



# Homeland Security

**FEDERAL LAW ENFORCEMENT  
TRAINING CENTERS  
OFFICE OF CHIEF COUNSEL  
GLYNCO, GEORGIA**

# **LEGAL TRAINING HANDBOOK**

**2025**

## Foreword

The Federal Law Enforcement Training Centers (FLETC) serve as the federal government's leader for, and provider of, world-class law enforcement training. The mission of the FLETC is to prepare the federal law enforcement community to safeguard the American people, our homeland, and our values.

In fulfilling this mission, the Office of Chief Counsel (OCC) Attorney-Advisors/Senior Instructors provide legal training in all areas of criminal law and procedure. While a large part of this training focuses on newly hired federal law enforcement officers and agents, the OCC also provides advanced training for law enforcement and attorneys through the Continuing Legal Education Training Program, legal updates, and export courses. The FLETC partner with more than 90 federal organizations as well as state, local, tribal, and international law enforcement.

We offer our *Legal Training Handbook* to enhance our programs. The 2025 edition includes materials for basic training, advanced training, and for field use. The *Legal Training Reference Book* is a companion to the *Handbook*. It is our hope that the *Legal Training Handbook* and *Reference Book* can serve law enforcement students and law enforcement officers alike.

While this text provides an exceptional review of important legal concepts, you should not limit yourself to this publication. An additional resource for federal, state, and local law enforcement is the FLETC website: <https://www.fletc.gov/legal-learning>.

Located there are various resources including podcasts, videocasts, links to upcoming webinars, federal circuit court and Supreme Court case digests, and *The Federal Law Enforcement Informer*. The *Informer* is a monthly newsletter that includes United States Supreme Court and federal circuit court case summaries covering a variety of topics of interest for law enforcement officers.

To receive the *Informer* free each month or to contact our legal instructors with any questions you may have, email [FLETC-LegalTrainingDivision@fletc.dhs.gov](mailto:FLETC-LegalTrainingDivision@fletc.dhs.gov). You can also sign up to receive the *Informer* on the website listed above.

Along with the entire staff at the FLETC Office of Chief Counsel, we wish you success in your efforts. We hope to continue to provide excellent legal training programs, tools, and resources throughout your law enforcement career.

Steven Ouzts, Editor

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## Current Legal Instructors

### Federal Law Enforcement Training Centers Office of Chief Counsel

Glynco, Georgia – Artesia, New Mexico –  
Charleston, South Carolina

**Lawrence Alt** is a law enforcement professional with more than 30 years of experience. As a Supervisory Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a prosecutor, police officer, and a Captain in the United States Army, Mr. Alt lead numerous complex investigations, developed innovating multi-faceted strategies to address challenges to law enforcement, and facilitated communication, collaboration, and coalitions to secure adoption and application of new law enforcement techniques. His experience includes the development and implementation of training curriculum at the ATF National Academy. Mr. Alt has a Juris Doctor (Cum Laude) and a Bachelor of Science in Criminal Justice from the University of Toledo and is a member of the State Bar of Arizona.

**Ken Anderson** was an Assistant Solicitor in the Fourteenth Judicial Circuit in South Carolina. As an Assistant Solicitor, Mr. Anderson prosecuted adult and juvenile defendants for crimes including murder, armed robbery, criminal sexual conduct, burglary, distribution of drugs, aggravated assault, and driving under the influence. He also represented the state in civil forfeiture actions. Mr. Anderson taught legal classes for officers participating in the South Carolina Reserve Officers Training Program. He received his B.A. from The Citadel, Charleston, South Carolina and his J.D. from Salmon P. Chase College of Law, Highland Heights, Kentucky. Mr. Anderson has been an active member of the South Carolina Bar since November 1996.

**Jason Andrise** joined FLETC as an Attorney-Instructor in July 2024. Mr. Andrise served 14 years as a Special Agent with the U.S. Secret Service in Chicago, Frankfurt, and Atlanta. Jason had the privilege of serving 4+ years overseas in the Frankfurt Resident Office where he was the sole Secret Service case agent in the “Tbilisi Grenade Case” in which would-be U.S. Presidential assassin Vladimir Arutinian was successfully identified, arrested, and sentenced to life in prison. On the streets of Atlanta, Mr. Andrise would lead several high-impact investigations involving the counterfeiting of U.S. currency as well as ATM card skimming. Mr. Andrise also spent two and half years with EY as part of their Fraud Investigation & Dispute Service practice. During this time, Jason managed several ‘shadow’ investigations as well as earned his CPA and CFE certifications. Prior to joining FLETC, he was the Investigations Center Director at UPS, where he led the Security function’s effort in investigating and resolving high potential liability HR/Ethics matters. Jason received a BBA in Accounting from the University of Georgia and his J.D. from Georgia State University. Mr. Andrise is a member of the State Bar of Georgia.

**Amanda (Blackledge) Barak** is a Branch Chief in the Legal Division at the FLETC, Glynco, Georgia. As a former city attorney for the City of St. Marys, Georgia, she also served as the City’s solicitor and created and managed a Pretrial Intervention and Diversion Program for first time non-violent offenders. While living overseas in Singapore for five years, Ms. Barak worked as a public affairs specialist for the U.S. Navy where she worked hand in hand with key Navy leaders as part of the installation leadership team. She also volunteered as a Sexual Assault Prevention and Response Victim Advocate for the Navy. Ms. Barak is a registered neutral with the Georgia Office of Dispute Resolution, able to mediate general civil as well as domestic cases that are

ordered to mediation by courts within Georgia. She is also a trained mediator for the DHS Shared Neutrals Program. Ms. Barak attended law school at St. Thomas University School of Law in Miami Gardens, Florida, and after graduation served on their administration team as the Director of Alumni Affairs. She is a member of the State Bar of Georgia and the Florida Bar. Ms. Barak is married to a Special Agent (Ret.) with the Naval Criminal Investigative Service.

**Bruce Cameron** is a Senior Legal Instructor with more than thirty years of experience as a legal supervisor, attorney, and legal instructor with the U.S. Treasury Department and the Department of Homeland Security. Mr. Cameron is currently assigned to the FLETC's WAE Division and primarily instructs legal courses for the FLETC Legal Division. Mr. Cameron has developed and taught many legal courses including Constitutional Law, Customs Border Search and Seizure Authorities, Courtroom Testimony, Money Laundering, Asset Forfeiture and Financial Investigations, Customs Fraud, Undercover Operations, Basic and Advanced Intelligence, Counter Proliferation Investigations, Technical Surveillance, Rights, Warnings and Disciplinary Procedures, Privacy Act, and Freedom of Information Act. Mr. Cameron is a graduate of the Ohio State University (J.D.) and the University of Maryland (B.A.)

**Dion DeRoia** spent eight years in law enforcement, starting as a police officer with the Armstrong Atlantic State University Police Department. In addition to serving as a patrol officer, he was also a field training officer and investigator. He also served as a probation officer with the Georgia Department of Corrections in the Savannah office. During that time, he worked with the U.S. Marshals Service, taking part in Operation Falcon. After attending law school, Mr. DeRoia served as a prosecutor in the Chatham County



District Attorney's Office and the Augusta-Richmond County Solicitor General's Office. He also taught criminal justice for Savannah Technical College in Savannah, Georgia. Mr. DeRoia has a B.S. and M.S. of Criminal Justice from Armstrong Atlantic State University in Georgia and a J.D. from Charlotte School of Law in North Carolina. Mr. DeRoia has been an active member of the Georgia Bar since November 2014.

**Robert J. Duncan** is a graduate of Bacone College (B.S. cum laude), Oklahoma City University School of Law (J.D.), and the University of Tulsa College of Law (LL.M. with honor – American Indian and Indigenous Law). He is assigned to the Field Training Division as an Attorney-Advisor (Instructor) and serves as the Editor of the Indian Law Handbook, which earned a DHS/OGC Excellence in Training Award in 2016. Mr. Duncan has also been a guest lecturer at the International Law Enforcement Academy—Roswell (ILEA) and has contributed to the *Informer* and the *Legal Division Workbook*. Prior to joining the FLETC, he was the Attorney-Advisor and Associate Professor of Transnational Law at Bacone College. Mr. Duncan also served as an arbitrator for the Cherokee Nation and advised colleges and universities on Title IX, VAWA and Clery Act issues in private practice. He served as a reserve law enforcement officer in Oklahoma for ten years and taught state, local, and tribal law enforcement officers in the Oklahoma Council on Law Enforcement Training and Education Reserve Academy. Mr. Duncan is a member of the Bars of the State of Oklahoma, the Cherokee Nation, and the Muscogee (Creek) Nation.

**Robert German, Jr.** joined FLETC as an Instructor in 2024. Prior to joining FLETC, Mr. German served as a prosecutor in the Office of the District Attorney for the Brunswick Judicial Circuit for 16 years. During the last three years of

his tenure in the Office of the District Attorney he was in a leadership role as the Managing Attorney of the Camden County Office. Mr. German was responsible for prosecuting numerous cases involving serious injuries, rape, child molestation, computer pornography, insurance fraud, murder, and Gang Act violations. Before becoming a prosecutor, Mr. German worked as an Assistant Public Defender in Savannah, Georgia for approximately 3 years. While the majority of his career has been spent in the public sector, Mr. German began his legal career in the private sector. In this capacity, he managed a broad and diverse civil litigation caseload. Mr. German has taught legal courses as adjunct faculty in Savannah, Georgia for approximately 18 years. Mr. German obtained his Juris Doctor from Tulane University Law School, as well as a Bachelor of Science degree from Savannah State University.

**Jenette Hernandez** is a Special Agent with U.S. Department of Health and Human Services Office of the Inspector General and is currently detailed to the Legal Division at FLETC in Glynco, Georgia. Special Agent Hernandez has been a member of the New York State Bar Association since 2005 and has over 22 years of investigative experience within the Federal Government. Prior to joining the Legal Division, she led numerous complex white-collar investigations, including health care fraud, money laundering, and grant fraud investigations. Special Agent Hernandez also served on numerous HHS Secretarial protection details to include protection operations of Dr. Anthony Fauci and CDC Director Rochelle Walensky. She has received numerous awards throughout her investigative career to include awards and recognition from the Department of Justice, the Council of the Inspectors General, the Department of Veteran Affairs, and the Federal Bureau of Investigations. In addition to investigations, Special Agent Hernandez has 13 years of experience as

firearms and tactics instructor. She is a graduate of Arizona State University (B.S., Justice Studies) and St. John's University School of Law (J.D.)

**Jeffrey A. Hosking** is an Attorney – Advisor (Instructor) for the Federal Law Enforcement Training Centers (FLETC) and is assigned to the Field Training Division, located in Artesia, New Mexico. In this role Dr. Hosking is responsible for researching, developing, and delivering legal training to law enforcement professionals. Prior to joining FLETC, Dr. Hosking was employed by Central Wyoming College. While at Central Wyoming College, Dr. Hosking served in several positions such as Criminal Justice Professor, Assistant Dean of Distance Education and Director of the Rocky Mountain Justice Academy. Preceding that position, Dr. Hosking served as a Special Agent for the Federal Bureau of Investigation (FBI) with special training in legal advising and defensive tactics. While working for the FBI, his first duty station was Bismarck, North Dakota. Dr. Hosking was later stationed in Chicago, Illinois. Dr. Hosking graduated from the University of Idaho School of Law (J. D.) and Colorado State University (Ph. D). He is licensed to practice law in Idaho.

**Jonathan Larcomb** is a Senior Instructor in the Legal Division at the FLETC in Glynco, Georgia with more than 20 years of military, state, and federal legal experience. Mr. Larcomb graduated from Regent University School of Law (J.D.) and from Wabash College (B.S. cum laude) and was admitted to the Virginia Bar in 1999. He served as an active-duty Judge Advocate for the United States Army from January 2000 until July 2006 where he prosecuted and defended dozens of general and special courts martial while stationed both in the U.S. and overseas. Mr. Larcomb then served the Commonwealth of Virginia as an Assistant Attorney General (2006-2009) before becoming a trial

attorney for Immigration and Customs Enforcement (ICE) (2009-2018). From 2018 to 2020, Mr. Larcomb litigated First Amendment cases on behalf of students, teachers, professors, and campus advocacy groups for a nonprofit legal firm. Before coming to FLETC, Mr. Larcomb also spent a year teaching high school government. Mr. Larcomb continues to serve as a Lieutenant Colonel in the Delaware Air National Guard in his role as the Area Defense Counsel for the 166th Airlift Wing in New Castle, Delaware.

**Brad Lawrence** is currently a rehired annuitant Senior Instructor with the Legal Training Division (LGD) at the Federal Law Enforcement Training Centers (FLETC), Glynco, Georgia. He assumed his current position after retiring in April 2024 following a 33-year federal law enforcement career. Before retiring, he served eight years as the Division Chief of the LGD, overseeing all the training performed by the Division and its instructors. Prior to his selection as Legal Division Chief, Mr. Lawrence served as the Branch Chief over the Practical Applications and Tactics Branches in the Enforcement Operations Division (EOD). Before joining EOD, he was a Branch Chief in the Physical Techniques Division and a Senior Instructor in the Legal Division, where he was the topical area expert on Use of Force, Warrantless Searches and an electronic control device instructor.

Before joining the FLETC, Mr. Lawrence spent 12 years as a law enforcement officer, including three years with the University of Oklahoma Police Department, where he was on the department's Special Response Team, and one and a half years as an inspector with the former Immigration and Naturalization Service. He then spent nearly eight years as a patrol officer with the United States Park Police's San Francisco Field Office, serving on the Park Police Special Event Team and as a field-training instructor.

While he was a patrol officer on the midnight shift with the Park Police, Mr. Lawrence attended law school in the evenings. He graduated cum laude from the University of San Francisco School of Law in 2000, was admitted to the California Bar, and joined the U.S. Air Force as a member of the Judge Advocate General (JAG) Corps. Mr. Lawrence served five years on active duty stationed at Lackland AFB, Texas. While in the JAG Corps, Mr. Lawrence litigated more than 45 general and special courts-martial before both judges and juries. He still serves as a Lieutenant Colonel in the Air Force Reserve and is currently the Individual Mobilization Augmentee for the Staff Judge Advocate of the 42d Air Base Wing at Maxwell AFB, Alabama.

**Tom Leak** served as a Judge Advocate General in the United States Navy from 1991 until 2011. His assignments in the Navy included two-year tours aboard the USS CONSTELLATION (CV-64), and with Carrier Strike Group SEVEN embarked on USS JOHN C. STENNIS (CVN-74). Mr. Leak also served as a military judge assigned to the Southeast Judicial Circuit of the Navy-Marine Court Trial Judiciary and as an assistant professor at the United States Naval Academy. Following his military service, Mr. Leak was as an Associate Legal Advisor to the Principal Legal Advisor, United States Immigration and Customs Enforcement (ICE) and worked in the District Court Litigation Division where he served as Agency Counsel for cases and claims brought against ICE and its officers and agents. He is a graduate of Brigham Young University (B.A. and M.A.) and the University of Idaho (J.D.).

**Samuel A. Lochridge** serves as a Branch Chief in the Legal Division and oversees legal training at the FLETC in Charleston, South Carolina, and Artesia, New Mexico. He is an experienced attorney with a career spanning various legal and law enforcement roles. He holds a Juris Doctor

from the University of Arkansas at Little Rock, William H. Bowen School of Law, as well as a Bachelor of Arts in Business Management from Reinhardt University, where he graduated Magna Cum Laude. Samuel's legal career began with his admission to the State Bar of Georgia in October of 2014. He has since held a diverse range of positions in the public sector, including serving as an Assistant District Attorney in the Paulding Judicial Circuit and as an Assistant Solicitor at the Fulton County Solicitor's Office. His current responsibilities at the Department of Homeland Security include serving as an instructor, subject-matter expert, and course developer in various areas of law. He has also represented FLETC, speaking at national and international law enforcement conferences, and acted as a mentor to newly hired attorneys. Prior to this, Samuel held roles at the United States Social Security Administration, and the Coweta Circuit Public Defender's Office, where he managed a significant caseload and gained extensive courtroom experience. Notably, Samuel also has law enforcement experience, having served as Captain and Division Commander at the Kingsland Police Department in Kingsland, GA.

**Mary Mara** joined the FLETC as an attorney-instructor in 2018. She served eleven years as an Assistant Prosecuting Attorney in Oakland County, Michigan, (1991-2002) where she tried more than 100 capital felony cases with a special emphasis on the investigation and prosecution of child sexual predators. Ms. Mara spent an additional 16 years as the chief of civil litigation in Oakland County Michigan (2002-2018). In this role, she defended Oakland County, the Oakland County Sheriff's Office, and hundreds of Oakland County Deputies in the United States District Court, Eastern District of Michigan in Detroit against claims alleging civil rights violations brought under 42 U.S.C. § 1983. Ms. Mara also provided guidance to the Sheriff's

Office regarding the proper scope and direction of internal investigations, made recommendations regarding disciplinary actions, and represented the County at labor arbitration and other administrative hearings. She also routinely represented the County in the Sixth Circuit Court of Appeals in Cincinnati, Ohio, most notably in *Hill v. Miracle*, 853 F.3d 306 (6th Cir 2017). Ms. Mara is a graduate of Michigan State University (B.A. 1987), Michigan State University College of Law (J.D. 1991 magna cum laude), and Western Michigan University Law School (LL.M. Homeland and National Security Law, 2017, with high honors).

**Liberty Moore** is a Branch Chief within the FLETC Legal Training Division. She coordinates the Homeland Security Law Training Program (HSLTP), and prior to assuming the position of Branch Chief, Ms. Moore was one of four attorney instructors on the use of force travel team. This team delivers use-of-force training throughout the United States as part of a Congressional mandate. Prior to her time at the FLETC, Ms. Moore was an Assistant District Attorney in the Brunswick Judicial Circuit of Georgia. In the Brunswick Judicial Circuit, she prosecuted adult and juvenile defendants for crimes including murder, armed robbery, home invasion, drug possession and distribution, aggravated assault, firearms offenses, sexual offenses, and violations of the Georgia Street Gang Terrorism and Prevention Act. She also represented the State of Georgia in civil forfeiture actions. Ms. Moore taught legal classes to officers, teachers, as well as other prosecutors. She received her B.S. and M.S. from the University of Georgia's Warnell School of Natural Resources and her J.D. from Florida Coastal School of Law in Jacksonville, Florida.

**Brad Morris** is a graduate of the University of West Florida (B.A. in Criminal Justice) and Florida State University (J.D.) He served as a state prosecutor in Tallahassee before



joining the Air Force JAG Corps from 2004 until 2024. In the Air Force he served three tours as a prosecutor, two tours as a defense counsel, two headquarter staff tours, two tours as a legal instructor at the Air Force JAG School and one tour as a military judge. Married to a native of Brunswick, he joined FLETC in 2024 after his retirement from the military.

**Steven Ouzts** is an Attorney-Advisor (Instructor) in the Legal Division in Glynco, Georgia. Mr. Ouzts graduated from Georgia Tech in 2009 with a B.S. in Management (High Honors), with concentrations in Finance and Operations Management. He obtained his law degree (*cum laude*) from the Mercer University School of Law, with a certificate in legal writing, in 2015.

Mr. Ouzts previously served as an Assistant United States Attorney in the Middle District of Georgia. As an AUSA, Mr. Ouzts specialized in complex drug prosecutions utilizing Title III wiretaps to dismantle gangs and drug distribution networks in the Middle Georgia area. He also served as the District's forfeiture attorney and obtained multiple judgments in favor of the United States, including a \$2.5 million dollar judgment against a healthcare fraud defendant and a judgment forfeiting hundreds of dogs used by multiple individuals for dog fighting. Mr. Ouzts also has multiple years of experience prosecuting state level crimes in Georgia as an Assistant District Attorney in the Towaliga and Brunswick Judicial Circuits.

**Leanne Polk** is an Attorney-Advisor and a certified Senior Instructor for the FLETC. She is a graduate of the University of Florida, (B.S.), St. Thomas University School of Law (J.D.; LL.M., *cum laude*), and a member of the Florida and Texas Bars. While in private practice, she focused on issues and regulations pertaining to higher education, representing schools, and teaching, while also serving on the



Florida Bar's Education Law Committee for seven years. In addition, she served as "of counsel" to several corporations throughout the U.S. before taking a full-time job teaching law. Prior to teaching, she also worked for the maritime industry working for a national association, where she monitored federal regulatory activity, developed and presented the association's formal position for inclusion in the public rulemaking docket, and served on advisory councils within the association. She was later appointed to the Federal Maritime Commission, serving as Special Advisor/Counsel to a Commissioner, where she researched, reviewed, and recommended actions concerning policy, protocol, and regulatory issues before the Commission, in addition to drafting speeches, dissenting opinions, and public remarks of the Commissioner.

**Major Stephan A. Ryder** is detailed to the Legal Division from the United States Air Force. Prior to joining the Legal Division, Major Ryder served as the Area Defense Counsel at Maxwell AFB, AL, and provided defense services to Columbus AFB in Mississippi. He provided legal representation to clients in a variety of military justice and administrative matters, including courts-martial, non-judicial punishment, and adverse administrative actions. Major Ryder received a direct commission as an Air Force judge advocate in March 2016. He served as JBSA-Lackland's Deputy Chief of Military Justice, Chief of Litigation, Chief of Adverse Actions, and Chief of Discharges. He also served as Chief of Civil Law and Adverse Actions at Anderson AFB. Major Ryder is certified to practice law before the Supreme Court of Wisconsin and the United States Court of Appeals for the Armed Forces. Prior to joining the Air Force, Major Ryder owned and operated his own law firm, specializing in litigation and serving hundreds of clients. He served as a prosecutor for the State of Wisconsin. Major Ryder is a graduate of Cornell

Law School.

**Hunter Smith** is an Attorney-Advisor and serves as the Law Enforcement Training Advisor in the Legal Division. Prior to joining FLETC, he was an Assistant District Attorney in the Brunswick Judicial Circuit. As an Assistant District Attorney, he prosecuted both juvenile and adult defendants for a wide range of felony crimes from Aggravated Assault, drug possession and distribution including trafficking, theft related offenses, escape, traffic violations, firearm offenses, sexual offenses, and violations of probation. He also has prior legal experience working with the Athens-Clark County District Attorney's Office, the Carl Vinson Institute of Government at the University of Georgia, the Brunswick Judicial Circuit Public Defender's Office, the Supreme Court of Georgia, and the Office of the Governor of the State of Georgia. Hunter graduated magna cum laude from the University of Georgia School of Law. Prior to earning his J.D., he also completed his Bachelor of Arts in Political Science at the University of Georgia where he graduated as a First Honor Graduate (4.0). Hunter is a member of the Georgia Bar and is licensed to practice law in all Georgia courts.

**Rachel Smith** is a graduate of the Paul M. Hebert Law Center at Louisiana State University (J.D.; Graduate Certificate: Civil Law) and Trinity University (B.A., Political Science; B.A., Spanish). She is currently assigned to the Field Legal Branch of the Federal Law Enforcement Training Centers in Artesia, New Mexico as an Attorney-Advisor (Instructor). Prior to joining FLETC, Ms. Smith clerked for the Hon. Anthony J. Marabella, spent six years as a staff attorney in criminal court at the 19th Judicial District Court of Louisiana, and served seven years as Traffic Safety Resource Prosecutor (TSRP) for the Louisiana District Attorneys Association. As part of a grant funded

initiative by the National Highway Traffic Safety Administration (NHTSA), she aided prosecutors in trial preparation and case strategy (including motions and issues related to DWI/DUI and SFST) and provided officers with training, education, legal research, and technical assistance. As one of less than one hundred qualified TSRPs in the United States, she has also been published in *THE PROSECUTOR* and presented on complex impaired driving issues to state, local, tribal, and territorial departments at national conferences and virtual trainings. Ms. Smith is admitted to practice in Louisiana.

**James P. Stack** is a graduate of The Citadel (B.S. and M.B.A.). After 20 years of military service and graduation from the University of South Carolina School of Law (J.D.) he began his legal career as a judicial law clerk for the Honorable Daniel Pieper of the Ninth Judicial Circuit in South Carolina. Subsequently, Mr. Stack served in the Ninth Circuit Solicitor's Office as a Managing Assistant Solicitor. His responsibilities included prosecution of crimes ranging from murder to drug trafficking to driving under the influence. He also supervised and represented the state in the estreatment of bond program. Mr. Stack is assigned to the FLETC's Charleston, South Carolina, facility.

**Johnnie Story** retired from the City of Atlanta Office of the Solicitor where he served in many different capacities, including Deputy Solicitor. He prosecuted cases for that office from September 1988 until May of 2007. He also trained and supervised assistant solicitors, trained police and code enforcement officers, and addressed community complaints. He assisted the City of Atlanta Council and Mayor's offices with drafting proposed city ordinances and participated in strategy development sessions with various city officials. Mr. Story is a graduate of St. Vincent College (B.S.) and Hofstra University Law School (J.D.).

**Jenny Turner** joined the Legal Division in 2019. For more than 17 years prior to that, she worked for the United States Department of Justice (DOJ), including 15 years as an AUSA in the Northern District of Georgia. Ms. Turner specialized in investigating and prosecuting complex drug, money laundering, financial, and asset forfeiture cases which included many multi-agency Organized Crime and Drug Enforcement Task Forces (OCDETF) wiretap and grand jury investigations as well as prosecutions of international drug trafficking and money laundering organizations. Five of these cases won OCDETF's district case of the year award between 2004 and 2010. Ms. Turner's duties also included coordinating searches for evidence and forfeitable assets in the United States and abroad and litigating appeals in Court of Appeals for the Eleventh Circuit. While working as a Money Laundering and Asset Recovery Section (MLARS) Trial Attorney in Washington, D.C. between 2017 and 2018, Ms. Turner served on teams investigating and prosecuting high-profile domestic and international fraud and money laundering cases with values ranging from more than \$10,000,000 to more than \$100,000,000 in criminal proceeds. In her capacity as an Attorney Advisor in the DOJ's Washington, D.C., OCDETF Executive Office between 2016 and 2017, Ms. Turner acted as a liaison between MLARS and OCDETF program managers and gave advice on legislative and policy developments affecting financial investigations and prosecutions, asset forfeiture, and equitable sharing. She also represented OCDETF during the international Financial Action Task Force's (FATF) December 2016 review of United States' measures to combat money laundering and terrorist financing. Throughout her career at DOJ, Ms. Turner developed, planned, coordinated, and executed training seminars on topics including forfeiture and money laundering, complex case investigation and management, and Fourth Amendment for federal, state, and local prosecutors, law enforcement officers, financial analysts,

and investigative professionals. Between 1999 and 2001, Ms. Turner worked as a Law Clerk for Joel M. Feldman, United States Magistrate Judge for the Northern District of Georgia, beginning just after her 1999 cum laude graduation from the University of Georgia's School of Law. She also served as an Editorial Board Member on University of Georgia Journal of Intellectual Property Law, where she published an article as a second-year law student. Before law school, Ms. Turner worked for three years as a parole officer for the Georgia State Board of Pardons and Paroles, where she supervised caseloads of 60-100 state-convicted felons and investigated, arrested, and prosecuted violators.

**Lyla Zeidan** is an Attorney-Advisor and Instructor in the Legal Division at the FLETC in Glynco, Georgia. She is a member of the FLETC Use of Force expert team and travels nationally to train local and state law enforcement officers in use of force aspects. Prior to joining FLETC, she served as the Legal Program Manager and Legal Instructor for the Northern Virginia Criminal Justice Training Academy (NVCJTA) in Ashburn, Virginia for over 10 years. NVCJTA is a regional academy that conducts training for seventeen different police departments and sheriff offices throughout the Northern Virginia and DC area. Prior to joining the Academy, Lyla served as an Assistant Commonwealth's Attorney and Senior Assistant Commonwealth's Attorney in Virginia Beach for almost 9 years. During that time, she prosecuted several thousands of cases ranging from DUI to Homicide. She handled bench trials, jury trials and trained police officers and attorneys.

Lyla is a speaker for various events held by law enforcement organizations such as the International Law Enforcement Educators and Trainers Association (ILEETA) and the International Association of Chiefs of Police (IACP). Lyla is a certified mediator in the areas of family law, federal workplace disputes, and organizational development and

conflict resolution. In addition, she is a speaker for mediation and conflict resolution conferences. She is certified in critical incident stress management (CISM) and was a legal subject matter expert for the Virginia Department of Criminal Justice Services (DCJS). She reviewed and developed proposed legal revisions to compulsory minimum training standards that would impact all law enforcement training academies in Virginia. Lyla was a subject matter expert in the Department of Justice's International Criminal Investigative Training Assistance Program (ICITAP) supporting the Engaging Multinational Policewomen on Equality and Rights (EMPoWER) program. As part of her assignment, Lyla conducted a Job Task Analysis (JTA) of the Jordanian Public Security Directorate's Special Branch in Amman, Jordan.

Lyla is licensed to practice law in Virginia and Washington, DC. She is a member of many professional organizations, including the IACP LOS Board, in which she serves as Vice Chair. Lyla holds a Juris Doctor from Regent University School of Law in Virginia Beach. She graduated in the top fifteen percent of her class. She graduated summa cum laude from East Tennessee State University with a Bachelor of Arts degree in Spanish and a Bachelor of Business Administration degree in Marketing.



# Chapter 1 -

## Authority and Jurisdiction of Federal Land Management Agencies

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## 1.1 Introduction

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

## 1.2 Sources of Authority and Jurisdiction

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

Federal statutes are the primary source of authority and jurisdiction for federal land management agencies. The easiest method to find federal statutes is using the U.S. Code citation to the statute. For example, section 3 of Title 16 of the U.S. Code is written as 16 U.S.C. § 3. The U.S. Code is officially published every six years. In more formal writing, the year of the last official publication of the Code is included in parentheses: 16 U.S.C. § 3 (2018). If a law passed by Congress changes many individual statutory provisions scattered throughout the U.S. Code, the easiest way to find the full text of the law is the Public Law version. For example, the USA PATRIOT Act amended many federal statutes. It would be a

significant task to find each one individually. P.L. 107-56 contains the full text of the USA PATRIOT Act.

Some congressional statutes authorize specific federal agencies to adopt regulations to implement the agency's statutory authority and responsibilities. This is called "enabling legislation" because it enables and authorizes the agency to adopt regulations for those areas specified in the statute. Without such enabling legislation, the agency would not have authority to adopt regulations. Some of these regulations define crimes and establish punishments for violations of the regulation. These violations are enforced as misdemeanors in U.S. courts, if the enabling legislation provides such authority. During the process of adopting regulations, proposed regulations and the final regulation are published in the Federal Register.

Regulations that are adopted through enabling legislation are published annually in the Code of Federal Regulations (C.F.R.). Citation to the C.F.R. is similar to the U.S. Code. For example, a regulation governing hitchhiking on any National Park Service property is found at 36 C.F.R. § 4.31. In formal writing, the year of the most recent version is included in parentheses: 36 C.F.R. § 4.31 (2022).

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

### **1.3 Types of Jurisdiction**

There are two types of jurisdiction that govern the authority of law enforcement agencies: territorial and subject-matter jurisdiction. Territorial jurisdiction relates to law enforcement authority based upon the geographic location of the offense. Subject-matter jurisdiction relates to the specific offenses over which the particular law

enforcement agency has authority. Some agencies have broad general subject matter jurisdiction over all federal criminal offenses, while others have limited subject matter jurisdiction over certain offenses only.

## 1.4 Territorial Jurisdiction

The concept of territorial jurisdiction has three components or ramifications in federal law. The first type of territorial jurisdiction relates to what authority the federal government has over the particular location involved. The second type relates to crimes that must occur within the special maritime and territorial jurisdiction (SMTJ) of the United States. The third type of territorial jurisdiction, often referred to as agency-specific territorial jurisdiction, relates to geographic limitations placed upon an agency's law enforcement officers by legislation or agency regulations.

### 1.4.1 Jurisdiction Over a Particular Geographic Area

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

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

a. Exclusive Jurisdiction

In areas of exclusive jurisdiction, only the federal government has law enforcement authority. This occurs when the federal government has received, through one of the methods outlined above, all the authority of the state on a certain tract of land contained within the state's borders. With exclusive jurisdiction, no reservations have been made to the state, except that state and local officers have the authority to serve criminal and civil process, such as arrest warrants, resulting from activities that occurred outside the area of exclusive jurisdiction.

b. Concurrent Jurisdiction

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

c. Proprietary Jurisdiction

Proprietary jurisdiction is primarily state jurisdiction, with exceptions for federal laws of general application and federal laws and regulations specifically applicable to the particular type of land involved. Proprietary jurisdiction exists when the United States has acquired some right or title to an area within a state's borders but has not acquired any measure of

the state's authority over the area. In essence, the United States has rights generally equivalent to a private landowner. In these situations, state law applies within the proprietary area to the same extent that it does throughout the remainder of the state. However, under the Supremacy and Property Clauses of the United States Constitution, federal law enforcement officers and agents may also enforce federal statutes or regulations enacted to protect these proprietary areas.

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

1. Statutes of General Application

Many federal statutes can be enforced throughout the United States or in any other place where the United States has jurisdiction. The Constitution empowers Congress to pass such statutes in order to protect and control uniquely federal functions. For example, it is a crime throughout the United States to assault a federal officer who is performing federal duties. The assailant can be prosecuted whether the crime is committed on or off federal property. Other examples of these types of statutes include: 16 U.S.C. §§ 3371-3378 (Lacey Act); 18 U.S.C. § 3 (Accessory After the Fact); 18 U.S.C. § 201 (Bribery of Public Officials and Witnesses); 18 U.S.C. § 371 (Conspiracy); and 18 U.S.C. § 641 (Embezzlement and Theft of Public Money, Property or Records).

2. Statutes and Regulations Applicable to Designated Lands

There are also many federal statutes and C.F.R. regulations whose application is limited to designated lands only. Examples of these statutes include, but are not limited to, 18 U.S.C. § 41 (hunting, fishing, trapping on wildlife refuges); 18 U.S.C. § 1852 (removing timber on public lands of the U.S.); 18

U.S.C. § 1853 (cutting or trees on U.S. land or Indian Reservations); and 18 U.S.C. § 1854 (trees boxed for pitch or turpentine on land belonging to the U.S.). Some sections in 36 C.F.R. apply to all lands within a park, regardless of land ownership. These violations include 36 C.F.R. § 2.31 (trespassing and vandalism) and 36 C.F.R. § 4.23 (DUI). If an offense specifies that the crime must be committed in a certain type of federal land and the crime was not committed in that type of federal land, that offense is not triable in federal court.

#### 1.4.2 Special Maritime and Territorial Jurisdiction

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

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

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

- High seas and other waters... not under the jurisdiction of a state;
- Vessels owned in whole or part by the U.S., U.S. citizens,

U.S. corporations, or any state, territory, district, or possession of the U.S. when the vessel is in such waters;

- Aircraft owned in whole or in part by the U.S., U.S. citizens;
- U.S. corporations, or any state, territory, district, or possession of the U.S. when the aircraft is flying over these waters;
- Waters of the Great Lakes and the St. Lawrence River;
- Islands, rocks, or keys containing guano if designated by the President; and
- Spacecraft while in flight.

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

### 1.4.3 Agency-Specific Territorial Jurisdiction

The third category of territorial jurisdiction is agency-specific territorial jurisdiction. Some criminal statutes specifically prohibit crimes on certain federal lands. For example, 18 U.S.C. § 41 prohibits unauthorized hunting in wildlife refuges. As already discussed, Congress can also pass enabling legislation to authorize an agency to adopt regulations concerning the land it controls. If, and only if, Congress passes enabling legislation, the agency can adopt regulations applying to the federal land it controls and set criminal punishments for violations of these regulations. So long as the misconduct occurs on the agency's land, it can be punished regardless of whether the land is an area of exclusive, concurrent, or proprietary jurisdiction. For example:

- The National Park Service has jurisdiction over offenses that occur within the National Park system and over the arrest of persons fleeing from that system. 54 U.S.C. §§ 100101, 100302(a)(3), 102701(a)(2)(b), 100751, and 320102(l).
- The USDA Forest Service has jurisdiction over offenses that occur within the National Forest System, or which affect the administration of the National Forest System. 16 U.S.C. §§ 551, 559, 559c, 559d.
- The Bureau of Land Management does not have territorial limits, but the offense must relate to the public lands or their resources. 43 U.S.C. § 1733(c).
- The Bureau of Reclamation has jurisdiction over offenses that occur within a reclamation project or on Reclamation lands. 43 U.S.C. § 373(b).
- The United States Fish and Wildlife Service and National Marine Fisheries Service do not have specific geographical boundaries, except as may be defined in specific statutory or regulatory provisions for which those agencies have subject matter jurisdiction. 16 U.S.C. §§ 668dd(g), 3375 (b).
- The territorial jurisdiction of Department of Defense Land Management Enforcement Officers is determined by DOD directives or other regulations.

### **1.5 Subject-Matter Jurisdiction and Statutory Arrest Authority**

Subject-matter jurisdiction relates to the specific offenses over which a particular law enforcement agency has authority. Statutory provisions conveying authority and jurisdiction to particular federal agencies may specify certain offenses over



which that agency has subject matter jurisdiction. Federal statutes also give specific statutory arrest authority to law enforcement officers of each agency. These statutes, in effect, define the primary mission of the agency's law enforcement officers.

It follows that the agency statute which specifies statutory arrest authority is the primary source of arrest authority for officers of each agency. For example, Tennessee Valley Authority (TVA) officers are empowered to:

maintain law and order and protect persons and property...on any lands or facilities owned or leased by the corporation or within such adjoining areas in the vicinity of such lands or facilities as may be determined by the TVA Board of Directors under statutory guidelines and on other lands or facilities in certain specified situations.

They are also authorized to arrest persons fleeing TVA lands or facilities. 16 U.S.C. § 831c-3.

### 1.5.1 Specific Statutory Subject-Matter Jurisdiction and Statutory Arrest Authority

Some land management agencies and their officers have full law enforcement power and statutory arrest authority over all federal offenses, but only within the limited territorial jurisdiction of that agency. For example, National Park Service officers generally have the authority to arrest violators for all federal offenses committed in their presence or all federal felonies they have reason to believe were committed, as long as those offenses were committed in the National Park System. National Park Service officers also have the authority to arrest persons fleeing the park system to avoid arrest. 54 U.S.C. § 102701.

By contrast, other agencies and their officers have no geographic limits on the power to arrest, but only may make arrests for offenses generally within their agency's purview. For example, law enforcement officers assigned to the National Forest Service "have authority to make arrests for the violation of the laws and regulations relating to the national forests." 16 U.S.C. § 559. Other agencies and their officers, however, have specific statutory or regulatory authority (and statutory arrest authority) only for certain specified offenses. For example, the National Marine Fisheries Service has approximately 37 different federal laws which it enforces.

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

### 1.5.2 Cross-Designation of Federal Officers

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

### 1.5.3 Jurisdiction Over State Offenses

Another potential source of authority for land management officers is state law.

a. Assimilative Crimes Act - 18 U.S.C. § 13

The Assimilative Crimes Act makes state law applicable to conduct occurring on federal land in certain situations. The following criteria must be met:

1. The U.S. has exclusive or concurrent jurisdiction,
2. There is no federal law covering the conduct, and
3. There is an applicable state law.

Under the Act, the state law is adopted and used to prosecute the defendant in federal court as a federal offense. The Act does not apply if there is a federal law that covers the conduct or in areas of proprietary jurisdiction. A more in-depth discussion of the Assimilative Crimes Act can be found in the Criminal Law chapters of this book.

b. State Peace Officer Authority

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

It is also important to know your agency's policy regarding state peace officer authority. In particular, agency personnel do not exercise state peace officer authority unless their agency's policy permits them to do so.

c. Cross-Designation as a State or Local Officer

Officers may acquire state jurisdiction by being deputized as a deputy sheriff or other state or local officer under the appropriate state law.

Again, it is also important to know your agency's policy regarding cross-designation as a state or local officer. Agency personnel do not exercise this authority unless the agency's policy permits them to do so.

d. Citizen's Arrest or Detention Authority

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

Officers ‘Good Samaritan’ Laws” section in the Officer Liability chapter of this book. In sum, arresting under citizen’s arrest powers is a high-risk procedure and should be used as a last resort.

## 1.6 The Code of Federal Regulations (C.F.R.)

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

For example, under 43 U.S.C. § 1733(a), the Secretary of the Interior has the following statutory rulemaking authority for public lands:

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

For the National Park Service, the Secretary of Interior has the following statutory rulemaking authority: “The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of system units.” 54 U.S.C. § 100751; See also 54 U.S.C. § 320102(l).

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

## **1.7 Significant Statutory Provisions**

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

### **1.7.1 Lacey Act**

The Lacey Act prohibits trafficking in fish, wildlife, or plants that are taken, possessed, transported, or sold in violation of any U.S. or Indian tribal law, treaty, or regulation as well as in violation of foreign law. The Act creates civil and criminal penalties. The Act does not include activities regulated by the Magnuson Fishery Conservation and Management Act, the Tuna Conventions Act, the Atlantic Tunas Convention Act, or any activity involving the harvest of highly migratory species. While the USFWS is a primary enforcer of Lacey Act violations, enforcement authority is assigned to agencies of the Departments of Interior, Commerce, Transportation, and Treasury. In addition, any of the appropriate lead agencies may, by agreement, use the personnel, services, and facilities of any other federal agency or any state agency in the

enforcement of the Lacey Act. Thus, whether as part of those Departments or by agreement, USFWS, National Marine Fisheries Service (NMFS), or the Animal and Plant Health Inspection Service are involved in Lacey Act enforcement.

### 1.7.2 Endangered Species Act

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

### 1.7.3 Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) prohibits, with certain exceptions, the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. The Departments of the Interior and Commerce are responsible for different aspects of this law. The Department of Interior handles U.S. takings of these species. The Department of Commerce handles importation of these

species. The appropriate lead agency may, by agreement, use the personnel, services, and facilities of any other federal agency in the enforcement of the Marine Mammal Protection Act. Either Secretary may also designate officers and employees of any state or of any possession of the United States to enforce the act.

