as advocating for the lower half of the range, let alone the lowest possible term of imprisonment”); *United States*

*v. Mitchell*, 136 F.3d 1192, 1194 (8th Cir. 1998) (acknowledging that government “technically adhered” to promise to make departure motion but finding references to defendant’s conduct and victim impact statements “violated the spirit of the promise and ultimately the plea agreement”); *United States v. Canada*, 960 F.2d 263, 268-69 (1st Cir. 1992) (finding breach where prosecutor argued “a substantial period of incarceration” was warranted and never affirmatively recommended sentence government had agreed to recommend but simply acknowledged it was “stuck with the plea agreement;” noting that *Santobello v. New York*, 404 U.S. 257 (1971), “prohibits not only explicit repudiation of the government’s assurances, but must in the interests of fairness be read to forbid end-runs around them’” (quoting *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985))); *United States v. Grandinetti*, 564 F.2d 723, 725, 727 (5th Cir. 1977) (finding breach where prosecutor indicated he had “very serious problems with” recommendation but agreed that “based on [the plea agreement] the government is locked-in”); *United States v. Brown*, 500 F.2d 375, 377-78 (4th Cir. 1974) (finding breach where prosecutor did make agreed-upon recommendation but when asked by court whether “you believe in it,” replied, “I do have some problems with that, anyhow, but that is the way I understand it”).

440 *See Santobello*, 404 U.S. at 263; *United States v. Fowler*, 445 F.3d 1035, 1038 (8th Cir. 2006); *Nolan- Cooper*, 155 F.3d at 241; *Margalli-Olvera v. INS,* 43 F.3d 345, 354-55 (8th Cir. 1994); *Canada*, 960 F.2d at 271; *United States v. Tobon-Hernandez*, 845 F.2d 277, 280 (11th Cir. 1988).

than the defendant,441 at least some courts have held that the defendant is entitled to the “lesser” remedy of specific performance if that is all the defendant wants.442 Not giving the defendant a right to specific performance would mean the government could effectively withdraw from a plea agreement whenever it wanted so long as it was willing to let the defendant withdraw his plea.443

In *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court ordered that the case be transferred to a different judge if the relief to be granted there -- which it left up to the state court -- was specific performance. *Id.* at 263. There is a split in the circuits on whether remand to a different judge is required in every case, however. Most circuits have indicated it is,444 but the D.C. Circuit and the Seventh Circuit have held that transfer to a different judge is not always necessary.445

441 *See, e.g.*, *Fowler*, 445 F.3d at 1038; *Canada*, 960 F.2d at 281; *Tobon-Hernandez*, 845 F.2d at 281.

442 *See Nolan-Cooper*, 155 F.3d at 241; *United States v. Kurkculer*, 918 F.2d 295, 302 (1st Cir. 1990);

*cf. United States v. Wood*, 378 F.3d 342, 350 n.6 (4th Cir. 2004) (noting that fashioning of appropriate relief is left to district court in most cases but no need for remand where defendant was requesting “only . . . the lesser relief of ‘specific performance’”); *Margalli-Olvera*, 43 F.3d at 355 (noting specific performance is preferred remedy and ordering specific performance rather than withdrawal of plea in case at bar); *United States v. Boatner*, 966 F.2d 1575, 1580 (11th Cir. 1992) (“Boatner’s request for specific performance is justified by the fact that he entered into his plea agreement freely and intelligently, and adhered to his part of the bargain. Because of his cooperation, his request should be honored.”). *But cf. United States v. Walker*, 927 F.2d 389, 391 (8th Cir. 1991) (noting that court should consider possible prejudice to defendant, conduct of government, and public interest and holding not abuse of discretion to permit withdrawal of plea in case at bar rather than order dismissal of indictment or specific performance, which both parties conceded was not practical); *United States*

*v. McGovern*, 822 F.2d 739, 746 (8th Cir. 1987) (where neither statements made by defendant during cooperation pursuant to plea agreement nor fruits of statements were used against him at trial, refusal to specifically enforce plea agreement did not deprive defendant of due process).

443 *United States v. Villa-Vazquez*, 536 F.3d 1189, 1202 (10th Cir. 2008); *Nolan-Cooper*, 155 F.3d at

241; *Kurkculer*, 918 F.2d at 302.

444 *See United States v. Mosley*, 505 F.3d 804, 812 (8th Cir. 2007) (collecting cases); *United States v.*

*Vaval*, 404 F.3d 144, 155 (2d Cir. 2005); *United States v. Rivera*, 357 F.3d 290, 297 (3d Cir. 2004); *United States*

*v. Barnes*, 278 F.3d 644, 649 (6th Cir. 2002); *United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000);

*United States v. Saling*, 205 F.3d 764, 768 (5th Cir. 2000); *United States v. Brye*, 146 F.3d 1207, 1213 (10th Cir.

1998); *United States v. Peglera*, 33 F.3d 412, 415 (4th Cir. 1994); *Canada*, 960 F.2d at 271 & n.9; *United States*

*v. Nelson*, 837 F.2d 1519, 1525 (11th Cir. 1988).

445 *See United States v. Wolff*, 127 F.3d 84, 87-88 (D.C. Cir. 1997); *United States v. Bowler*, 585 F.2d

851, 856 (7th Cir. 1978). The D.C. Circuit in *Wolff* suggested that there was an intracircuit conflict in the Ninth Circuit, based on several older Ninth Circuit cases, *see id.*, 127 F.3d at 88 (citing *United States v. Travis*, 735 F.2d 1129, 1135 (9th Cir. 1984) and *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979)), but the conflict was resolved in favor of the different judge requirement in *United States v. Camper*, 66 F.3d 229 (9th Cir. 1995), *see id.* at 232, and that rule has been consistently followed in subsequent Ninth Circuit cases, *see United States v. Franco-Lopez*, 312 F.3d 984, 994 n.7 (9th Cir. 2002); *United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001); *United States v. Mondragon*, 228 F.3d at 981; *United States v. Johnson*, 187 F.3d

1129, 1136 (9th Cir. 1999).

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