#### 1.7.4 Archaeological Resources Protection Act

The Archaeological Resources Protection Act (ARPA) protects archaeological resources and facilitates cooperation and the exchange of information between agencies regarding these resources. Civil and criminal penalties are possible for the damage and excavation of archaeological resources. Under the Act, the archaeological resources recovered, and any instruments used to commit the violations, may be forfeited. The Act also provides restrictions against trafficking in illegally obtained artifacts. Each agency having archaeological resources on public lands under its jurisdiction has authority over those lands but may also ask the Department of the Interior to assume authority. The Indian Arts and Crafts Act prohibits misrepresentation in the marketing of Indian art and craft products within the U.S. The Indian Arts and Crafts Board has responsibility for overseeing the implementation of the Act. Statutory authority allows the Board to refer an alleged violation of the Indian Arts and Crafts Act to any federal law enforcement officer for appropriate investigation. This investigation can happen regardless of whether the federal law enforcement officer receives a referral.

#### 1.7.5 Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (BGEPA) prohibits anyone from taking, possessing, or transporting a bald eagle or golden eagle, or the parts, nests, or eggs of such birds without prior authorization. This includes inactive nests as well as active nests. Rewards are provided for information



leading to arrest and conviction for violation of the BGEPA. The Department of the Interior has the primary responsibility for enforcement of this Act. Enforcement authority may be delegated also to state fish and wildlife authorities, but notably, not to other federal agencies. The bald and golden eagle are also protected by the Migratory Bird Treaty Act (MBTA), which implements four international conservation treaties that the U.S. entered into with Canada, Mexico, Japan, and Russia. The MBTA is intended to ensure the sustainability of populations of all protected migratory bird species.

## 1.8 Administrative Inspection Authority

If authorized by a federal statute or regulation, federal agencies may set up a reasonable regulatory inspection scheme and exercise administrative inspection authority. Inspections are constitutionally permitted because they are an effective way for the government to accomplish legitimate government missions besides traditional law enforcement.

The enforcement of many land management agency regulations is dependent upon inspection authority. Fishing, hunting, and boating are among the areas subject to inspection. For example, the National Park Service provision below, written in a question-and-answer format, illustrates the typical inspection authority for land management agencies.

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

(a) An authorized person may at any time stop and/or board a vessel to examine documents, licenses or permits relating to operation of the vessel, and to inspect the vessel to determine compliance with regulations pertaining to safety

equipment, vessel capacity, marine sanitation devices, and other pollution and noise abatement requirements.

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

As this provision illustrates, administrative inspections do not require a search warrant. Nor must an officer have reasonable suspicion or probable cause that a violation has occurred. Generally termed “inspections,” these types of administrative searches take place in a variety of different forums and are conducted on both personal and real property.

To be valid, an inspection statute must be limited in time, place, and scope; should apply to all facilities within a designated industry as specifically defined; should contain specific standards with which the operator must comply; and should provide a specific mechanism for accommodating the special privacy concerns the owner may have.

A warrantless inspection of a closely regulated business is reasonable if:

1. There is a substantial governmental interest;
2. A warrantless inspection is necessary to further the regulatory scheme; and
3. The statutory inspection program, in terms of certainty and regularity of its application, provides a

constitutionally adequate substitute for a warrant.

When these requirements are met, the courts have upheld inspection programs as reasonable regulatory schemes. Criminal evidence discovered through such an inspection is admissible. However, when an inspection is conducted as a ploy or subterfuge to locate and seize criminal evidence, that evidence will not be admissible because it violates the Fourth Amendment.

Fish and game checkpoints at hunting and fishing areas are reasonable because fish and game are highly regulated activities. Wildlife is a natural resource uniformly subject to pervasive regulation by all the states and the federal government with respect to which fish, animals, or birds may be taken, when they may be taken, and in what quantity. There are criminal offenses for exceeding the limits for taking fish and game or killing protected animals and birds. Therefore, game wardens and other officers have the authority to establish checkpoints for the enforcement of fish and game laws if the stop is conducted in a manner that is reasonably related to the enforcement goal. If it cannot be shown that the stop is reasonably related to the enforcement goal, the stop may be a violation of the Fourth Amendment.

Individual inspections and vehicle checkpoints by federal law enforcement officers to enforce applicable regulations must be conducted in accordance with agency regulation or policy.

Officers conducting inspections and checkpoints are limited by the agency's reasonable regulatory scheme in two ways. First, the officer's discretion to decide who will be inspected is limited. In the context of vehicle checkpoints, this is often done by randomizing the choice of which vehicle to stop or by stopping every vehicle passing through during a specific timeframe. Second, the scope and extent of the officer's inspection must be limited to the purpose of the inspection. For

example, an officer conducting an inspection during antlered deer season to ensure that hunters are taking legal bucks (instead of illegal does) is not able to check a vehicle's glovebox. In sum, the government's discretion is limited and scoped by the reasonable regulatory scheme. It follows that the authority to conduct a boat safety inspection could not be used as a ploy or subterfuge to do a detailed search of a locked briefcase on board based on a groundless hunch that it might contain drugs.

Inspections are also discussed in the Fourth Amendment chapter of this book.



**Chapter 2 -  
Constitutional Law**

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## 2.1 Historical Background

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

After the ratification of the Declaration of Independence, establishing the thirteen colonies as “united” states, it became apparent that a central government was necessary to carry on the day-to-day affairs of the states. As a result, the Articles of Confederation were written during the early part of the American Revolution and approved in 1781.

Deliberately kept weak by the Articles’ authors, the national government, reserved much of the power to the states. For example, some states adopted laws that hampered trade by discriminating against goods and services from other states. To retaliate, some states enacted taxes on commerce, which only frustrated trade among the other states.

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

## 2.2 Framing the Constitution of the United States

The United States Constitution is the most important document in American governance. It is the foundational cornerstone of the citizen/government relationship. The Constitution defines the rights, privileges and responsibilities

of the people and limits government authority over the people. It is a contract between the people and the federal government. The people are bound by the laws of the federal government and the federal government is bound by the provisions and principles of the Constitution.

The Constitution is the source of all federal law. Our federal government is one of enumerated powers, which means that the government can only exercise powers granted to it by the Constitution. Article I, Section 8 of the Constitution grants to Congress the authority to make laws regarding specific subjects (these are called the enumerated powers). However, Congress can pass legislation concerning other subjects not expressly authorized by the enumerated powers in Article I, Section 8, as long as one of the enumerated powers is used as its constitutional anchor. For example, regulating firearms is not an enumerated power provided to Congress. However, Congress by using the Commerce Clause (an enumerated power), can regulate firearms by passing legislation, as long as the firearms are involved in interstate commerce.

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

### **2.3 Organization of the Federal Government**

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



### 2.3.1 The Legislative Branch

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

### 2.3.2 The Executive Branch

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

### 2.3.3 The Judicial Branch

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

### 2.3.4 A System of Checks and Balances

To ensure that no single branch of government becomes excessively strong, a system of checks and balances creates complex interrelationships between the branches. Each branch exercises a certain degree of control over the other two.

There are many examples of this complex arrangement, but the following are a few of the more important ones:

- The Congress can pass laws, but the President may veto them.
- By a 2/3 vote of each house, the Congress can override the President's veto.
- The President appoints Justices to serve on the Supreme Court, but the Senate must approve them. Once confirmed, the Justices serve for life or as the Constitution states, holding "their offices during good Behaviour."
- The President can be impeached and tried by the Senate, as can all federal judges, including Justices of the Supreme Court.
- The Congress can establish federal courts inferior to the Supreme Court and with certain limitations can regulate the appellate jurisdiction of the Supreme Court.
- Only Congress can appropriate the funds necessary to run the government.
- Congress can pass laws and even appropriate the money to run the government, but the President can choose not to implement and enforce the laws.
- The Supreme Court can declare laws passed by Congress and signed by the President to be unconstitutional. Although there is no specific authority in the Constitution to declare laws unconstitutional, in Marbury v. Madison, 5 U.S. 137 (1803), the Supreme Court declared that a law that is repugnant to the Constitution is void.

## 2.4 The Constitution and the Bill of Rights

The Constitution provides many safeguards through the checks and balances system against an excessively strong and potentially abusive central government. However, many scholars speculate the Constitution would not have been ratified but for assurances that one of the first priorities of the new government would be the passage of the first ten Amendments to the Constitution, often referred to as the Bill of Rights. With the exception of the Ninth and Tenth Amendments, the Amendments are specific guarantees of individual liberties belonging to the people. They proscribe government conduct that infringes on the rights of the people. These Amendments apply only to government conduct.

### 2.4.1 First Amendment

#### **FIRST AMENDMENT**

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

The First Amendment protects personal belief, opinion, and action. It addresses four basic freedoms that are necessary for a free society functioning within a democratic government. Those rights are freedom of religion, freedom of speech, freedom of the press, and the dual right to assemble peaceably and to petition the government. It has generally been held by the Supreme Court that a balance is required between First Amendment freedoms and the powers of a government to govern effectively. Supreme Court decisions throughout the 20th and 21st century balanced First Amendment rights with the requirements of public order. As a result of these decisions,

fighting words, true threats, and obscenity are not afforded First Amendment protection.

a. Religion

Two clauses in the Constitution, the establishment clause and the free exercise clause, protect freedom of religion. The establishment clause prohibits the establishment of a national religion or the preference of one religion over another. The clause was intended to erect a wall of separation between church and state. Laws enacted by the government must have a secular purpose; that is, the action must have a primary effect that neither advances nor inhibits religion. Even having only one secular purpose is sufficient to meet this “purpose” test. United States circuit courts have found the commemoration of the nation’s heritage was a sufficient secular purpose in placing “In God We Trust” on currency. Mayle v. United States, 891 F.3d 680, 686 (7th Cir. 2018). Additionally, the establishment clause must be interpreted by reference to historical practices and understanding. The line that courts and governments must draw between the permissible and the impermissible must accord with history and faithfully reflect the understanding of the Founding Fathers. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

The free exercise clause prevents the government from interfering with religious beliefs. However, religious practices may be limited and must be balanced against broader social values. A law with a legitimate secular purpose (not targeted at religion) may incidentally affect religious practices without violating the First Amendment. For example, practitioners of Native American religious rites challenged a law that made it illegal to possess peyote, which is a controlled substance employed in religious ceremonies. The Supreme Court held that the law was constitutional. Congress responded to this holding by passing 42 U.S.C. § 2000bb and 42 U.S.C. § 1996A.

These Acts restrict government action which would substantially burden religion, and they provide a legal exception for Native American religious practices involving peyote. Under the free exercise clause, when the government impinges upon the religious exercise it must normally satisfy at least “strict scrutiny,” showing that its restriction on a person’s right serves a compelling governmental interest and are narrowly tailored to that end. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

## b. Speech

The people have a First Amendment right to express their thoughts and ideas. Expression, even that which is offensive, is protected against government interference under the First Amendment, unless the government can prove that it falls within an unprotected category. Some of those unprotected categories of speech are outlined below. (A more complete discussion is found later in this chapter.)

### 1. Fighting Words

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

The fighting words doctrine is at its narrowest, if it exists at all, with respect to speech directed at public officials such as law enforcement officers. Officers are expected to exercise a higher degree of restraint than the average citizen. Moreover, Americans have a constitutional right to criticize their government and government officials. In Lewis v. City of New Orleans, 415 U.S. 130 (1974), the Supreme Court found unconstitutional a municipal ordinance that made it a crime

“for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while engaged in the performance of duty.” Freedom to verbally oppose or challenge police action without risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. In essence, “contempt of cop” is not a crime.

## 2. True Threats

A true threat is a crime. To be a true threat, the defendant must communicate a threat, a clear or present determination or intent to injure someone presently or in the future. Prior to 2023, whether a threat could be punished as a crime was based on the objective reasonable person standard. In 2023, the standard became a subjective one, i.e. whether the person making the threat consciously disregarded a substantial risk that their communication would be viewed as threatening violence.

## 3. Advocating Imminent Lawless Action

Historically, the people have not only criticized the United States, but some have advocated its laws be ignored and government overthrown. Sometimes called political speech, advocacy of this nature in public forums is protected under the First Amendment, unless the speech explicitly or implicitly encourages violence, it was the speaker’s intent that the speech would result in violent or lawless action, and that imminent violence or lawlessness is a likely result of the speech.

## 4. Speech Constituting a Clear and Present Danger

Although the test of whether speech poses a clear and present danger was further narrowed by the Supreme Court to include inciting imminent lawless action as discussed above,

knowingly conveying false information about an impending peril, such as yelling “fire!” in a crowded theatre or yelling “bomb!” on an airplane, creates a likelihood of danger to people. The most stringent protection of speech would not protect words causing a panic.

## 5. Obscenity

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court defined obscenity as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interests.” “Prurient” describes material that has a tendency to incite lustful thoughts or unwholesome sexual desires. It is grossly offensive to modesty, decency, or propriety. It shocks the moral sense, because of its vulgar, filthy, or disgusting nature. It must violate community standards. For example, the First Amendment does not protect possession of child pornography. Child pornography includes depictions of “actual children” under the age of 18 engaged in sexually explicit acts. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Challenges in enforcing obscenity laws exist today due to the strong presence of the internet and social media. Identifying community standards which to judge speech by can be convoluted, as some materials deemed “obscene” in one community may be accessed from virtually anywhere.

## 6. Fraudulent Misrepresentation

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

### c. Peaceful Assembly

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

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

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

The people, however, do not have unfettered access to public forums. Demonstrators cannot march down a public street anytime they wish. The government can require demonstrators to obtain a permit. Permits may restrict the time, place, and manner of expression. Time, place, and manner restrictions have the incidental by-product of interfering with the speaker's message. However, they will be upheld if they serve a significant government purpose and are not intended to restrict the speaker's content of the message.

### d. Electronic Recording of Law Enforcement Officers

The First Amendment protects the right of the people to record matters of public interest. It is a long standing First Amendment freedom of speech principle that people have a right to videotape public officials in the conduct of their official



business. This right is not limited to reporters and journalists but is the right of all citizens.

Private citizens may photograph, videotape, and record police officers performing their duties in traditional public places, including sidewalks, streets and locations of public protests. The right to record police activity also includes areas where individuals have a legal right to be present, such as the individual's home or business, and common areas of public and private facilities and buildings.

The right to record police officers carrying out their duties is limited to situations where the recording of the police activity does not interfere with the performance of the officer's duties. In general, the police cannot interfere with the recording unless the actions of the individual jeopardize the safety of the police or others, violate the law, or incite others to violate the law. The officer cannot search, seize, delete, or destroy the recording or device without a search warrant.

The officer should not threaten, intimidate, or otherwise discourage an individual from recording police enforcement activities or intentionally block or obstruct cameras or recording devices. If the bystander's actions approach the level of interference, the officer should recommend to the bystander a less intrusive or safer location from which the recording, photography, or observation of the police activity may be conducted.

## 2.4.2 Fourth Amendment

### **FOURTH AMENDMENT**

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

The Fourth Amendment prohibits unreasonable government searches and seizures. These protections are covered in more detail in the Fourth Amendment chapter of this book; however, some general principles are described below.

The Fourth Amendment protects “the people,” meaning those having a substantial connection to the United States. People inside the United States, its territories, or its possessions have such a connection, whether they are U.S. citizens or not. U.S. citizens receive Fourth Amendment protections, whether in the United States or abroad. Still, not everyone is protected. For example, the Fourth Amendment does not apply when the U.S. Government searches a foreign national’s property in a foreign country.

A “search” under the Fourth Amendment is a government intrusion that adversely impacts upon a person, house, paper or effect, or into a place where a person has a reasonable expectation of privacy. When the government trespasses on private property with the intent to obtain information, a government search has been conducted. The Fourth Amendment does not regulate searches by private citizens. It applies only to government conduct.

A person or their property may be “seized” under the Fourth Amendment. Common seizures for law enforcement officers are arrests, detainments, and taking personal property as evidence.

### 2.4.3 Fifth Amendment

#### **FIFTH AMENDMENT**

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

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

#### a. Double Jeopardy

Double jeopardy means to be tried twice, by the same sovereign, for the same offense. The Constitution prohibits prosecutors from repeated prosecutions until a conviction is ultimately obtained. Once the accused is acquitted, the same sovereign cannot retry the defendant for the same crime, even if they confess to their guilt or new evidence is found. The following situations, however, are NOT double jeopardy:

## 1. Dual Sovereignty

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

## 2. Mistrial

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

## 3. Nolle prosequi (nolle pros)

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

## 4. Remand of the Case

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

### b. Self-Incrimination

The Self-Incrimination Clause of the Fifth Amendment is covered in depth in another chapter of this book, but some general observations are appropriate. While the Fourth

Amendment concerns government searches for physical evidence, the Fifth Amendment's Self-Incrimination Clause focuses on government interrogations seeking communicative evidence. Government interrogation means words or actions likely to elicit an incriminating response (e.g., "Did you do it?"). Communicative, or testimonial, evidence from the suspect can be verbal (e.g., "Yes, I did."), written, or non-verbal (nodding). In any case, it requires the accused to communicate a thought process about the crime. Obtaining booking information (name/address/phone number/etc.), fingerprints and physical evidence (blood, urine, hair, and semen) do not require the communication of a thought process and therefore, do not present a Fifth Amendment self-incrimination issue.

#### c. Grand Jury Indictment

All "infamous" crimes must be prosecuted by grand jury indictment. "Infamous" means felony offenses. A grand jury is a body of impartial citizens selected to review a criminal incident and conduct their own investigations to determine whether probable cause exists to charge a person with a crime.

A suspect has a constitutional right to a grand jury indictment if they are charged with a federal felony offense. This right to a grand jury indictment can be waived unless it is a capital offense.

#### d. Due Process of Law

No person may be denied life, liberty or property without due process of law. Due Process is a body of rules and procedures incorporated into our judicial system. Due Process directly impacts several important law enforcement practices such as show-ups, line-ups, and photo arrays. Due Process means that the standards and procedures are the same - for everyone. Furthermore, the more adverse the proposed government action against the individual, the more due process is provided.

Due process ensures government action is fundamentally fair for everyone.

#### 2.4.4 Sixth Amendment

**SIXTH AMENDMENT**

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

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

a. Speedy Trial

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

b. Confrontation of Witnesses

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

c. Compulsory Process

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

d. Assistance of Counsel

The defendant has a Sixth Amendment right to assistance of counsel regarding the offenses for which they are charged. The right to counsel regarding these offenses attaches upon indictment by a grand jury, a filing of an information (charging document) by the government, or upon the suspect's initial appearance in court. If any of these events occur and the government wants to interrogate the suspect, place the suspect in a lineup, or take the suspect to court regarding the charged offense, the suspect is entitled to be informed of their right to counsel.

e. Informed of the Nature and Cause of Charges

Once taken into federal custody, a suspect will be taken to court without unnecessary delay for their initial appearance. The initial appearance is a court hearing where the suspect is formally notified of their rights and the charges that have been filed against them.

f. Venue

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

### 2.4.5 Eighth Amendment

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

The purpose of bail is not to punish, but rather to allow the pretrial release from custody of a person who is presumed innocent until proven otherwise. At the same time, bail provides the government with a reasonable assurance that the defendant will, in fact, appear at the next stage in the judicial proceedings. What is considered to be “excessive” is difficult to determine, but generally the bail should be the absolute minimum that will reasonably assure the appearance of the accused (See 18 U.S.C. § 3141 et seq.). The courts have applied the Eighth Amendment’s protection against excessive fines to civil asset forfeitures when they are at least partially punitive in nature. An example might be where a \$42,000 vehicle is seized in a case where the maximum fine was \$10,000.

### 2.4.6 Fourteenth Amendment

The Bill of Rights originally only limited the power of the federal government. Following the Civil War, Congress enacted the Fourteenth Amendment. This amendment was used as a funnel by the Supreme Court to selectively incorporate the fundamental rights found in the Bill of Rights and make them applicable to the states. Today, if a federal law enforcement officer conducts an unreasonable search and seizure, that officer violates the Fourth Amendment. If a state law enforcement officer does so, they violate the Fourth Amendment, as made applicable to the states through the Fourteenth Amendment.



## 2.5 Criminal Justice Components from the Constitution

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

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

## 2.6 Controlling Speech Under the First Amendment

### 2.6.1 Generally

The people have a First Amendment right to express their thoughts and ideas in public forums. Expression can be offensive, even “anti- American.” Nonetheless, expression is protected unless it falls within one of the unprotected categories discussed later in this chapter. Rights of expression are greatest in public forums, as these are the places where the people have traditionally exercised their First Amendment rights.

## 2.6.2 Government Action

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

Today, if a federal law enforcement officer unduly restricts expression, that officer violates the First Amendment. If a state law enforcement officer does so, they violate the First Amendment as made applicable to the states through the Fourteenth Amendment. Private action, however, never triggers First Amendment protections or any other constitutional protection, for that matter.

## 2.6.3 Expression

The First Amendment rights of “freedom of speech, or of the press, or the right of the people peaceably to assemble” are often grouped together and called freedom of expression. The First Amendment protects the people from unreasonable government restrictions upon their expression of thoughts and ideas.

The expression of thoughts and ideas has been addressed in multiple mediums to include the written word, the spoken word, symbols, and conduct. Symbols and conduct also receive First Amendment protection when there is intent to convey a particular message and the likelihood is great that the message will be understood by those who view it.

The First Amendment protects ideas. It is not the government’s place to control ideas because they are wrong, offensive, or anti-American. In essence, the Constitution gives

the people the right to express their ideas. Those ideas are protected unless shown likely to produce a clear and present danger of serious substantive evil that rises far above just offending someone. Some examples of protected expression follow:

- Expressing disapproval (through the spoken word) of Canada's decision not to support Operation Iraqi Freedom by shouting, "F--- Canada" as the Canadian flag passed in a parade.
- Expressing disapproval (through the written word) of the Vietnam War by sewing the words "F--- the Draft" on the back of a jacket.
- Expressing disapproval of American policy (through speech and conduct) by dousing an American flag with kerosene setting it on fire, and chanting, "America, the red, white, and blue, we spit on you."
- Wearing and displaying symbols of racial superiority, like the Nazi uniform and Swastika.

#### 2.6.4 Government Restrictions

Historically, the government attempted to restrict expression of both content and content-neutral messages.

##### a. Content-Based Restrictions

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

down, as a violation of the First Amendment right of expression.

“When the Nazis Came to Skokie – Freedom for Speech We Hate” by Philippa Strum provides an excellent example of government, content-based restrictions on speech. In the late 1970’s, the Chicago suburb of Skokie was predominately Jewish. One out of every six Jewish citizens was a survivor or directly related to a survivor of the Holocaust. When a neo-Nazi group announced its intention to demonstrate there in 1977, the city enacted ordinances prohibiting “public display of markings and clothing of symbolic significance.”

In effect, the ordinances prohibited the Nazis from wearing their brown-shirt uniforms and flying the Swastika. These government restrictions were intended to protect Jewish citizens from the communicative impact (shock affect) of the Nazis’ message. As such, they restricted ideas and were struck down by the courts.

Finding government action content-based is normally its death blow. In strictly scrutinizing such action, the court will require the government to prove that restricting the idea not only serves a compelling government interest but is also narrowly drawn to achieve that end. Of course, averting violent clashes between two competing crowds (the Nazis and the Jews) is a compelling government interest. That, however, is not enough. The government must also show that the government interest is not achievable through some alternative other than restricting the message. For example, if the government can implement safety measures to control the crowd to avert violence, any government restriction based on the speech content is not narrowly drawn, and the court is likely to strike the restriction down.

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

- A Texas statute that prohibited the desecration of a state or national flag in a way which seriously offends one or more persons likely to observe the act.
- Reducing a Ku Klux Klan march in Washington, D.C. from 14 blocks to four based on the crowd's potentially violent reaction to the Klan's message.

#### b. Content-Neutral Restrictions in Public Forums

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

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

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

Public forums are where the people have traditionally exercised First Amendment freedoms. They traditionally include public streets, sidewalks, and parks. Nonetheless, people do not have unfettered access to public forums. Demonstrators cannot march down a public street anytime they wish. The government can require demonstrators to obtain a permit that restricts the time, place, and manner of expression. Time, place, and manner restrictions may have the incidental by-product of interfering with the speaker's message. However, they will be upheld if they serve a significant government purpose, are enforced in a content-neutral manner, and do not allow government agents to use their own discretion about when to issue a permit. These restrictions are not limiting what someone might say, but possibly when and where they might say it. Federal law enforcement officers must strictly adhere to the guidelines in the permitting process. Some examples follow:

- The U.S. Park Service may require an organization to obtain a permit that restricts the time of its demonstration in order to prevent one demonstration from interfering with another.
- The Park Service's permitting process may restrict where the demonstration takes place in order to prevent demonstrations from blocking traffic.
- The permit may require sound amplification devices (bull horns) to remain under a certain amplification level in order to prevent the demonstration from unduly disturbing other people using the park.

### 2.6.5 Unprotected Conduct

Conduct receives less First Amendment protection than other types of expression for a couple of reasons. First, the Supreme Court rejects the view that all conduct can be labeled First

Amendment expression simply because the person engaging in it intends to express an idea. The Constitution protects the exposition of thoughts and ideas. However, violence and destruction of another's property is not protected expression. Moreover, in criminalizing such behavior, the government's intent is to stop destructive behavior, not ideas. Examples of unprotected conduct follow:

- A defendant may be charged with 18 U.S.C. § 111, assaulting a U.S. Marine on account of their service in Iraq. The statute is content-neutral because it is intended to protect federal employees, not thoughts and ideas about the war.
- A defendant may be charged with burning an American flag in a National Park in violation of an ordinance prohibiting outdoor fires, so long as the ordinance is intended to stop forest fires, not demonstrators from dishonoring the flag.
- A state criminal statute may prohibit cross burning in a public place if the cross was burned with the intent to intimidate any person or group of persons. The statute distinguishes protective, albeit offensive expression (symbols identifying the Ku Klux Klan), from criminal conduct (intentional intimidation).

### 2.6.6 Unprotected Speech

While other forms of expression (speech, words, symbols, and pictures) receive higher protection than conduct, they, too, may fall outside the constitutional umbrella. The Supreme Court has identified categories of unprotected speech that the government can prohibit. Those categories are defined based on the subject matter of the speech and are exceptions to the rule that the government may not regulate the message of the speaker.

a. Fighting Words

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

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

- Law enforcement officers had probable cause to arrest the defendant for fighting words after the defendant faced the victims from a short distance and repeatedly yelled “f--- you,” called one victim a “fat son-of-a b----,” and made clucking sounds like a chicken, as if one of the victims was afraid to fight. In addition to these facts, the court also considered that the night before the defendant had brandished a knife toward the victims, which increased the chance for violence. Even though the victims exercised restraint, the court found that a reasonable onlooker could have believed the defendant’s actions were a direct personal insult and an invitation to fight.
- However, a Nazi demonstrator is not using fighting words when they say to a crowd, “The Holocaust is a big lie, made up by the f---ing Jews.” Standing alone, these words are not an invitation to fight.

As stated above, the fighting words doctrine is at its narrowest, if it exists at all, with respect to speech directed at public officials, such as law enforcement officers. Officers are expected to exercise a higher degree of restraint than the



average citizen. Americans have a constitutional right to criticize their government and government officials. For example:

- A woman’s expression of telling a police officer, “You G— d---- mother f---ing police. I’m going to the Superintendent of Police about this,” is protected speech.
- An Arkansas state trooper was denied qualified immunity for a constitutional tort after arresting the plaintiff for “flipping him off.”
- But, distinguish mere criticism of police action from actual interference with law enforcement activities. A U.S. Park Service ranger was in the process of making an arrest, when the defendant, who was an onlooker, yelled statements of police brutality, “f-- this, f-- that, and this is f---ked.” After the ranger told the defendant to back up, the defendant clenched their fists, stuck out their chest, stepped forward, and yelled “f--- you.” The court was not concerned with the defendant’s verbal criticism but sustained a conviction for violating 36 C.F.R. 2.32(a)(2) – violating the lawful order of a government agent during law enforcement actions.

#### b. True Threats

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

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

- Title 18 U.S.C. § 844(e), regarding fire or explosives, states in part that “Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate ... commerce, willfully makes any threat ... concerning an attempt to kill, injure, or intimidate any individual or to unlawfully damage or destroy any building....”
- Title 18 U.S.C. § 876(c) states in part that “Whoever knowingly ... deposits or causes to be delivered (through the use of the mail), any threat to injure the person of the addressee or of another....”
- Title 18 U.S.C. § 871 makes it a crime to make threats against the President or Vice President.

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

The standard is a subjective one. In Counterman v. Colorado, 600 U.S. 66 (2023), the Supreme Court held that in order for a person to be convicted of making true threats, the maker of the threat must have had a subjective understanding as to whether the person to whom their words were directed would perceive them as threatening. The Supreme Court explained that the requisite mental state for a true threat is recklessness and requires proof that the maker of the threat consciously

disregarded a substantial risk that their communications would be viewed as threatening violence.

An utterance in jest or conditioned on a variable that cannot occur (being younger) is not a threat. Moreover, the defendant need not communicate the threat to the intended victim. Communicating the threat to a third party is sufficient. The following might be true threats under 18 U.S.C. § 115 if made under circumstances that would show that the speaker consciously disregarded a substantial risk that their communications would be viewed as threatening violence:

- The speaker tells a U.S. Park ranger during the execution of an arrest, “I’m going to kick your a--.” However, “I would kick your a-- if I were sober” is not a true threat.
- The speaker sees a U.S. Park ranger at the mall and says, “You’re the stupid b---- that arrested me two years ago. I’m going to kick your a--.”
- The defendant sees a U.S. Park ranger’s husband at the mall and says, “Your wife arrested me two years ago. I’m going to kick your a--.”
- The speaker sees a U.S. Park ranger’s husband at the mall and says, “Your wife arrested me two years ago. Neither of you will live to see Christmas.”

### c. Advocating Imminent Lawless Action

Historically, some people have not only criticized their country, but advocated for laws to be ignored and the government overthrown. Restrictions on speech that advocate lawlessness are tightly limited when the advocacy occurs in public. Advocating lawlessness in public is punishable when two conditions are satisfied. First, the advocacy must be directed to inciting or producing imminent lawless action.

Consequently, advocating lawlessness at some future time is protected. Secondly, the advocacy must be likely to incite or produce lawlessness. So even if the speaker advocates immediate lawlessness, the crowd must still be receptive to the idea. Brandenburg v. Ohio, 395 U.S. 444 (1969). Some examples follow:

- Advocating imminent lawlessness: During a public demonstration, a speaker yells at a crowd, “If you’re a Muslim, then you’re responsible for 9/11.” At this, the non-Muslim crowd cheers in approval. The speaker continues, “See that store over there” pointing to a grocery store. “That’s owned by Muslims. Let’s give them a taste of their own medicine and bust out their windows.” At this the crowd cheers louder and even begins to pick up rocks as if they might throw them at the store windows.
- Advocacy based on a contingency that does not incite imminent lawlessness: During a demonstration, a speaker yells, “The war in Afghanistan violates international law. Unless U.S. troops are pulled out of Afghanistan, we are going to come back and give President Obama a taste of what war is like and torch government buildings.” The crowd cheers in agreement.
- Advocacy that is not likely to incite lawlessness: During a demonstration about the war in Afghanistan, a demonstrator yells, “There’s no way you’re going to make me go. If they try to send me, the first guy I’ll shoot will be Barack Obama.” The crowd laughs.

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

d. Creating a Clear and Present Danger

Comments that place the public in fear of an impending peril are punishable. For example, telephoning security personnel at a federal building and saying, “There’s a bomb in the building” is unprotected speech. Likewise, joking with a flight attendant on an airline and saying, “I’ve got a bomb” is unprotected speech. The bomb threat is punishable under 18 U.S.C. § 844, above. The joke (false information) about the bomb on the airplane is punishable under 18 U.S.C. § 32.

e. Obscenity

The Supreme Court defined obscenity as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.” “Prurient” describes material that has a tendency to incite lustful thoughts, or unwholesome sexual desires. Obscenity is grossly offensive to modesty, decency, or propriety. It shocks the moral sense, because of its vulgar, filthy, or disgusting nature. It must violate community standards. Child pornography violates community standards of decency, so long as it depicts actual children under the age of 18 engaged in sexually explicit acts. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Several federal statutes proscribe obscenity. 18 U.S.C. § 2252A proscribes possession of child pornography that has been transported in interstate commerce. 18 U.S.C. § 1460 prohibits possession with intent to sell or the sale of any obscene material on federal property.

## Chapter 3 -

### Courtroom Evidence

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### **3.1 Introduction to Courtroom Evidence**

Evidence is the backbone of every criminal prosecution. Unless law enforcement officers and prosecutors properly collect, preserve, and present evidence, it will not be admissible in court, and the jury cannot consider it no matter how important or persuasive it may be. Law enforcement officers must have a general understanding and appreciation of some fundamentals of the Federal Rules of Evidence (F.R.E.) to ensure that they are collecting and preserving evidence so that the court will admit it at trial.

The jury decides how much weight to give to evidence that the court admits at trial. Jurors may consider the evidence as powerful proof, or they might disregard it altogether. When law enforcement officers collect evidence in a way that complies with the F.R.E., the judge will generally admit the evidence and allow the jury to consider it when determining whether the defendant is guilty.

The law enforcement community uses the word “evidence” in many ways. For purposes of this chapter, evidence refers to anything that either side, the prosecution or the defense, offers in court to prove or disprove a fact at issue.



### 3.1.1 Forms of Evidence

Evidence comes in several forms:

Testimonial: A witness takes the stand, the court places the witness under oath, and they answer questions. The witness's answers are testimonial evidence.

Physical: Physical evidence is something that can actually be touched or seen. Items that law enforcement officers find, collect, seize or otherwise obtain become exhibits that the government prosecutor can offer into evidence. Guns, drugs, photographs, and documents are common forms of physical evidence. The government or the defendant will assign an exhibit number to physical evidence when offering it into evidence at trial. (Government's Exhibit #1 or Defendant's Exhibit #1).

Demonstrative: Demonstrative evidence consists of items that demonstrate or illustrate something to the jury, such as models, charts, and graphic aids. A party uses demonstrative evidence to explain other evidence that the court has already admitted.

### 3.1.2 Admissibility

The judge decides the admissibility of the evidence. When one party offers evidence, the opposing party may object. If the judge overrules the objection, they admit the evidence and the jury may consider it in deciding the verdict. Such evidence has been "received in evidence." If the judge sustains the objection, they do not admit the evidence and the jury may not consider it. The judge applies the F.R.E. in deciding whether to admit evidence.

### 3.1.3 Applicability of the Federal Rules of Evidence

During the prosecution of a criminal case, many proceedings require the prosecution and defense to appear before a judge. These proceedings include the initial appearance, detention and identity hearing, preliminary hearing, arraignment, trial, and sentencing hearing. With the exception of two specific F.R.E.s that deal with privileges, which apply to all judicial proceedings, the F.R.E. only apply at trial. The trial is the judicial proceeding where the parties present evidence and the jury determines whether the defendant is guilty. The F.R.E. governs the admissibility of evidence at the trial.

The F.R.E. also do not limit the information officers may consider when investigating a case. For example, officers may consider hearsay information when conducting an investigation or deciding whether there is reasonable suspicion or probable cause. With the exception of privileges, the F.R.E. do not limit the evidence judges may consider in deciding whether to issue search warrants or arrest warrants.

## 3.2 The Procedural Stages of a Criminal Trial

### 3.2.1 Pre-Trial Suppression (Motion) Hearings

If one party does not want the jury to hear or see certain evidence, that party will file a motion to suppress or exclude that evidence. Most often, the defense files suppression motions because it claims the government unlawfully obtained a confession or an item of physical evidence. The judge will usually order a hearing if the defense files a suppression motion. Law enforcement officers frequently testify at suppression hearings. A jury is not present, and the judge will decide whether to admit the evidence so that the jury can consider it at the later trial.

If the judge grants a defense motion to suppress, the jury will not see or hear the evidence. If the judge denies the motion to suppress, the government may present the evidence to the jury.

### 3.2.2 Voir Dire

During voir dire, the lawyers for the government and the defense question the potential jurors. Each party has the opportunity to eliminate, or challenge, a certain number of potential jurors from the panel if it perceives, based on the questioning, that that juror might be biased. After the parties exercise their challenges, the court will select the jury from the remaining members of the panel.

### 3.2.3 Opening Statements by Counsel

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

### 3.2.4 The Case-in-Chief

The government presents its evidence during the case-in-chief by calling witnesses and offering exhibits. The government presents its case-in-chief first because the government has the burden of proving the defendant's guilt. The defense may cross-examine any witness who testifies and may challenge the admissibility of exhibits. If the defense cross-examines a witness, the government may conduct a "re-direct" examination. The judge can allow further re-cross and re-direct examination.

### 3.2.5 The Defense Case

The defense is never required to present evidence because the burden is, and always remains, on the government to prove the defendant's guilt. However, the defense may choose to call witnesses and introduce exhibits. The government can cross-examine defense witnesses and challenge the admissibility of defense exhibits. The defense can conduct a re-direct examination if the government cross-examines a witness.

### 3.2.6 The Rebuttal Case

If the defense presents a case, the government may offer rebuttal evidence. In the rebuttal case, the government may only present evidence that rebuts or challenges the evidence the defense presented. If the government presents a rebuttal case, the defense may then rebut only the evidence that the government presented in rebuttal.

### 3.2.7 Closing Argument

During closing arguments, the lawyers tell the jury what they believe the evidence showed. The lawyers may refer only to evidence that the court admitted during the trial. Argument by counsel is not evidence.

### 3.2.8 The Charge to the Jury

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

### 3.2.9 Sentencing

If the defendant is convicted of any offense, the judge will conduct a sentencing hearing. Because the U.S. Probation

Office must conduct and prepare a Presentence Investigation Report, the sentencing hearing is generally set weeks or sometimes months after trial. In federal criminal trials, only the judge determines the sentence. The jury does not participate unless the case is a capital (death penalty) case. In capital cases, the jury makes certain findings.

### 3.3 Relevant Evidence

#### 3.3.1 The Requirement for Evidence to be Relevant

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

Evidence which tends to: (a) prove (or disprove) an element of the crime charged, (b) prove or rebut a defense, or (c) concerns the credibility (believability) of a witness is always relevant. If evidence has any tendency to prove a part of the government or defense case—directly or indirectly—the evidence is relevant.

#### 3.3.2 Other Crimes, Wrongs, and Acts of the Defendant

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

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

## Examples:

- **Motive.** Does a prior act tend to prove the defendant's motive to commit the charged crime? For example, a prior altercation between the defendant and the victim may be admissible to prove motive for a later assault. In a bank fraud case, evidence that the defendant had outstanding debts may be admissible to prove the motive for using a false name on a bank loan.
- **Intent.** Does a prior act tend to prove whether the defendant had a specific intent to commit the charged offense? In one case, the court held that a prior conviction for distributing drugs was admissible to prove intent in a charge for conspiracy to distribute drugs.
- **Knowledge.** Do the defendant's acts tend to prove the defendant knew a certain fact? Evidence that 20 firearms were seized from the defendant's house might be admissible to prove the defendant knew the defendant had firearms in his home, even if the defendant was only charged with possessing one firearm in connection with drug trafficking.
- **Plan or preparation.** Do the defendant's acts tend to prove how the defendant planned or prepared for the charged crime? In a sexual assault trial, evidence that the defendant gave prescription sleeping medication to the victim in a drink prior to the assault would probably be admissible to show the defendant's plan to render the victim unable to resist the assault.
- **Opportunity to commit the crime.** In one case, the court permitted the government to show a photo of the defendant holding a "large gun," taken before the charged crimes, to show defendant had access to guns.

- **Modus Operandi.** If the defendant has a particular way of committing an offense, evidence of prior offenses the defendant committed in the same way may be admitted to prove the defendant committed the offense for which the defendant is on trial.
- **Identity of the perpetrator.** Evidence that on a prior occasion the defendant, under “signature-like” circumstances, committed an offense may be admissible to prove that the defendant was the person who committed the charged offense.
- **Impeachment by contradiction.** If the defendant makes a factual claim while testifying, the government can introduce the defendant’s prior bad acts or convictions if they contradict that factual claim. For example, a defendant charged with tax fraud might testify that they never knowingly claimed a fraudulent deduction on their tax return. The government could seek to introduce evidence of their prior conviction for filing a tax return claiming a deduction for a charitable contribution to a fictitious charity. As another example, if the defendant claims they were never at a particular location, the government could rebut that testimony with a prior conviction for an offense that occurred at that very location.
- **Predisposition to defeat entrapment.** If a defendant raises an entrapment defense, prior similar criminal acts are admissible to prove that the defendant was predisposed to commit the charged crime.

### **3.4 Direct and Circumstantial Evidence**

Direct evidence tends to prove a fact directly and without the need to draw an inference or a conclusion about what the evidence implies or suggests. Direct evidence most often comes

from what a witness sees, hears, smells, tastes, or touches. In contrast, circumstantial evidence (also known as “indirect evidence”) tends to prove a fact indirectly through an inference, deduction, or a conclusion. For example, testimony that “The street was wet when I got up in the morning” would be circumstantial evidence that it had rained during the night, even if the witness did not testify that he saw or heard the rain falling.

Evidence can be direct or circumstantial. There is no legal difference as to the weight the jury can assign either type. In spite of some common beliefs, circumstantial evidence can be very powerful, and juries may sometimes find it more reliable and convincing than eyewitness testimony. Most physical evidence is circumstantial because it proves something indirectly. For example, a ballistics test that proves a certain gun fired a certain bullet is circumstantial evidence that the defendant (whom law enforcement officers found in possession of the gun) killed the victim.

### **3.5 Lay (And Expert) Witness Testimony**

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

Criminal trials often involve expert witness testimony due to advances in forensic evidence such as fingerprint identification, DNA, ballistics, toxicology, blood splatter (or spatter), fiber comparison, tool and die marks, questioned documents, and similar disciplines. To testify about a scientific or technical matter or other area of specialized knowledge, the witness must have qualifications stemming from their knowledge, skill, expertise, training, or education. (F.R.E. 702). Recent Supreme Court cases have emphasized that the Confrontation Clause of the U.S. Constitution requires in-



court testimony of the experts who perform forensic analysis to determine, for example, the identity of controlled substances. See the Confrontation Clause discussion below in the Hearsay section.

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

A person who is not an expert witness is a lay witness. A lay witness may give an opinion only when: (a) the opinion is rationally based on the witness's perception and personal knowledge, (b) the opinion is helpful to a clear understanding of the witness's testimony or the determination of a fact at issue, and (c) the opinion is not one that is based on scientific, technical, or other specialized knowledge. In sum, a lay witness may offer an opinion about matters that are within the perception of an ordinary person that results, as one court said, "from a process of reasoning familiar in everyday life." Some examples of a proper lay witness opinion are:

### 3.5.1 Handwriting

Identification of handwriting if the witness has sufficient familiarity with that handwriting. A secretary or co-worker, for example, might be sufficiently familiar with someone's handwriting to offer an opinion that particular handwriting is or is not that person's handwriting.

### 3.5.2 Voice

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

### 3.5.3 Emotional Condition

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

### 3.5.4 Not Requiring Scientific or Technical Knowledge

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

## 3.6 Witness Credibility and Impeachment

A witness is "credible" if they are believable. The jury (or the judge in a bench trial without a jury) decides whether a witness is credible, and can elect to believe all, nothing, or part of what a witness says.

### 3.6.1 Impeachment

Impeachment is an attack on the credibility of a witness. The opposing party can impeach any witness who testifies during cross-examination of that witness, through the testimony of another witness, or by introducing other evidence that contradicts the witness's testimony. Suppose that a defense witness testifies that they witnessed a robbery through the windows of the bank while standing in the parking lot, and that the robber he observed did not look like the defendant.

## Examples:

- Impeachment through cross-examination: “Isn’t it true that you must wear prescription glasses to see at that distance, and you were not wearing your glasses at the time?”
- Impeachment testimony of another witness: “Were you with Mr. Smith in the parking lot of the bank? Does he wear prescription glasses? Was he wearing them in the parking lot?”
- Impeachment by introducing other evidence: Bank surveillance video showing that the robber did not look like the person Mr. Smith described.

If an opposing party impeaches a witness, the jury may find that their testimony is less believable. The party that called the witness will then have an opportunity to “rehabilitate” (to restore) the witness’ credibility. For example, if an opposing party impeached a witness with questions about whether the witness was wearing glasses, the party calling the witness could rehabilitate them with evidence that the prescription was current and the witness was wearing clean glasses in a correct manner.

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

### 3.6.2 Factors that Affect Witness Credibility

#### a. Bias

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

#### b. Motive to Fabricate Testimony

A witness with a stake in the outcome of the trial or a vendetta against another witness or the opposing party may have a motive to lie (motive and bias are similar). For example, witnesses who are financially or emotionally dependent on the defendant, or witnesses who have a reason to help (or hurt) the defendant, have a motive to fabricate their testimony. Defense counsel can easily attack cooperating co-defendants and co-conspirators if they try to shift the blame toward the defendant.

#### c. Inability to Observe or Accurately Remember

An opposing party can impeach a witness by showing that they could not clearly see or hear what happened or cannot confidently remember or recall what happened. Examples include witnesses who have problems with vision or hearing, who were not in a position to see or hear what occurred, who were under the influence of alcohol or drugs at the time of the event, or who have a mental impairment.

#### d. Contradiction

A common form of impeachment is to challenge the testimony of a witness with other testimony or evidence that contradicts

the witness's testimony. An opposing party can impeach a witness who says the car was green with a photo or other evidence showing that the car was, in fact, red.

e. Prior Inconsistent Statements

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

f. Specific Instances of Conduct that Indicate a Witness is Untruthful

An opposing party may cross-examine a witness about his past conduct if it would indicate he is untruthful. The conduct does not have to relate to the case that is the subject of the trial. Examples would include lying in an investigation, forging checks, or engaging in acts of deceit. LEOs who have engaged in such conduct, on or off duty, might have that conduct exposed in court, as the prosecution may be required to notify the defense counsel about incidents involving a law enforcement officer's dishonesty. See the Federal Court Procedures chapter in this book.

g. Prior Convictions to Show Untruthfulness (F.R.E. 609)

An opposing party can use certain prior convictions to impeach any witness (including the defendant) who testifies. An opposing party cannot use a prior arrest that did not result in a conviction to impeach a witness. The concept behind permitting a party to use prior convictions for impeachment is that a jury may find a person with prior convictions to be less credible. A party may use any felony conviction to impeach. A party may use a misdemeanor conviction for crimes involving dishonesty to impeach a witness. The conviction must be less than 10 years old. Convictions more than 10 years old are

admissible only if the judge determines, “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” The 10 years is measured from the date of conviction or the date of release from imprisonment, whichever is later. A party may impeach with a conviction that is under appeal, but not with a conviction that a higher court has reversed on appeal or for which the witness has been pardoned. Generally, a party may not impeach a witness with a juvenile adjudication, though LEOs should inform the AUSA about any juvenile adjudications.

### **3.7 Privileges**

Privileges are protections given to information shared between people in specific relationships. When a privilege exists, it means that the government cannot require a person to provide certain information and the person can prevent others from doing so. Ordinarily a party can subpoena a witness to testify at a grand jury, a court proceeding, or a trial. If the witness refuses to testify, the court can hold the witness in contempt. However, if the information is privileged, the court cannot compel a person to provide the information, no matter how relevant and important it may be. The courts developed the privileges used in federal criminal trials.

Privileges protect certain information – though relevant and important – from disclosure in order to promote some other societal good. For example, in order to ensure that criminal defendants will candidly communicate with their defense attorneys, the law makes their communications privileged. Society has decided that it is better to have clients talk fully and candidly to their lawyers than to reveal attorney-client discussions.

### 3.7.1 Holders of a Privilege

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

### 3.7.2 Waiver of Privileges

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

Even if a person holds a privilege, law enforcement officers may still attempt to question the person, and need not advise the person that the privilege exists.

If the person answers the question, they waive the privilege. Law enforcement officers should assume the person might attempt to invoke the privilege at a later proceeding. To guard against this possibility, officers should obtain independent information that proves or corroborates the information that the privilege holder provided.

### 3.7.3 Privileges and the Federal Rules of Evidence

The general rule is that the F.R.E. apply only during trials, and not to other proceedings such as the initial appearance, the preliminary hearing, arraignment, grand jury proceedings, sentencing hearings, and detention and identity hearings.

However, F.R.E. 501 and F.R.E. 502, dealing with privileges, apply to all proceedings.

### 3.7.4 The Federal Privileges

Federal privileges that a law enforcement officer will normally encounter include:

- The Fifth Amendment privilege against self-incrimination. (See the chapter on Fifth & Sixth Amendments for a detailed analysis of this privilege.)
- The attorney-client privilege.
- The spousal privileges.
- The psychotherapist-patient privilege.
- The government-informant privilege.
- The clergy-communicant privilege.

### 3.7.5 Non-Federally Recognized Privileges

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

### 3.7.6 The Attorney-Client Privilege

This privilege covers communications, written or oral, between an attorney and a client during professional consultation. It includes communications before payment for services, and the privilege remains even if the attorney-client relationship ends,



such as when a client fires the lawyer. The privilege exists to encourage clients charged or under investigation for a crime to speak candidly with their attorney in order to obtain legal advice.

For the privilege to exist: (a) the attorney must be acting as an attorney in a professional capacity, (b) the client must intend the communication to be confidential, and (c) the communication must be confidential in fact.

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

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

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

Attorney-client communications that take place in the presence of a third person or in a public place in circumstances that allow others to overhear are not confidential in nature, and therefore are not privileged. The law recognizes, however, that if the presence of a third person is essential for the attorney to prepare a defense in a criminal case, then these third persons fall under the “umbrella” of the privilege. Examples would include a legal secretary, paralegal, defense-employed investigator, or interpreter working for the attorney.

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

### 3.7.7 The Spousal Privileges

There are two spousal privileges. The testimonial privilege provides that people have the right to refuse to testify against their spouses. This privilege extends to what the spouse saw, was told, or knows, including information discovered before the marriage. The testifying spouse holds this privilege and can waive it and elect to testify. The privilege ends with divorce.

The marital communication privilege, on the other hand, protects private communications between the spouses made during the marriage. The communication does not have to be of an intimate nature or even concern the marriage. A statement in private by a husband to his wife, “I robbed a bank” is protected by this privilege. If the spouse makes the communication under conditions that are not private – such as in the presence of their children or friends – then it is not a private marital communication. This privilege protects only private communications between spouses made during the marriage and extends beyond divorce. The spouse who made the communication holds the privilege. More and more courts are holding that this privilege belongs to both spouses.

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

### 3.7.8 The Psychotherapist-Patient Privilege

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

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

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

### 3.7.9 The Clergy-Communicant Privilege

The Supreme Court has not specifically adopted the clergy-communicant privilege though most Federal Circuits have done so. A party asserting the clergy-communicant privilege must show that they made the communications: (a) to a member of the clergy, (b) in the clergy's spiritual and professional capacity, and (c) with a reasonable expectation of

confidentiality. “Clergy” includes a minister, priest, pastor, rabbi, or other similar leader of a religious organization, or an individual whom the person making the communication reasonably believes to be a leader of a religious organization. The presence of others necessary to communicate the information does not defeat the privilege. The privilege exists to encourage people to communicate with members of the clergy on spiritual matters.

The communicant holds the privilege. The clergy may exercise the privilege for the communicant by refusing to divulge what the communicant said. If the communication did not concern a spiritual matter (for example, if the communication was about a joint criminal enterprise between the clergy and the communicant), the privilege will not apply.

### 3.7.10 The Government-Informant Privilege

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

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

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

A judge may order the government to reveal the identity of a confidential informant. If the judge orders the government to reveal the informant's identity, the AUSA must do so, appeal the judge's order, or dismiss the case. The judge will not order the government to reveal the informant's identity unless it is relevant and helpful to the defense of an accused and is essential to a fair determination of the case. The proper balance depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors.

- If the informant is just a tipster or the source of probable cause, the court will not usually order the government to reveal the informant's identity.
- If the informant merely introduces the defendant to an undercover agent, the court will not usually order the government to reveal the informant's identity, since what transpires between the undercover agent and the defendant is the information that is relevant for the defense.
- If the informant witnessed activities that are part of either the government's or the defense's case, the judge will have to decide whether revealing the informant's identity is relevant and helpful to the defense and necessary to a fair trial. In this case, it is more likely that the court will order the government to reveal the informant's identity.
- If the informant is a co-defendant, conspirator, confederate, or a party to a charged offense, it is likely

that the court will order the government to reveal the informant's identity.

### **3.8 Evidentiary Foundations**

A party offering evidence at trial must authenticate it, or it will not be admissible in court. Authentication requires introducing facts to prove that the item is what the party offering the evidence claims it to be. The process of authenticating evidence in court is called “laying a foundation.” The AUSA is responsible for laying a foundation for government evidence, using facts collected by the law enforcement officer.

Even if the judge admits evidence, the jury alone determines whether to place any value on it, and, if so, how much. For example, though a judge may admit a gun into evidence, the jury does not have to believe that the gun was the one that someone found at the scene of the crime, or that the defendant used the gun in a murder.

#### **3.8.1 Laying a Foundation**

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

### 3.8.2 Marking/Tagging Evidence

The evidence tag documents the location where the LEO found the evidence, the date and time the LEO found the evidence, and the name of the LEO who found the evidence. Proper marking, tagging and bagging will ensure that the LEO can authenticate the evidence when the government offers it in court. The LEO who found or seized the evidence should mark, tag, and bag the evidence in such a way that the LEO will recognize it in court.

### 3.8.3 Chain of Custody

A properly prepared chain of custody documents where the evidence has been and who has handled it from the time law enforcement officers discovered it until the time the government offers it in court. It also documents any alterations to the evidence occurring after law enforcement officers discovered it. The first entry on the chain of custody should be the person who found the evidence. A new entry is made each time the evidence changes custody from one person to another. A chain of custody does not eliminate the need to call a witness to lay a foundation and is not a substitute for having the item in court. It can, however, reduce the number of witnesses required, assist the government in laying a foundation for the evidence, and protect the foundation from attack.

### 3.8.4 Legal Admissibility/Preserving Trace Evidence

Evidence collectors have two challenges: (1) ensuring that a witness will be able to authenticate the evidence so that the court will admit it at trial; and (2) preserving the item's characteristics and associated trace evidence such as fingerprints, hair, and fiber evidence. Laying a foundation for the admissibility of evidence does not satisfy evidence-handling techniques designed to preserve trace evidence.

Handling evidence in a way that preserves trace evidence may not always satisfy legal admissibility rules. Law enforcement officers must collect and preserve evidence to ensure both the government's ability to lay a foundation and the preservation of trace evidence.

### 3.8.5 Condition of the Evidence at the Time of Trial

The court does not require the government to show that the evidence it presents in court is in the same condition it was when the law enforcement officer collected it. It usually is sufficient that the evidence is in the same or substantially the same condition as when the law enforcement officer collected it. If the evidence is not in the same condition as when the officer found it, the government must document and explain the alterations. For example, if law enforcement officers seize 20 grams of cocaine and the laboratory consumes .05 grams in its analysis, there will only be 19.95 grams of cocaine at the time of trial. This is not a problem because the chain of custody will document that the government sent the cocaine to the laboratory, and the laboratory report will document that the analysis consumed .05 grams of cocaine. Mishandling of evidence or alterations that the government fails to document may result in the government's inability to lay a proper foundation. The evidence may then be inadmissible. There is no limit to the ways the defense can challenge an evidentiary foundation. Here are some examples:

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



- Failure to wear gloves or other protective garb and obliterating trace evidence or contaminating the scene (use proper trace evidence handling techniques; bring in a specially trained evidence team when necessary).
- Improper storage of evidence such as un-refrigerated biological materials or computer disks and magnetic tapes stored near excessive heat or a magnetic source (consult evidence handling experts).
- Reuse of evidence tape, swabs, bags, or seals (these items are cheap; discard contaminated or used supplies).
- Documents or evidence marked in such a way that the evidence is “altered” (Did the LEO obliterate a fingerprint when the item was marked? Did page numbering of documents alter the meaning or authenticity of the document?).
- Work done on originals of computer disks, photos, documents, tape recordings or the like (make copies and work with copies).
- Combining separate pieces of evidence found in different places into a single collection of evidence.
- Use of collection tools in such a manner that trace evidence may be transferred between items of evidence.

### **3.9 Foundations: Business Records/Public Documents**

#### **3.9.1 The Best Evidence Rule (F.R.E.s 1001 and 1002)**

Law enforcement officers and prosecutors can remember this as the “Original Document or Writing Rule.” Before copy machines, carbon paper, and other duplicating processes, copies of documents were hand made. This process lent itself

to errors in copying, and what was supposed to be an exact copy was not always so. Though technology has resolved many of the rule's concerns, parties must follow the rule.

a. An "Original"

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

b. "Duplicates"

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

The Best Evidence Rule states that proving the contents of a writing requires admission of the original writing into evidence. Witnesses may not testify regarding the contents of a document over objection by counsel. If the original document or writing is available, the party must offer it into evidence. There are exceptions. A witness can testify to the contents of a document when all originals have been lost or are unobtainable, or when the opposing party has the original and will not produce it.

### 3.9.2 Self-Authentication

A foundation is required to introduce a business record or public record. Ordinarily, the custodian of the record who can testify about the creation and maintenance of the record lays the foundation. Special rules, however, allow certain documents and records to be “self-authenticating.” Self-authenticating records and reports do not require a witness to testify and lay a foundation.

#### a. Public Records and Documents

The F.R.E. permit documents that are public records to be self-authenticating if a custodian places the seal of the public entity on the record to certify they are accurate and complete. Federal agencies have established procedures and the necessary forms for individuals to obtain certified records. The custodian does not have to then testify in order to lay a foundation for the document if the document or record is certified or under seal. LEOs do not have to obtain these records personally from the custodian.

#### b. Business Records

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

- The record was made at or near the time to which the record pertains by a person with knowledge of the matter,
- The record was kept in the ordinary course of business, and
- The business made such a record as a regular practice

(in other words, the business did not generate the record just for the trial).

- **Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of F.R.E. 902(11) or (12). The proponent must also meet the notice requirements of F.R.E. 902(11).
- **Certified Data Copied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of F.R.E. 902(11) or (12). The proponent also must meet the notice requirements of F.R.E. 902(11).

### 3.9.3 Hearsay Exceptions

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

## 3.10 Hearsay

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

### 3.10.1 Hearsay Defined

Hearsay occurs when: (a) a person makes a statement out of court, (b) a party offers the out-of-court statement in court (trial), and (c) the party offers the out-of-court statement for the truth of the matter asserted in the statement.

### 3.10.2 Hearsay Examples

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

- “Susan said Bob stole her purse.” (To prove that Bob stole the purse).
- “John said he saw the robbers drive away in a green car.” (To prove the defendants drove a green getaway car).

### 3.10.3 Applicability of the Hearsay Rule

The hearsay rule applies only to trials. LEOs can and often do rely on hearsay to develop probable cause, develop reasonable suspicion, guide their decisions, and develop leads. Law enforcement officers may also include hearsay in criminal complaints and search warrant affidavits.

### 3.10.4 Reason for the Hearsay Rule

Hearsay is inadmissible at trial because it is not possible to confront and cross-examine the person who made the out-of-court statement, and the jury is unable to assess that person’s

demeanor and credibility. The courts do not consider hearsay sufficiently trustworthy to let the jury consider it.

### 3.10.5 What is a Statement?

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

### 3.10.6 “Truth of the Matter Asserted”

The third component of the hearsay rule is that a party is offering the out-of-court statement for the truth of the matter asserted. If the party offering the statement is asking the jury to believe it is true, the statement is hearsay. If the party is offering the statement for a legitimate reason other than to prove that the statement is true, then the statement is not hearsay. For example, if the government offers the statement “The victim told me that Joe shot him” to prove Joe shot the victim, then the statement is hearsay. If the government offers the statement to show the reason an officer was looking for Joe, the statement is not hearsay because the government is not offering the statement to prove Joe shot the victim.

### 3.10.7 Non-Hearsay

#### a. Statements of the Defendant

Because the government cannot call the defendant to the stand to testify, statements made by the defendant and offered by the government are specifically excluded from the definition of hearsay. The statement could be an admission, confession, or just information.

## b. Other Statements

The definition of hearsay excludes statements of the defendant's co-conspirators made during and in furtherance of the conspiracy. The court will sometimes admit prior statements made by trial witnesses that contradict or support their trial testimony.

### 3.10.8 Confrontation of Witnesses

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

## 3.11 Exceptions to the Hearsay Rule

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

### 3.11.1 "Excited Utterances"

The law recognizes that a person is unlikely to fabricate a "non-testimonial" statement he makes under emotional stress. The elements of the exception are: (a) the person making the statement experienced a startling event; (b) the person made

the statement while under the stress or excitement (influence) the event caused; and (c) the statement was about the startling event. For example, while yelling, holding their hand over a gunshot wound, and in a high emotional state, a victim blurts out, “Joe shot me!” This statement would meet the exception for excited utterance.

### 3.11.2 Statements Regarding Medical Diagnosis/Treatment

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

### 3.12 Statements, Reports, and Courtroom Testimony

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

An opposing party can use a law enforcement officer’s reports and notes, as well as written statements and notes of other witnesses, to impeach a witness’s testimony in court. For example, if a witness testifies that the license plate of a certain



car was ABC but the report or the on-scene notes indicate otherwise, the opposing party can use this contradiction to impeach the witness.

Memory can be “refreshed” if a witness forgets a fact while testifying. Counsel can use anything to refresh a witness’s memory. Counsel can use sketches, photos, physical objects, reports, notes, and even documents prepared by other LEOs or non-LEOs. Documents or statements used to refresh a witness’s memory do not have to be made under oath. If the attempt to refresh the witness’s memory succeeds, the witness can then testify from memory. The report or item that counsel used to refresh memory is neither read nor given to the jury.

Notes, reports, statements or other writings that counsel uses to refresh a witness’s testimony are available to the opposite party. Opposing counsel can then use these items to cross-examine the witness and for other purposes.

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

### **3.13 Authenticating Digital Evidence From Computers**

#### **3.13.1 Involving Computer Forensics Experts**

Computer forensics experts should participate in all search warrant phases (determining whether probable cause exists to search computers, drafting the search warrant, and executing the search). Failure to include a computer expert can

jeopardize the admissibility of the evidence seized. Title 18 U.S.C. § 3105 provides that no person, except in the aid of the officer requiring it, may be present and acting in the execution of a search warrant. If law enforcement officers require the assistance of a computer forensics expert, they should make sure the warrant authorizes the presence of the expert to aid in the search.

### 3.13.2 Evidentiary Issues and Authentication

Digital evidence is nothing but an electronic series of “0s” and “1s” that a computer program interprets. Below are some of the specific and significant issues related to the admission of digital evidence at trial.

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

Proving authorship is usually solved by collecting circumstantial and other evidence during the search. This might include:

- Where the storage device (drive, disk, or other medium) was found;
- Who had access to the data;
- Trace evidence (DNA, fingerprints);
- Passwords and screen names and who had access to them;

- Names on computer folders containing the data or passwords; and
- Sources of e-mails that contain attachments.

### 3.13.3 Admissibility of Digital Evidence

In order for the government to establish that digital evidence is admissible, it needs to be prepared to show that a reliable computer program converted the digital evidence into a readable format. It is easy to alter computer records, and opposing parties may allege that computer records lack authenticity because someone tampered with or changed the records after their creation. A few things can be done to reduce this possibility. For example, Windows® based computers associate certain file types with the software designed to create and read them, so it is important to seize the computer software to show computer-generated “associations” between particular file types and software. Having the program that creates the data is a substantial step in proving the same program will accurately print it out. Many software applications embed data that establishes when a document was created and/or modified, and that identifies the computer on which this was done. Forensic experts should look for this data.

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

### 3.13.4 Best Evidence Rule - “Original”

According to F.R.E. 1001(d): “For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information.” Thus, an accurate printout of computer data satisfies the Best

Evidence Rule. Doe v. United States, 805 F. Supp. 1513, 1517 (D. Haw. 1992).

### 3.13.5 Hearsay Issues

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

Records that a computer generates are NOT hearsay. Hearsay rules apply only to statements of humans. Records generated by a computer from computer data (phone billings, bank statements and the like) are admissible if the party offering them into evidence authenticates them as business records.

Other “statements” that are seized from a computer must meet a hearsay exception, or the party offering the statement into evidence must locate the author who can authenticate and testify to the statement. For example, a letter found on the computer from someone other than the defendant must meet hearsay exceptions before the court will admit the contents of the letter for the truth of the matter asserted.



## Chapter 4 -

### Courtroom Testimony

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## 4.1 Introduction to Courtroom Testimony

No matter how well law enforcement officers perform their duties, justice ultimately depends upon the facts presented in court and how they are perceived by the jury or by the judge in

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

## **4.2 Stages of a Criminal Trial**

The stages of a criminal trial are discussed in the Courtroom Evidence chapter of this book.

## **4.3 Effective Witness Characteristics**

### **4.3.1 Meeting the Jury's Expectations**

Juries are made up of people from the community who do not have any connection to the case and usually are not very familiar with the criminal justice system. Jurors did not ask to be there, but usually try to do their best to be fair to both sides. They expect government witnesses to be professional, unbiased, and to tell the truth at all times. Jurors must be educated about the law and the facts of the case they are asked to judge, and the law enforcement witness plays a big part in that. In a criminal case, the purpose of the trial is to determine whether the accused is guilty of the crime charged and to see that justice is served.

### **4.3.2 Characteristics That Jurors Expect of Witnesses**

#### **a. Tell the Truth**

The most important testimonial characteristic of any witness at a trial or hearing is to tell the truth. There is no substitute for telling the truth. A witness's failure to tell the truth is a crime, otherwise known as perjury. But even more importantly, it is a morally reprehensible act that



jeopardizes the very foundations of our criminal justice system. As a law enforcement officer, it is your sworn legal and professional duty to tell the truth in each and every case.

b. Be Impartial and Objective

Law enforcement witnesses need to be impartial, objective, and dispassionate at all times, but especially in court. Such witnesses are more likely to be seen as reliable and dependable servants of the people and, therefore, more likely to be believed by the fact finder, i.e., the jury or judge.

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

Law enforcement witnesses should treat the judge, jury, and counsel (prosecutor and defense attorney) with respect in court. They should not show deference to either the government or defense. They are there to tell the truth about what happened in the case. Witnesses should provide both the prosecutor and the defense attorney with the same courtesies that they themselves would want to receive.

d. Be Prepared

To be an effective witness, an officer must be thoroughly prepared. There is usually a substantial delay between time of arrest and trial. Delays usually benefit the defendant, as witnesses' memories may become fogged because of the passage of time, a witness may move away, or evidence can be lost or destroyed. While we cannot prevent all of these occurrences, to refresh your memories, you should thoroughly review your notes, reports, case file, and evidence associated with the case before trial. Even visiting the crime scene may prove to be helpful. Reviewing physical evidence can help as well. Furthermore, it is permissible and even advisable for witnesses to review their testimony

with the prosecutor and actually practice answering questions from the witness stand. The prosecutor needs to know what you know about the case to put together a proper direct examination. As the adage goes, proper prior preparation prevents poor performance.

e. Be Properly Attired

A witness's credibility can be adversely affected by their choice of clothing and jewelry, as well as by personal grooming habits. A commonsense axiom is to dress for success. Wearing a suit or coat and tie with minimal tasteful jewelry, if any, is preferable. Clothing that is clean, pressed and conservative in appearance is appropriate for court appearances. Your agency may wish you to wear your uniform, in which case follow your agency's policies. Officers are making non-verbal statements in the way they dress. It is important to make the right statement. Most federal courts have court rules indicating what is or is not appropriate attire for witnesses. Furthermore, court rules will identify those items that are not permitted in court. Check with your Assistant United States Attorney (AUSA) as to the court's rules or preferences. Some federal judges have been known to ensure that witnesses learn lessons the hard way via contempt proceedings. This is especially true with respect to carrying weapons, cell phones, pagers, noise making jewelry, etc. Most judges have little patience for law enforcement officers who are less than professional in their appearance.

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

f. Demeanor Counts

Juries and judges consider witness demeanor in evaluating credibility (i.e., believability). How one approaches the witness stand, looks while taking the oath and one's posture while sitting in the witness chair can all have an effect on whether the jury or judge will believe the witness. A firm, convincing "Yes, I do," in response to the oath makes a positive first impression, for example. Witnesses should make a conscious effort to avoid sending unwanted messages through nonverbal communications. For example, slouching in the witness chair or rolling your eyes in response to a defense counsel question can be seen as an attempt to ridicule or show negative feelings about that person. Regardless of how you see the defense counsel, it is not the act of a professional, so do not do it.

g. Stay Serious

Trials are very serious occasions. When you testify, project a professional image and avoid laughing or smiling. Do not be robotic, but it is not a time for joking or laughing. Defense attorneys will commonly draw attention to an officer who smiles or laughs by asking, "Do you think this is funny?" Since an individual's life and liberty is at stake, witnesses should not provide the defense attorney with the opportunity to imply that they believe the matter to be less than serious. Be professional at all times.

h. Avoid a "Bad Attitude"

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

i. Admit Mistakes

Witnesses often make mistakes in their testimony. It has happened to just about every witness out there. If it happens, do not try to hide it or sweep it under the rug and hope nobody notices it. It will come out sooner or later. A mistake must be corrected as soon as possible, even if it means bringing it up in the middle of a different line of questioning. If the subject matter of the mistake comes up during cross-examination or redirect examination, make it a point to identify the mistake and correct it. If not given the opportunity to correct the mistake while testifying, a witness should inform the prosecutor at the earliest opportunity.

#### 4.4 Essential Testimonial Skills

##### 4.4.1 Manner of Answers

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

##### 4.4.2 Skills that Make Testimony Convincing

a. Listen and Answer

Witnesses should listen carefully to the questions asked and think about their responses before responding. This is very important. Do not rush to blurt out an answer as soon as you think you know what the question is going to be. You may not know where the attorney is heading with the question until it is fully asked. On the other hand, while answers should not be rushed, long delays before answering simple questions can lead the jury to question one's credibility. Use common sense to answer questions in a thoughtful, professional, and

forthright manner.

b. Give Audible Responses

Court reporters and other audio recording equipment take down witness testimony verbatim. Witnesses who nod their heads to answer a question cannot be recorded. Speak so that the court reporter or recording equipment can record the response. Similarly, if a witness is using a gesture by holding their hands apart to provide a visual portrayal of size and saying, “The knife was this big.” only the comment will be recorded and not the gesture. The witness must provide an audible response that matches the size they are conveying with the gesture (“It was about 14 inches long.”) Witnesses should speak clearly, intelligibly, and loudly enough so they will be heard and understood throughout the courtroom. Monotone presentations are far less effective than presentations which contain variations in volume, speed of delivery, and tone. Be mindful that some courtrooms have microphones. Do not assume the microphone is for sound projection though. Many microphones only record testimony.

c. Do Not Volunteer Information

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

d. Wait for Rulings on Objections

The witness must stop speaking when either the prosecutor or defense counsel objects to a question. Allow the judge to rule

on the objection. If an objection has been overruled, that means the question is acceptable and the witness may answer it. If the witness has forgotten the question, they should ask counsel to repeat the question. If the judge sustains the objection, that means that there is a legal problem with the question and therefore the witness must not answer it. Simply wait for the next question.

e. Prosecutorial Assistance

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

f. Speaking to the Judge

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

g. Avoid "Cop Talk"

Avoid using legal phrases or law enforcement jargon such as, "I pruned the suspect out," "I did a protective sweep," "I exited the vehicle," or "I frisked the suspect." These terms have particular meanings that are not always known to the

general public. To be an effective witness, testify in a language jurors will understand. Officers should simply explain in everyday, plain language what they did. If a specific police term is used, then the witness should provide a definition or explanation as to what it means. Do not assume the jury or judge understands the terminology you are using.

#### h. Just the Facts

Witnesses may testify only about matters that are within their personal knowledge. They can testify to what they observed, heard, smelled, tasted, or touched. Law enforcement witnesses may also provide an opinion based on a rationally based perception, on a limited basis. However, you are not considered an “expert witness” as courts use that term. (Please see the section on Expert Witnesses.) Witnesses should not offer an opinion unless specifically asked for the opinion. Witnesses must have a basis of knowledge based on facts to provide an opinion. Officers should try not to testify about what others observed. Let others testify to what they observed.

#### i. “I Don’t Know”

“I do not know” means that the witness never knew the information that is the subject of the question. If the correct answer to the question is “I do not know,” say so in the same voice and manner used to answer other questions. It signals to the attorneys that you do not know and there is no point in asking again or if something else could refresh your memory.

#### j. “I Don’t Recall”

This answer implies the witness once knew the information, but cannot recall it at the moment. If true, it is acceptable to say it. This answer is not a truthful one if the witness

remembers, but does not want to answer the question that is asked. Counsel may offer to refresh your memory with something else, such as your police report.

#### k. Positive and Definitive Answers

Give positive, definite answers when testifying. Avoid saying things such as, “I think,” or “I believe.” What an officer thinks or believes is generally not relevant. If an officer does not know the answer, they should say so. If a witness cannot offer a precise answer but can provide an estimate, the witness should state that it is only an estimate. For example, “I would estimate that the defendant was about fifteen yards away.”

#### l. Memorized Testimony

Witnesses should not try to memorize reports so that they can provide a verbatim response. Memorized testimony is suspect and is generally not believable. The idea is to be very familiar with the facts of the case so that you can answer competently and confidently.

#### m. Speak to the Audience

Generally speaking, witnesses should make eye contact with those whom they are addressing. Maintaining eye contact with those being addressed is an intangible human attribute that provides a measure of respect to the recipient. Since either the prosecutor or defense counsel are asking you questions, you will normally look at them while they are asking each question. If it is a short answer, such as “yes” or “no” then look at them and give your answer. If, however, your answer requires some level of explanation of the facts or to define something such as a “Terry frisk,” then look at the jury while explaining. It will draw the jury in and engage their interest in your testimony. By maintaining eye contact with the jury, the witness provides deference to the jury, while



simultaneously establishing credibility. At trial, when a jury is present, the most important people in the court who require our attention are the members of the jury. That is because the jury is the fact finder that makes life-altering decisions concerning the defendant based on the evidence provided. So, remember, for important aspects of testimony, witnesses should always address the jury.

#### 4.5 Using Statements and Reports When Testifying

Generally, the basis for a witness's testimony must be the personal knowledge and recollection of that witness. Therefore, except for some expert witnesses and other limited circumstances, witnesses cannot testify from their reports or notes. Officers should check with the prosecutor about whether to bring reports or notes to the witness stand. Generally, defense counsel will object if a witness tries to bring something to the witness stand. Officers should provide notes, reports, etc. to the prosecutor prior to trial. The court can allow a witness to refer to them during testimony if the prosecutor can lay an appropriate evidentiary foundation during trial.

A copy of your report will be given to the defense counsel prior to trial, as is required by law. Reports and notes, as well as written statements and notes of other witnesses, can be used to impeach a witness's in-court testimony. For example, if a witness testifies that the license plate of a certain car was 123 ABC, but the report or the on-scene notes indicate 456 XYZ, the defense can use the contradiction to impeach the witness.

It is not unusual for a witness to forget a fact or facts, thus frustrating the witness's ability to answer certain questions. A witness's memory can be "refreshed" if a witness forgets while testifying. Anything can be used to refresh a witness's memory. Sketches, photos, physical objects, reports, notes, and even documents prepared by other LEOs or non-LEOs can be used. Documents or statements used to refresh a witness's

memory do not have to be made under oath. When a witness's memory is refreshed, the witness will then testify from memory. The report or item that was used to refresh memory is neither read nor given to the jury. It is used for the sole purpose of allowing the witness to jog their memory. Notes, reports, statements or other writings or things that are used to refresh a witness's memory will be made available to defense counsel immediately after the witness testifies, if they do not already have a copy. Defense counsel can use them for the purpose of cross-examination and/or impeachment.

Non-law enforcement officer witnesses may testify at trial, and they too may need their memories refreshed. Officers should be prepared to obtain the item used to refresh a non-law enforcement officer witness's memory so it will be available at trial. For example, if during an interview a witness must refer to a phone bill to remember when they spoke to someone, the officer should obtain a copy of the phone bill prior to trial so it will be available in court should the Assistant United States Attorney need to refresh the witness's memory.

## **4.6 Witness Examination and Impeachment**

During trial, do not expect to be able to hear the testimony of other witnesses in order to prepare. F.R.E. 615, often referred to as the rule of sequestration, requires the court to order witnesses excluded so that they cannot hear other witnesses' testimony at a party's request.

### **4.6.1 Direct Examination**

When counsel calls a witness to the stand to testify, they will ask the witness a series of questions about the case. This part is referred to as "direct examination." Direct examination questions may not be leading; that is, the question may not suggest the answer. In other words, direct examination questions are opened ended (e.g. "Tell me what happened.")

Generally, direct examination questions may not suggest the answer to the question that is asked. (e.g. “Your investigation began on January 2 of this year, didn’t it?”) Direct examination questions will ordinarily begin with who, what, why, where, when, or how. In effect, direct examination questions allow witnesses to explain in their own words what happened. Prior to testifying, law enforcement witnesses should review with counsel the potential subject matter of their testimony and be prepared and able to testify without prompting. Testimony needs to flow smoothly, like a good interview.

Direct examination usually follows this general format:

- Introduction – establishing credentials.
- General investigation.
- Highlighting more specific acts.
- Introducing exhibits.
- Admissible case conclusions / decisions / opinions.

#### 4.6.2 Cross-Examination

When the counsel that called the witness to the stand has finished questioning the witness, the witness is then “passed” to opposing counsel for cross-examination. Cross-examination has two primary goals:

- To discredit the opposing party’s case, and
- To elicit favorable facts and thereby advance the case of the cross-examining party.

In pursuit of those goals, opposing counsel is permitted to ask leading questions during cross-examination. Leading

questions suggest an answer. They are framed in a way which attempts to evoke a specific response from the witness. In effect, leading questions allow counsel to suggest the answer and the witness simply agrees or disagrees with the question. So, instead of having to ask a question such as “What happened?” counsel could ask “Isn’t it true, Officer, that you pulled your pistol on my client and shot her for no reason?”

Cross-examination can at times seem quite ordinary and to the point. However, as the previous example suggests, cross-examination can also be designed to put a twist on facts to make the witness’s acts appear to be unseemly, crude, self-serving, unprofessional, and even criminal. Be mindful this type of question can be asked.

Understanding and preparing for common cross-examination techniques is essential. Later some common cross-examination techniques are discussed. Regardless of what technique is used, the number one rule is always to tell the truth.

#### 4.6.3 Redirect and Re-Cross-Examination

Once opposing counsel has concluded cross-examination, there will be an opportunity for redirect examination, typically limited to matters addressed in the cross-examination. It is a chance to clear up any misunderstandings and misconceptions generated by cross-examination. For example, if the witness was not allowed to explain an answer during cross-examination, counsel may ask for the explanation then. However, the questions counsel asks on re-redirect must be open ended, and witnesses should be prepared to testify to these explanations, knowing that counsel cannot lead them to the answers.

After redirect, the court may allow opposing counsel the opportunity to re-cross. Re-cross is usually limited, however, to matters raised for the first-time during redirect. Whether or

not re-cross is allowed is entirely up to the discretion of the court.

#### 4.6.4 Impeachment

On cross-examination, an attorney is permitted to impeach the witness. Impeachment in this context means to closely question a witness to determine the truth; the action of calling into question the integrity or validity of someone or something. Impeachment in court is used to attack the credibility of the witness. There are many ways to impeach a witness's testimony. Often during the impeachment process, the witness's professionalism and integrity are attacked. Regardless of counsel's method, officers must always ensure that they tell the truth. Regardless of what happens, remain professional at all times.

### 4.7 Law Enforcement Officers and Cross-Examination

Officers are trained to be in control of the scene and the situation. Testifying in court, especially on cross-examination, can be frustrating for officers because they are not in control of this environment. In this section we will look at how cross examination works, including some cross-examination techniques commonly used in court. To be properly prepared, officers must learn how cross-examination techniques work. Officers must trust their prosecutor to ask the right questions, and especially on redirect examination to provide them the opportunity to clear up any confusion caused by defense questions during cross-examination.

Below are some common cross-examination techniques. Regardless of which technique is used, the obvious response is always to tell the truth and be professional in the process of doing so.

#### 4.7.1 Yes or No Questions

Generally, counsel is entitled to a yes or no answer if one is possible. Such an answer is not possible if the witness does not know the answer, does not recall the answer, or the question is a compound question (two or more questions combined as one and asking for a single response). Attempts to fully explain an answer can be cut-off, but the prosecutor is entitled to have the explanation provided on re-direct examination. On cross-examination, the witness may also answer each part of the compound question separately.

#### 4.7.2 Putting Words in the Witness's Mouth

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

#### 4.7.3 Badgering the Witness

Badgering the witness is a technique trial lawyers use to undermine a witness’s testimony. Defense counsel knows that if a witness, especially a law enforcement officer, becomes angry on the witness stand, two things might happen. First, the officer focuses on anger and not the facts of the case, thereby becoming distracted. Second, the officer can appear to be biased, which may be perceived by the jury as lacking the ability to objectively deal with the issues. Do not become angry or antagonistic, even when the defense counsel is clearly doing their best to bait you. An officer who is angry often exaggerates or appears to be less than objective. Juries expect officers to

remain professional at all times.

#### 4.7.4 Do Not Volunteer Information

Do not volunteer extraneous information. If a question cannot be truthfully answered with a “Yes” or “No,” request permission to expand upon or explain the answer. If the lawyers need more information, they will ask. Do not feel you must start adding extra information. Sometimes defense counsel will look at the witness and not say anything after the witness has answered, which suggests to the witness that they should keep talking. Remain silent in the face of this tactic and wait for the next question.

#### 4.7.5 Pre-Trial Discussions with the Prosecutor

There is nothing improper about meeting with the prosecutor before trial to discuss or even practice your anticipated testimony. Such meetings are a part of normal trial preparation. If asked by the defense counsel, “Isn’t it a fact you rehearsed your testimony with the prosecutor?” do not hesitate to say, “I met with the prosecutor to prepare for my testimony” if that is a truthful and correct answer. This does not mean that the prosecutor told you what to say. The prosecutor needs to know what facts you know about this case and whether there are any problems with it. It is far better to tell the prosecutor up front, before trial, if there were any problems or mistakes. Remember, you and the prosecutor are working together in court. It will be bad for both of you if a mistake is brought out in court which the prosecutor knows nothing about.

#### 4.7.6 Repetitive Questions

The defense attorney may rephrase questions and ask the same question from a different angle. This is done either to emphasize a defense-favorable point, or to see if the answer

will change. When a defense attorney starts asking the same question in a slightly different manner, the witness should respond by saying, “As I stated earlier...” Do so without sounding sarcastic. Always remain professional.

#### 4.7.7 Compound Questions

Often, defense counsel will ask two questions in one. For example, defense counsel may ask, “Officer, didn’t you arrest my client and search him?” If the witness was both the arresting officer and the officer that conducted the search, the answer to the question is easy. However, if the witness arrested the defendant and a partner searched the defendant, it is important for the witness to respond correctly. At trial, witnesses quite often fail to recognize that two questions are being asked as one. If a witness does not recognize that there are two questions in one, they are playing directly into the defense counsel’s hands for subsequent impeachment.

#### 4.7.8 Rapid-Fire Questions

This technique is meant to rush the testimony, denying the witness the time to understand the question and provide a correct answer. Resist the temptation to keep up with the defense counsel’s tempo. Witnesses should speak at their own pace when providing truthful and accurate answers. The witness controls the pace of the testimony, not the lawyer. The witness is not obligated to follow the defense counsel’s questioning tempo.

#### 4.7.9 Admitting Mistakes

You may get a question such as the following: “Have you ever made a mistake?” The answer will of course be “Yes.” Do not be afraid to admit mistakes. Jurors find officers who honestly admit mistakes to be credible. We all make mistakes; it is a human condition. There is nothing wrong with making



mistakes. The real question of course is whether you made a mistake in this case. The answer to that question is usually “No.”

#### 4.7.10 Possibilities

“Isn’t it possible that...” Anything is possible, but in many cases not probable. Testifying that something is possible, but not probable, based upon the facts of the case, is responsive while remaining believable. If not allowed to provide a complete answer, a simple, “Yes” or “Yes, but not likely” will do. The prosecutor can ask you to elaborate on re-direct examination.

#### 4.7.11 Friendly Defense Counsel

Some defense attorneys may appear friendly to witnesses during cross-examination. This may lull the witness into becoming overly familiar with defense counsel or appearing to be less than professional. It may also give the impression to the law enforcement witness that this defense attorney will not try to impeach them. That is not true. Beware the “friendly defense counsel” as their tactics may be more subtle, but their goal is the same; to discredit your testimony. Additionally, if the defense attorney speaks softly or in a friendly tone and manner, the witness will often do the same. This technique is called mirroring. As a result, the witness may not speak up, the jurors may not hear the testimony, and as a result, the testimony will be less effective.

#### 4.7.12 Twisting Prior Testimony

The defense attorney may restate a witness’s testimony, and in doing so, misstate it. In such cases, listen very carefully when the defense attorney starts with the question “You stated earlier...” Do not presume that the defense counsel will portray the prior testimony accurately. In many cases, defense

counsel may intentionally misstate the testimony. If prior testimony has been misstated, it is incumbent on the witness to say so.

#### 4.7.13 Conflicting Witness Testimony

If two or more officers have participated in the same investigation, the defense attorney may question both officers separately about each officer's observations in an attempt to find conflicts. In fact, only one officer will be allowed in the courtroom at a time during the trial, so you will not be there to hear the other officer's testimony. A witness should not be intimidated into admitting an error, declaring another officer "wrong," or losing confidence in their command of the facts. Just tell the truth!

#### 4.7.14 Impeachment by Prior Statements

Showing a conflict between a witness's earlier statement or report and the witness's in-court testimony can be powerful impeachment. A witness should review prior statements (preliminary hearings, grand jury testimony, motions hearings, etc.) before trial whenever possible. That way you will be able to know if the current testimony is truly different.

#### 4.7.15 Corrected Statements

"So, you lied (in your report) (in your testimony)?" This question arises when there is a mistake in testimony that is corrected or there is an irreconcilable difference between testimony and a prior statement. Distinguish between a lie or being untruthful on one hand, and a mistake on the other. A lie or being untruthful is an intentional act. Mistakes are not lies. Mistakes are inadvertent, not intentional deceptions.

#### 4.7.16 Previous Lies

“Have you ever told a lie before?” The answer will of course be yes, everyone has lied. Leave it to the prosecutor to conduct a redirect that any lie was never under oath, not in a report or in an official matter, and certainly not in regard to this case.

### 4.8 Subjects Not to be Volunteered When Testifying

#### 4.8.1 Prior Criminal History

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

#### 4.8.2 Issues Involving Constitutional Rights

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

If asked at trial about what happened when the defendant was arrested or booked, the witness should testify about what they did (i.e., “I processed the defendants and turned them over to the jail”) without mentioning their Miranda warnings. Because this is a problematic area, when in doubt, do not mention specific Miranda warnings, the defendant’s

invocation of the right to silence or invocation of the right to counsel. Wait for specific questions to be asked as to the defendant's invocation of rights.

#### 4.8.3 Suppressed Evidence

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

While there are exceptions that might allow suppressed evidence to be admitted during the trial for specific limited purposes, no witness should mention or allude to evidence that has been suppressed unless specifically asked. Under the Fruit of the Poisonous Tree Doctrine, evidence that is derived from evidence that has been suppressed cannot be referenced either. Unless the witness is specifically asked about evidence that has been suppressed, do not mention it. Wait for specific questions from counsel before addressing evidence that has been suppressed.

### 4.9 Forensics Expert Witness Testimony

#### 4.9.1 Expert Assistant/Consultant

An expert assistant/consultant is someone either retained by the prosecution or defense team or detailed to them by either the convening authority or the military judge to assist the respective counsel during the investigative stage of the prosecution process. Expert assistance may also be requested or assigned for any other stage of the proceedings. Expert assistants/consultants most commonly assist prosecution and

defense counsel in the evaluation of scientific or technical evidence that the government intends to offer at trial.

a. Production and Employment.

Rules for Courts-Martial (R.C.M.) 703(d) governs the production and employment of an expert in military courts-martial. Under the Military Rules of Evidence (M.R.E.), an accused may hire an expert assistant/consultant. (M.R.E. 706(c)). If the defense or the government is seeking to have an expert produced and to have the government cover the expense, counsel must, prior to employing the expert and with notice to the opposing counsel, submit a request to the convening authority to authorize employment and fix compensation.

The request must include a complete statement of reasons why the expert is necessary, and an estimate of the costs. A three-step test determines whether such government-funded expert assistance is necessary.

- Why is the expert assistance needed?
- What would the expert assistance accomplish?
- Why is counsel unable to gather and present the evidence that the expert assistant/consultant would be able to develop?

If the convening authority denies its request, the defense raises the issue with the military judge. If the military judge determines that the expert is relevant and necessary, an order will be issued requiring the government to provide the expert or an adequate substitute. An adequate substitute may be a government employee. The proceedings will be abated on the failure by the government to produce the court-ordered expert assistant/consultant or a court-ordered adequate substitute.

b. Lawyer-Client Privilege.

M.R.E. 502, Lawyer-Client Privilege, protects a lawyer's "representative" from compelled disclosure to a third party. A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services. If the prosecution and/or defense obtains an expert assistant/consultant, then the expert is a "representative" of the lawyer and becomes part of the respective trial team. Therefore, communications between the prosecution expert assistant/consultant and trial counsel and communications between the defense expert assistant/consultant and defense counsel and/or the accused are privileged. Counsel may not interview an expert assistant without the approval of the opposing counsel.

Federal Rules of Evidence (F.R.E.) 501 and 502 provide that the privileges recognized and the parameters of each in the federal court systems are established by federal common law (U.S. Supreme Court and federal circuit court decisions). Attorney-client privilege and attorney work product privilege are well established. Attorney-client privilege is extended to third parties hired by a lawyer or a client to assist in providing legal services to a client.

#### 4.9.2 Expert Witness

An expert assistant/consultant is not automatically entitled to testify as an expert witness. Trial/Defense counsel make the determination as to whether to call an expert assistant/consultant to testify as an expert witness. The decision is made when the attorney feels it will benefit the case to have the expert testify and render an opinion on questions which fall within their respective area of expertise. Ordinarily, an expert assistant/consultant will be listed and called as a witness.

### 4.9.3 Lawyer-Client Privilege

With very few, limited exceptions based on specific, particular facts, once a party lists its expert assistant/consultant as a witness, lawyer-client privilege no longer applies, and the opposing counsel is free to contact and interview the expert witness. The testifying expert's work product, including drafts of reports, are then discoverable and not protected by lawyer-client privilege.

### 4.9.4 The Standard for Qualifying as an Expert Witness

#### a. M.R.E. 702

M.R.E. 702, Testimony of Experts, governs when a witness may testify in courts-martial as an expert and give an opinion about the meaning and/or significance of factual evidence.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. If (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

#### b. F.R.E. 702

F.R.E. 702, Testimony by Expert Witnesses, governs when a witness may testify in federal civilian courts as an expert and give an opinion about the meaning and/or significance of factual evidence.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact at issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

The judge is the “gatekeeper” responsible for determining:

- Whether scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,
- Whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, and
- Whether the witness has applied the principles and methods reliably to the facts of the case.

#### 4.10 Frye/Daubert/Kumho Tire Co.

The sufficiency of the facts and reliability of the methodology have been defined by a series of federal court cases.



#### 4.10.1 Frye v. United States

Frye sets forth the "General acceptance" test, commonly called the "Frye Test." Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The court in Frye ruled that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

#### 4.10.2 Daubert v. Merrell Dow Pharmaceuticals, Inc.

In Daubert, the Supreme Court held that the trial judge is to act as a "gatekeeper" and determine whether the expert's proposed testimony is helpful to the trier of fact and whether the testimony truly relates to issues in the case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Based on Daubert, the following are factors that guide the decision on whether the expert's methodology is reliable:

- Has the theory or technique been tested?
- Has the theory been subjected to peer review discussion in publications?
- Does the theory or technique have a high known or potential rate of error?
- Are there standards controlling the technique's operation?
- Has the theory or methodology attracted widespread acceptance in the relevant scientific or professional community? In this sense, Daubert incorporates the Frye test.

#### 4.10.3 Kumho Tire Co. v. Carmichael

In Kumho, the Supreme Court held that Daubert's “gatekeeping” standard applies to all expert testimony by stating, “The initial question before us is whether the basic gatekeeping obligation applies only to scientific testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.” Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

#### 4.10.4 The Procedure for Qualifying as an Expert Witness

The process for qualifying and then offering a witness as an expert is sometimes referred to as “voir dire” – the examination of the qualifications of the witness to be considered an expert.

##### a. Direct Examination

Outside of the presence of the members (jury), the witness will be called to the stand by the party offering the witness as an expert. That counsel will conduct direct examination to establish the witness’s credentials – education, training, experience, and skills.

A qualifications checklist may include the following:

- Business or Occupation: What -- how long -- description of field -- company or organization -- capacity -- how long -- where located -- prior positions -- description of positions.
- Education: Undergraduate school -- degree -- when graduated. Post-graduate school -- degree -- when graduated -area of study.
- Training: Formal courses -- what -- when -- trained

under recognized expert -- who -- when -- how long.

- Licenses: What -- when reviewed -- specialty certification -- exams required -- when -- requirements.
- Professional Associations: What -- positions held. Other Background. Teaching positions -- publications -- lectures -- consulting work.
- Expert Witness at Trials: How many -- which side.
- Experience in Specialty: Types of examinations conducted – how many. Ever perform a test -- how many? Does that experience include? Over these years of practice, how many have you (bought, sold, dealt with, installed, taken, examined, analyzed, etc.)?

Then counsel will ask about the methodologies and theories applied to the specific facts of the case. Counsel may ask the witness to describe those methodologies and theories in detail. Counsel will then ask if the methods and theories used have been tested, subject to peer review, have a high rate of error, have controlling standards, and have been generally accepted by the pertinent scientific/professional communities.

At the conclusion of the direct examination, counsel will formally offer the witness as an expert and state the specific area of expertise. The judge will defer a finding until after cross-examination.

#### b. Cross-Examination

The opposing counsel may stipulate to the witness's qualifications and not object to the offer of the witness as an expert and the judge's finding that the witness is qualified as an expert. If not, opposing counsel will have an opportunity to cross-examine the witness, attacking the witness's credentials

– education, training, experience, and skills – and/or the methodologies theories used.

Because an individual’s credentials and methodologies are being challenged and because a judge will determine whether the qualifications are sufficient and the witness is competent to give an expert opinion, the process can be unnerving, no matter how many times a person has been through it.

c. Judge’s Finding

The judge may allow re-direct and re-cross examination. At the conclusion of the voir dire, the judge will enter a finding on the record as to:

- Whether scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,
- Whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, and
- Whether the witness has applied the principles and methods reliably to the facts of the case.

When the judge determines that the threshold has been met, the witness will be qualified as and may then testify as an expert.

#### 4.11 Opinion Testimony

M.R.E. 702 and F.R.E. 702 provide that a witness who has been found to be an “expert” by the judge will be allowed to provide opinion testimony to the trier of fact – the members/jury or the judge in a bench trial.

#### 4.11.1 Basis of Opinion.

Although they vary slightly in wording, M.R.E. 703 and F.R.E. 703 are substantively the same.

##### a. M.R.E. 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the members by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

##### b. F.R.E. 703.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

##### c. Foundations for Facts Used to Form the Opinion

###### 1. Facts Personally Observed

The foundation for this basis ordinarily includes:

- Where, when, and how the fact(s) were observed;
- The fact(s) observed;
- Who else, if anyone, was present?

2. Fact(s) Made Known to the Expert by Others Before or at the Hearing.

The foundation for this basis ordinarily includes:

- The source of the fact(s);
- The fact(s) reported;
- It is customary within the specialty to consider such fact(s) from such sources.

4.11.2 Opinion on an Ultimate Issue

a. M.R.E. 704

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

b. F.R.E. 704

(a) In General - Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the

crime charged or of a defense. Those matters are for the trier of fact alone.

The essential difference between the two rules is that F.R.E. 704 sets out a specific exception in criminal cases regarding the mental state of the defendant.

#### 4.11.3 Prohibited Opinions

Under both rules an expert witness may not give an opinion as to the guilt or innocence of the accused/defendant, the credibility or believability of a witness, or state a legal opinion.

Disclosure of Facts or Data Underlying Expert Opinion:

##### a. M.R.E. 705

The expert may testify in terms of opinion or inference and give the expert's reasons therefore without first testifying to the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

##### b. F.R.E. 705

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Nothing in either rule prohibits the expert from testifying about some or all of the underlying facts or data during direct examination.

## 4.12 Testifying as a Forensics Expert Witness

Cases are won and lost every day on the effectiveness of witnesses. Any witness – civilian witnesses, victims, law enforcement officers, and expert witnesses – can turn a strong case into an acquittal. If the witnesses do not testify clearly, concisely, completely, and compellingly, a case may be lost regardless of how well it was investigated or how strong it is.

Taking the stand and testifying is nerve-wracking for everyone, including law enforcement officers and expert witnesses who testify often due to the nature of their work. Just like mere mortals, expert witnesses get nervous, forget things, and may have difficulty conveying the facts in court.

Understanding the role of an expert witness and getting thoroughly prepared are the best ways to reduce the stress and be a confident, effective witness.

### 4.12.1 The Role of an Expert Witness

Why are experts used in an investigation and called to testify in the trial? The ultimate goal is to help the fact-finder decide what happened and who did it. Expert witnesses accomplish this in a number of ways.

#### a. Fact Witness.

Experts are used during an investigation to gather, analyze, and explain the meaning and significance of evidence that may establish identity, establish contact and/or connection to victim/crime scene, corroborate or discredit party/witness statements, and exclude innocent explanations and mistake of fact. When an expert discovers and/or seizes tangible, real evidence, that expert often serves as a fact witness to lay the foundation for the admissibility of that evidence at trial.



## b. Educator

One who possesses expertise on a particular subject has more knowledge than the average person on that subject. This creates the need to educate the fact-finder – the judge and/or members (jury) and, sometimes even counsel – on subjects less understood by the average person but necessary to resolve the issues of fact presented by a particular case. Experts must be able to clearly and effectively communicate with fact-finders in a way that they will understand. In this way, experts educate fact-finders on what the evidence is and why it is – or is not – reliable.

Experts also interpret the evidence and educate fact-finders on the significance and meaning of the evidence, such as the method and mechanism of injury, amount of force necessary, patterns of injury and constellation, cause of death/prognosis.

New breakthroughs and developments in science and technology occur every day. Because of the proliferation of media, including television and all kinds of new methods of communication and their connection to the internet, the general public learns of these developments almost immediately. Television shows and movies, both fictional and reality based, often include the new sciences and technologies, but also often create misunderstandings and misconceptions about their use, effectiveness, and significance. The general public often gains its knowledge and understanding of these sciences and technologies solely from these media sources and, thereby, develops unrealistic impressions and misunderstandings. Experts educate fact-finders to correct those misunderstandings and dispel myths.

Clear and persuasive communication skills are required to accomplish this role. The most effective experts are those

who explain as much as possible in layman's terms and use demonstrative evidence to highlight the facts relied on to develop the facts and expert opinion(s).

c. CSI Effect.

The CSI Effect has been described as the belief by the general public that nearly infallible science and technology exists and is available for use in criminal investigations and the expectation that it should be/will be used and the results presented at trial.

A study reported in the National Institute of Justice Journal found in a survey of prospective jurors that:

- 46 percent expect to see some kind of scientific evidence in every criminal case;
- 22 percent expect to see DNA evidence in every criminal case. A higher percentage expect to see DNA evidence in the more serious violent offenses, such as murder or attempted murder (46 percent) and rape (73 percent);
- 36 percent expect to see fingerprint evidence in every criminal case. A higher percentage want to see fingerprint evidence in breaking and entering cases (71 percent), any theft case (59 percent), and in crimes involving a gun (66 percent);
- 32 percent expect to see ballistic or other firearms laboratory evidence in every criminal case.

If the prosecutor relies on circumstantial evidence, the prospective jurors said they would demand some kind of scientific evidence before they would return a guilty verdict.

The corollary perspective is that if the prosecution fails to or chooses not to perform scientific tests and present the results at trial, fact-finders may reasonably doubt the strength of the government's case. In other words, the absence of proof is the proof of absence. There may be the assumption that a party will naturally offer the evidence if it exists, and failure to do so means it doesn't exist.

These perceptions by the general public have led to the use of scientific testing and the offering of scientific evidence on unimportant collateral points and when time and expense constraints would otherwise argue against it.

In order to preempt or overcome potential defenses, some trials now include experts as "negative-evidence witnesses" to tell fact-finders why certain tests were not used and when, during an investigation, it is not unusual not to find certain kinds of physical evidence.

#### 4.12.2 Preparation

Being completely prepared is the best way to reduce the inherent stress of testifying and to increase one's effectiveness as a witness. At a bare minimum, experts must obtain, maintain, and always utilize the knowledge and skills necessary to perform required tasks. This will better ensure credible results, persuasive evidence, and confidence that enhance a witness's effectiveness. Lack of preparation, on the other hand, will signal to the fact-finder a lack of professionalism, a lack of belief in the worthiness of the case, a lack of concern for that type of victim and crime, and a lack of confidence in the science, methods, and techniques.

Preparation to testify in a specific case begins with first involvement and continues throughout the investigation. It includes decisions about what to do and how to do it. Fact-finders need to know what was done, why it was done, and how

it was done. Preparation also includes decisions about what not to do. Failure to conduct tests and/or failure to use available resources are typical subjects for cross-examination. Understanding from the beginning that tests, processes, and results will be reviewed and questioned by other experts, opposing counsel, and fact-finders will ensure that correct decisions and sound judgments are made that will withstand scrutiny. Conduct every investigation from the beginning with the expectation that the case will go to trial, requiring direct testimony to be followed by vigorous cross-examination.

a. Reports

Accurate, clear, concise, and complete reports are essential. There is no limit as to how much information may be included in such reports. If necessary, supplemental reports may be added later. If information was at all a factor in making decisions about whether and how to test or process, include it in the report.

Independent memory of the scene and what was done and not done there will likely be compromised by the passage of time and other intervening cases, some of which may be similar in nature. Comprehensive and conscientiously drafted reports offer the best way to refresh the expert's memory of a specific case, both in preparation for a hearing or trial and at trial should the expert momentarily forget a particular fact necessary to answer a question by an attorney or the judge.

Independent memory of the scene and events will also be challenged by opposing counsel on cross-examination – “if it's not in the report, it did not happen.” Omitted facts may adversely affect witness and process credibility. This can be very effective cross-examination because judges and many jurors write reports for a living. They understand and appreciate the need for accuracy and completeness in reports. Their livelihood may depend on it.

Review and know all reports pertaining to the case. In doing so, if you notice a discrepancy between reports or determine something previously written was mistaken, immediately bring that to the prosecutor's attention. Testifying is not an open book exam. Except in very limited circumstances, a witness must testify from personal knowledge and may not testify from a report. No one, especially opposing counsel and opposing experts, should know the report better than its author.

b. Counsel

Preparation is a two-way street. The expert witness must know how the legal system works, and counsel has to understand the work performed and the report(s) prepared by the expert. Therefore, preparation includes close consultation with counsel. It is critical that the expert witness and counsel work as a team. The expert must, as necessary and appropriate, educate counsel in the relevant science, techniques and methodologies so that the team may function well and compelling evidence may be developed and presented.

Through early, frequent, and consistent consultation with counsel, the expert will be better able to understand both counsel's expectations and the theme of the case, the expert's role and significance in the case, and the purpose/objective(s) of the direct examination. Therefore, the expert must be prepared to explain as much as possible in layman's terms and use demonstrative evidence to highlight the facts relied on to develop the opinion. This also will help to ensure that all of the facts have been disclosed as required by law.

It is imperative that counsel be aware of all aspects of the investigation and evidence – the strengths and weaknesses of the case. When counsel knows the good, the bad, and the ugly of the case, the team can plan and work to overcome obstacles,

shore up weaknesses, and prepare for challenges by opposing counsel.

Through early, frequent, and consistent consultation with counsel, the expert will learn about and understand the opposing party and counsel. This includes opposing party goals, the theory of their case, their potential witnesses, including opposing experts, potential defenses, observations/findings made that contradict defense theory, facts that opposing counsel may want to elicit during cross-examination, and tactics likely to be employed by opposing counsel.

If there is an opposing expert, it is also imperative that the reports, processes, methods, and results be reviewed thoroughly and discussed with counsel.



## Chapter 5 -

### Criminal Law – Introduction

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#### 5.1 Introduction to Criminal Law

The subject of criminal law is very broad. By studying selected federal laws presented in this book, you will learn how to analyze and apply criminal statutes. Following this introduction, the Handbook is divided into numerous chapters focused on various statutes.

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

##### 5.1.1 What is a Crime?

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



and deterring others from similar conduct. Aggrieved parties bring tort actions, seeking compensation for damage to property and/or injury to person. Crimes and torts are not mutually exclusive remedies. For example, if a perpetrator assaults a law enforcement officer, the government could prosecute the perpetrator. In addition, the officer could pursue a tort action (sue) against the perpetrator for the harm incurred by the assault.

### 5.1.2 Elements of Criminal Statutes

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

There are no common law crimes in the United States. All criminal laws in the United States are found in written statutes (statutory law). To substantiate criminal charges that actually go to trial, the government must establish each element of the offense to a probable cause threshold. Probable cause can be defined as facts and circumstances that would lead a reasonably prudent person to believe that a criminal offense has probably taken place and the person charged with that offense probably committed it. To obtain a conviction at trial, the government must prove each element of the offense beyond a reasonable doubt.

Most crimes consist of both a prohibited act and a criminal intent. An individual must both intend to commit a prohibited act and then act in furtherance of that intent. However, action

is not required for all crimes. For example, the government could criminally charge a parent with child abuse for not acting to care for their child. Failure to act can be a crime. To convict for a criminal offense, the government must prove beyond a reasonable doubt that a defendant with the required mental state performed a prohibited act (or failed to perform an act) that caused the proscribed social harm.

There are two kinds of criminal intent (state of mind) offenses – general intent offenses and specific intent offenses. A general intent offense only requires the intent to do the prohibited act. No specific mental state, evil motive or intent to violate the law is required. All the government must prove is that the perpetrator committed the act willfully, deliberately, or intentionally and that it was not an accident or a misadventure. It does not matter that harm was not intended; it is sufficient that the act was intended and that harm resulted. For example, if a defendant intentionally hits a person and gives him a broken nose, it does not matter that the defendant intended to give the victim a broken nose. All the government must prove is the defendant intended to perform the act that resulted in harm.

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

that the defendant broke and entered, in the nighttime, and at the time of the breaking and entering the defendant had the intent to commit a felony.

Intent, which is a state of mind, can be difficult to prove. The suspect's admissions, confessions, and statements to others are the best and most compelling ways to prove intent. It may also be possible to prove the required intent through the suspect's actions. For example, if a perpetrator stabbed a victim in the chest with deep penetrating wounds 50 times, we can reasonably infer the perpetrator intended to kill the victim.

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

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

Motive can be an important issue for both the officer and prosecutor. The government can use motive to solve crimes by identifying potential perpetrators and proving criminal intent.

Motive can help explain the “who and why” of a crime. However, motive itself is generally not a required element of proof of a crime. As a general rule, the government does not have to prove why someone committed the crime. Hate crimes and terrorism statutes are exceptions to this rule. To obtain a conviction for a hate crime, the government must prove that the act was committed because of the special status (sex, age or race) of the victim. For terrorism, the government must prove violence against civilians for the purpose of advancing political or religious agendas.

### 5.1.3 Felonies and Misdemeanors

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

Criminal statutes classify crimes by the maximum penalty authorized. Whether a statute classifies a crime as a felony or a misdemeanor depends on the possible term of punishment authorized by the statute and not the actual sentence imposed. Title 18 U.S.C. § 3559 specifically classifies a federal felony as an offense for which the maximum term of imprisonment authorized by statute is more than one year. A misdemeanor is an offense for which the maximum term of imprisonment authorized by statute is one year or less. An infraction is a type of misdemeanor where the term of imprisonment, if any, is no more than five days. (For further discussion of the classification of federal crimes, see the Federal Court Procedures chapter.)

### 5.1.4 Attempts

An attempt to commit a crime is a crime. To prove an attempt to commit a crime, the government must show the defendant’s

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

#### 5.1.5 Jurisdiction and the Assimilative Crimes Act

Jurisdiction is the power of the government to act when a criminal offense has been committed. In many cases, the federal government can act regardless of the location of the offense. For example, it is a federal crime to assault a federal employee and a federal crime to steal federal government property regardless of where the assault or theft takes place. For other violations, however, the federal government and its law enforcement officers are only empowered to act when the offense is committed on federal property. In some cases, the state in which the federal property is located may also have jurisdiction over the same offense. Under these circumstances, whether the federal or state government, or both, can exercise jurisdiction depends on whether the federal government has exclusive, concurrent, or proprietary jurisdiction over the place where the offense occurred.

##### a. Exclusive Jurisdiction

Exclusive federal jurisdiction property provides only the United States Government with criminal jurisdiction over the

area. All policing, investigating, and prosecuting of offenses is conducted solely by the federal government.

b. Concurrent Jurisdiction

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

c. Proprietary Jurisdiction

Proprietary jurisdiction means that the United States has no more authority over the area than any other owner of private property. Proprietary jurisdiction provides no special authority or power to the federal government. For example, if the federal government leases an office building to house various federal agencies, it has only proprietary jurisdiction. The state would investigate and prosecute most crimes committed in the building. However, if a perpetrator assaults a federal government employee in the building or steals federal property from there, the federal government could also prosecute the perpetrator in federal court for those federal offenses.

d. Assimilative Crimes Act

Many criminal offenses found in state law are not found in federal law. This is important when investigating offenses on exclusive and concurrent jurisdiction property. What happens if someone commits an act on either exclusive or concurrent

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

## Chapter 6 -

### Criminal Law – Assault / Bribery

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#### 6.1 The Law of Assault and Battery

At common law, there were two basic kinds of assault, an assault by offer and an assault by attempted battery. An assault by offer is any willful threat to inflict injury upon another person with the apparent present ability and intent to do so. The assault by offer puts the victim in apprehension of immediate bodily harm. For example, an assault by offer is committed when John, while waving a baseball bat, approaches Bob and tells him that he is going to pulverize him. It is reasonable for Bob to apprehend immediate bodily harm based on John’s words and actions. For the expectation of harm



to exist, the intended victim must be aware of the potential intended harm. A present apparent ability and intent to inflict bodily harm must actually exist and the victim must be aware of it. A threat of the use of force sometime in the indefinite future (“One of these days, I’m going to....”) does not constitute an offer assault. An assault by attempted battery is an unsuccessful battery. If John tries to punch Bob, but misses him, John has committed an assault by attempted battery. It is not necessary for the victim to be aware of the failed attempt.

A battery is an intentional, harmful or offensive touching of another person, without consent. Actual injury is not required. Minimal physical contact can qualify as a violation. Chargeable offenses include being punched, poked and spit upon.

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

## **6.2 Assault – Title 18 U.S.C. § 111**

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

### **6.2.1 Elements**

- The Defendant forcibly assaults;

- Any current or former federal employee;
- While they are engaged in or because of their official duties.

### 6.2.2 Individuals Covered Under the Statute

As mentioned before, § 111 provides protection for any person designated in 18 U.S.C. § 1114, or any person who formerly served as a person designated in § 1114. Therefore, in order to determine who is covered by § 111, it is necessary to examine § 1114. Title 18 U.S.C. § 1114 provides for the protection of officers and employees of the United States, and reads, in part, as follows:

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

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

### 6.2.3 Forcibly – Defined

Title 18 U.S.C. § 111 makes it a crime to “forcibly” assault, resist, oppose, impede, intimidate or interfere. “Forcibly” applies to each of the distinct ways in which the statute can be violated. For there to be a violation of § 111, the force element must be satisfied. Forcibly includes force actually used or imminently threatened. The government must establish the defendant’s behavior would have reasonably inspired fear in a reasonable person. Proof of actual physical contact or threats

or displays of physical aggression toward an officer, so as to inspire fear of pain, bodily harm or death suffices. Violently pounding on an officer's patrol car door or by advancing toward an officer in an extremely agitated manner would satisfy the force requirement. However, "tensing up" in anticipation of arrest and disobeying orders to move and lie down, may make an officer's job more difficult, but it does not by itself amount to an assault. Mere passive resistance is not sufficient for a conviction under § 111.

#### 6.2.4 Engaged In or On Account of Official Duties – Defined

Section 111 covers current federal officers and employees (and those assisting them) if they are assaulted while "engaged in" the performance of official duties. For example, the government could prosecute a suspect who punches a federal law enforcement officer who is on duty and making an arrest. The suspect may be charged with assault under § 111. When a suspect assaults a federal employee who is engaged in the performance of official duties, it is not necessary for the government to prove that the defendant knew that the person he assaulted was a federal employee. Therefore, if a suspect assaults an undercover officer who is performing undercover duties, the suspect may be charged under § 111 even though he was unaware the person he assaulted was a federal officer.

Current federal employees (and those assisting them) who are off-duty are covered by § 111 if assaulted on account of something done while performing official duties. For example, after having made an arrest earlier in the day, an officer, while off duty, is seen by the arrestee's husband. The husband punches the officer because of the officer's earlier arrest of his wife. The husband can be charged with assault under § 111. Also, it is possible a person could be prosecuted under § 111 for assaulting a federal employee if the only reason for the assault was that the person was a federal employee.

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

### 6.2.5 Penalty

When the defendant's conduct amounts to only simple assault (no touching), it is a misdemeanor. The maximum penalty for misdemeanor is not more than one year in prison. In an assault that involves contact, but does not result in bodily injury, the penalty is not more than eight years in prison. If the assault results in bodily injury or involves a deadly or dangerous weapon, the maximum punishment is not more than twenty years in prison. Almost any object has the potential for being a deadly or dangerous weapon. Examples from cases including violations of § 111 which resulted in enhanced penalty for using a deadly or dangerous weapon include hitting an officer over the head with a phone, throwing a water pitcher at an Assistant United States Attorney, hitting a federal officer with a stick, and attempting to run over a federal agent with an automobile.

## 6.3 Bribery - Title 18 U.S.C. § 201

Title 18 U.S.C. § 201 entitled Bribery of Public Officials and Witnesses, was enacted to protect government officials and witnesses from corrupting influences while they are performing their official duties. It covers any situation in which the judgment of a government official or witness might

be influenced because of payments or gifts made, while performing official duties.

### 6.3.1 Elements

- The Defendant corruptly;
- Offers/gives or requests/receives;
- Anything of value;
- To/from a public official;
- To influence an official act.

### 6.3.2 Public Officials – Defined

It is a crime to corruptly give, offer, or promise a public official (or person who has been selected to be a public official), directly or indirectly, anything of value, with the intent to influence any official act by that public official. Conversely, it is a crime for a public official (or person who has been selected to be a public official) to either, directly or indirectly, corruptly demand, seek, receive, accept, or agree to accept anything of value, in return for influencing any official act by that public official. The term “public official” includes any officer or employee or person acting for, or on behalf of, the United States, or any department or branch of the United States government, or a juror.

As an example, a person violates the statute when they offer a federal agent five thousand dollars to destroy a piece of evidence the federal agent was going to use in a criminal case. It is also an offense for the agent to accept the five thousand dollars in exchange for destroying the evidence. Furthermore, it is an offense for the agent to offer to destroy the evidence for five thousand dollars.

### 6.3.3 Witnesses

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

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

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

#### 6.3.4 Directly or Indirectly

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

#### 6.3.5 Anything of Value

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

#### 6.3.6 To Influence Any Official Act

To prove a § 201 violation, the government must establish a connection between the “thing of value” and an official act to be performed by the public official. The suspect must give, offer, promise, demand, seek or accept the “thing of value” with the corrupt intent to influence an official act. For example, as part of his official duties, an IRS Revenue Agent conducts a tax audit and determines that an individual owes the government a sum of money. If that individual offers the IRS agent one

thousand dollars to alter the results of the audit to show that no taxes are owed, he may be charged with violation of § 201. The individual offered a “thing of value” to corruptly influence the IRS agent to violate his official duty to perform accurate audits. Likewise, the IRS agent commits the offense of bribery if he suggests the taxpayer gives him a thousand dollars to alter the results of the audit to reflect the taxpayer owed no taxes. If the taxpayer accepts the offer, the taxpayer has committed the offense of bribery as well.

### 6.3.7 Gratuities

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

Agency administrative policies may also prohibit government employees from receiving or taking gifts of all types and value. Though some acts may not be worthy of criminal prosecution, the employee could be disciplined for violations of the agency policy. Should there be a question as to what a federal law enforcement officer may or may not be authorized to receive, the officer should check with their ethics counselor. Every agency has a designated ethics official that will provide guidance.





## Chapter 7 -

### Criminal Law – Federal Firearms Offenses

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#### **7.1 Introduction**

All law enforcement officers face the possibility of encountering firearms on the job. This course is an introduction to selected federal firearms laws. It does not address agency-specific officer concerns, such as the ability to carry off-duty, the ability to carry personal weapons, etc.

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

## **7.2 18 U.S.C. § 922(g) - Prohibited Persons**

### **7.2.1 Definition of “Firearm”**

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

### **7.2.2 Prohibited Persons**

Federal law prohibits certain persons from possessing a firearm or ammunition. Since the Constitution does not provide Congress with an express enumerated power pertaining to the regulation of firearms, Congress has to rely upon some other enumerated power. The constitutional anchor upon which the firearms statutes are based is the commerce clause. At trial, the government must prove a connection (“nexus”) between each firearm offense and interstate commerce.

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

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

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

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

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

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

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

This includes both unlawful users of drugs and those addicted to a controlled substance (as defined in section 102 of the Controlled Substances Act).

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

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

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

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

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

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

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

Anyone person who has renounced their United States citizenship.

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

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

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

Any person who has been convicted of a misdemeanor crime of domestic violence.

This means a conviction for a crime that is a misdemeanor under federal, state, or tribal law and that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33)(A).

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

### 7.2.3 Pardon or Expungement

A person who receives a complete pardon, restoration of civil rights, or expungement of a felony or misdemeanor crime of domestic violence conviction is no longer considered convicted,

and is, therefore, no longer disqualified from possessing a firearm. However, possessing firearms remains a crime under federal law if the pardon or expungement states that the person may not possess firearms. 18 U.S.C. § 921 (a)(20)(B) and 18 U.S.C. § 921 (a)(33)(B)(ii).

## **7.3 Enhanced Mandatory Penalties**

### **7.3.1 Introduction**

18 U.S.C. § 924(c)(1)(A) provides enhanced mandatory penalties for any person who possesses, brandishes, or discharges a firearm during the commission of a federal crime of violence or federal drug trafficking crime. The term “brandish” means to display the weapon or make possession of the weapon known. Discharging a firearm includes an accidental discharge. Any person subject to these enhanced penalties is not eligible for parole, probation, or a suspended sentence. Further, the law requires that the enhanced penalty run consecutively to the term of imprisonment imposed for the crime of violence or drug trafficking crime.

### **7.3.2 Definitions - 18 U.S.C. § 924(c)(3)**

#### **a. Federal Crime of Violence**

The term “federal crime of violence” means a federal offense that is a felony and has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another.

#### **b. Federal Drug Trafficking Crime**

The term “federal drug trafficking crime” means “any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law

Enforcement Act (46 U.S.C. App. 1901 et seq.).” This is a very broad definition.

### 7.3.3 Enhanced Mandatory Penalties

#### a. Firearm Possessed

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

#### b. Firearm Brandished

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

#### c. Firearm Discharged

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

## 7.4 Possession of Firearms in Federal Facilities

Under 18 U.S.C. § 930, it is unlawful to knowingly possess or cause to be presented a firearm or “other dangerous weapon” in a “federal facility.” The term “federal facility” is defined broadly to include any building (or parts of buildings) owned or leased by the federal government where federal employees are regularly present for performing their duties.

The term “dangerous weapon” is also broadly defined. It includes any weapon or substance capable of causing death or serious bodily injury. A knife with a blade length of two and one half (2 ½) inches or longer is a dangerous weapon.



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

## **7.5 Weapons Requiring Registration**

### **7.5.1 Introduction**

Weapons listed in 26 U.S.C. § 5845(a) must be registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in order to be legally possessed. 26 U.S.C. § 5861 prohibits possession of such unregistered weapons. These weapons include short-barrel shotguns, short-barrel rifles, machine guns, silencers/mufflers, and destructive devices.

### **7.5.2 Procedure**

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

a. **Is Registration Required**

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

b. **Is the Weapon Registered**

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

### 7.5.3 Weapons Requiring Registration

#### a. Short-Barrel Shotgun

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

#### b. Short-Barrel Rifle

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

#### c. Machine Guns

All machine guns must be registered. A machine gun is any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger. This term includes the frame or receiver of any such weapon, any combination of parts from which a machine gun can be assembled, and parts which convert an ordinary firearm into a machine gun.

#### d. Silencer/Suppressor

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

e. Destructive Devices

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

## 7.6 Tracing a Firearm through the ATF

### 7.6.1 Introduction

The ATF National Tracing Center handles about 350,000 firearm trace requests annually. Tracing a firearm may assist an investigation in any number of ways. The main reason for tracing firearms is to link criminally used weapons to a specific person. Additionally, the trace may assist in identifying: (1) stolen property; (2) associates of suspects; and (3) sources and suppliers of firearms for criminal suspects. Finally, tracing firearms helps to prove the connection (“nexus”) between the firearm and interstate commerce.

### 7.6.2 Information Required to Trace a Firearm

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

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

- b. Model: For example, a “Detective Special” or “Model 26.”
- c. Serial Number: For example, “33419.”
- d. Caliber/Gauge: For example, “.38 Caliber.”

### 7.6.3 Information Gained from Successful Trace

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



## Chapter 8 -

### Criminal Law – Federal Drug Offenses

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#### 8.1 Introduction and Elements

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

The elements of these crimes include:

- The defendant knowingly or intentionally;
- Possessed (§ 844) or Distributed (§ 841)
- A controlled substance;
- Without authority.

## 8.2 Controlled Substances

Knowing or intentional possession, or knowing or intentional possession with intent to distribute (transfer), a controlled substance are criminal offenses. These substances would be legal to possess and distribute, but for the statutes which “control” them. Congress has not included alcohol and tobacco on the schedule of controlled substances. Be mindful, that there are circumstances where possession of controlled substances can be lawful. Examples of those who may lawfully possess a controlled substance include patients who have a valid prescription to possess and consume a drug, officers who possess drugs from a lawful search incident to arrest, a physician who administers the drug for medical purposes, or a researcher who possesses the drug for testing.

### 8.2.1 Defined

A controlled substance is defined by federal statute as a “drug or other substance...” identified in schedules I, II, III, IV, and V of 21 U.S.C. § 812. Schedule I substances are considered the most dangerous, as they have little or no currently accepted medical use and have a high potential for abuse. The remaining schedules list drugs based on their accepted medical use and their potential for abuse. The schedules list drugs by their scientific names. They also list finished drugs like cocaine, and the raw material, such as coca leaves, from which it is created. Controlled substance analogues are substances which have substantially similar chemical structures to controlled substances. Congress criminalized the possession and distribution of analogues, as well as the immediate precursor chemicals necessary to create the drugs. When charging these offenses, the controlled substance must be listed in one of the five schedules, must be alleged in the charging document, and must be proven beyond a reasonable doubt.

### 8.2.2 Possession – 21 U.S.C. § 844

Pursuant to Title 21 U.S.C. § 844, it is “unlawful for any person knowingly or intentionally to possess a controlled substance...”

One of the elements the government must prove in a wrongful possession case is that the defendant unlawfully possessed a controlled substance. Many individuals lawfully possess controlled substances. For example, a patient lawfully possesses a controlled substance when they have a valid prescription from a medical practitioner for use in treating an ailment. In addition, if a law enforcement officer takes possession of controlled substance during a search incident to arrest, the possession of the controlled substance would be lawful. If, instead of turning the controlled substance in as evidence, the officer keeps it and takes it home for personal use, the officer would unlawfully possess the controlled substance.

Knowing or intentional possession of a controlled substance is also an element of the offense. Knowingly means that a person realizes what he is doing and is aware of the nature of the conduct and does not act through ignorance, mistake, or accident. A prosecutor can use a person’s words, acts, or omissions to determine if they acted “knowingly.” Mere presence at the scene of a controlled substance offense is not, by itself, sufficient evidence to convict a defendant. However, if a defendant suspected another party was committing a crime, and the defendant shut his eyes for fear of what he may learn, a jury may conclude the defendant had sufficient knowledge to establish criminal culpability. It is the law enforcement officer’s responsibility to develop facts to prove all the elements of the offense.

Possession is the ability to control the substance. Knowing or intentional possession means that the person has knowledge of the nature of the possessed substance. The government is



not required to prove the defendant knew the exact nature of the substance they possessed. The government is required to merely prove the defendant knew the substance they possessed was a controlled substance. Similarly, if the person believes the substance they possess is cocaine when in fact it is heroin, the government need only prove the defendant possessed a controlled substance, not a particular controlled substance. However, a person who possesses cocaine, but actually believes it to be powdered sugar, does not knowingly possess a controlled substance.

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

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

### 8.2.3 Distribution – 21 U.S.C. § 841

21 U.S.C. § 841(a) makes it unlawful for any person to knowingly or intentionally: “(1) manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...” Possession with intent to manufacture, distribute, or dispense is usually proved through circumstantial evidence. Prosecutors can use words, acts, omissions, packaging materials, method of packaging, scales, quantity, value, purity, and the presence of cash, distribution paraphernalia, and transportation arrangements to circumstantially prove possession with intent to distribute. The government need not prove any commercial transaction (exchange of drugs for money). All that is necessary is evidence to support the knowing or intentional distribution (transfer) or possession with intent to distribute (transfer) the controlled substance. It is the law enforcement officer’s responsibility to develop facts to prove elements of these offenses.

### 8.2.4 Penalties and Charging

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

may be charged. Generally, the government charges possession of “user amounts” as a misdemeanor and forfeitures and civil penalties can be imposed.

## Chapter 9 -

### Criminal Law – Conspiracy and Parties

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#### 9.1 Introduction – Conspiracy

The crime of conspiracy was created because of the inherent dangers that are created when two or more individuals join together to violate the law. A person who joins with others to commit a crime strengthens the criminal scheme and enhances the potential success of the scheme. Furthermore, once an individual joins with another or others to violate the law, those persons are less likely to change their minds. When just one individual makes a solitary decision to violate the law, that individual is more likely to reassess their decision or simply

change their mind. Often their conscience gets the best of them, and they have a change of heart. However, when there are two or more individuals involved, they reinforce each other, thus there is generally little likelihood that they will change their mind or reassess their decision. Once a conspiracy is formed, there is the danger it will spin out of control, as members of the conspiracy recruit others to join their enterprise, making it more dangerous and difficult to immobilize. For these reasons, the identification and targeting of multi-defendant criminal enterprises are essential to successful law enforcement.

Conspiracy statutes can be used to great advantage by criminal investigators. Some of the advantages include the ability to investigate beyond the first layer of the criminal enterprise, while allowing a jury to see the big picture behind a given criminal act. It also enables investigators to be proactive and even prevent substantive offenses, while still being able to charge felony criminal conduct. Disadvantages to conspiracy charges are highlighted by time-consuming investigations and difficulties dealing with witnesses, who are often co-conspirators. In spite of these disadvantages, the conspiracy investigation is one of the most effective weapons in the law enforcement officer's arsenal. It is designed to immobilize and eliminate those who come together to strengthen a criminal enterprise. This chapter provides a basic working knowledge of conspiracy law.

## **9.2 The Statute: Title 18 U.S.C. § 371**

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

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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

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

### 9.2.1 The Elements

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

- Two or more persons;

- Intentionally;
- Agree;
- To violate federal law or defraud the United States;
- And commit an overt act in furtherance of the agreement.

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

a. Two or More Persons

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

Co-conspirators need not meet and they need not know each other’s identities, but they must be aware of, or must reasonably foresee, each other’s existence and roles. For example, in a conspiracy to hijack goods, the person who steals a tractor-trailer from a truck stop may not know the person

who provided advice as to when the tractor-trailer could be easily taken, nor would he necessarily know the person who was purchasing the stolen goods. Furthermore, as long as there are at least two members to the conspiracy involved at all times, the conspiracy continues, even if the members change and the original members have withdrawn and are no longer involved in the conspiracy.

## b. Knowledge and Intent

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

### 1. Knowledge

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

### 2. Intent

The defendant must intend to participate in the conspiracy. The government must present evidence that the defendant joined the conspiracy voluntarily, by agreeing to play some part in it with the intent to help it succeed. Showing that a defendant was aware of the plan or that the defendant approved of the plan is not enough by itself to prosecute. The defendant's intent to participate in the conspiracy must be



proven. A defendant's intent may be proven through circumstantial evidence, such as the defendant's relationship with other members of the conspiracy, the length of the association between the members, the defendant's attitude and conduct, and the nature of the conspiracy. Acts committed by the defendant that furthered the objective of the conspiracy are strong circumstantial evidence that the defendant was a knowing and willing participant in the conspiracy.

### c. The Agreement

The essence of any conspiracy is the agreement. With conspiracy, the mere agreement to violate the law or defraud the United States becomes criminal once an overt act in furtherance of that agreement is committed by a co-conspirator. Seldom, if ever, is there proof of a formal agreement, and the agreement does not have to be put into words, either oral or written. The agreement is often established through circumstantial evidence that a mutual understanding was formed. Association with members of a conspiracy helps to establish a defendant's willing participation. However, mere presence at the scene is not by itself enough to establish an agreement. An individual can be present with others that are known to be co-conspirators without intending to join or further the objects of the conspiracy.

An individual can also do something to help the conspiracy without actually joining. For example, an individual may rent an apartment to members of a conspiracy. The conspirators use the apartment to set up their "bookmaking" operation. The apartment owner has aided the conspiracy. However, absent a showing that he had a stake in the venture (doubled the rent) or knew of the conspiracy and intended to help it by providing a hiding place, he has not joined in the agreement. Mere presence or helping without joining in the agreement are common defenses to conspiracy charges. Efforts must be made

to establish a defendant's joining in the agreement. This can be shown directly by co-conspirators testifying about the defendant's role in the organization or indirectly by documenting a series of acts or events that demonstrate that the defendant acted in concert with and therefore must have been in agreement with other members of the conspiracy.

d. Unlawful or Fraudulent Means or Objective

To successfully prosecute under § 371, either the objective of the conspiracy or the means to accomplish the objective must be (1) an offense against the United States or (2) must involve defrauding the United States. If neither the objective nor the means to accomplish the objective violate federal law or defraud the United States, a prosecution under § 371 is not possible. Note that the objective of the conspiracy does not have to be a crime. It is sufficient to show that the contemplated objective would defraud, impede, impair, defeat, or obstruct the proper functions of the United States Government. This could be accomplished through a scheme such as "bid-rigging" or through an agreement to obstruct the regulatory functions of a government agency.

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

e. The Overt Act

Once an agreement has been made, one of the conspirators must commit an "overt act" in furtherance of the agreement to complete the crime of conspiracy. The overt act demonstrates

that the conspirators have moved from a “thought” crime to one of action. Instead of simply talking about the crime, the conspirators have actually taken a step towards making it a reality. An overt act shows that the agreement is not dormant but is actually being pursued by the conspirators.

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

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

### 9.3 The Law of Conspiracy

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

### 9.3.1 The Doctrine of Merger/Double Jeopardy

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

### 9.3.2 Pinkerton Theory of Vicarious Liability

Conspirators are criminally responsible for the reasonably foreseeable acts of any co-conspirator that are committed while they are members of the conspiracy and that are in furtherance of the overall plan. This is known as the Pinkerton Theory of “vicarious liability.” For example, if the plan was to smuggle counterfeit computer software into the United States, bribing a Customs and Border Protection Officer would be a reasonably foreseeable act. In such a case, each conspirator would be liable for the substantive act of bribery, regardless of who actually committed the bribery. If an act was not a reasonably foreseeable consequence of the overall plan, a co-conspirator could not be held liable for that act unless they were the individual who actually committed it. One benefit of this rule is that all foreseeable acts of the conspiracy can be introduced at trial even though those on trial may not have participated in the acts. The lesson regarding conspiracy that most criminals learn the hard way is that they must choose

their co-conspirators wisely, because the reasonably foreseeable act of a co-conspirator is the act of all, when the act is committed in furtherance of the agreement.

### 9.3.3 Late Joiners to a Conspiracy

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

### 9.3.4 Withdrawal from a Conspiracy

Just as the law recognizes that individuals may join a conspiracy after it begins, the law also recognizes that conspirators may withdraw from the conspiracy prior to its termination. Withdrawal from a conspiracy requires more than simply no longer participating. A valid withdrawal from a conspiracy has two basic requirements. First, the conspirator must perform some affirmative act inconsistent with the goals of the conspiracy. Unless a conspirator produces affirmative evidence of withdrawal, their participation is presumed to continue. Second, the affirmative act must be reasonably calculated to be communicated to at least one other known conspirator or law enforcement personnel. Withdrawal is an affirmative defense, which means the burden is on the defendant to prove that he has withdrawn.

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

### 9.3.5 Statute of Limitations - 18 U.S.C. § 3282

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

### 9.3.6 Venue

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

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

## 9.4 Introduction – Parties to Criminal Offenses

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

#### 9.4.1 Aiding and Abetting - 18 U.S.C. § 2(a)

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

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

An aider and abettor is not required to be present at the time the actual crime is committed, nor know all the details of the crime. Further, presence at the scene of the crime, even in the presence of the principal, does not, by itself, create criminal liability as an aider and abettor. The government must show that the association with the principal was for the purpose of assisting in committing the crime. “Mere association” with the principal is a common defense to an aiding and abetting charge. In addition to an affirmative act of association, the defendant must also know that they are assisting in the commission of a crime. Deliberate avoidance of knowledge (otherwise known as “willful blindness”) may suffice. Deliberate avoidance occurs when a defendant claims a lack of guilty knowledge, but the evidence shows that they instead chose to intentionally avoid gaining knowledge about the circumstances surrounding their assistance in order to avoid criminal responsibility.



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

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

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

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

#### 9.4.3 Accessory After the Fact - 18 U.S.C. § 3

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

There is a distinct difference in punishment between aiding and abetting and accessory after the fact offenses. An aider and abettor is punished for the offense he aids or abets. However, when an individual is convicted for being an accessory after the fact, the maximum possible punishment is one-half the maximum punishment possible for the principal of the offense (not the actual sentence received), up to a total of 15 years in those cases where the principal could receive either life imprisonment or the death penalty.

#### 9.4.4 Misprision of Felony - 18 U.S.C. § 4

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

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

As with the crime of accessory after the fact, an individual's silence alone is not a crime. A simple failure to report a crime does not, without an affirmative act of concealment, make one guilty of misprision of felony. However, where an individual lies to or misleads criminal investigators, this element may be met. A defendant accused of being an accessory after the fact must intentionally assist the principal of the crime, while one accused of misprision of felony need only commit an act of concealment without necessarily intending to assist the

principal. Finally, accessory after the fact does not require the defendant to disclose his knowledge as soon as possible, while misprision of felony does.

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

## Chapter 10 -

### Criminal Law – The Entrapment Defense

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#### 10.1 Introduction

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

Entrapment occurs only when the criminal conduct was the product of the activity of government officials. This means that entrapment cannot result from the inducements of a purely private citizen but must be the product of government conduct initiated by its officers or their agents.

## 10.2 Overview: How the Entrapment Defense Works

Entrapment is an affirmative defense. To substantiate the defense, the defendant must establish sufficient facts from which a reasonable jury could find the government induced an innocent person to commit a criminal offense. The defendant typically does this during the government's case-in-chief through the cross-examination of the government's witnesses. It can also be a part of the defense's case-in-chief if it presents one. The question of entrapment is one for the jury to decide, unless the defendant waives his right to a jury trial and the government tries the case before only a judge.

The critical factor in the entrapment defense is the state of mind of the defendant. At issue is the defendant's predisposition to commit the offense charged. The question is whether the defendant possessed the state of mind to commit the offense charged. Once the defendant has raised the entrapment defense, the government must negate it by establishing predisposition beyond a reasonable doubt. If the government establishes the defendant's predisposition, the entrapment defense fails.

## 10.3 Analysis of the Entrapment Defense

A valid entrapment defense consists of two components: (1) government inducement of the defendant to commit the crime; and (2) lack of predisposition by the defendant to commit the crime.

### 10.3.1 Government Inducement

For the entrapment defense to work, the defendant must first establish the government induced the criminal activity. Inducement by law enforcement officers may take many forms including requesting, asking, suggesting, overbearing persuasion, fraudulent representations, threats, coercive

tactics, harassment, promises of reward, or pleas based upon need, sympathy, or friendship.

a. Permitted Inducements

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

b. Prohibited Inducements

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

- Threats against the well-being of the target's family.
- Extreme appeals to the sympathy or emotions of the solicited target.
- Offers of unreasonable amounts of money to an impoverished or financially desperate target.
- Continuous pressure such as repeated phone calls, visits or requests; repeated insistence, badgering.
- Violent demonstrations, for example, threats regarding loss of job, or custody of children.

In some cases, government conduct can be so outrageous that due process principles will absolutely bar the government from

obtaining a conviction. To establish outrageous government conduct, there must be over-involvement by the government combined with a passive role by the defendant. In other words, the government conduct must be so outrageous that it shocks the universal sense of justice and fundamental principles of fair play. For example, when the government supplies a defendant with counterfeit currency for the sole purpose of indicting him for receiving counterfeit currency with the intent to pass it as genuine, the government's actions violate due process.

### 10.3.2 Predisposition

Predisposition means that the defendant is presently ready and willing to commit the crime. Predisposition is a state of mind that readily responds to the opportunity furnished by the government or its agent to commit the offense.

The government can establish predisposition in many ways to include:

- Statements made by the defendant before, during, and after the inducement.
- Character and reputation.
- Motive for committing the crime.
- Eagerness or ready acceptance of the government's suggestion.
- Possession of contraband for sale on his premises.
- Prior convictions or criminal activity of the same or similar nature evidencing intent, motive or knowledge.
- Acceptance of an offer to supply the last essential

ingredient to manufacture drugs.

### 10.3.3 Examples of Predisposition

#### a. An Existing Course of Similar Conduct

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

#### b. Previously Formed Intent

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

#### c. A Ready Response to a Criminal Offer

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

### 10.3.4 Examples of No Predisposition

#### a. Extreme Appeals to Emotion

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



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

b. Threats

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

c. Excessive Amounts of Money

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

## 10.4 Conclusion

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

## Chapter 11 -

### Criminal Law – False Statements

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#### 11.1 Title 18 U.S.C. § 1001 – Elements

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

- Regarding certain federal matters;
- The Defendant knowingly and willfully;
- made a false material statement, OR concealed or covered up a material fact, OR made or used a document containing a false material statement.

##### 11.1.1 Regarding Certain Federal Matters

Section 1001 applies to false statements made in a matter within the criminal jurisdiction of the executive, legislative, or judicial branches. False material statements include statements and documents, made or used, that contain material false statements or those which cover up or conceal material facts. The statute applies to statements made during administrative, civil, or criminal investigations, or during regulatory or rule-making activities, with the following limitations:

a. Judicial Proceedings

Section (a) of § 1001 does not apply to a party or to a party's counsel for any statements, representations, writings or documents submitted by them to a judge or magistrate during a judicial proceeding. Thus, non-parties could be prosecuted for any false statements made during a judicial proceeding, while a party could only be prosecuted for false submissions made to a judicial entity during administrative housekeeping matters. Such entities include, for example, the Office of Probation and the Clerk of the Court.

b. Legislative Branch Matters

Section (a) of § 1001 applies to matters within the jurisdiction of the legislative branch only if they relate to administrative matters or Congressional investigations conducted consistent with applicable Congressional rules. Administrative matters include such things as financial disclosure filings, claims for payment made to the House Finance Office, and submissions to legislative entities, such as the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House, and the Capitol Police.

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

The statute covers material false statements made to a federal agency by a witness/informant about alleged criminal acts within the jurisdiction of the agency, even when no such criminal acts actually occurred. False material statements made to an agency regarding the regulatory functions of a federal department or agency fall under § 1001. Federal courts

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

### 11.1.2 Knowingly and Willfully – Intent

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

### 11.1.3 Materiality

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

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

At one time, some circuits held that false “exculpatory no” statements made by a suspect to agents in a criminal investigation did not violate § 1001. An “exculpatory no” statement is a statement in which a suspect denies he is guilty of the crime which he knows he committed. However, the Supreme Court now holds § 1001 covers any false material statement, of whatever kind, including the use of the word “no” in response to a question. The “exculpatory no” statement

must be material to the investigation. Title 18 U.S.C. § 1001 does not require a suspect to talk to law enforcement, as a suspect has a constitutional right to remain silent. However, if the suspect chooses to speak, the suspect has no constitutional right to lie to a federal law enforcement officer. Consequently, when a suspect lies to an investigator by responding “No” to a question that asks if the suspect committed the offense, and the government can prove that the suspect did in fact commit the offense, the suspect can be prosecuted for a § 1001 violation.

## Chapter 12 -

### Criminal Law – Theft and Related Crimes

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## **12.1 Introduction: Title 18 U.S.C. § 641**

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

## **12.2 Terms of the Statute**

For purposes of the statute, “property” refers to any “record, voucher, money, or thing of value” belonging to, “or any property made or being made under contract for,” the United States or any department or agency thereof. If the value of the property stolen, embezzled, converted, or received is more than \$1,000, the offense is a felony, which is punishable by ten years imprisonment and a maximum fine of \$250,000. If the value of the property stolen, embezzled, converted, or received is \$1,000 or less, the offense is a misdemeanor and could result in imprisonment of up to one year and a maximum fine of \$100,000. The government must allege the value of the stolen government property in the charging document and prove it beyond a reasonable doubt at trial.

## **12.3 Theft**

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

“Theft” is the wrongful taking and carrying away of property belonging to the United States government or any agency thereof with the intent to deprive the United States government of the use or benefit of the property so taken.

### 12.3.1 Elements

The government must prove three elements to convict a defendant of theft under § 641:

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

### 12.3.2 Example

A defendant takes a vehicle that belongs to the United States government and paints the vehicle a different color, intending to keep it for his own use. The defendant is guilty of theft of government property. He knowingly stole property belonging to the United States with the intent to deprive the United States of the use of the property. The fact that the defendant repaints the vehicle is an example of evidence the government could introduce to show the defendant intended to keep the vehicle for his own use, thus depriving the government of the use and benefit of the vehicle.

A defendant “steals” property when they take and carries away property belonging to another (the government) with the intent to deprive the owner (the government) of the property. To successfully prosecute a defendant for theft under § 641, the government must prove that the defendant had, at the



time of the taking, the specific intent to deprive the rightful owner of the property of its use and benefit. The government is not required to prove that the defendant knew that the item he stole belonged to the United States or one of its departments or agencies or that the property was made or being made under contract for the United States. Rather, the government need only prove that the defendant knew he was taking something that did not belong to him. The government must prove the property belonged to the United States to establish federal jurisdiction over the crime. The defendant's knowledge of this jurisdictional fact is irrelevant. In order to prove an item belongs to the United States, the government must prove that it had "title to, possession of, or control over" that item.

If the defendant takes property he reasonably believed was abandoned, he may raise that as a defense to a prosecution under § 641.

If the government alleges the theft was a felony crime, the government must prove that the value of the item stolen is greater than \$1,000.

## 12.4 Embezzlement

"Embezzlement" is the wrongful, intentional taking of property of another by an individual to whom the property had been lawfully given because of some office, employment, or position of trust (such as a bank manager). In other words, the defendant initially takes the property lawfully with the express or implied consent of the owner.

However, after the defendant lawfully acquires the property because of the defendant's position of trust (sometimes referred to as a "fiduciary" relationship), the defendant intentionally takes the property with the intent of depriving

the owner (the United States in a § 641 crime) of the use or benefit of the property.

#### 12.4.1 Elements

The government must prove three elements to convict a defendant of embezzlement under § 641. With the exception of the second element, the elements of embezzlement are the same as those for theft. These elements are:

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

#### 12.4.2 Example

A federal postal employee is responsible for selling stamps to the public. At the end of the workday, the employee is obligated to deposit the day's cash receipts into the government account. Instead, the employee pockets the money for his personal use. The employee has committed the crime of embezzlement. The money was the property of the United States. The government initially entrusted the employee with the money – in the course of his employment, he accepted the money in exchange for the stamps he sold. The employee pocketed the money, thus depriving the United States of its use and intentionally appropriated it to his own personal use.

While the elements are virtually identical for both crimes, embezzlement and theft are separate and distinct offenses. In the crime of embezzlement, the defendant originally acquires the property lawfully, and it is in the defendant's rightful

possession. The defendant commits no fraud or crime when they originally obtain the property. It is only after the government has entrusted the property to the defendant that they deprive the government of the use of the property by a wrongful taking. This is the primary difference between embezzlement and theft of government property. In theft, the property is not initially in the defendant's rightful possession, and the intent to deprive the United States of the property must exist at the time of the taking. As with the crime of theft, if the government alleges the embezzlement was a felony, it must prove that the value of the property embezzled was more than \$1,000. An individual can embezzle money or property belonging to the government.

## 12.5 Conversion

“Conversion” is wrongfully depriving the United States or any department or agency thereof of its property. In its most basic form, “conversion” simply means that an individual lawfully comes into possession of United States property and wrongfully converts it to their own use. Theft by conversion differs from embezzlement because it does not require that the defendant intends to keep the property permanently. Conversion differs from theft because it does not require an unlawful taking by the defendant. Under § 641, theft by conversion includes misuse or abuse of government property, as well as use of the property in an unauthorized manner or to an unauthorized extent. Conversion deprives the government of the benefit and use of the property.

### 12.5.1 Elements

The government must prove three elements to convict a defendant of theft by conversion under § 641. With the exception of the second element, the elements of conversion are identical to those of theft and embezzlement. These elements are:

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

If the government alleges the crime was a felony, it must prove the value of the property converted was more than \$1,000.

### 12.5.2 Example

Conversion often involves misuse of government property for personal reasons. For example, a federal agency has a government vehicle for its employees to use for official purposes. At lunch one afternoon, one of the employees uses the government vehicle to go shopping for a couple of hours at a local mall. The employee is guilty of conversion under § 641. The employee wrongfully deprived the United States government of the use and benefit of its property, in this case by using the vehicle in an unauthorized manner and to an unauthorized extent.

## 12.6 Receipt of Stolen Property

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

### 12.6.1 Elements

The government must prove four elements to convict a defendant of theft by receiving stolen property under § 641.

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

### 12.6.2 Example

A federal employee steals a computer belonging to the United States government. The employee takes it to a friend and asks him if he would like to buy it at a discount. When asked about the origin of the computer, the employee admits to the friend that he stole it. The friend agrees to purchase the computer. While the federal employee is responsible for theft of government property, the friend is responsible for theft by receiving stolen property. The friend received the computer knowing that the computer was stolen property. The friend received the computer with the intent to deprive the rightful owner of its use by taking possession of the computer for his own use.

As with theft, the government need not prove that a defendant accused of theft by receiving stolen property under § 641 knew the stolen property belonged to the United States government or any agency or department thereof. The government is

required to prove that the defendant knew the property was stolen, embezzled or converted. The government must prove its ownership of the property only to establish federal jurisdiction; it is not an element of the offense. If the value of the property is more than \$1,000, the crime is a felony. Remember, all four types of theft set forth in the statute apply to government property, to include property made under contract for the United States.

## **12.7 Fraud in Connection with Identification Documents – 18 U.S.C. § 1028**

Title 18 U.S.C. § 1028, titled “Fraud and related activity in connection with Identification Documents, Authentication Features, and Information” is a statute designed to deter the production, manufacture, transfer, trafficking, possession and use of identification documents and authentication features. Its prohibitions also cover fraudulent identifications (i.e. fake I.D.s).

When 18 U.S.C. § 1028 discusses identification documents, it covers all those issued by federal, state, local, foreign, international and quasi-international governmental entities. Similarly, the term “Authentication Feature” used in the statute has an expansive definition. It is defined as any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature used by an issuing authority or an identification document to determine if the document is counterfeit, altered, or otherwise falsified.

If the identification documents or authentication features in question appear to be issued by or are intended to defraud the United States, criminal penalties may apply.

### 12.7.1 Unlawful Possession of Identification Documents to Defraud the United States – 18 U.S.C. § 1028(a)(4)

It is a crime for a person to knowingly possess an identification document (other than the one issued lawfully for the use of the possessor), authentication feature or a false identification document with the intent to use it to defraud the United States. The criminal intent to “defraud the United States” is not limited to financial gain. Instead, the perpetrator only needs to act for personal benefit or to deprive another of something, but that something need not be money. United States v. Luke, 628 F.3d 114, 121 (4th Cir. 2010).

Example: A law enforcement officer, while conducting an immigration investigation, discovers that the non-citizen he is investigating is in possession of a Social Security card that had been issued to another person. The officer also discovers that this non-citizen intended to use the card to avoid immigration authorities and stay in the country.

The intent element is an important aspect of this crime. If this non-citizen had been found merely holding the card for another person or had simply picked it up off of the street, no crime would have been committed by its possession alone. The law enforcement officer must have evidence that the defendant intended to use it to defraud the United States before concluding that criminal conduct has occurred. In this case, due to the personal benefit of using the card to avoid Federal immigration authorities, officers have evidence of fraudulent intent.

### 12.7.2 Unlawful Possession or Transfer of 5 or More Identification Documents – 18 U.S.C. § 1028(a)(3)

It is also a crime for a person to knowingly possess five or more identifications documents, authentication features or false identification documents with the intent to unlawfully use or

transfer them to someone other than a person to whom they were lawfully issued. Conviction under this subsection can result in up to five years in prison and/or fines.

Example: Law enforcement officers are conducting a contracting fraud investigation and discover an individual with 12 U.S. passports which were lawfully issued to U.S. citizens that are now deceased. They also discover communications between this person and non-citizens indicating that this individual was planning to sell the passports.

While this example would qualify for prosecution under 18 U.S.C. § 1028(a)(3), it is worth noting that this person could have also been prosecuted if he had intended to merely distribute the passports or use one of them himself to defraud the United States. Due to the number of passports in his possession, this individual will be subject to heightened penalties.

### 12.7.3 Knowing Possession or Transfer of Stolen or Fraudulent U.S. Identification Documents – 18 U.S.C. § 1028(a)(6) & 18 U.S.C. § 1028(a)(2)

Section 1028(a)(6) makes it a crime to knowingly possess a stolen or fraudulently produced an identification document or authentication feature. Specifically, it prohibits knowingly possessing an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States which is stolen or produced without lawful authority; while knowing that such document or feature was stolen or produced without such authority.

Section 1028(a)(2) makes it a crime to knowingly transfer any identification document, authentication feature, or false



identification document that one knows to be stolen or produced without lawful authority (i.e. fake).

Example: Law enforcement officers locate Smith, a person suspected of identity theft, in possession of a U.S. passport belonging Frank Jones. Smith admitted that his brother, Jim, stole the passport from Jones and gave it to Smith.

Both Smith and Jim can be prosecuted. Smith's possession was illegal because of his knowledge that the U.S. identification document was stolen. Additionally, if Smith knew that this U.S. passport was fake (i.e. produced without lawful authority) that too would suffice to make his possession of the passport criminal. Jim is also subject to prosecution (not just for the theft), because Jim possessed and transferred the identification document knowing it was stolen.

#### 12.7.4 Possession, Transfer, or Use of Identification to Commit a Crime – 18 U.S.C. § 1028(a)(7)

This section prohibits knowingly transferring, possessing, or using a means of another person's identification with the intent to commit or to aid or abet any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable state/local law.

Example: Bob asks James for his Social Security card in order to buy a gun. Bob is a felon and is prohibited from acquiring a firearm; nevertheless, James agrees to loan him his identification to purchase a firearm in his name.

In this example, both Bob and James are guilty of a crime. James knowingly transferred his identification to Bob so that Bob could violate Federal statutes by acquiring a gun. Bob possessed and used the identification to violate Federal statutes; accordingly, both may be charged under 18 U.S.C § 1028(a)(7).

### 12.7.5 Unlawful Production of Identification Documents – 18 U.S.C. § 1028(a)(1)

Title 18 U.S.C. § 1028 not only penalizes the possession, transfer, or use of identification documents, but also prohibits unlawful production. In section (a)(1), the statute criminalizes knowing unlawful production of an identification document, authentication feature, or a false identification document. Production, as it is used in the statute, includes wrongfully altering, assembling or authenticating identification documents. It should be noted that this statute will apply to the production of state identifications as well as the federal variety.

Example: A specialized fraud task force is investigating a Federal benefits scam involving the use of fake persons qualifying for benefits through the mail. During the execution of a search warrant in the defendant's residence, Federal law enforcement officers discover a stack of other people's licenses with the defendant's photo crudely pasted over the top.

Production is a serious offense under 18 U.S.C. § 1028 and carries stiff penalties. In the example above, law enforcement officers have all the evidence they need to connect the defendant to the knowing production of the identification documents. Had they simply found the state licenses in the house, without evidence that the defendant altered them, they would need more to prosecute for unlawful production.

### 12.7.6 Unlawful Possession, Production, Transfer, or Possession of Document-Making Implements or Authentication Features – 18 U.S.C. § 1028(a)(5)

Section 1028(a)(5) prohibits knowingly producing, transferring, or possessing a document-making implement or authentication feature with the intent such document-making implement or authentication feature will be used in the

production of a false identification document or another document-making implement or authentication feature which will be so used. The term “document-making implement” used in the statute is quite broad and encompasses anything that is specifically configured or primarily used for making identification documents.

Example: During an immigration investigation, federal law enforcement officers interview several non-citizens that said they received fraudulent immigration documents from Jimmy Jones, who had sent them a computer file with a fillable permanent resident card (PRC) template. After executing a search warrant on Jones’ residence, the police discover a laptop computer containing the PRC template, hard plastic sheets, a cutting device configured to cut-out PRC-sized shapes, and a specialized printer.

In the above example, the ‘document-making implements’ include anything that was specifically configured or primarily used for making fake identification documents. This would include the computer template, the cutting device, and the printer. Moreover, officers have more than enough evidence to prove that Jones’ intent was to produce fraudulent identification documents, and to transfer document-making implements to others so they could do the same. A conversation with Jones could lead investigators to find out who produced the computer template if he did not do so himself.

#### 12.7.7 Unlawful Trafficking of False or Actual Authentication Features – 18 U.S.C. § 1028(a)(8)

This Section criminalizes any ‘trafficking’ of fake or real authentication features for their use in false identification documents, document-making implements, or means of identification. ‘Trafficking,’ as used by the statute, means transporting, transferring, or otherwise disposing of

authentication features for some kind of pay. It can also mean unauthorized making of authentication features with the intent to transport, transfer, or dispose of for pay.

Example: After receiving a tip that holograms were being sold online through a website—the kind that are typically used in U.S. Passports—Federal law enforcement officers worked to uncover the individuals running the website. Once identifications are made, officers confirmed that the holograms existed and arrested the individuals involved.

Note that it is important to identify if the authentication features actually exist. If this website was merely promising to sell authentication features but was instead harvesting the credit card numbers of naïve individuals who would likely not alert the police, a different criminal statute may apply.



## Chapter 13 -

### Criminal Law – Federal Fraud Statutes

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#### 13.1 Introduction

The concept of “federalism” embodied in our U.S. Constitution - independent states relinquishing certain of their rights, while maintaining others to form a more workable union - helped create the world’s greatest democracy, but it also posed significant challenges. Issues arose regarding how to prevent

and prosecute crimes spanning more than one state. When con artists used the mail transported by pony express to defraud victims in distant states, which state's law did they violate and where could they be prosecuted once apprehended? If thieves stole property in one state but transported it across state lines for sale in another state, which state's laws applied? Which state's officials were responsible for the investigating, arresting and prosecuting the thieves? As a result, early in our history, a suspect's flight across state lines for all but the most heinous crimes was the most effective means of eluding capture and conviction.

As the nation's borders expanded and its population grew, Congress recognized the increasing need to combat these interstate crimes and responded by enacting legislation based primarily on its authority under Article I, Section 8, Clause 3 of the Constitution to regulate commerce among the several States. Consequently, federal investigators and prosecutors now have a vast array of federal statutes to combat crimes that cross state lines by employing means of interstate transportation and communication. In the fraud area, those statutes include 18 U.S.C. § 1343, Fraud by Wire, Radio, or Television (more commonly referred to as the Wire Fraud Statute), and 18 U.S.C. § 2314, Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting (more commonly known as the Interstate Transport of Stolen Property or "ITSP"). Congress also looked to its Constitutional authority to establish post offices and post roads (Article I, Section 8, Clause 7) to enact 18 U.S.C. § 1341, Frauds and Swindles (the Mail Fraud Statute). Together, these three statutes are the federal government's primary weapons in prosecuting fraud schemes involving interstate commerce or use of the mails.

## 13.2 Mail Fraud - 18 U.S.C. § 1341

### 13.2.1 Elements

The statute requires proof of the following elements:

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

### 13.2.2 Definition of Fraud

Fraud is the intentional presentation of falsehoods as truth with the goal of causing someone to part with something of value under false pretenses. The words “to defraud” commonly refer to adversely affecting someone’s property rights by dishonest methods or schemes. It usually involves injury to, or loss of, property resulting from the use of deceit, trickery, or overreaching.

### 13.2.3 Application of the Mail Fraud Statute

#### a. In General

Each use of the United States mail or an interstate carrier (such as United Parcel Service or Federal Express) in furtherance of a scheme to defraud is a chargeable count of mail fraud. A simple example would be a defendant who used the mail to order goods for which he had no intention of paying. The defendant’s mailing of the order form would be chargeable as one count of mail fraud. The mailing of the goods by the



seller to the defendant would be a second count of mail fraud under § 1341.

The government is not required to prove the defendant intends, or even knows, about the use of the mail. In fact, the defendant may take deliberate steps to avoid using the mail and still violate the statute. It is sufficient that the use of the mail was reasonably foreseeable to the defendant. Thus, under the mail fraud statute, the government can prosecute a defendant who hand-delivers a fraudulent claim to his insurance agent if the insurance agent mails the claim to the home office for processing. Though the defendant intended to avoid use of the mail by hand delivering the claim, it was reasonably foreseeable to the defendant that his agent would mail the claim.

Accordingly, a defendant can be criminally liable for a mailing which they did not personally place in the mail and which does not itself contain a false representation. If the defendant caused the mail to be used and the mailing was in furtherance of the overall scheme to defraud, the defendant is liable for mail fraud. In the example above, the seller (victim) mails the goods to the defendant, who does not intend to pay for them. The defendant did not mail the goods but caused the seller to use the mails to ship the goods in response to the defendant's order. There was no false representation involved in the mailing of the goods by the seller to the defendant. However, the mailing furthered the defendant's overall scheme to defraud the seller.

Finally, unlike the Wire Fraud statute (§ 1343) discussed below, the mailings charged in a mail fraud prosecution can be intrastate (solely within one state). Thus, a victim's check mailed from Manhattan, N.Y. to the defendant in Brooklyn, N.Y., is chargeable as mail fraud.

Remember, the same principles apply if the defendant uses the U.S. mail or a private interstate commercial carrier, such as FedEx, UPS, or DHL.

b. “Furtherance of the Scheme”

A mailing is chargeable under the mail fraud statute if it is in furtherance of the scheme to defraud. Use of the U.S. mail or a private interstate carrier does not need to be an “essential” part of the fraudulent scheme so long as it is a step in the plot to complete the fraudulent scheme.

Mailings made after the fraudulent scheme is complete are not chargeable. For example, if someone uses a stolen credit card to purchase products and services, the credit card company will subsequently mail an invoice to the authorized cardholder for payment. The cardholder may mail a check in payment of the invoice. The government cannot charge these mailings as mail fraud, because the fraudulent scheme was already complete.

However, the courts have distinguished between mailings after the completion of the fraud, which are not chargeable under § 1341, and “lulling letters.” Lulling letters are mailings designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendant less likely. As an example, if an investment advisor sold bogus stocks to his clients and converted their funds to his own use, he could still be charged with subsequent mailings of false statements which indicated their accounts had risen in value. Although the investment advisor made these mailings after the victims had already lost their money, the advisor designed the mailings to deceive the investors as to the true condition of their accounts and allow the scheme to go undetected. The ability to charge lulling letters as mail fraud can sometimes

enable prosecutors to indict cases that they otherwise could not, due to the expiration of the five-year statute of limitations.

#### 13.2.4 Examples of Common Schemes

Fraud schemes come in all shapes and sizes, limited only by the perpetrator's creativity. The great benefit of the mail fraud statute is its easy adaptability to any type of scheme in which the defendant has obtained something of value by "conning" their victim. Described below are a few of the "garden variety" schemes that the government has successfully prosecuted using the mail fraud statute. Keep in mind, however, that these are only a few examples of the many schemes to which a federal investigator can apply the mail fraud statute.

##### a. Bribes and Kickbacks – Public Corruption

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

##### b. Bribes and Kickbacks – Private Corruption

In mail fraud cases involving misuse of corporate positions by executives seeking private gain, the scheme to defraud must involve bribery or kickbacks that deprive the corporation or its shareholders of honest services. The government can prosecute any mailing to execute the bribery or kickback scheme as mail fraud.

##### c. Fraud Against Consumers

A business may "puff" or exaggerate the virtues of its product but may not fabricate non-existent qualities. A business may not offer an item and fail to deliver it or substitute it for another item of materially different quality or characteristics.

Any mailing that assists in the execution or completion of such a scheme is chargeable as mail fraud. Examples include odometer rollback schemes (the mailing occurs when the defendant sends the false odometer certification to the state); telemarketing fraud (the mailing occurs when the victims send the money to obtain the non-existent product); and sweepstakes that require people to send money to win or receive their prize.

#### d. Fraud Against Business

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

#### e. Fraud Against Government

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

#### f. Private Fraud

Any person who commits a fraud against another person and either uses the mail or causes the mail to be used in furtherance of the scheme commits mail fraud. For example, a defendant who married a recently widowed person and used the mail in furtherance of a scheme to deplete the assets left to that person by the deceased spouse violated the mail fraud statute.

## 13.3 Wire Fraud - 18 U.S.C. § 1343

### 13.3.1 Elements

The statute requires proof of the following elements:

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

### 13.3.2 Application of the Wire Fraud Statute

The wire fraud statute prohibits the use, in interstate commerce, of the telephone, television, telegraph, and internet to promote a fraud scheme. In applying § 1343, the courts have stated consistently that its elements are the same as those of the mail fraud statute.

The major difference between mail fraud and wire fraud statutes is the nature of the communication method the defendant uses in furtherance or support of the scheme – a mailing or an interstate wire transmission.

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

even if the defendant made the phone call to the person living next door.

As with the mail fraud statute, the wire fraud statute does not require the defendant himself to place the telephone call or send the facsimile message. It is sufficient that the use of the telephone, facsimile, computer, television or radio was reasonably foreseeable to the defendant. Federal investigators have commonly relied on the wire fraud statute in cases involving the wiring of funds through the banking system by fraud victims; schemes in which defendants have used the internet to order products for which they had no intention of paying; “pump and dump” schemes in which defendants have sold stocks for huge profits after using the internet to fraudulently tout their value; and most popular of all, the ever-present fraudulent telemarketing schemes. Like the mail fraud statute, § 1343 is extremely versatile and remains a favorite weapon of federal prosecutors. In one case, the government successfully prosecuted a fertility specialist under the wire fraud statute whose fraud victims made interstate telephone calls to schedule appointments at his office.

As technology changes and our interstate communications system evolves from “wire” to “broadband” and other yet to be developed hardware, federal investigators can expect to see innovative applications of the wire fraud statute, as well as new legislation aimed specifically at combating these new mechanisms of fraud. Despite § 1343’s short title as the “wire fraud” statute, federal prosecutors have already applied it to interstate communications effected by telephones other than “land lines,” based on its application to radio transmissions. Wire fraud also applies to fraudulent schemes involving foreign commerce.

## 13.4 National Stolen Property Act - 18 U.S.C. § 2314

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

Section 2314 contains six distinct provisions that criminalize activities involving the transportation of certain specified items and persons across state lines and in interstate commerce. Each such provision requires its own elements of proof. This course will address only the first three provisions of the statute.

### 13.4.1 Interstate Transportation of Stolen Goods – The Elements

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

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

### 13.4.2 Proving the Elements

#### a. Interstate or Foreign Commerce

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

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

b. Transport, Transfer or Transmit

The method the defendant uses to transport or transfer the stolen or fraudulently obtained property or money is not material. That is, the defendant can transport the item personally, enlist another person to transport the item, or use the United States mail or a private or commercial courier. Any of these methods satisfy this element of the statute. Interstate wire transfers of funds a defendant obtains through theft or fraud are also violations of ITSP.

The courts have consistently held that the government can charge ITSP concurrently with the mail fraud and wire fraud statutes because each statute demands proof of at least one different element. With regard to foreign commerce, ITSP makes it a crime to transport to the United States goods stolen in a foreign country, even if they do not subsequently travel in interstate commerce once they arrive in the United States. Likewise, the transportation or transmission to a foreign country of property or money obtained by fraud or theft in the United States violates ITSP.

c. Value of \$5,000 or More

The stolen or fraudulently obtained property transported in interstate or foreign commerce must be valued at \$5,000 or



more. This requirement prevents the over-extension of federal law enforcement resources by restricting their application to more substantial frauds and thefts. To determine the appropriate measure of value, the courts refer initially to 18 U.S.C. § 2311, which defines value as face, par, or market value, whichever is the greatest. For items with no face or par value, the courts have generally defined market value as the price a willing buyer would pay a willing seller at the time and the place the property was stolen or at any time during the receipt or concealment of the property. In applying this standard, the courts look to the particular facts of each case and pose the question: in what type of transaction would the person from whom the defendant stole the property have engaged? If the victim was a wholesale merchant, the value for purposes of ITSP is the wholesale market price; if the victim was a retail merchant, the value of the stolen property is the retail market price. Where there is no established market for the stolen item, courts have relied on the prices paid among those dealing in the stolen property, referring to this as the “thieves market.”

The government can charge each interstate or foreign transport or transfer of an item valued at \$5,000 or more as a separate count of ITSP. In addition, the government can aggregate the value of separate shipments of stolen goods to reach the jurisdictional amount of \$5,000 or more, and charge the separate shipments as a single offense. To do so, the government would have to establish a relationship between the separate shipments, such as establishing them as a series of shipments to a particular defendant.

#### d. Knowledge

To obtain a conviction under ITSP, the government must show that the defendant knew that the items he transported or caused to be transported in interstate or foreign commerce were stolen, embezzled, or obtained by fraud. The government

is not required to prove that the defendant knew, foresaw, or intended that the stolen items were or would be transported in interstate or foreign commerce. The courts have generally held that the jury may infer that a person in possession of recently stolen property knew the property was stolen, unless such possession is satisfactorily explained.

### 13.4.3 Travel Fraud – The Elements

The second provision of ITSP prohibits “travel fraud” - causing potential victims of a fraudulent scheme to travel in interstate or foreign commerce in furtherance of or to conceal a fraudulent scheme. Thus, pursuant to the ITSP, the government can prosecute a con artist who misleads his victim in a face-to-face encounter if the victim crossed state lines or traveled into or out of the United States to investigate or learn of the fraudulent offer. The elements of travel fraud are:

- Transportation of or inducement of a person to travel in interstate or foreign commerce;
- For the purpose of defrauding that person of money or property valued at \$5,000 or more.

### 13.4.4 Proving the Elements

#### a. Transport or Induce to Travel in Interstate or Foreign Commerce

Proof that a potential or actual victim of a fraud scheme travels in interstate or foreign commerce in connection with the scheme satisfies this element of travel fraud. The government is not required to prove the victim actually parted with money or property. It is sufficient if the defendant induced the victim to travel in an effort to defraud the victim. In addition, the government need not prove that the money or property the defendant seeks or receives from the victim

traveled in interstate or foreign commerce. Thus, where a con artist induces his next-door neighbor to travel out of state to view certain real estate parcels the con artist is offering in a fraudulent scheme, the government can charge him with travel fraud whether or not the neighbor invests. The key to travel fraud is the interstate travel of the victim.

b. To Defraud a Person of \$5,000 or More

As with the Mail Fraud and Wire Fraud statutes, the government must prove the defendant's intent to defraud, as discussed in the Mail Fraud section of this chapter. As with the first provision of ITSP, travel fraud requires that the suspect defrauded or endeavored to defraud the victim of \$5,000 or more.

#### 13.4.5 Transportation of Falsely Made, Altered, or Counterfeited Securities or Tax Stamps – The Elements

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

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

## 13.4.6 Proving the Elements

### a. Securities

Securities include stock certificates, bonds, money orders, motor vehicle titles, and checks. While the courts have included checks within the definition, they have found the language “falsely made, forged, altered or counterfeited securities” does not include checks with forged endorsements. It does include checks signed by a maker using a fictitious name, checks drawn on an account opened with a fictitious name, checks bearing a forged signature of an authorized signatory to the account, checks drawn on closed accounts, and checks bearing the actual signature of a person not authorized to act as a signatory on the account. (Note that checks with forged endorsements that are stolen or obtained by fraud and transported across state lines could be charged under paragraph one of ITSP if they meet the \$5,000 valuation requirement).

Airline tickets, credit cards, credit card slips, and leases do not fall within the definition of “securities” under this third paragraph (See 18 U.S.C. § 2311 for the statutory definition of securities). In addition, the final paragraph of Section 2314 states that the statute’s provisions do not apply to counterfeit obligations and securities of the United States or any foreign government, nor falsely made or counterfeit foreign currency.

The primary reason for this exclusion of United States obligations and securities is that “trafficking in counterfeits, forgeries and spurious representations of [these instruments] is made criminal elsewhere in the United States Code by anti-counterfeiting statutes,” such as 18 U.S.C. § 471.

b. Interstate or Foreign Commerce

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

c. Fraudulent Intent

The government must establish that the defendant transported the forged or counterfeit check or security with unlawful or fraudulent intent. The prosecutor can establish the required intent through direct evidence of the defendant's own statements and/or through circumstantial evidence of his participation in the scheme to transport or negotiate the securities.

d. Knowledge of Forgery or Counterfeit

To sustain a conviction under this paragraph of ITSP, the government must prove the defendant knew the security transported in interstate or foreign commerce was forged or counterfeited at the time of its transportation. It is not necessary to prove that the defendant forged the security himself. The government only needs to establish that the defendant knew the securities transported were forged.

## 13.5 Venue

Venue for violations of the Mail Fraud statute, Wire Fraud statute and ITSP is governed by 18 U.S.C. § 3237. This statute provides in pertinent part: “Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.”

Accordingly, the government can charge mail fraud cases in the district where the subject mail matter is placed in the mail, any district through which it travels, or the district in which it is received by the addressee. The government can charge wire fraud cases in the districts from which the transmission was sent, through which it passed, and in which it was received. The government can charge ITSP in the districts from which the stolen items or victims originated, through which they traveled, and in which they completed their journey. Generally, Department of Justice policy is to charge violations of these three statutes at their beginning or ending points, rather than in the districts through which the mail, transmission, victims or property merely passed.



## Chapter 14 -

### Criminal Law – Human Trafficking

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#### 14.1 Introduction

Human Trafficking has been called modern day slavery. Although the Thirteenth Amendment to the Constitution abolished slavery and indentured servitude in the United States, this form of slavery continues to persist in the U.S. and around the world, even though this defies federal law, state law, and international law. The Department of Homeland Security developed a program called the Blue Campaign to bring awareness to this problem, as too many people are unaware of its depth and breadth. In this chapter, we are covering a few of the essential federal laws that criminalize human trafficking in its various forms. In particular, we



examine three main categories, Peonage, Forced Labor, and Sex Trafficking, of both adults and children. Because of the persistent nature of this problem, it is incumbent upon every law enforcement officer to be aware of what signs to look for and how it is addressed in the law.

## 14.2 Peonage - Title 18 U.S.C. § 1581

There are two distinct ways in which the peonage statute may be violated: Direct action of holding or returning a person to such a condition or obstruction/interference in the enforcement of this law. The statutory penalties are the same, regardless of the manner in which this law is violated.

### 14.2.1 Elements of Peonage

#### a. Peonage: Direct Action

- Defendant holds or returns;
- Any person;
- In or to a condition of peonage.

#### b. Peonage: Obstruction/Interference in Enforcement

- Defendant obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section.

### 14.2.2 Definitions: Peonage/“Holds”

Peonage is a status or condition of compulsory service, based upon the indebtedness of the peon (person who owes a debt) to the holder of the debt. The core issue here is indebtedness; but

peonage, however created, is compulsory service, involuntary servitude.

Under 18 U.S.C. § 1581, the term “holds” means the exercise of control by one individual over another so that the latter is coerced into laboring for the former. The use, or threatened use, of law or physical force is the most common method of forcing another to enter into or remain in a state of involuntary servitude. However, the means or method of coercion is not the determinative factor in deciding whether there is a holding.

Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion or may even be more coercive; such conduct, therefore, may violate the Thirteenth Amendment and this statute.

The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person. A “holding” in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that they have no alternative but to perform the labor.

#### 14.2.3 Punishments for Peonage

<b>Offense</b>	<b>Maximum Punishment</b>
Basic Violation/Obstruction	20 years confinement
If death results, or if the violation includes (actual or attempted) kidnapping, aggravated sexual abuse, or an attempt to kill	Life imprisonment

### 14.3 Forced Labor - Title 18 U.S.C. § 1589

There are two distinct ways in which the forced labor statute may be violated – direct action (i.e. forcing someone to work against their will) or indirectly benefitting from such a venture. The statutory penalties are the same, regardless of the manner in which this law is violated.

#### 14.3.1 Elements of Forced Labor

##### a. Forced Labor: Direct Action

- Defendant knowingly provided or obtained labor or services of a person by:
  - Force and/or physical restraints;
  - Threats of force and/or physical restraints;
  - Abuse or threatened abuse of law or legal process;  
or
  - Scheme, plan, or pattern intended to cause the person to believe that, if he/she did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.
- Against that person and/or another person

##### b. Forced Labor: Indirectly Benefits

- Defendant knowingly benefits, financially or by receiving anything of value;
- From participation in a venture which has engaged in the providing or obtaining of labor or services by:

- Force and/or physical restraints;
  - Threats of force and/or physical restraints;
  - Abuse or threatened abuse of law or legal process;  
or
  - Scheme, plan, or pattern intended to cause the person to believe that, if he/she did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.
- Knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means.

#### 14.3.2 Definitions of Forced Labor

##### a. Abuse or Threatened Abuse of Law or Legal Process

The use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

##### b. Serious Harm

Any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances, to perform or to continue performing labor or services in order to avoid incurring that harm.

### 14.3.3 Punishments for Forced Labor

<b>Offense</b>	<b>Maximum Punishment</b>
Basic Violation/Obstruction	20 years confinement
If death results, or if the violation includes (actual or attempted) kidnapping, aggravated sexual abuse, or an attempt to kill	Life imprisonment

## 14.4 Sex Trafficking - Title 18 U.S.C. § 1591

There are two distinct ways in which the sex trafficking statute may be violated: direct action (i.e. actually committing the act of sex trafficking) or indirectly benefitting from such a venture. The statutory penalties are the same, regardless of the manner in which it is violated.

### 14.4.1 Four Classes of Victims of Sex Trafficking

There are four classes of victim based on age:

- 18 years of age or older
- Under 18 years of age
- 14 years of age but under 18
- Under 14 years of age

### 14.4.2 Elements of Sex Trafficking

Victims of sex trafficking may be adults or minors, those who are under the age of 18. For victims under the age of 18, coercion is not a required element of proof, but does enhance punishment.

a. Sex Trafficking: Direct Action – Victim 18 Years of Age or Older

- In or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction (SMTJ) of the United States;
- The Defendant recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means;
- Any person 18 years of age or older;
- Using or knowing that force, threats of force, fraud, coercion, or any combination of such means will be used;
- To cause the victim to engage in a commercial sex act.

b. Sex Trafficking: Benefitting – Victim 18 Years of Age or Older

- In or affecting interstate or foreign commerce, or within SMTJ;
- The defendant benefits, financially or by receiving anything of value, from participation in a venture;
- Knowing, or in reckless disregard of the fact [except advertising] that force, threats of force, fraud, coercion, or any combination of such means will be used against;
- Any person;
- To cause the victim to engage in a commercial sex act.

c. Sex Trafficking: Victim Under 18 Years of Age

- In or affecting interstate or foreign commerce, or within SMTJ;
- The defendant recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means, or indirectly benefits from such a venture;
- Knowing, or in reckless disregard of the fact [except advertising], that the person has not attained the age of 18 years;
- Any person under 18 years of age;
- To cause [victim] to engage in a commercial sex act.

14.4.3 Definitions of Sex Trafficking

a. Abuse or Threatened Abuse of Law or Legal Process

The use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

b. Coercion

Threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of law or the legal process.

c. Commercial Sex Act

Any sex act, on account of which anything of value is given to or received by any person.

d. Serious Harm

Any harm, whether physical or nonphysical, including psychological, financial, or reputational harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual acts in order to avoid incurring that harm.

e. Venture

Any group of two or more individuals associated in fact, whether or not a legal entity.

#### 14.4.4 Punishments

For victims under the age of 18, coercion is not a required element of proof, but does enhance punishment.

Age	10 years to life	15 years to life
18 or older (coerced)		X
14 or older but under 18 (coerced)		X
14 or older but under 18 (not coerced)	X	
Under 14 (coercion not required)		X





## Chapter 15 -

### Electronic Law and Evidence

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## 15.1 Introduction

Technology, such as cell phones and computers, is part of modern daily life, so it is natural to expect that technology will be a necessary part of a criminal investigation. This chapter gives a basic overview of federal laws regarding intercepting communications, tracking movements of a person or object, tracing communications, obtaining electronically stored communications and data, and using video-only surveillance.

This chapter will not cover state law regarding electronic surveillance. While state and local law enforcement must, at a minimum, provide the same individual protections as the U.S. Constitution regarding electronic surveillance, each state is free to make its own wiretapping statutes. This chapter will also not cover the Foreign Intelligence Surveillance Act (FISA) which addresses the use of wiretaps and searches in connection with foreign intelligence investigations.

## 15.2 Wiretapping and Title III

Before 1934, no federal statute specifically regulated wiretapping. In 1928, the Supreme Court held in Olmstead v. United States, 277 U.S. 438 (1928), agents who tapped a suspect's phone lines from a location off the suspect's premises, even without his consent or a search warrant, did not violate the Fourth Amendment. The Court based its decision upon a finding that the agents committed no trespass upon Olmstead's person, house, papers, or effects, and, hence, did not "search" within the confines of the Fourth Amendment.

The Court noted, however, that Congress could regulate wiretapping if it so desired. Six years after Olmstead, Congress passed the Federal Communications Act of 1934 (FCA) which prohibited wiretapping by any person, including federal law enforcement officers, without a warrant. However, the FCA still permitted federal law enforcement officers to use eavesdropping techniques in law enforcement operations.

In 1967, nearly 40 years after Olmstead, the Supreme Court took on the eavesdropping issue in the landmark case of Katz v. United States, 389 U.S. 347 (1967). Before Katz, the Supreme Court held on to a very literal reading of the Fourth Amendment, focusing on property rights (a person's physical body, houses, papers and effects, personal property). The Fourth Amendment still protects property rights, but Katz changed the focus of Fourth Amendment analysis from one based on property rights to one based on individual privacy rights. In Katz, the defendant was a "handicapper" making most of his money with college football illegal gambling. (Handicappers assign advantages or odds through scoring compensation for illegal betting.) As part of the operation, the defendant used a public telephone located in a group of telephone booths on a public street on Sunset Boulevard, in Los Angeles, CA to "transmit wagering information across state lines" (giving the odds to his bookkeepers). To monitor

these conversations, federal law enforcement officers placed a sensitive microphone on top of the telephone booth that recorded what Mr. Katz was saying. Because they had not intruded onto the defendant's property or person when installing and utilizing this device, the officers had complied with Olmstead. Additionally, they did not violate the FCA given that they had not tapped the telephone line. Nevertheless, the Supreme Court held the Fourth Amendment was violated. Creating a new "Reasonable Expectation of Privacy" (REP) standard, the Court stated Katz had manifested a subjective REP in his use of a phone booth to make his calls, and further, that the officers had intruded upon that REP. The court held Mr. Katz's subjective REP was objectively reasonable, thus evoking Fourth Amendment protections. Therefore, the warrantless recording of his conversations violated the Fourth Amendment.

Congress's response to the Supreme Court's decision in Katz came in 1968 in the form of the Omnibus Safe Streets and Crime Control Act (found at 18 U.S.C. § 2510, et seq). Title III of that Act regulated the way law enforcement officers may lawfully conduct real-time interceptions of wire and oral communications. (When Congress passed the Omnibus Crime Control and Safe Streets Act, these provisions were in Title III of the Act. Subsequently, these provisions were moved to another section; however, this body of law is still referred to as "Title III" or "T III.") The purpose of Title III was twofold: first, to protect the privacy of wire and oral communications; and second, to set forth, on a uniform basis, the circumstances and conditions under which the interception of wire and oral communications may be authorized. Under Title III, officers may use evidence obtained through electronic surveillance if they first obtain a court order authorized under the statute.

In 1968, when Congress enacted Title III, many of the technologies which are commonplace today did not exist. Congress eventually extended privacy protections to more

modern, advanced technologies when it passed the Electronic Communications Privacy Act of 1986 (ECPA). In the ECPA, Congress added “electronic communications” as a third category of communications to have its interception regulated by Title III. Where Title III had been limited to voice communications, whether face-to-face or over a wire, the ECPA extended Title III to include non-verbal communications such as text messages and chat messages that occur over computers, facsimile machines, cellular telephones, and other electronic devices.

### 15.2.1 When a Title III Court Order is Required

Title 18, United States Code, Section 2510 et seq., often referenced as “Title III” or “T III,” prohibits the warrantless non-consensual interception of live (real time) wire or electronic communications, as well as the interception of live oral communications in which one or more of the participants in such communications has a REP. Such intercepts may be lawfully done only with a Title III court order.

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

- Oral communications: Those spoken by a person who exhibits an expectation of privacy when speaking. Oral communication means directly from the speaker to the listener’s ear.
- Wire communications: The transfer of the human voice via a wire, cable, or “other like connection” even if there is no REP. An example of a wire communication would be the digitized human voice transmitted over a phone line, network, video teleconference, the Internet, or

other similar medium.

- **Electronic communication:** The transfer of any other communication and/or data via a wire, cable, or “other like connection” even if there is no REP. Text messages, e-mail and facsimile transmissions are examples of such data that are transferred by way of an electronic communication.

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

The Courts have interpreted the term “interception” to mean a real time interception. Thus, Title III would be applicable to wire and electronic communications only if the interception of such communications occurs during the “live” or “real-time” transmission of the communication. As to oral communications, there is no interception unless done with a “device” while the communication is being made. A device is anything other than the human ear.

The general rule is that Title III does not apply to any oral communications overheard with the unaided human ear while the listener is in a place where they have the right to be. Hearings aids set to correct subnormal hearing to normal are excluded from the definition of “device.”

Another exception to the application of Title III to intercepted communications is where at least one party to the communication has consented to the interception. This

exception applies regardless of whether the intercepted communication is oral, by wire, or electronic.

## 15.2.2 How to Obtain a Title III Court Order

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

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

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

### b. Enumerated Crimes Requirement

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

#### 1. Wire or Oral Communications

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

#### 2. Electronic Communications

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



c. Authorization to Apply for a Title III Court Order

Before an agent or officer submits an application for a Title III court order to the appropriate judge, the application should first be reviewed and approved by the United States Attorney in the district where the intercept will occur. (Department of Justice policies require an AUSA review for all Title III applications.) Final approval of the application must come from an appropriate Department of Justice official designated by the U.S. Attorney General. Usually, that will be the Assistant Attorney General or the Deputy Assistant Attorney General for the Criminal Division.

1. Wire or Oral Communications

Under 18 U.S.C. § 2516(1), the designated Department of Justice official must first review and authorize any application requesting permission to intercept wire or oral communications without the consent of one or more parties to the conversation. This requirement is to ensure this powerful investigative tool is used with restraint and only where the circumstances warrant it.

2. Electronic Communications

Under 18 U.S.C. § 2516(3), any government attorney may authorize a Title III application to intercept electronic communications in the investigation of any federal felony. Under Department of Justice policy, however, the approval of the Assistant Attorney General (or the Deputy AAG) for its Criminal Division is required before a criminal investigator may apply to a judge to intercept other electronic communications over any other device, such as computers and facsimile machines. For a Title III of a digital pager, however, only the approval of an AUSA is required.

#### d. Contents of the Application

Under 18 U.S.C. § 2518, each application for a Title III court order must contain specific information before a court may authorize the interception. In addition to being in writing, under oath, and signed by either the United States Attorney or an Assistant United States Attorney, the application must contain the following:

##### 1. Identity

The application must contain the identity of the investigative or law enforcement officer making the application, as well as the DOJ official who authorized it. 18 U.S.C. § 2518(1)(a). Failure to include the name of the DOJ official could potentially lead to suppression of all evidence derived from the Title III order.

##### 2. Statement of Facts and Circumstances

18 U.S.C. § 2518(1)(b) requires a full and complete statement by the applicant of the facts and circumstances relied upon to justify the applicant's belief a Title III court order should be issued. The applicant's statement must demonstrate probable cause that the evidence sought will be obtained through the use of the proposed surveillance. This statement must include the following information:

- Details about the particular offense that has been, is being, or is about to be committed;
- A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;
- A particular description of the type of communications sought to be intercepted; and

- The identity of the individuals, if known, committing the offense and whose communications are to be intercepted. The Supreme Court requires a Title III application identify (1) the names of all individuals as to whom the government's evidence shows probable cause they are engaged in the criminal activity under investigation and (2) whose conversations the government expects to intercept. Additionally, it is the policy of the Department of Justice to "name as subjects all persons whose involvement in the alleged offenses is indicated." Criminal Resources Manual at 28; See also Justice Manual, Chapter 9,

### 3. Necessity Statement

Under 18 U.S.C. § 2518(1)(c), a Title III application must contain a full and complete statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or would be too dangerous. This section is sometimes referred to as the "necessity statement" and means the interception must be shown to be necessary to the investigation of the case. This section was designed to assure wiretapping is not conducted where traditional investigative techniques would suffice to expose the crime under investigation. It is not necessary, however, that the Government attempt or exhaust all conceivable investigative techniques before resorting to electronic surveillance. The statute only requires the authorizing judicial officer be made aware of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods in that investigation. Practically speaking, do not use "canned" or "standardized" responses when explaining why you have not attempted a technique or why a technique has not allowed you to meet your investigatory goals. Your responses must be individualized based upon your case; otherwise, all evidence derived from the Title III could be subject to suppression.

#### 4. Time Period

The application must contain a statement of the period of time for the wiretap. 18 U.S.C. § 2518(1)(d). Under 18 U.S.C. § 2518(5), Title III court orders are valid only for the period necessary to achieve the objective of the authorization, but in no event longer than 30 days. This 30-day period begins on the earlier of either (1) the day on which the investigative or law enforcement officer begins to conduct an interception under the order, or (2) ten days after the order is issued, whichever occurs first. This 10-day period is intended primarily for the installation of whatever device will be used to conduct the interceptions. Extensions of the 30-day period are permissible, but only after again meeting the requirements of the initial Title III application. Further, where the Title III application is for an extension of a previously approved order, the application “must include a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.” 18 U.S.C. § 2518(1)(f).

#### 5. Statement Regarding Previous Applications

Under 18 U.S.C. § 2518(1)(e), a Title III application must also contain a full and complete statement of the facts surrounding all previous Title III applications known to the individual authorizing and making the application that involved any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each of these previous applications. Such information is recorded in electronic surveillance indexes maintained by Department of Justice and its law enforcement agencies and may be accessed by an appropriate representative of an agency for use in a Title III application. This is commonly referred to as an ELSUR check, and it is one of the last things a law enforcement officer does before submitting the affidavit.

## 6. Minimization Statement

A Title III application should also contain a statement that the surveillance, if approved, will be “conducted in such a way as to minimize the interception of communications not otherwise subject to interception.” 18 U.S.C. § 2518(5). In determining compliance with this requirement, courts look to the “totality of the circumstances” to see if the minimization effort was reasonable.

Among the factors the courts have considered in determining whether the minimization efforts are reasonable are: “(1) whether a large number of the calls are very short, one-time only, or in guarded or coded language; (2) the breadth of the investigation underlying the need for the wiretap; (3) whether the phone is public or private; and (4) whether the non-minimized calls occurred early in the surveillance; . . . [and] (5) the extent to which the authorizing judge supervised the ongoing wiretap.” United States v. Yarbrough, 527 F.3d 1092 (10th Cir. 2008) (citing Scott v. United States, 436 U.S. 128 (1978)). Where the government fails to adequately minimize the electronic surveillance, any evidence obtained from those impermissible intercepts may be suppressed; however, errors in minimizing one portion of an interception do not automatically result in the suppression of all the evidence obtained through the use of electronic surveillance. Instead, suppression of all electronic surveillance is proper only where the defendant demonstrates the entire surveillance was tainted by the impermissible intercepts.

## 7. Request for Covert Entry

The Department of Justice requires Title III applications specifically contain a request for permission to surreptitiously enter to install, maintain, and remove electronic surveillance devices. Justice Manual, Chapter 9, Criminal Resources Manual at 28. Note the Supreme Court has held a Title III

application does not have to contain a specific request for permission to covertly enter a location to install, maintain, and remove surveillance devices because “[t]hose considering the surveillance legislation (i.e., Congress) understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries.” Dalia v. United States, 441 U.S. 238 (1979). Nevertheless, Department of Justice policy requires that a Title III application include a request for covert entry.

e. Who May Issue a Title III Court Order?

A Title III order may only be issued by a United States District Court Judge or a United States Circuit Court of Appeals Judge. 18 U.S.C. § 2510(9). United States Magistrate Judges are not authorized to issue a Title III order.

### 15.2.3 Interceptions Exempted from Title III

Not all interceptions of wire, oral, or electronic communications require a Title III court order. Two of the most important exemptions to the requirements of Title III involve situations where (1) no REP exists in an oral communication, and (2) at least one of the parties to the conversation has given consent to intercept the communication (sometimes referenced as “consensual monitoring”).

a. No Reasonable Expectation of Privacy

In Katz, the Supreme Court established the standard for determining whether a REP exists. The test is two-pronged: first, the individual must have exhibited an actual (subjective) expectation of privacy. Second, that expectation must be one that society is prepared to recognize as objectively reasonable. If either prong fails, then no REP exists. An “oral communication” is defined in 18 U.S.C. § 2510(2) as one

“uttered by a person exhibiting an expectation of privacy that such communication is not subject to interception under circumstances justifying such expectation...” The legislative history of Title III indicates that Congress intended this definition to parallel the Katz “reasonable expectation of privacy” test.

Generally, there is no REP in a conversation that can be overheard from a location where the interceptor has a legal right to be and where the interceptor uses only their unaided ear. As noted by the Supreme Court in Katz, “[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.” Accordingly, if two individuals have a conversation in a public restaurant and speak loudly enough for others in the restaurant to overhear their conversation, they would have no REP as to their conversation. On the other hand, there would be a reasonable expectation of privacy if two individuals were talking quietly in a hotel room and their conversation could not be heard from outside the room.

Finally, even though a speaker may subjectively intend for their conversation to remain private, that speaker has no objectively reasonable expectation the person to whom he is speaking will not later reveal the contents of the conversation. There is only a reasonable expectation of privacy as long as both parties expect it. If, however, one party to the conversation decides to reveal the contents of the conversation, the other party has no “right to privacy” preventing its disclosure. So, if an individual engages in conversation with another, the individual does so at his own peril. An expectation of privacy does not attach to a “wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in

the conditions of human society.” Hoffa v. United States, 385 U.S. 293 (1966).

This requirement of an expectation of privacy only applies to oral communications. As stated earlier, the statute does not include the requirement of a demonstrated reasonable expectation of privacy for wire and electronic communications to be subject to Title III. Congress intended to prohibit the non-consensual interception of wire and electronic communications regardless of the communicating parties’ expectation of privacy. See Justice Manual, Chapter 9-7.301.

#### b. Consensual Monitoring

18 U.S.C. § 2511(2)(c) “permits government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications, as well as oral and electronic communications.” Justice Manual, Chapter 9-7.301. The consent must be given voluntarily, without physical coercion or duress. The Attorney General established guidelines for the investigative use of consensual monitoring by law enforcement agencies within the Executive Branch. The most recent version of these guidelines were promulgated by the Attorney General on May 30, 2002, and are set forth in the Justice Manual, Chapter 9-7.302 (Updated June 2018). The following is a general summary of those guidelines. Law enforcement officers must become familiar, however, with the particular requirements of their agency regarding this issue.

##### 1. Written Approval Required in Certain Cases

In certain sensitive or high-visibility cases, the Department of Justice requires written approval before an oral communication can be monitored without the consent of all parties to the communication. This requirement would apply, for example, when the monitoring relates to the investigation



of a congressman, federal judge, governor or lieutenant governor of a state or territory, etc. This requirement includes persons who served in that capacity two years prior.

## 2. Prior AUSA Advice to Monitor Conversations

Current Department of Justice policy requires that, prior to approval of any consensual face-to-face monitoring by the head of a department or agency or their designee, a designated representative of that department or agency must obtain oral or written advice from the Assistant U.S. Attorney or Department of Justice attorney responsible for that particular investigation. Such contact, consent, advice, or approval is not required prior to the consensual monitoring of telephone or radio communications.

### c. Special Limitations on Consensual Monitoring

Questions often arise during consensual monitoring concerning where the monitoring device may be located and when that device may be property monitored. Some general discussion of these issues is outlined in the Justice Manual:

When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects of the consenting party, or in a fixed location. When engaging in consensual monitoring, the law enforcement agency involved must ensure that the consenting party will be present at all times when the device is operating.

#### 1. Device Located on the Person

Officers may place the monitoring device on the consenting person. If the monitoring device is so placed, the party (be it

an undercover agent or confidential informant) may record any conversations that they have with the suspect.

## 2. Device in a Fixed Location

It is not legally required that a monitoring device be placed on the consenting person. In many instances, it may be more tactically advisable to place the device in a specific, fixed location, for example, a hotel room where a confidential informant and the suspect are to meet.

When the device is placed in a fixed location, officers need to consider two important issues. First, does the government need to obtain a warrant for the installation of the device? When a confidential informant rents a hotel room and consents to having the device placed in the room, no warrant would be required for the installation. On the other hand, if the operational plan is to install the device within the REP of a non-consenting person, the government will need a court order to do so.

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

### d. Electronic Communications Exempt from Title III

Though ECPA extended Title III protections to "electronic communications," certain types of communications were specifically excluded from this protection. Accordingly, a Title III court order is not required to intercept the following types of electronic communications:

- **Tone-Only Pagers.** 18 U.S.C. § 2510(12)(B).
- **Tracking Devices, Beepers and Transponders.** 18 U.S.C. § 2510(12)(C). Tracking devices are defined in 18 U.S.C. § 3117 and include GPS devices.
- **Video-Only Surveillance.** The use of video-only surveillance is not regulated by Title III but is regulated by the Fourth Amendment.
- **General Public Communications.** General public communications that are easily received by the public, such as AM/FM radio station broadcasts, and citizen band radio transmissions.

### **15.3 Electronic Tracking Devices: Applicable Law**

18 U.S.C. § 3117 regulates the use of mobile tracking devices and defines a tracking device as “an electronic or mechanical device which permits the tracking of the movement of a person or object.” Electronic tracking devices serve an important law enforcement function by allowing law enforcement officers to track and monitor the movements of suspects or objects from a distance, thereby reducing the possibility of detection. Three of the most commonly used tracking devices are “beepers,” “transponders,” and GPS devices. A “beeper” is a radio transmitter which emits periodic signals that can be picked up by radio receiver. Similar to a beeper in many respects, a “transponder” is most often used to track the location of aircraft.

As Congress specifically excluded electronic tracking devices from Title III, the Fourth Amendment regulates their installation and monitoring. Accordingly, in order to determine if a warrant will be required to either install or monitor a tracking device, a Fourth Amendment analysis is needed. Hence, a law enforcement officer must first determine

whether the installation or monitoring of a tracking device constitutes a “search” under the Fourth Amendment.

In 2012, the Supreme Court issued a landmark decision redefining what constitutes a “search” under the Fourth Amendment. In United States v. Jones, 565 U.S. 400 (2012), the Supreme Court retained the Katz definition of a search (with its focus on “privacy”), but also reinstated the traditional definition of a search based on a trespass to a specifically enumerated area of Constitutional protection (persons, houses, papers, and effects). The Supreme Court held agents are required to obtain a Fourth Amendment warrant before installing an electronic tracking device onto a suspect’s vehicle. While this case is more fully discussed in the Fourth Amendment chapter, it is important to mention here because of the significant impact it had on the installation and monitoring of tracking devices.

### 15.3.1 The “Trespass” Definition of Search

As a result of Jones, there are two ways for government action to trigger a “search” under the Fourth Amendment. The Katz definition of search is still valid, so a government intrusion into an area where a person has REP for the purpose of gathering information is a search. But the Court in Jones also added a companion definition for a Fourth Amendment “search,” when there is a physical intrusion by the government into a “constitutionally protected area” for the purpose of gathering information. The constitutionally protected areas are “persons, houses, paper, and effects.”

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

For the installation of a tracking device to constitute a Jones search, it must have been installed with the intent to be monitored. This is because Jones required both a physical trespass coupled with the purpose of gathering information. These circumstances are almost always a given with trackers. Under a Jones search analysis as applied to GPS tracking devices on vehicles, the installation is where the physical intrusion takes place, and the monitoring provides the requisite intent to gather information.

In determining whether the installation of the tracking device constitutes a physical intrusion into a constitutionally protected area, there are two questions that must be answered. First, is the area intruded upon a person, house, paper, or effect? In other words, is it a constitutionally protected area as set out in the Fourth Amendment? If the answer is “no,” then there is no Jones search under the calculus. If the answer is “yes,” then the officer must answer the second question: Does the person who is raising the issue have “possession” of the object to which the tracking device was affixed at the time it was affixed?

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

For example, assume there is a confidential informant named Bob and Bob owns a nice car that is often admired by Tim. Federal agents believe Tim is involved in activity that violates federal criminal law and they want to track him. The federal agents get Bob’s consent to install a tracking device in Bob’s car, and Bob agrees to loan his car to Tim without telling Tim

the tracking device is in the car. This would not constitute a Jones search since the installation occurred before Tim acquired a possessory right to the vehicle.

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

### 15.3.2 The “Privacy” Definition of Search

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

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

### 15.3.3 Installation of an Electronic Tracking Device

In deciding whether an electronic tracking device was legally installed, courts utilize a Fourth Amendment analysis focusing on whether installation of the device constitutes a search. Hence, under Katz, the law enforcement officer must ask if there is an intrusion into a protected REP area during

the installation. If there is, the officer must have a warrant or a recognized warrant exception; if not, no warrant is required under the Katz analysis. As explained above, there are two ways to have a “search” under the Fourth Amendment.

a. Vehicles

When determining whether the installation of a tracking device under Katz triggers Fourth Amendment protection, the first question is: Did the installation occur while the suspect had a possessory right to the vehicle? If the installation occurs before the suspect acquires the right to use the vehicle, the suspect had no REP in the vehicle and no warrant is required for the installation under the Katz analysis. If the installation of the tracking device occurs after the suspect acquires the right to use the vehicle, then there is a REP, and a warrant or recognized warrant exception would be required for the installation.

The physical intrusion (installation of the tracking device) into the constitutionally protected REP area (the vehicle) must be coupled with purpose of gathering information (actually monitoring the movement of the vehicle) in order to trigger Fourth Amendment protection. In other words, the installation of a tracking device alone does not necessarily constitute a Katz search.

b. Other Types of Property

The same two search analyses apply to installing tracking devices on other types of property as well. First, is there a physical intrusion by the government into a constitutionally protected area for the purpose of gathering information? Second, is there a government intrusion into an area where a person has a reasonable expectation of privacy for the purpose of gathering information? If the answer is “yes” to either question, then the government action is a “search” under the

Fourth Amendment and the law enforcement officer must obtain a warrant.

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

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

#### 15.3.4 Monitoring of an Electronic Tracking Device

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

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

If the installation of the device occurs before the suspect acquires a possessory interest in the item being tracked, then



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

a. Areas with No REP

When an electronic tracking device is located in an area where there is no REP, Fourth Amendment protections are usually not triggered in the monitoring. For example, if a device is lawfully installed onto a vehicle, an officer may monitor the device while the vehicle is traveling on public streets and highways. In these sort of cases, a defendant's movements are open to visual surveillance by anyone who wishes to look, including the government. For this reason, a defendant has no reasonable expectation that their movements on a public thoroughfare will not be observed. United States v. Knotts, 460 U.S. 276 (1983).

This rule from Knotts, while technically still good law, is subject to ongoing dispute. The Supreme Court held in Carpenter v. United States, 585 U.S. 296 (2018), that a person can, in fact, have a REP in the "whole of his physical movements," regardless of whether such movement was in public or private. This case will be discussed in more detail below, but for now it will suffice to state tracking an individual for seven days or more may in fact suggest REP and trigger the Fourth Amendment. The total amount of days a person is tracked is being considered a factor in evaluating REP.

b. Areas with REP

In contrast, when an electronic tracking device is located in an area not open to visual surveillance and where a reasonable expectation of privacy exists, such as inside a home, the Fourth Amendment protections apply in the monitoring of the device, and a warrant (or consent) is required.

In these types of cases, the monitoring of the device reveals aspects of the home that could not be observed through traditional visual surveillance. For example, while an officer may observe the object to which a beeper is attached enter a home, the later monitoring of the device in the home not only verifies the officer's observations, but also establishes the object remains on the premises, a fact not verifiable by visual surveillance. Because it is often difficult to determine where an object containing an electronic tracking device will ultimately come to rest, and since it may become critical to monitor the device to determine it is actually located in a place not open to visual surveillance, the Supreme Court has stated that warrants for the installation and monitoring of an electronic tracking device are desirable. United States v. Karo, 468 U.S. 705 (1984).

15.3.5 United States v. Jones Concurring Opinions and Carpenter

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

In the concurring opinion of Jones written by Justice Alito (in which three other Justices joined), Justice Alito would have held the actions of the government in Jones to be a search because the extended 24/7 tracking violated Jones's REP in such extended monitoring. In other words, four of the nine

Justices believed that at some point a person develops REP in their movement in public places when they are being continuously tracked. Although Justice Alito did not state exactly when this line would be crossed and a warrant would be required, he stated that the line “was surely crossed before the 4-week mark.” Again, this was the minority opinion and therefore did not establish a rule of law.

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

This case presented itself to the Court in Carpenter v. United States. A majority of the Supreme Court cited to these Jones concurrences in holding the continuous tracking of the movements of a suspect for even just seven (7) days required a search warrant. In that case, Carpenter was tracked by his cell phone and the use of Cell Site Location Information (CSLI). The Court determined individuals have a “reasonable expectation of privacy in the whole of their physical movements,” and continuous monitoring, even in public locations, even by third parties, constitutes a search under the Fourth Amendment which requires a warrant or a recognized warrant exception.

Unfortunately, the Court did not address the magic line as to when exactly a person develops REP in the “whole of physical movements” but was satisfied that at least seven days was sufficient. Hence, it is possible that even continuous tracking for six (6) or less days may trigger the Fourth Amendment. Therefore, for the time being, it is likely LEOs will be asked to secure a warrant much more often than previously until this new rule is more settled. (Even Department of Justice

guidelines have urged when probable cause can be established, get a warrant to obtain any amount of CSLI.)

a. Warrants for Tracking Devices

There is a process for obtaining warrants to install and monitor a tracking device. Rule 41 of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) provides process to obtain a tracking warrant. Specifically, Fed. R. Crim. P. 41(e)(2)(B) and 41(f)(2) address warrants for tracking devices.

Generally, Fed. R. Crim. P. 41 states:

A magistrate judge in the district where the device will be installed may issue a warrant to install a tracking device. The issuing magistrate judge may authorize tracking in the district where the device will be installed, another district, or both, and the warrant must contain the following:

- Identity of the person or property to be tracked.
- Identity of the magistrate judge to whom the return on the warrant will be made.
- A reasonable period of time that the device may be used. (The time will not exceed 45 days. Extensions for not more than 45 days may be granted for good cause shown.)
- A command that the device be installed within 10 days or less from the time the warrant is issued, and during the daytime, unless the magistrate for good cause shown authorizes another time.
- A command there shall be a return on the warrant.

The officer executing the warrant must make the return to the magistrate judge specified in the warrant. The return must contain the exact dates and times of both the installing of the device and the period in which it was used. The return must be served on the person who was tracked, or whose property was tracked, within ten days after use of the device has ended. Upon request of the government, the magistrate judge may delay providing the notice required by the return.

### 15.3.6 Tracking Mobile Telephones

In recent years, advances in technology have made it possible to “track” the approximate location of anyone in possession of a power-on cell phone by obtaining real time cell site data from a cell phone service provider. At a minimum, such data will identify the single cell tower that with which the cell phone would communicate if an actual call were placed at a given time. The cell phone companies also have the capability using data from multiple cell sites to triangulate a nearly exact location of a cell phone.

Tracking a person by use of cell site data will require at a minimum a “2703(d) order”. This is named after the code section that specifies its uses, 18 U.S.C. § 2703(d). However, as discussed above, under the Carpenter decision, the tracking of a person for seven (7) days or more requires a warrant or recognized exception, therefore a LEO must exercise great caution using a 2703(d) for such tracking from here on out. It is not clear if it is permissible to track a person in public places for less than seven (7) days using a pen register and trap and trace order with cell site location. An AUSA assigned to each case should be contacted for guidance on this issue.

## 15.4 Pen Registers and Trap and Trace Devices

Pen registers and trap and trace devices are not regulated by Title III. Rather, use of such devices is subject to the provisions of 18 U.S.C. §§ 3121 – 3127.

### 15.4.1 Definitions and Purposes

#### a. Pen Registers

The U.S. Code definition of a pen register is a “device which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such communication shall not include the contents of any communications . . . .” 18 U.S.C. § 3127(3).

To put it simply, a pen register captures all numbers that are being dialed out from a specific telephone line (allowing the interceptor to learn what numbers a suspect is calling from that telephone). Pen registers can also be used to capture the email addresses from an email sent by a target. Pen registers do not reveal the contents of the phone conversation or email.

#### b. Trap and Trace Devices

The U.S. Code definition of a trap and trace is “a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication provided, however, that such information shall not include the contents of any communication.” 18 U.S.C. § 3127(4).

Trap and trace devices capture all numbers that are coming into a specified telephone line and allows the interceptor to

learn where telephone calls to the targeted phone are originating from. They can also be used to capture the email addresses of those who send emails to the target. A trap and trace does not reveal the content of the conversation or email.

#### 15.4.2 Applicable Federal Statutes

The statutes governing pen registers and trap and trace devices are contained at 18 U.S.C. §§ 3121–27. These devices are not regulated by Title III, and the Supreme Court has held the use of pen registers and trap and trace devices does not implicate the Fourth Amendment because there is no actual expectation of privacy in phone numbers dialed. Smith v. Maryland, 442 U.S. 735 (1979). Instead, the general rule regarding the use of pen registers and trap and trace devices is contained at 18 U.S.C. § 3121(a), which provides that “no person may install or use a pen register or trap and trace device without first obtaining a court order under section 3123.” These court orders are often called Pen Register court orders, or Trap and Trace court orders, or PRTT court orders (Pen Register Trap and Trace).

#### 15.4.3 Obtaining a Court Order

There are a number of procedural steps to obtain a court order to use a pen register or trap and trace device. First, an “attorney for the government” must make the application for the court order, not the individual law enforcement officer. Second, the application must be in writing, under oath, and directed to a United States Magistrate Court, United States District Court, or United States Circuit Court of Appeals. Third, the application must include the following three pieces of information:

- The identity of the attorney for the government who is making the application;

- The identity of the law enforcement agency conducting the investigation; and
- A certification by the attorney for the government the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency. 18 U.S.C. § 3122(b).

If these procedural steps are followed, a court order may be issued authorizing installation and use of a pen register or trap and trace device anywhere within the United States. This court order cannot exceed sixty days, although extensions of sixty (60) days may be granted if the initial requirements for issuing the court order are again met.

It is a criminal offense to obtain evidence that required a pen or trap order without the required court order, however it will not result in suppression of the evidence on Fourth Amendment exclusionary rule grounds.

### **15.5 Video-Only Surveillance in an Area With REP**

Using video-only surveillance to record activity in an area where a reasonable expectation of privacy exists is governed by the Fourth Amendment, not Title III. Before either installing a video-camera or using it to record a suspect's actions, officers must determine if a search warrant or consent is required. A search warrant, or recognized exception (or consent) is required if the officer needs to enter into a home or enter onto the curtilage of the home to install a camera. If the officer installs a video camera in a public location in order to observe activities in the curtilage of a target's home, the officers will have to determine if the target has a reasonable expectation of privacy in the part of the curtilage the camera is observing.



The courts have not clearly established what is required to develop REP in the curtilage of the home. One factor many courts have considered relevant is whether steps have been taken to block the view of the curtilage from public view. For example, the government may need a search warrant (or consent) if they want to record activity occurring in the home or in the curtilage when the target of the investigation has REP and law enforcement uses an elevated camera to see over and into the curtilage in a manner that is not visible from the street. But if the device is installed in an area where there is no REP and it monitors activities where there is no REP, no search warrant is required. For example, installing the camera in the neighbor's second story window (with consent of the neighbor), or the next block over on an elevated street, where any pedestrian could see over the privacy fence of the target.

While recognizing Title III does not govern the use of video-only surveillance in unprotected areas, many federal courts have adopted rules requiring search warrants for video-only surveillance to meet a higher Title III-like standard. Specifically, six federal circuit courts also require the following information be included in a search warrant for video-only surveillance:

- A factual statement alternative investigative methods have been tried and failed or reasonably appear to be unlikely to succeed if tried or would be too dangerous;
- A statement of the steps to be taken to assure the surveillance will be minimized to effectuate only the purposes for which the order is issued;
- A particularized description of the premises to be surveilled;
- A statement of the duration of the order, which shall not be longer than necessary to achieve the objective of the

authorization, nor, in any event, longer than thirty days, measured from the date of the order (with thirty-day extension periods possible); and

- The names of the persons to be surveilled, if known.

Department of Justice policy also requires the investigative agency seeking to use court-ordered video surveillance obtain approval from the appropriate Department of Justice official prior to obtaining a court order for video-only surveillance in areas where REP exists. Justice Manual, Chapter 9-7.200.

## 15.6 Stored Electronic Communications

The Electronic Communications Privacy Act of 1986 (ECPA), found at 18 U.S.C. § 2510, was enacted by Congress to extend government restrictions on the interception of telephone calls to include transmissions of electronic data by computer. Specifically, ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which was primarily designed to prevent unauthorized real time interception by the government of private oral, wire, and electronic communications.

The ECPA also contains the Stored Communications Act (SCA), found at 18 U.S.C. §§ 2701-2712, that controls government access to electronic communications that have been stored by publicly accessible internet service providers (ISP), such as Google, Yahoo, and Comcast. Electronic mail (email) stored on a network server is the primary example of a stored communication. While this portion of the statute is unusually complicated, it may be simplified into two basic questions:

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

ISP to disclose the type of information being sought?

### 15.6.1 Classifying the Information Being Sought

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

#### a. Basic Subscriber Information

18 U.S.C. § 2703(c)(2) provides that “basic subscriber information” includes the following: “Name; address; local and long distance telephone connection records, or records of session times and durations; length of service (including start date) and types of services utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service.”

#### b. Transactional Records

18 U.S.C. § 2703(c)(1)(A) defines “transactional records” as “record[s] or other information pertaining to a subscriber to or customer of such service (not including the contents of communications . . . .)” In short, such information relates to how the internet service subscriber uses their account. Described by many as a “catch-all” category, transactional records include “only historical data involving past activity on the account.” Examples of “transactional records” include:

- Web sites visited by the customer or subscriber;
- Cell-site data for cellular telephone calls; (But keep in mind Carpenter and check with your local AUSA for

guidance); and

- Email addresses of other individuals with whom the account holder has corresponded (e.g., those who have sent email to, or received email from, the customer or subscriber).

c. Contents

The “contents” of a network account includes the actual files stored in the account, for example, the actual text contained within an email and attachments to the email. According to statute, “contents” includes “any information concerning the substance, purport, or meaning of that communication.” That would also include any data in the subject line of an email.

Although the statute states that the contents of some emails can be obtained without a search warrant, United States v. Warshak, 631 F.3d 266 (6th Cir. 2010), ruled that this section was unconstitutional. The Supreme Court cited favorably to Warshak in Carpenter, making it applicable across the nation. Therefore, the contents of any stored communications can only be obtained with a search warrant.

It is important to remember this provision applies only to “stored electronic communications.” That term is defined in the statute as “any temporary, intermediate storage of a wire or electronic communication incidental to electronic transmission thereof,” and then only when held by the email provider. 18 U.S.C. § 2510(17). So, while a target may store emails on a home computer, they do not fall into the definition of a stored electronic communication because it does not meet the criteria above.

## 15.6.2 Obtaining Stored Electronic Communications

Three types of documents may be used to compel disclosure of the information listed above: (1) search warrants; (2) 18 U.S.C. § 2703(d) court orders; and (3) subpoenas. The choice of which document is appropriate will depend upon the type of information sought. While the consent of the customer or subscriber may always be obtained, often consent is not sought for tactical reasons. Listed below are the minimum legal methods to compel an ISP to disclose information. Of course, officers may always use a more stringent method to access information that could have been obtained with a “lesser” form of process. For example, the government may obtain a search warrant to compel the production of certain information, even if a § 2703(d) court order or subpoena would suffice.

### a. Basic Subscriber Information – Subpoena

Only a subpoena is required to obtain “basic subscriber information” from an ISP. 18 U.S.C. § 2703(c)(2). When such information is obtained using a subpoena, the government is not required to provide notice to the subscriber or customer. The subpoena may be issued by a federal grand jury or a federal trial court or may be an administrative subpoena authorized by a federal statute, such as 6(a)(4) of the Inspector General Act.

### b. Transactional Records – Court Order

To obtain “transactional records,” the government must, at a minimum, use a court order issued pursuant to 18 U.S.C. § 2703(d). Either a United States Magistrate Judge, United States District Court Judge, or United States Circuit Court of Appeals Judge may issue a § 2703(d) court order. To obtain a 2703(d) order, the government must “offer specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic information, or

the records or other information sought, are ‘relevant and material’ to an ongoing criminal investigation.” The government is not required to provide prior notice to the customer or subscriber before requiring the ISP to disclose the records sought pursuant to a § 2703(d) order.

c. Contents – Search Warrant

The government may require an ISP to provide the actual contents of wire or electronic communications held in storage. Content includes the subject line as well as the body of an email. To require an ISP to disclose the contents of a wire or electronic communication, the officer must obtain a search warrant.

When using a search warrant, the officer is not required to give prior notice to the customer or subscriber. Further, the officer may apply for a court order to prohibit the ISP from notifying the customer or subscriber of the existence of the warrant. If the court determines notification would result in an “adverse result,” a request for delayed notice will be approved. This includes endangering the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial. 18 U.S.C. § 2705(b). There is no specified period established in the statute for how long an ISP may be required to delay notice to the customer. Instead, the statute provides such an order may be issued “for such period as the court deems appropriate.”

### 15.6.3 Preservation Letters

There is no requirement under the law that internet service providers retain the emails of their customers for any specific period of time. Thus, there is the danger that, between the

time when the officer's need for the emails becomes apparent and an order is issued, those emails could be destroyed.

To guard against the deletion or other destruction of email evidence by an ISP before an order or other legal process can be obtained, 18 U.S.C. § 2703(f) authorizes a government agency to issue a preservation letter to that ISP. Generally, Preservation letters should be issued on government agency stationery by an agency supervisor. Once served with a preservation letter, the statute requires the ISP "shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." The statute further requires the ISP to retain the records for a period of ninety days, with a ninety-day extension possible upon a renewed request by the government. The law is not prospective, meaning once the ISP receives a preservation letter and makes a copy of initial files requested, emails received after that time would not be captured unless specifically noted in the warrant.

#### 15.6.4 Multi-Jurisdiction Warrants

Ordinarily, a search warrant may only be issued by a judge in the district where the evidence that is subject to seizure is located. This could present a problem with a warrant for stored electronic communications because even a single ISP may store emails on servers in more than one district. For this reason, 18 U.S.C. § 2703(a) authorizes any federal court with "jurisdiction over the offense under investigation" to issue a warrant that is effective in all districts where such evidence is located. Therefore, an agent can present a search warrant to any magistrate judge in a district where part of the crime is occurring (or has occurred). The agent can then present the search warrant electronically to the electronic communications provider who must comply with it.

The search warrant for stored electronic communications is valid even if the stored information is located outside the United States, though the agent should consult with an AUSA in order to properly comply with the CLOUD Act for information sought from outside of the United States. As long as the United States has jurisdiction over the company that provides the communication service (like the email service provider), the company must comply with the search warrant.

However, electronically stored data that is not sent incidental to an electronic communication held within the purview of the provider cannot be obtained through the use of a multi-jurisdictional warrant. A search warrant for such data would need to be obtained from a judge in the district where the data is located. Determining the data's location can be an entire investigation of its own. For example, if a suspect stores information on their own network that had computers in different districts, agents would have to obtain a search warrant from the district the data (i.e. the computer) is located.

## 15.7 Searching Computers Without a Warrant

The Fourth Amendment requires that all searches must be reasonable, and any search based upon a search warrant be based upon sworn facts showing probable cause to search a particular place or to seize a person or thing. Searches of computers and other electronic devices must therefore comply with the Fourth Amendment's requirements.

A warrant to search a computer must demonstrate probable cause that evidence of a crime is stored on the particular computer to be searched. In executing a computer search warrant, the officer must take reasonable steps to confine the search to the scope of the search authorized by the warrant and to avoid searching for items or information not within that scope; however, while doing so, if the officer observes evidence



that is immediately apparent as evidence of another crime, the officer may seize it under the plain view doctrine.

Searching a computer without a warrant is legally permissible in one of three situations: (1) when the search is conducted by a private (non-governmental) entity; (2) when government conduct does not intrude into an area where an individual has a “reasonable expectation of privacy” (REP); or (3) when a recognized exception to the warrant requirement exists.

### 15.7.1 Private Searches

The Fourth Amendment does not apply to a search conducted by a private person who is not acting as an agent of the government or with the participation or encouragement of a government official. For example, when a computer owner takes their computer to a private repair facility for servicing and incriminating evidence is found on the computer by the repair person, the Fourth Amendment does not apply because there was no intrusion into an REP area.

When searching without a warrant after a private search has occurred, the officer must limit the investigative search to the precise scope of the private search. Even though it was obtained without a warrant, the evidence within that scope may be properly used by the government to obtain a warrant for a further search of that computer. Moreover, the government may temporarily seize that computer while it is actively seeking a search warrant. Of course, the officer could also conduct a warrantless search of that computer if a valid exception to the warrant requirement applies.

### 15.7.2 REP in Computers

There is a two-prong REP test for any place to be searched: first, whether the individual exhibited a personal, or subjective, expectation of privacy as to the place or thing to be

searched; and, second, whether that expectation is one society is prepared to recognize as objectively reasonable. REP does not exist unless both prongs of the test are met.

In computer search cases, the question is whether an individual enjoys a reasonable expectation of privacy in electronic information stored on computers, smart phones, thumb drives, and other electronic storage media. If the answer is “yes,” then the officer ordinarily must obtain a warrant before accessing the information. In analyzing the issue of REP, some courts have compared computers to closed containers such as filing cabinets.

To be sure, the Fourth Amendment generally prohibits the government from accessing and viewing information stored in a computer without a warrant if, in the same situation, an officer would be prohibited from opening a closed container and examining the contents. That stated, however, a few courts have recently begun veering away from that concept noting that a computer, given its design and purpose, very likely contains vast quantities of personal data. Thus, those courts have, to varying degrees, required the government to ensure that it takes reasonable steps to insure that the execution of a computer search remains within the scope of the search authorized by the underlying search warrant.

### 15.7.3 Losing REP in Computers

Although individuals generally have a reasonable expectation of privacy in their computers, circumstances may eliminate that expectation. Some of these circumstances are outlined below.

#### a. Exposure to the Public

In the landmark case of Katz v. United States, the Supreme Court made clear that “what a person knowingly exposes to

the public, even in his own home or office, is not a subject of Fourth Amendment protection.” When individuals make information on a computer openly available, they lose any expectation of privacy in that information. For example, this may occur when a person leaves data un-encrypted or password protected on a computer accessible to others, or where one makes their computer files available to others via peer-to-peer software.

b. Stolen Computers

A thief has no REP in the contents of a computer they have stolen, including content that the thief has added to the stolen computer. This also applies to a computer that was obtained through fraud – such as a purchase with a stolen credit card; however, the rightful owner or possessor of the stolen computer generally retains REP in the contents.

c. Third-Party Possession

The courts have repeatedly held that one who divulges information to a third party, even with the subjective expectation the information will remain private, does not retain control over that information once it has been provided to the third-party. Rather, the person assumes the risk that the third party will divulge the information to others. (Note that the Carpenter decision may put this into question to some degree, even though the Justices in that decision stated that the third-party doctrine is not implicated by it.)

#### 15.7.4 Exceptions to the Warrant Requirement

Warrantless searches that fall within an established exception to the warrant requirement do not violate the Fourth Amendment. Below are some of the common exceptions to the warrant requirement as they apply to searches of computers.

## a. Consent

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

### 1. Requirements

There are two requirements for a consent search to be valid. First, the consent must be voluntary and not the result of coercion. If a defendant later challenges the voluntariness of their consent, for example, in a motion to suppress, the government carries the burden of proving that consent was voluntary.

Second, the consent must be also given by an individual who possesses either actual or apparent authority over the computer to be searched. Do parents, roommates, friends, or others have the authority to consent to a search of another person's computer files? Generally, the answer to that question depends upon whether the owner of the computer has afforded the consenting person shared access to those computer files.

### 2. Scope of a Consent Search

Assuming voluntary consent by a person with authority to give it, the next issue is the scope of the consent given. For example, when a target consents to the search of their "computer," does the consent authorize the officer to search devices attached to the computer (such as a thumb drive or a portable USB hard drive) or media (such as CDs or DVDs) located near the computer?

The scope of a consent search is defined by the terms and plain meaning of the consent given. An individual may limit the scope of any consent. If so, the scope of a consent search may not exceed, either in duration or physical scope, the limits of

the consent given. Additionally, where consent has been granted, it may also be revoked. If that happens, the officer must immediately stop searching unless another Fourth Amendment exception applies. Of course, any incriminating evidence the officer discovered before the consent was revoked may be used to demonstrate probable cause in support of a search warrant.

Does consent to search a location or item implicitly include consent to access computer memory or electronic storage devices encountered during the search? Courts look to whether the particular circumstances of the request for consent implicitly or explicitly limited the scope of the search to a particular type, scope, or duration. Be especially careful about relying on consent as the basis for a search when consent was obtained for one reason or type of evidence, but the officer then wants to conduct a search for a different reason or type of evidence. Because the decisions evaluating the scope of consent to search computers have sometimes reached unpredictable results, the officer must indicate the scope of the search explicitly when obtaining a suspect's consent to search a computer.

While consent to search a "computer" would ordinarily include the active memory and internal hard drives of the computer case or body, it does not necessarily include storage media such as CDs, DVDs, thumb drives, portable hard drives, and other media. Caution is best here; the consent obtained should specifically include these items if the government wants to search them.

### 3. Third-Party Consent

It is common for several people to own or use the same computer equipment. Generally speaking, if any of those people give permission to search for data, the government may rely on that consent. In such cases, all users have assumed the

risk that a co-user might discover everything on the computer and might also permit law enforcement to search this “common area” as well. A private third party may consent to a search of property under the third party’s joint access or control. This rule often requires the officer to inquire into the third party’s rights of access before conducting a consent search, and to draw lines between those areas that fall within the third party’s shared or common authority and those areas outside the third party’s control.

Prior to the Supreme Court’s holding in Georgia v. Randolph, 547 U.S. 103 (2006), in 2006, consent by an owner or resident of a dwelling was sufficient to justify a warrantless search of the dwelling even if another occupant objected. Randolph reversed that line of cases and held the refusal of a physically present co-owner or resident to permit the warrantless search of the dwelling would invalidate that search as to the non-consenting party. Since Randolph, at least one Circuit Court has specifically declined to expand the holding of Randolph to personal property, in particular, a computer. United States v. King, 604 F.3d 125 (3d Cir. 2010). Therefore, the officer should seek local legal advice before conducting a warrantless computer search in these circumstances.

The presence of encrypted or password protected data will, in most cases, indicate the absence of common authority to consent to a search by co-users who do not know the password or possess the encryption key. Conversely, if the suspect has given the co-user the password or encryption key, then the co-user probably has the requisite common authority to consent to a search of the files.

The Supreme Court has yet to determine whether the government may compel the owner to disclose a decryption password or other means of access, such as biometric keys, without violating a suspect’s Fifth Amendment right against self-incrimination. The Court’s answer to this question will

likely depend on whether the act of providing the decryption key or other means of access is considered testimonial in nature. For example, a district court in Vermont has held that when the government already knew the contents of a computer due to a previous search of the device by a border agent, the government could compel the suspect to disclose a decryption key without violating the Fifth Amendment since the contents of the device were already known to the government. In re Grand Jury Subpoena (Boucer), 2009 U.S. Dist. LEXIS 13006 (D. Vt. Feb 19, 2009). Where, however, the government has no prior knowledge of either the existence or the whereabouts of information on the computer, the Eleventh Circuit has found that the act of providing a decryption key from a suspect would be testimonial in nature and therefore protected by the Fifth Amendment privilege against self-incrimination. United States v. Doe (In re Grand Jury Subpoena Duces Tecum), 670 F.3d 1335 (11th Cir. 2012). However, the Ninth Circuit found that law enforcement using a probationer's thumbprint to unlock the probationer's phone was not a testimonial act and, therefore, not a violation of the Fifth Amendment. See United States v. Payne, 99 F.4th 495 (9th Cir. 2024).

#### 4. Implied Consent and Network Banners

The Fourth Amendment prohibits all "unreasonable searches and seizures" by a government employer or supervisor of a place where an employee of that government agency has a legitimate expectation of privacy. A legitimate expectation of privacy may exist as to the employee's office, desk, filing cabinets, and computer. The Supreme Court has recognized, however, that office practices, procedures, or regulations may reduce or narrow an employee's legitimate privacy expectations. O'Connor v. Ortega, 480 U.S. 709 (1987).

For example, computer users may waive their rights to privacy as a condition of using a computer or the system to which the computer is connected. This often occurs through the use of

written employment policies and/or network “banners.” Banners are written notices that greet users before they log on to a computer or computer network. These notices will typically reflect the owner of the computer and/or network to which the computer is connected may, as it deems appropriate, audit, inspect, and/or monitor employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages. This policy places the employees on notice they may not reasonably expect their use of the agency computer would be private.

Alternatively, a government agency's banner policy may result in the employee's implied consent to the search by their employer of otherwise private areas in their office. Some courts have proven reluctant to apply the implied consent doctrine absent evidence the suspect actually knew of the search and voluntarily consented to it at the time the search occurred. Other courts have held the banner language was sufficient to permit intrusions only for network administrator housekeeping but not for general law enforcement purposes.

In any event, the best practice for a criminal investigator is always to consult with an AUSA before relying on a banner search.

#### b. Exigent Circumstances

Under the “exigent circumstances” exception to the warrant requirement, the officer may search without a warrant if the circumstances “would cause a reasonable person to believe that entry...was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984). In determining whether exigent circumstances exist, consider: (1) the degree of urgency involved, (2) the amount of



time necessary to obtain a warrant, (3) whether the evidence is about to be removed or destroyed, (4) the possibility of danger at the site, (5) information indicating the possessors of the contraband know the police are on their trail, and (6) the ready destructibility of the contraband.

Exigent circumstances often arise in computer cases because electronic data may be easily altered, concealed, or destroyed. This can happen in a matter of seconds as the result of manual or pre-programmed computer commands or physical mutilation, as well as from excess humidity, temperature, or magnetic fields created, for example, by passing a strong magnet over a hard drive.

The exigent circumstances exception does not allow the government to search or seize beyond what is necessary to prevent the destruction of the evidence. When the exigency ends, the right to conduct a warrantless search based on that exigency ends as well. In short, the need to prevent the destruction of evidence does not authorize the government to search without a warrant once the likelihood of such destruction has ended. Accordingly, the seizure of computer hardware to prevent the destruction of information it contains will not ordinarily support a subsequent search of that information without a warrant. Once steps have been taken to prevent destruction of the evidence, the officer must quickly move to obtain a warrant unless valid consent to search is obtained.

### c. Plain View

Evidence of a crime may be seized without a warrant under the plain view exception to the warrant requirement. To rely on this exception, the officer must be in a lawful position to observe and access the evidence, and its incriminating character must be immediately apparent. Horton v. California, 496 U.S. 128 (1990).

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

In computer cases, this means that the government may not rely on the plain view exception to open a closed computer file, look into a thumb drive lying in the open, or search a computer because incriminating evidence has been seen. The contents of a file that must be opened to be viewed are not in “plain view.” For example, if an officer observed a computer in a public place and saw data on a suspect’s computer monitor that constitutes probable cause evidence of a crime, they may immediately seize that computer to prevent the destruction of the data. Thereafter, if the officer wished to conduct a further search of that computer, they will need a warrant or consent to do so. However, what the officer observed on the monitor may be used to establish probable cause.

It would seem logical, therefore, to conclude the plain view rule would also apply to a search of a computer pursuant to a warrant and the discovery of evidence outside the scope of the warrant. For example, while executing a search warrant to look for evidence of fraud, an agent opens a computer file that turns out to be an image of child pornography. This image would be admissible because the agent was lawfully searching the computer pursuant to a warrant. Moreover, if, while continuing the search for evidence of the fraud pursuant to the search warrant, the agent discovers more child pornography, those images would also be admissible. On the other hand, if the agent decides to redirect their efforts towards finding more child pornography, the plain view exception would not apply because the agent would have ventured outside the scope of the initial search warrant. To do so lawfully, the agent must

first obtain a second search warrant related to the search for child pornography.

Because suspects can conceal evidence by changing the file name or changing file extensions to make, for example, an image file appear to be a word processing document, usually there is no restriction on looking for specific types of files or files with specific names.

Some Courts have not applied the plain view doctrine as broadly to computer searches as it does to non-electronic searches. See United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009). During the execution of a computer search warrant, if an officer finds evidence of a crime that is arguably outside the scope of the warrant, the officer may seize it under the plain view doctrine. If the officer has not yet concluded the search reasonably permitted by the search warrant, the officer may continue that search. If, however, the officer's intent is in any way to expand the search to include evidence of the criminal activity beyond the scope of the search warrant, the officer must obtain a separate search warrant. In doing so, the officer may use the newly discovered evidence. The best practice would be to suspend the original search and seek a second or amended search warrant to permit a search for the newly discovered crime.

#### d. Search Incident to Arrest

A search conducted incident to a lawful custodial arrest (SIA) is a well-recognized exception to the warrant requirement. Such searches have been acknowledged by the Supreme Court as reasonable and permissible without a warrant because of: (1) the need to disarm the suspect to take them into custody, and (2) the need to preserve evidence for later use at trial. Chimel v. California, 395 U.S. 752 (1969). The permissible scope of a search incident to arrest includes a search of the

person and the areas under the person's immediate control for weapons, means of escape, and evidence of a crime.

In 2014, the Supreme Court in Riley v. California, 573 U.S. 373 (2014), held officers cannot search the electronic data in a mobile phone, or any other electronic device, incident to the arrest of a person. Officers are permitted to examine the physical parts of the phone, remove the phone case or battery, and otherwise ensure the phone or electronic device does not contain a weapon or contraband. Officers cannot examine the electronic data contained on the device without a search warrant, consent, or other (rare) exigent circumstance.

#### e. Inventory Searches

Inventory searches are a well-recognized exception to the warrant requirement and explained in detail in the Fourth Amendment chapter of this book. Neither the Supreme Court nor any of the federal circuit courts have issued opinions concerning whether the data stored on a cell phone may be inventoried, but many lower courts have tackled the issue. These courts have all held officers may not inventory of the digital contents of a cell phone. The officers may seize the phone and list it in the inventory, but the officer cannot examine the electronic data stored on a phone or electronic device pursuant to an inventory search. It is unclear and unsettled whether or not this exception will be extended in the future due to the rise in crypto-currency, but as of the date of the publication of this book, no federal court has extended the inventory search exception to electronics.

### 15.8 Preparing Search Warrants for Computers

Searches that target computers and data have some differences from searches of physical locations. In most searches, the government is looking for a particular physical item in a particular location. Because computer files consist of

electronic data that can be stored in any digital medium and instantly moved or deleted, the government may not always know precisely where particular computer files are stored or in what form. The data may be on the computer being searched, but electronically hidden from view. The filenames and suffixes may be anything the suspect wants them to be. The data may be instantly erased, modified, or transmitted to another person or to remote storage. The same data may exist in identical form in many different places. Court cases recognize that computer records are extremely susceptible to tampering, concealment, and destruction.

### 15.8.1 The Need for Pre-Search Information

It is always critical for the criminal investigator to have as much advanced knowledge as possible about an area in which a search warrant is to be executed. This applies equally, if not more so, to computer searches. At a minimum, prior to executing a search warrant, the officer should attempt to determine:

- What types of computers and operating systems is the suspect using?
- What types of software does the suspect use?
- Is the computer connected to a network? If so, where is the computer network server located?
- Can the computer or data storage device be searched safely and effectively on-site, or must the computer be moved to another location to conduct the search?
- Is the execution of the computer search warrant likely to have an adverse impact on the operation of a legitimate business, for example, the search of a computer at a doctor's office where patient health records are likely

stored?

Gathering this information may involve an interview of the system administrator of the targeted network, of others who are familiar with the network, or possibly of a whistleblower or cooperating individual. This might be done in an undercover capacity. On-site visits (often undercover) may also reveal important information about the hardware involved.

### 15.8.2 The Particularity Requirement

The Fourth Amendment does not permit general exploratory searches but requires the place to be searched and things to be seized be described with “particularity.” This requirement applies equally to searches of computers and the data contained on them.

#### a. The “Independent Component Doctrine”

The officer must be particular about where to look for data. Each component to be searched must be viewed independently and there must be probable cause to search each component. For example, to say the government wants to search or seize a “computer” can be both too broad and too narrow, and it rarely meets the Fourth Amendment particularity requirement.

Data is often the real objective of a computer search. Data can be stored in many places, including the hard drive in the computer, on removable media such flash memory devices such as thumb drives, memory chips, zip drives, CDs/DVDs, external hard drives and at off-site locations referred to as “the Cloud.”

Peripheral components, such as routers, printers, and scanners, often have small memory chips that may be a good source of evidence. Similarly, the government may wish to seize a keyboard, monitor, cables or other devices during the

search, to assist in retrieving the information from the computer. If so, each item must be independently listed and its seizure justified.

Other items to search for would include computer manuals so officers and forensic examiners know how to circumvent encryption and/or passwords; original software and manuals; and notes and journals that might contain passwords, encryption keys, e-mail addresses, Internet URLs (addresses), and indexes of storage media.

#### b. Identifying the Objects of the Search

In most computer or data searches, the primary objective of the search is the data and not the computer and its attendant components.

In order to seize data, the government must articulate probable cause that the data exists and describe what that data is. The officer cannot simply request permission to seize “all records” from an operating business unless there is probable cause to believe the criminal activity under investigation pervades the entire business. Instead, the government must include limiting phrases in the description of the files that can modify and limit the “all records” search to that for which probable cause exists.

For example, the officer may specify the crime under investigation, the target of the investigation if known, and the time frame of the records involved. In addition, instead of just saying “all records showing bank transactions between x and y,” agents should say “all records in any form ...” to ensure the affidavit and warrant includes not only paper, but electronic records as well.

On occasion seizing only the actual computers – and not the data – may be the objective of the search. That would be the

case, for example, when searching for stolen computers (contraband or fruits of a crime). That might also apply to a computer used in the commission of a crime (instrumentalities) such as when a computer was used to prepare a letter or spreadsheet or to send an e-mail. “Hardware only” searches are uncommon because a computer involved in a crime was probably used to create, receive, transmit, or otherwise manipulate data. In such a case, officers want to seize the computer and search the data contained in the computer.

### 15.8.3 Justifying Off-Site Searches

In many, if not most, electronic device searches, the government will want to remove the device from the location listed in the search warrant and conduct the search and forensic analysis of its contents at a different location. If so, the government must ask for and justify an off-site search in the search warrant affidavit and ensure that the search warrant includes the court’s approval to do so. This requirement exists because seizing a device can effectively close a business, disable a computer network, or deny innocent persons the ability to conduct daily activities. It is important that the officer considers such factors and include sufficient information in the search warrant application to justify seizure of a device for later, off-site forensic examination.

In some instances, the desired data may be obtained at the location where the media or computer is found. When this is possible, the computer system and the peripheral devices do not have to be taken from the scene to be searched.

As the use of computers and the sophistication and complexity of computer systems increases, it has become less likely that safe and meaningful on-scene computer/device searches can be conducted; therefore, off-site searches of computers/devices are increasingly becoming the norm. As mentioned above,



however, the officer must articulate in the search warrant affidavit facts and information to justify the removal and off-site search of computers, devices, or computer media. Some of the justifications are:

- **Must search to determine media contents:** The government may often be unable to determine what storage media contains by looking at just the container; each container (hard drive, floppy disk, CD or other media) must be examined.
- **Time required:** It may take days or weeks to find the specific information described in the warrant because computer storage devices can contain extraordinary amounts of information. Searching on scene may be more intrusive because of the time officers would have to remain on the premises.
- **Labeling, intentional mislabeling, and hiding data:** Even if the government knows specific information about the files sought, the data may be mislabeled, encrypted, stored in hidden directories, or embedded in “slack space” a simple file listing will not reveal. Images can be hidden in all manner of files, and it may take special skills and equipment to find it.
- **Availability of necessary tools:** On-site tools may not be sophisticated enough to defeat security and encryption measures.
- **Proper environment:** The lack of a controlled and clean environment to conduct the search.
- **Lack of On-Site Technical Expertise:** Attempting to search files on-site may risk damaging the evidence itself in some cases. Off-site searches also may be necessary if there is reason to believe the computer has

been “booby trapped” with a self-destruct feature.

- **Preserving the Evidence:** In an on-site search, the target or other persons could momentarily access the computer to delete or destroy data. This is especially true if the computer is attached to a network (even wirelessly) because a command to the computer to be searched might be sent from any computer on the network.
- **Safety of the Officers and Preserving Law Enforcement Techniques and Methods:** A lengthy search in the target’s home or business may unnecessarily expose officers to risk.

#### 15.8.4 Identifying the Need for Multiple Warrants

Increasingly, computer users choose to store their data on an Internet-connected computer (server) that can be located anywhere in the world. From a business efficiency viewpoint, this makes good sense as people can retrieve data no matter where they are, provided they can access the Internet. From a criminal’s point of view, storing data on a server makes finding that data harder for law enforcement and permits the criminal to constantly move that data at will.

Fed. R. Crim. P. 41(b) states that a magistrate judge located in one judicial district may issue a search warrant for “a search of property ... within the district,” or “a search of property ... outside the district if the property ... is within the district when the warrant is sought but might move outside the district before the warrant is executed.” If there is reason to believe that a network search will retrieve data (not stored e-mails as addressed below) that is stored in multiple locations, the officer must obtain a warrant in each affected district.

A different rule exists in the case of “stored electronic communications.” Stored electronic communications are e-

mails that are stored temporarily on the servers of companies that provide e-mail services (e.g. AOL, Yahoo, Hotmail, Google) where the storage is incidental to the transmission of the e-mail. For stored electronic communications, 18 U.S.C. § 2703 eliminates the need to obtain multiple warrants. A nationwide warrant for stored e-mails can be issued “using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation.”

If a suspect in a criminal investigation in the Eastern District of Virginia has stored electronic communications on internet servers in California and Texas, a federal judge in the Eastern District of Virginia could issue a search warrant for the stored e-mails in California and Texas so long as the issuing judge had jurisdiction over the suspected offense. The judge can even issue a search warrant for an email account that is stored outside the United States, if the United States has jurisdiction over the email service provider. Agents can obtain warrants for email accounts like Gmail, Yahoo, and Microsoft Outlook even if the information is stored outside the United States because these companies do business inside the United States.

## **15.9 Executing Search Warrants for Computers**

### **15.9.1 Technical Assistance During Execution**

A computer forensics expert is essential not only to the operational planning for executing the warrant, but also to the execution of the warrant. Accordingly, the officer should give strong consideration to having a technical expert accompany the search team or, at a minimum, be available on immediate call. Such person might very well be a sworn criminal investigator; however, 18 U.S.C. § 3105 also permits non-law enforcement officers to aid in the execution of a warrant. That statute provides:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

The best practice for a criminal investigator is to specify in the search warrant application the need for a computer forensics expert (especially if the expert is not a sworn officer) to be a part of the search team and, if possible, to name the person who will assist in the execution of the warrant. In short, except in all but the simplest cases, consult a forensics expert in planning the search, obtaining the warrant, and executing the search.

### 15.9.2 Knock and Announce

The “knock and announce” statute set forth at 18 U.S.C. § 3109 provides as follows:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This statute applies to all searches of residences, including when the objectives of the search include computers and data. The rule is not absolute, however. In Richards v. Wisconsin, 520 U.S. 385 (1997), the Supreme Court held a law enforcement officer who executes a search warrant may dispense with the knock-and-announce requirement if they have:

a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

By knocking and announcing one's official presence and authority, a law enforcement officer may provide a criminal target with the opportunity to conceal or destroy electronic evidence. Technically adept suspects may "hot wire" their computers with software that, with a few keystrokes by the owner or operator, may quickly delete or obliterate evidence. In many cases, this may involve a "hard deletion," rendering the data unrecoverable. Even merely turning off the computer may result in the destruction, alteration or encryption of data the user was working on at the time of the shut-down.

It is therefore essential the officer acquire as much information as possible in advance of the search about the criminal suspect and the computer hardware and software that will be the subject of the search. When the officer has reason to believe that knocking and announcing the government's presence would result in the destruction of any evidence being sought, would be dangerous, or would be futile, the officer should request a no-knock warrant from the magistrate judge. Even if a no-knock warrant is not obtained, the knock-and-announce statute does not prevent the officer from conducting a no-knock search, if, upon arrival at the search location, the officer develops reasonable suspicion that evidence will be destroyed. In Richards, the Supreme Court made clear that "the reasonableness of the officers' decision [to dispense with the knock- and-announce rule] ... must be evaluated as of the time they entered" the area to be searched. Accordingly, the officer may exercise independent judgment and decide to conduct a no-knock search when executing the search, even if they do not have a no-knock warrant.

For example, while approaching a residence with a warrant to search for data, an officer develops reasonable suspicion their presence has been detected and a person or persons inside will destroy (delete) the data. Such facts may excuse compliance with the knock and announce statute. If the officer dispenses with the knock and announce requirements, they must be prepared to articulate the basis for this decision to a judge.

In a memorandum dated September 13, 2021, the Department of Justice issued policy changes applicable to its law enforcement components on “no knock” entries. Specifically, law enforcement agents of the Department of Justice are limited to using “no knock” entries to those circumstances in which the agent has reasonable grounds to believe at the time the warrant is sought that knocking and announcing the agent’s presence would create an imminent threat of physical violence to the agent and/or another person. Or, if an agent did not anticipate the need for a “no knock” entry at the time the warrant was sought, the agent may conduct a “no knock” entry only if exigent circumstances arise at the scene such that knocking and announcing the agent’s presence would create an imminent threat of physical violence to the agent and/or another person.

Therefore, in accordance with the Department of Justice memorandum, “no knock” entries solely to prevent the destruction or removal of evidence are no longer permitted by components within the Department of Justice.

However, it is likely U.S. Attorney’s Offices across the United States will not concur in the application of “no knock” warrants nor support “no knock” entries to prevent the destruction of evidence from any law enforcement agency, including those agencies outside the Department of Justice.

This is a policy change within the Department of Justice and Congress has not made any changes to 18 U.S.C. § 3109 and

case law continues to support “no knock” entries to prevent the destruction of evidence. As a practical matter though, because the concurrence of the U.S. Attorney’s Office is required on all search warrant applications, all Federal Law Enforcement agents will need to comply with the Department of Justice memorandum on “no knock” entries.

### 15.9.3 Time Frames For Searching Computers

The forensic examination of the contents of a computer that has been lawfully seized pursuant to a search warrant may take months to complete because computers can store enormous amounts of data. Neither the Federal Rules of Criminal Procedure nor the Fourth Amendment imposes any specific limitation on the time period for such forensic examination to be completed. Under Fed. R. Crim. P. 41(e)(2)(B), a search warrant may authorize not only the seizure of electronic storage media or the seizure and copying of electronically stored information, but also a later review of the media or information consistent with the warrant. Thus, any court-imposed time limitation as to the execution of the warrant refers to the seizure or on-site copying of the media or information, but not to any later off-site copying or review.

Ordinarily, then, unless otherwise ordered by the Court, the government may retain a seized computer and examine its contents in a careful and deliberate manner without legal restrictions, subject only to Fed. R. Crim. P. 41(g)’s provision that a “person aggrieved” by the seizure of property may bring a motion for the return of that property. If the targeted computer serves as storage of data necessary to operate a legitimate business, medical facility, or the like, the agent should be prepared to copy the data from the targeted computer, rather than resorting to seizure and retention of that computer, if the latter action would unnecessarily inhibit the operation of the underlying enterprise.

## 15.10 Authentication of Electronic Data

Authentication, in general, is covered in the Courtroom Evidence chapter. That chapter also covers hearsay, which should be taken into account when dealing with electronic evidence. However, you will have to show (1) the data shown in court is the data you seized, (2) the data in court is in the same or substantially the same condition as when it was seized, (3), the data has not been changed/damaged/manipulated, and (4) the method/device/software/application used to copy/convert the data to a usable format was reliable. Ultimately, you will likely need an expert to authenticate the data.

Before even getting to that point, agents should ask themselves several questions when seizing and subsequently searching electronic storage devices in order to authenticate data believed to belong to a particular individual. These are not meant to be all inclusive, but merely a starting point.

1. Whose data is it?
2. Who had access to the data/device?
3. Did the device have any forensic evidence?
4. Where was the device found?
5. Where was the data found on the device?
6. Who had passwords/encryption codes?
7. When was the data created?
8. From where did the data originate?

Consider the following. Agents obtain a search warrant to seize and subsequently search a laptop belonging to a family of three individuals. The agents seize the laptop and image the hard drive. While reviewing the data, the agents learn that there are three separate profiles for the laptop, each of which are password protected. Incriminating data is located and is connected to your target's profile, which is password protected. This may seem like very strong evidence at a first



glance. While it is a good start, your investigation should not end there. Agents should continue looking for additional circumstantial evidence that would suggest that only your target knew of the evidence and/or put it on the laptop. How did it get there? Was it connected to any other accounts (e.g. Gmail, Yahoo, Facebook, etc.) connected to your target that were also password protected. Was the file created at a time when the remaining two individuals could not have possibly been able to download or otherwise access the data? The important thing is to gather as much circumstantial evidence as possible to prove that the incriminating data belongs to your target in order to minimize the ability of the target to blame someone else for the data.

## Chapter 16 –

### Federal Court Procedures

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## 16.1 Introduction

This chapter discusses how the federal courts operate, focusing on the law enforcement officer's role in obtaining the necessary documents, and following the necessary procedures, to have a

defendant brought before a court to answer a criminal charge. This chapter is based on the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) but focuses on only those rules that directly affect federal law enforcement officers. Further information may be obtained by reading the Federal Rules of Criminal Procedure in its entirety.

## 16.2 Two Types of Federal Court Jurisdiction in Criminal Matters

In matters of federal criminal law, federal courts have one of two types of power or authority, also called "jurisdiction." The first type, called "original jurisdiction," is the power to preside over and decide matters from the time when the government files formal criminal charges until the end of sentencing. When federal courts with original jurisdiction preside over pretrial matters, trials, and sentencings, everything that they consider, including motions, evidence, live testimony, and arguments, is preserved as part of that case's official "record."

The second type of jurisdiction is called "appellate jurisdiction," a power exercised by appellate courts. Once a court with original jurisdiction has ruled on all required matters, a defendant, and in more limited circumstances the government, may ask a court with appellate jurisdiction to examine the case record to decide if a lower court made a mistake of law. Because federal appellate courts are ordinarily only allowed to consider evidence and testimony that the defendant and the government presented to the court with original jurisdiction, witnesses do not testify before them and neither party is permitted to introduce new evidence. Instead, the appellant (the party bringing the appeal, usually a convicted defendant) can only rely on the lower court's official record to try to show that they should not have been convicted, that the first judge erred when ruling on a legal issue, or both.

## 16.3 The Organization, Powers, and Duties of the United States Courts

This section describes the composition, duties, and organizational structure of the pertinent United States courts from highest to lowest.

### 16.3.1 The Supreme Court of the United States

The United States Supreme Court, which consists of nine presidentially appointed, senate-confirmed Justices with lifetime appointments, exercises only appellate jurisdiction in criminal matters and is the final authority on the interpretation of the United States Constitution and federal law. Virtually all cases considered by the Supreme Court are appeals from the decisions of United States Courts of Appeals or state courts.

No party to a case in a lower court has a right to have their case reviewed by the Supreme Court. Instead, the Supreme Court has the power to decide whether it will hear an appeal, a power that it exercises in only a small percentage of cases.

Appealing a federal criminal case to the Supreme Court requires that a party who loses an appeal before a Circuit Court of Appeals to file a motion called a Petition for a Writ of Certiorari ("to make certain"). Four of the nine Justices must agree to hear the petitioner's case before the Supreme Court issues a Writ of Certiorari. If the Supreme Court grants that Petition, then it will decide the appeal based on the case's record without hearing new testimony or otherwise allowing parties to introduce new evidence into court records.

Usually, all nine Justices participate in each case, and the Supreme Court makes its decisions by majority vote. When the Supreme Court reaches a decision, one Justice takes

responsibility for writing the majority opinion. Other Justices who agree with the decision for different reasons or wish to make additional points may write concurring opinions. In contrast, Justices who disagree with the majority's ruling may also write separate opinions called "dissents." The Supreme Court also occasionally issues "per curiam" (by the court) decisions. These are issued by the Court as a whole rather than written by one specific Justice. In the Spring of each year, the Supreme Court proposes changes to the Federal Rules of Criminal Procedure. Those proposed changes to the Rules are automatically implemented unless Congress rejects or changes them.

### 16.3.2 Courts of Appeals – The Circuit Courts

Of the 13 United States courts of appeals, only 12 – the Courts of Appeals for the First through the Eleventh Circuits and the D.C. Circuit (referenced collectively here as the "Circuit Courts") -- are relevant to criminal prosecutions. Like the Supreme Court Justices, circuit court judges are also presidentially nominated, Senate-confirmed, and serve lifetime appointments.

Each individual Circuit Court, which exercises only appellate jurisdiction, is responsible for hearing appeals from cases tried by the district courts located within its geographic boundaries. Because of the way each Circuit Court's geographic boundaries are drawn, every district court located in a particular region or in the District of Columbia will send its appeals to the same Circuit Court, and all of the district courts within a single state are located in the same circuit. Like the Supreme Court, the Circuit Courts do not generally hear live testimony from witnesses or allow parties to introduce new evidence. Similarly to the Supreme Court, the judges decide by majority vote.

Unlike the Supreme Court, a criminal defendant has the right to demand that the circuit court responsible for the geographic area review a lower court's decisions. Importantly, although a circuit court's decision becomes the law that binds all federal courts in the geographic areas that make up that circuit, one circuit court's decision is nothing more than "helpful advice" to courts located in a different federal circuit. Consequently, the law can differ from one circuit to another on particular legal issues.

### 16.3.3 United States District Courts

The United States District Courts are composed of a total of 94 different geographic divisions known as "judicial districts" that are located throughout the United States and its territories. While many states contain more than one judicial district, the boundaries of a single judicial district, which are specified in the United States Code, never cross state lines. Officers must know the precise boundaries of the districts where they work or otherwise have duties to perform because certain tasks can only be performed in certain places. For example, duties such as conducting an initial appearance, obtaining an arrest warrant, applying for a search warrant, obtaining a grand jury subpoena, and holding a criminal defendant's trial, can only be done in a location where a particular court is authorized to act, that is, in the right "venue" or place.

Just like Supreme Court Justices and circuit court judges, United States district court judges are presidentially nominated, senate-confirmed, and appointed to their positions for life. Unlike the Supreme Court and the circuit courts of appeals, which exercise only appellate jurisdiction in criminal cases, district courts are the only federal courts with the power to conduct criminal trials in felony cases. Additionally, district courts must also conduct criminal trials in Class A



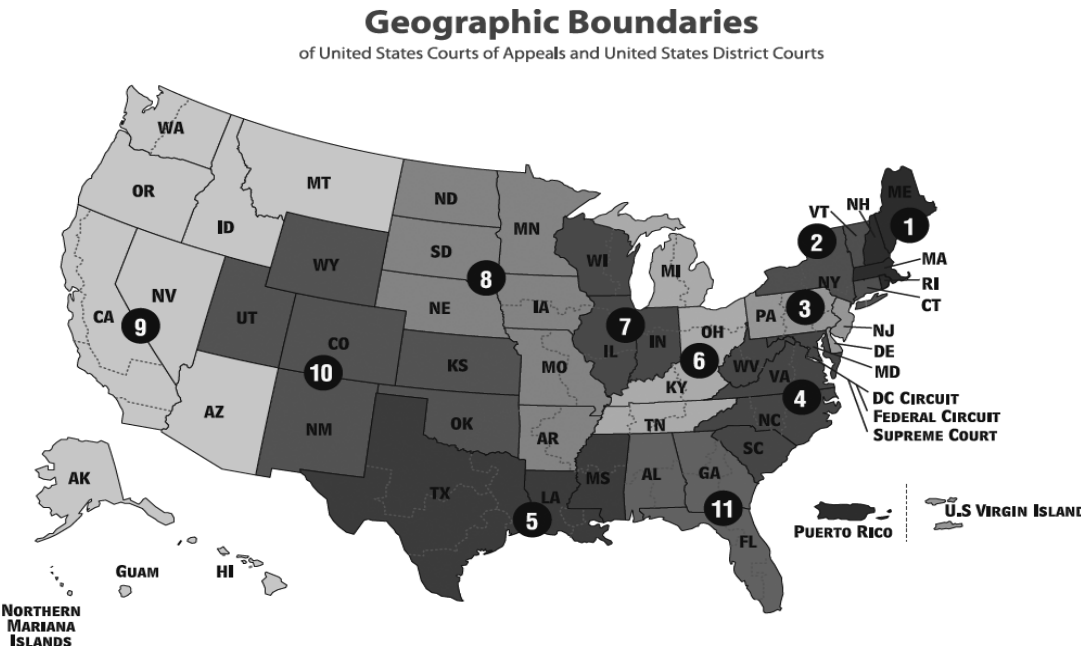
misdemeanor cases where a defendant refuses to consent to trial before a federal magistrate judge.

Consequently, district courts are the first and the highest ranking of the two federal courts with original jurisdiction to conduct pretrial proceedings and trials, hear live testimony from witnesses, and admit documents, records, and other evidence into court records in criminal prosecutions.

Although district court judges also have the power to perform all of the following functions, they often delegate all or part of that power to federal magistrate judges. For example:

- Deciding matters that arise before a defendant is charged with a federal crime, including but not limited to whether to issue a criminal complaint and arrest warrant, whether to issue a search warrant, whether to order a reluctant witness to testify before a grand jury, and whether to appoint counsel to witnesses subpoenaed to testify before a grand jury;
- Presiding over pretrial proceedings and deciding issues that arise during those proceedings, including but not limited to initial appearances, identity hearings, removal proceedings, detention hearings, preliminary hearings, arraignments, discovery motions, motions to dismiss charging documents, motions to suppress evidence, other motions to exclude evidence at trial, and pretrial hearings;
- Taking pleas in capital felony; felony; Class A, B, and C misdemeanors; and infractions and imposing sentences on defendants convicted of those offenses; and
- Presiding over post-trial and conviction matters such as motions for new trial and habeas corpus cases.

Additionally, although district court judges must follow the Federal Rules of Criminal Procedure, each district court can also make additional local rules to govern procedural matters within the district. A local rule may, for example, establish a dress code, require that a certain procedure be accomplished within a certain period of time, or mandate document formatting requirements. Local rules may also require particular forms for arrest warrants and criminal complaints, search warrant applications and search and seizure warrants, and other documents. Consequently, officers should familiarize themselves with the local rules when arriving in a new district.



### 16.3.4 United States Magistrate Courts

All 94 United States district courts have a Magistrate Judge's Division consisting of one or more federal magistrate judges who work underneath and for the United States district courts. Unlike Supreme Court Justices, circuit court judges, and district court judges, federal magistrate court judges are appointed by the district court judges in the judicial district

where they sit for four or eight-year terms. A federal magistrate judge's term is renewable so long as district judges remain satisfied with the magistrate judge's performance.

Although defendants charged with a Class A misdemeanor offense may insist on a trial before a district court judge, magistrate judges may try Class A misdemeanors with the defendant's consent. Magistrate judges also have the power to try petty offenses, Class B and C misdemeanors and infractions, that take place in the district, regardless of whether the defendant consents. Magistrate judges do not under any circumstances have the power to conduct felony trials.

Nonetheless, federal law enforcement officers should expect the overwhelming majority of their federal court business to occur before magistrate judges. Although practices vary from district to district, federal district judges ordinarily delegate responsibility for more mundane matters to the magistrate judges. Consequently, even though magistrate judges cannot hold trials in felony cases, they routinely conduct pretrial proceedings and hearings in prosecutions of the entire range of federal criminal offenses. Common delegations of responsibility to magistrate judges can include issuing criminal complaints and arrest warrants, issuing search warrants, and presiding over initial appearances, preliminary hearings, identity hearings, removal proceedings, detention hearings, and evidentiary hearings on motions to suppress evidence.

## **16.4 Beginning a Formal Criminal Prosecution in Federal Court**

Two classes of documents play critical roles in formal federal criminal prosecutions - charging documents and appearance documents. This section addresses each category in turn.

### 16.4.1 Charging documents

Charging documents are the tools that the government uses to transform a law enforcement officer's criminal investigation into a full-fledged, in-court criminal prosecution where a defendant must appear and answer charges. No federal criminal prosecution can begin without one of the following four charging documents, which are discussed in detail below: A Violation Notice (or Citation), a Criminal Complaint, a Criminal Information, and a Criminal Indictment

Although each of the four classes of charging documents have different requirements, characteristics, capabilities, and in some cases, limitations, they all have one thing in common. Regardless of its other characteristics, every charging document must, at a minimum, identify the offense or offenses with which the government has charged the defendant, usually by criminal statute title and section or by citing the appropriate federal regulation (for example, "18 U.S.C. § 922(g)(1)" or "36 C.F.R. § 4.23").

Charging documents generally also have at least a brief description of the nature of the crime (for example "possession of a firearm by a convicted felon" or "operating a motor vehicle in a national park while under the influence of alcohol").

#### a. Violation Notice/Citation

A law enforcement officer has the power to issue a Violation Notice, also called a Citation. Violation Notices are similar to traffic tickets and may be used in charging someone with a petty offense.

#### b. Criminal Complaint

Depending on local practices, the government can (at least in theory) use a criminal complaint, also called a "complaint," to

initiate formal criminal proceedings for any type of crime. Law enforcement officers are responsible for preparing criminal complaints, including the necessary affidavit and other documents accompanying the criminal complaint, prior to an initial appearance. Preparing the criminal complaint can be labor intensive; however, a law enforcement officer can usually complete it more quickly than a criminal indictment, which must be returned by a grand jury, or a criminal information, which is prepared and filed by an Assistant U.S. Attorney.

The Fourth Amendment chapter describes the process of preparing a criminal complaint, which requires an officer to prepare a written statement citing the statute or regulation that the defendant violated and outlining facts showing probable cause to believe that the defendant's conduct satisfied all of the required elements. Thereafter, the officer, usually with assistance from an Assistant U.S. Attorney, presents the criminal complaint to a federal judge with authority in the district where the crime took place for review and approval. If no federal judge is reasonably available, the officer may also present the complaint to a state or local judge with jurisdiction in the place where the crime happened. Presuming that the court finds the written statement sufficient, the officer then signs the complaint under oath in the judge's presence, and the judge thereafter signs the complaint as well.

Criminal complaints suffer from several disadvantages. First, and most importantly, charges filed by criminal complaint are only valid for 30 days. Consequently, law enforcement officers should think of criminal complaints as temporary fixes best suited to solving only pressing, time-sensitive problems such as these:

- A law enforcement officer who has probable cause makes a warrantless arrest for a felony or misdemeanor. Because applicable constitutional law mandates that a charging document must be filed no later than 48 hours

after a warrantless arrest (although 24 hours is preferred), and because obtaining a criminal complaint can be done relatively quickly, the officer prepares a criminal complaint and supporting affidavit and swears to it before a judge prior to the defendant's initial appearance;

- A law enforcement officer is conducting a long term, felony fraud investigation. Although the government is not ready to present the case to a grand jury because the investigation is not complete, the officer has probable cause to arrest the primary target. The officer learns that the target has purchased a one-way airline ticket to fly to another country from which extradition is not possible. Consequently, the officer prepares a criminal complaint and arrest warrant so that investigators can arrest the target before the target flees the following afternoon; and,
- Law enforcement officers conducting a wiretap investigation in a drug case have sufficient evidence to charge a local overseer of a drug stash house with drug trafficking, but their investigation of local cartel managers is ongoing. After intercepting cartel managers discussing plans to harm the stash house overseer, investigators prepare a criminal complaint and arrest warrant and arrest the overseer before his conspirators can harm him.

Second, defendants charged by criminal complaint stand to learn more about the government's evidence and witnesses at an earlier time than defendants charged by criminal indictment or information. An affidavit supporting a criminal complaint must contain a narrative of facts showing probable cause, a requirement that does not apply to a criminal indictment or information. Because the defendant is entitled to a copy of the complaint and the affidavit at or before initial

appearance, which takes place before the government is obligated to provide discovery, a defendant charged by complaint gets premature discovery.

Moreover, every defendant charged by complaint is entitled to a preliminary hearing unless a criminal indictment or information is filed before the time the court schedules the hearing. Because the defense has the right to cross examine the officer or officers who must testify at the preliminary hearing, the defendant charged by complaint has a second opportunity to probe the case. For these reasons, most federal prosecutors prefer not to charge by criminal complaint unless necessary.

#### c. Criminal Information

A criminal information, also called an "information," is a charging document that an Assistant U.S. Attorney is responsible for preparing and may, in non-felony cases, decide unilaterally to file with the court. Unlike a criminal complaint, an information usually only contains a citation to the criminal statute or statutes that the defendant violated, a few words describing the crime, and a listing of elements that the government must prove to convict the defendant.

Although the government is free to charge Class A, B, and C misdemeanors and infractions by information and does so routinely, it may only charge a felony crime by information if the defendant waives their constitutional right to be charged by a grand jury's indictment. Moreover, a defendant charged with a capital felony must be indicted by a grand jury, a requirement that cannot be waived.

#### d. Criminal Indictment

Although the content of a criminal indictment, also called an "indictment," closely resembles that of an information, only a

grand jury can approve of and file an indictment. A grand jury consists of 23 members of the community empaneled by a District Court judge to sit for a period of 18 months. The grand jury may return an indictment only when 12 or more of its members find probable cause to believe that the defendant committed the crime or crimes that the indictment describes.

Although the government may initiate a felony prosecution with a criminal complaint, it may not take a felony case to trial unless a grand jury returns an indictment or the defendant waives the right to be indicted. Moreover, an indictment is not waivable where a defendant is charged with a capital felony and no court may hold a trial on a capital felony unless a grand jury has returned an indictment.

#### 16.4.2 Appearance Documents

When a defendant charged by complaint, information, or indictment is not already in custody following a warrantless, probable cause arrest, the Assistant U.S. Attorney and the investigating agent must decide how to ensure that the defendant appears in court and answers the formal charges. The government ordinarily has two choices - arrest warrant or a summons - either of which becomes available upon request once a judge signs a criminal complaint, an Assistant U.S. Attorney files a criminal information, or a grand jury returns an indictment. Both the arrest warrant and the court-issued summons are exercises of the court's power to compel a defendant to appear.

##### a. Arrest Warrant

An arrest warrant is a command that a court issues to authorized law enforcement officers to arrest a particular person and bring them to an initial appearance without unnecessary delay. The arrest warrant identifies not only the person to be arrested but also the crime charged.



If the officer who arrests the defendant has the warrant or a copy of it, they must show it to the defendant. If the officer does not have a copy of the arrest warrant, they must tell the defendant that the warrant exists and the nature of the charge on the warrant. At the defendant's request, the officer must show the warrant to the defendant as soon as possible.

After executing an arrest warrant, the officer must make a return (report) to the judge before whom the defendant has the initial appearance. If the arrest was made pursuant to an NCIC (National Crime Information Center) notice, then the arresting officer or the prosecuting attorney should contact the district that issued the warrant to obtain a faxed copy prior to the initial appearance.

#### b. Summons

A summons is a command that a federal court issues to a defendant who has been formally charged with a crime by complaint, information, or indictment. The summons, which is served by a United States Marshal or other federal law enforcement officer, commands the defendant to appear before the court at a stated time and place to answer the formal charges.

A defendant who is the subject of a summons is not arrested, but instead, comes to court under their own power. Because the court uses either an arrest warrant or a summons to compel a defendant to appear and answer formal, criminal charges, mere knowledge that a defendant is the subject of a criminal complaint, criminal information, or indictment does not, standing alone, authorize a law enforcement officer to make an arrest.

Although some Violation Notices and Citations that federal law enforcement officers issue for Class B or Class C misdemeanors or petty offenses may contain a "summons"

directing the recipient to come to court at a specific time and place, a law enforcement officer cannot access the court's power to require a defendant to appear and answer charges without a complaint, information, or indictment.

U.S. Marshals and other federal officers serve summonses by personally delivering a copy of to the defendant. If the defendant cannot be found, a summons is served by leaving a copy at the defendant's residence or usual place of abode with a person of "suitable age and discretion" who lives there. When a summons is not personally served on the defendant, a copy of the summons must also be mailed to the defendant's last known address. The officer who serves a summons must complete the back of the summons stating how and when the summons was served. Filling out the back of the summons is known as making a "return" of the summons.

Before trial, the government, the defendant, and the court must know exactly the offenses with which the defendant is charged. The charging document informs the parties of the exact charges. The charges at trial may be different than the ones in the complaint or information that was used at the initial appearance or to obtain an arrest warrant or summons. The charges may also be different than the ones for which the defendant was originally indicted, because the defendant may have been indicted for additional offenses, or the AUSA may have obtained a superseding indictment.

16.4.3 Summary of Offenses, Courts, and Charging Documents Sufficient for Trial

<b>Offense Type 18 U.S.C. § 3559</b>	<b>Maximum Sentence</b>	<b>Trial Court</b>	<b>Charging Documents (required to try defendant)</b>
Capital Felony	Death	District Court	Indictment (not waivable)
Felony	More than 1 year	District Court	Indictment or Information (with waiver)
Class A Misdemeanor	More than 6 months, up to 1 year	District Court (unless waived)	Information or Complaint
Class A Misdemeanor	More than 6 months, up to 1 year	Magistrate Court (with waiver)	Information or Complaint
Class B Misdemeanor	6 months or less, but more than 30 days	Magistrate Court	Information, Complaint, or Violation Notice/Citation
Class C Misdemeanor	30 days or less, but more than 5 days	Magistrate Court	Information, Complaint, or Violation Notice/Citation
Infraction	5 days or less	Magistrate Court	Violation Notice/Citation

Although, at least in theory, the government can probably try Class A, B, and C misdemeanors and infractions with an indictment, and although it can probably also try an infraction with an information or a complaint, it would be extremely unlikely to do so.

## 16.5 The Initial Appearance

### 16.5.1 The Initial Appearance

A defendant's first appearance before a federal judge will be at a proceeding called an initial appearance. While a district court judge could conduct the initial appearance, a magistrate judge usually conducts them even in felony cases.

### 16.5.2 Bringing a Defendant Before a Magistrate Judge

#### a. Warrantless Arrest

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

#### b. Arrest with a Warrant

Officers may obtain arrest warrants in several ways.

##### 1. With a Criminal Complaint

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

##### 2. With an Indictment

If the defendant has been indicted by a grand jury, the indictment will be filed with the clerk of the court in that

district. The clerk of the court will issue an arrest warrant based on the charge or charges contained in the indictment.

### 3. With an Information

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

#### c. Appearance on a Summons

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

### 16.5.3 Non-Federal Judges and Initial Appearances

Federal law permits certain state and local judicial officers to perform some federal court functions to include swearing officers to criminal complaints, issuing search or arrest warrants, and conducting initial appearances. Federal law enforcement officers should avoid using state or local judges to issue federal warrants or conduct federal proceedings except in exigent circumstances and only after first coordinating with your AUSA. 18 U.S.C. § 3041.

## 16.6 Initial Appearance: The Officer's Responsibility

After an arrest but before the initial appearance, the officer must take certain steps to secure and prepare the defendant for processing by the courts. Such steps include: a search incident to arrest; booking procedures (fingerprinting, photographing, preparing various forms); transporting the defendant to a federally approved detention facility; a possible inventory of impounded property; and notifying the Pretrial Services Office of the arrest and the location of the defendant.

If the arrest was without a warrant, and a criminal complaint, indictment, or information has not already been prepared, the officer must prepare a criminal complaint.

### 16.6.1 Requirement and Timing

Fed. R. Crim. P. 5a states that, upon arrest, a suspect must be taken to an initial appearance before a magistrate judge without unnecessary delay. Failure to do so can have an adverse effect on statements made during a post-arrest interview. First, of course, any statement taken has to be voluntary. Proper Miranda warnings must be given and a valid waiver obtained. Assuming this has been done, the courts may then look at whether there was a delay in getting to the magistrate.

By statute, Congress created a “safe zone” for the first six (6) hours after an arrest. In accordance with 18 U.S.C. § 3501(c), statements taken during the first six hours will not be suppressed because of any delay. That six-hour safe zone can be extended if the delay is reasonable given means of transportation and distance to the magistrate. Thus, a statement taken nine (9) hours after arrest may still be usable if extensive travel was required to get to the magistrate for the initial appearance.

A statement will not automatically be suppressed just because it is made after that six-hour safe zone. After the six hours, courts will simply begin to assess whether any delay is reasonable and necessary. For example, if a defendant had to be taken to the emergency room for treatment, then that delay would be deemed necessary, and any statements made could probably still be used at trial. If there is a problem with availability of the magistrate, officers should coordinate with an AUSA as to what should be done.

Delays solely for the purpose of continuing or conducting an interrogation can be seen by a court as unnecessary and statements may be lost. So, if a magistrate is readily available, and a two-hour interview is begun five hours after an arrest, statements given during the first hour will be usable, but those made in the second hour might not be.

The Supreme Court has never defined exactly what “unnecessary delay” is, but a good rule of thumb is that the officer should ordinarily have the defendant in court for an initial appearance the next time the Magistrate Judge holds court following the defendant’s arrest. The officer should be aware of any particular requirements in this regard set forth in the district’s Local Rules.

The courts have given examples of unnecessary delay as: delay for the purpose of gathering additional evidence to justify the arrest; delay motivated by ill will against the arrested individual; or delay for delay’s sake. If there is the possibility it may take longer than 48 hours to have the defendant at the initial appearance, you should immediately notify the AUSA or the duty AUSA after hours. If a federal judge or magistrate judge is unavailable, the officer may take the defendant before a local or state judge, mayor of a city, or other official designated in 18 U.S.C. § 3041 for an initial appearance. This alternative should not be used unless approved by the AUSA.

### 16.6.2 Purpose and Procedure

The primary purpose of the initial appearance is to inform the defendant of the charges for which the arrest was made and the procedural rights in the upcoming trial. Pre-trial release (bail) may also be considered at this time.

### 16.6.3 Defendant's Rights at the Initial Appearance

The judge informs the defendant of the charge usually by providing the defendant with a copy of the indictment, information, or criminal complaint, or by having the AUSA describe the charges pending against the defendant. The defendant will be told of his right to retain counsel, and if the defendant cannot afford counsel, the right to have counsel appointed. The defendant will also be told how he can secure pretrial release, the defendant's right not to make a statement, and that any statement made can be used against him.

### 16.6.4 Pretrial Release or Detention

The defendant can be released or detained pending the trial date. This determination is made by applying the Bail Reform Act, 18 U.S.C. §§ 3141 - 42. In most cases, there is a presumption that the defendant will be released on bond with conditions. The government may only overcome that presumption by demonstrating to the court that the defendant, if released on bond, would pose a risk of flight or danger to the community. Where the charges are narcotics related (Titles 21 or 46) and have a maximum penalty of ten years or more, there is a rebuttable presumption that the defendant, if released, will pose the risk of flight and danger to the community. In that event, the law affords the defendant the opportunity to rebut that presumption.

The process of making the determination is as follows:

#### a. Pretrial Services Interview and Recommendation

Prior to being taken to the initial appearance, the Pretrial Services Office within the district collects information from the defendant and other sources. It then recommends to the judge whether a defendant should be detained or released. The recommendation may include conditions of release. Judges



often follow the recommendations of the Pretrial Services Office. If that office recommends release pending trial, and the government believes that detention is warranted, the officer should inform the AUSA immediately so the AUSA can decide whether to request a detention hearing. The report prepared by the Pretrial Services Office is confidential, but it may be released to the AUSA. A copy will not automatically be given to the officer.

#### b. Judge's Options

At the initial appearance, the judge may:

- Release the defendant on his own recognizance;
- Release the defendant on condition or conditions that may include bail;
- Conduct a detention hearing if the attorneys for both sides are prepared to proceed; or
- Temporarily detain the defendant until the detention hearing can be held.

#### c. Conditional Release

The judge has wide discretion in selecting conditions that are reasonably necessary to assure the defendant's appearance and the safety of others and the community. Every release is conditioned upon the defendant's not committing a crime during the period of release. There are many other options the judge may choose such as: maintaining employment; travel restrictions; restrictions on place of residence and associating with other persons to include victims and witnesses; curfews; drug and alcohol use restrictions; medical evaluation and treatment requirements; bail; limited custody when the defendant is not at work; and "tethering" by electronically

monitoring the defendant's location.

### 16.6.5 Detention Hearings and Decision

The decision to detain the defendant in custody is made at a detention hearing. At that hearing, the defendant is permitted to present evidence, call witnesses, cross-examine other witnesses, and be represented by counsel.

### 16.6.6 Release is Preferred

The Bail Reform Act requires the pretrial release of a defendant on either his personal recognizance or an unsecured appearance bond (neither of which requires a deposit of money or property as security), subject to conditions while on release, unless the judge determines release: (1) will not reasonably assure the appearance of the defendant (flight risk), or (2) will endanger the safety of any other person or the community. The judge will consider the seriousness of the charged offense, the strength of the case, criminal history, and the possible danger that the defendant may present to the community.

### 16.6.7 Bail Jumping

If the defendant fails to appear in court after being released, the judge has many options, and the government can, and usually does, seek an indictment charging the defendant with a violation of the federal Failure to Appear statute, also known as "bail jumping." If later convicted of bail jumping, the sentence for bail jumping will be in addition to (consecutive sentence) any sentence for the offense for which the defendant failed to appear. 18 U.S.C. § 3146.

## 16.7 Initial Appearance: Which District?

If the defendant is arrested in the district where the crime occurred, the officer must take the defendant for his initial

appearance in that district. When possible, an arrest should be made in the district where the offense was committed because the officers, AUSA, and judge will already be familiar with the case, and it will be easier to obtain witnesses for any necessary proceedings.

### 16.7.1 Initial Appearance Options

When the defendant is arrested in any district other than the one in which the crime occurred, there are several options for where to take the defendant for the initial appearance, depending on the proximity of other districts and how quickly the initial appearance can be held. The officer may take the defendant to a district that meets the following criteria:

- The district in which the defendant was arrested, or
- An adjacent district (a district that touches the district of arrest) if:
  - The initial appearance can occur more promptly in the adjacent district, or
  - The offense was committed in the adjacent district and the initial appearance can be held on the same day as the arrest.

### 16.7.2 Removal and Identity Hearings

When the initial appearance is held in a district other than one in which the crime occurred, the judge must conduct a removal, and often, an identity hearing.

Removal is the process of transferring the defendant to the district where the crime occurred to stand trial. If the defendant was arrested without a warrant in hand, then the

officer must obtain an arrest warrant from the district where the crime occurred. The documents can be sent by facsimile.

As part of the removal hearing process, the judge must determine that the defendant is the same person named in the arrest warrant. This will be done at an identity hearing. When the defendant admits his true name, this requirement is satisfied. Otherwise, the AUSA may have to produce witnesses who can identify the defendant or match descriptions from other evidence.

## 16.8 Diplomats

### 16.8.1 Diplomatic Immunity

Diplomats are representatives of foreign countries who work in the United States on behalf of the government of that foreign country. In order to enjoy status as a diplomat, a foreign government representative must be officially recognized by the U.S. Government.

Diplomatic immunity is based on international law and treaties that the United States has made with other nations. A person with diplomatic immunity is not subject to the jurisdiction of U.S. courts either for official, or, to a large extent, personal activities and therefore may not be arrested or prosecuted for any offense no matter how serious.

The same laws that protect foreign diplomats in the U.S. also protect U.S. diplomats overseas.

### 16.8.2 Verifying the Status of Diplomats

There are many levels of diplomatic immunity; this chapter will only discuss those with full diplomatic immunity. When encountering suspects who claim diplomatic immunity, officers should inform the suspect they will be detained until

their identity and diplomatic status has been verified. Most diplomats carry diplomatic passports or identification cards issued by the U.S. Department of State. Nevertheless, officers should verify the claimed status of every person by calling the Department of State at the Diplomatic Security Command Center (DSCC) at (571) 345-3146. DSCC will respond with diplomatic status and degree of immunity.

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

### 16.8.3 Diplomats: After Verifying Diplomatic Status

- Do not arrest.
- Investigate and prepare a report.
- Do not use handcuffs unless the diplomat poses an immediate threat to safety.
- Do not search or frisk the person, their vehicle, or personal belongings unless necessary for officer safety.

### 16.8.4 Diplomats: Traffic Incidents

Law enforcement officers can stop and cite diplomats for moving traffic violations. This is not considered detention or arrest. The diplomat may not be compelled to sign a citation. In serious traffic incidents (DWI, DUI, and accidents involving personal injury) the officer may offer a field sobriety test, but the diplomat may not be required to take it. Vehicles may not be impounded or booted but may be towed to prevent obstructing traffic. Intoxicated diplomat-drivers should be offered a ride, a taxi, or to have a friend transport them; however, the diplomat may refuse the offer.

A diplomat might refuse offers to assist with transportation or other arrangements and yet still be too intoxicated to drive or walk home. In such instances, officers should contact supervisors and call upon the diplomat's embassy to advise them of the situation. The diplomat's government may take action on its own or direct its diplomat to accept offers of assistance. If the diplomat persists in driving while intoxicated, the officer must use common sense to secure the car keys or perhaps block the car so the diplomat cannot drive it. The officer should not stand by while an intoxicated person attempts to drive.

In other situations, a diplomat may still present a possible danger to others. For example, during a domestic assault, the diplomat may still be trying to strike a spouse. Again, common sense should prevail. The officer should notify a superior and the diplomat's embassy and offer protection to the potential victim of an assault. If the diplomat presents a threat of injury to the officer or another, use reasonable force to prevent injury. However, the officer still may not arrest.

The officer should forward reports of diplomatic incidents to the U.S. Department of State as soon as possible after the incident. Copies of any citations or charges should accompany each report. The addressee for incident reports, etc. is Protective Liaison Division, DSS – fax (202) 895-3613.

By law, a foreign embassy or diplomatic mission must be treated as foreign (non-U.S.) soil. Even with a search or arrest warrant, the officer may not enter these places without permission from the foreign nation.

### **16.9 Foreign Nationals – Compliance with the Vienna Convention on Consular Relations (VCCR)**

The 1963 Vienna Convention on Consular Relations (VCCR) established the protocol for the treatment of foreign nationals

arrested in the United States as well as for U.S. citizens arrested by foreign governments. The agreements contained in the VCCR have the status of treaties in international law. The U.S. Constitution provides that treaties, once adopted, have the force of law in the United States. Therefore, the provisions of the VCCR are binding on federal, state, and local government officials.

International legal obligations exist to assure foreign governments that the United States will extend appropriate consular services to their nationals in the United States. These are mutual obligations that also pertain to American citizens abroad. For purposes of consular notification, a “foreign national” is any person who is not a U.S. citizen. The following situations create obligations for law enforcement officers.

#### 16.9.1 Arrests/Detentions – Advising of Right to Consular Notification

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national’s government has the opportunity to offer their appropriate consular assistance. All foreign nationals in custody must be told of the right of consular notification and access. In most cases, the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. Neither the gravity of the charges, nor the immigration status of the individual, are relevant to the consular notification decision; the only triggering factor is arrest or detention of a non-U.S. citizen.

##### a. Requested Notification (Basic Rule)

If the detained foreign national is a national of a country that is not on the mandatory notification list, the “Basic Rule” applies: the officer must inform the foreign national without delay of the option to have his/her government’s consular

representatives notified of the detention. If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay.

b. Mandatory Notification (Special Rule)

In some cases, however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes. Those countries requiring mandatory notification are identified in the State Department list of "Special Rule" (mandatory notification) countries. If a national of one of these countries is arrested or detained, notification to the individual's consular officials must be made without delay.

Whether the case falls under the "Basic Rule" or the "Special Rule," the officer should always keep a written record of all notification actions taken, including initial provision of information to the detained individual about the right of consular notification and access.

16.9.2 Consular Access

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to their consular representatives must be forwarded by the appropriate local officials to the consular post without delay. Foreign consular officers must be given access to and allowed to communicate with their nationals who are being held in detention. Further, they are entitled to provide consular assistance, such as arranging for legal representation and contacting family members. They must refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. The rights of consular access and communication generally must be exercised subject to local laws and regulations.



### 16.9.3 Deaths

When U.S. government officials become aware of the death of a foreign national, the nearest consulate of that national's country must be notified without delay. This will permit the foreign government to make an official record of the death for its own legal purposes.

### 16.9.4 Appointments of Guardians/Trustees

When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or an incompetent adult, consular officials must be informed without delay.

### 16.9.5 Ship/Aircraft Accidents

If a ship or airplane registered in a foreign country wrecks or crashes in the United States, consular officials of that country must be notified without delay.

## 16.10 Members of Congress

### 16.10.1 Privilege from Arrest

Members of Congress are privileged from arrest while Congress is in session and while attending, or going to and from, sessions of Congress. (Art.1, Section 6 of the U.S. Constitution.) The privilege does not prohibit issuing traffic and other citations, investigating and preparing reports, serving a subpoena or summons, or prosecution for a crime.

### 16.10.2 Exceptions to the Privilege

Even if attending congressional sessions or on the way to and from them, a member of Congress may be arrested for a felony or breach of the peace. Generally, a breach of the peace is an offense that involves violence. Because "breach of the peace" is

a fluid term and subject to constant interpretation, officers should investigate and document the breach of the peace and then submit findings to superiors. No arrest should be made unless authorized by superiors in consultation with the U.S. Attorney's Office.

## 16.11 Juveniles

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

- Immediately advise the juvenile of their Miranda rights in words that the juvenile can understand even if there is no intention to question the juvenile; (Miranda v. Arizona, 384 U.S. 436 (1966).)
- Immediately notify the AUSA of the juvenile's arrest and the charge(s);
- Immediately notify the parents or guardian of the juvenile's arrest, the charges, and the juvenile's legal rights under Miranda. (It is the officer's responsibility to make a good faith effort to notify the juvenile's parents or guardian. If the parent or guardian requests to speak with the juvenile, the government must allow it), and
- Take the juvenile forthwith before a United States magistrate judge. ("Forthwith" requires more speed than "without unnecessary delay"), and
- Do not make a media release. The government should not make public the name or the picture of any juvenile (or any reports, documents, fingerprints, and the like pertaining to them) without prior approval of the district court. (See 18 USC §§ 5031-5038.)

The officer may and should investigate the case as any other. If the juvenile understands and waives their Miranda rights, the officer may question the juvenile. Any statement obtained lawfully and without delay in bringing the juvenile before the magistrate judge will be admissible in court.

When an officer intends or expects to arrest a juvenile, they should attempt to obtain the approval and guidance of the AUSA before the arrest.

## 16.12 Preliminary Hearings and Arraignments

### 16.12.1 Preliminary Hearings

A preliminary hearing is a proceeding during which the government is required to produce evidence from which the court may conclude whether or not the defendant's arrest was based upon probable cause. F.R.Cr.P. 5.1(a) requires that the magistrate judge hold a preliminary hearing for all defendants charged in a criminal complaint with a felony or class A misdemeanor, that is, defendants other than those charged with a petty offense, with the following exceptions:

- The defendant waives (gives up the right to) the hearing.
- The defendant was already indicted, or charged by information, before the time the preliminary hearing is to be held.
- The government dismisses the case on its own. A defendant who has been detained in custody must then be released.

#### a. The Preliminary Hearing Procedure

At a preliminary hearing, the magistrate judge will hear evidence to determine whether there is probable cause to

believe that an offense has been committed and that the defendant committed it. The AUSA will call witnesses and may offer other evidence. The officer may testify at preliminary hearings. The defense may cross-examine government witnesses, call its own witnesses, and offer evidence. Because the preliminary hearing is not a trial, there is no jury and hearsay is admissible. Because the preliminary hearing is not a suppression hearing, the defense may not object on the grounds that evidence was unlawfully seized. Testimony given at the preliminary hearing is recorded and could be used to impeach testimony at a later proceeding.

#### b. The Preliminary Hearing Timing and Results

If the judge finds there is probable cause to believe an offense has been committed and the defendant committed it, the defendant will be required to appear for further proceedings. If the judge decides there is no probable cause, the judge will dismiss the complaint. If the defendant is in custody, they will be released. A finding of no probable cause does not prevent a subsequent prosecution. The investigation may continue, and the AUSA may still seek an indictment or file an information.

The preliminary hearing must be held not later than 14 days after the initial appearance if the defendant is detained in custody, or 21 days after the initial appearance if the defendant has been released from custody. Generally, a preliminary hearing is held in the same district as the initial appearance. When a person is arrested in a district other than where the crime occurred and the initial appearance is held in the district of arrest, the defendant may elect to have the preliminary hearing in the district where the crime occurred.

Preliminary hearings consume resources, expose government witnesses to cross-examination, may compromise sensitive information, and may force the government to disclose information prematurely. Processing a case in a way to avoid

having a preliminary hearing is a legitimate tactic. For example, if an indictment or information is obtained before the arrest, the defendant is not entitled to a preliminary hearing. In many situations, however, it may be appropriate to arrest before the indictment or information is obtained, as illustrated by the below examples:

- The danger that a defendant may harm another, flee, or destroy evidence may require an immediate arrest.
- Before an indictment can be obtained, the government may realize the defendant may be in possession of evidence at a particular time and wish to take advantage of a search incident to arrest.

### 16.12.2 Arraignment

The purposes of an arraignment are: (1) to ensure that the defendant has a copy of the indictment or information; (2) either to read the charging document to the defendant or to advise the defendant of the substance of the charges; and (3) for the defendant to enter a plea to those charges.

An arraignment does not occur until formal charges are filed against the defendant in the form of an indictment or an information. The judge may permit a defendant to waive formal arraignment if the defendant requests waiver, pleads not guilty, and certifies receipt of a copy of the indictment or information.

At the time of the arraignment, the defendant, through defense counsel, will typically enter a plea of not guilty. The court will accept the not guilty plea and, in response to it, will enter an order requiring the exchange of discovery by the government and defense counsel in preparation for trial.

## 16.13 The Grand Jury

### 16.13.1 Purpose of the Grand Jury

A grand jury is an independent body that operates under the supervision of a district court judge and under the direction of an AUSA. A grand jury performs two essential functions.

First, grand juries return indictments. The Fifth Amendment to the U.S. Constitution provides that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury....” Accordingly, if the defendant is to be tried for a felony, a “true bill of indictment” (referred to simply as an indictment) is required unless the defendant waives it. Fed. R. Crim. P. 7(a)(1).

Second, a grand jury may investigate crimes within its district. Grand juries have broad powers to investigate crime and may, through the use of grand jury subpoenas, obtain testimony, documents, and other evidence that officers cannot. If the grand jury concludes an investigation by finding probable cause that a crime was committed and that a particular person, or persons, committed that crime, it may then return an indictment naming that person or persons as defendants. A grand jury may not investigate civil matters.

### 16.13.2 Selection, Empanelment, and Structure

Grand jurors are selected by a random drawing, usually by the Clerk of Court, from a “pool” consisting of registered voters. Grand jurors must be U.S. Citizens, at least 18 years of age, proficient in English, and have no felony convictions or pending prosecution. Federal grand juries consist of 23 such persons who generally serve for 18 months; however, the court may discharge the jury earlier or extend the jury’s service six additional months. When the grand jury sits, there must be a minimum of 16 grand jurors present.

### 16.13.3 The Grand Jury Process

The grand jury usually meets in a special, private room. Grand jury proceedings are formal, but less formal than a trial. Unlike a trial jury, a grand jury does not sit to hear just a single case. Once a grand jury starts hearing evidence on a particular investigation, they do not have to finish that investigation before they begin another. A grand jury could hear evidence on case A in the morning, case B in the afternoon, and then continue on case A again the following day. A grand jury may not meet every day, and a grand jury may not always be in session in your area.

The grand jury serves under the guidance of an AUSA. While the grand jury is empaneled by a District Court judge and legally functions under the judge's supervision, the AUSA presents the case to the grand jury, calls and examines witnesses, issues subpoenas in the name of the grand jury, and presents the proposed indictment.

Grand jury proceedings are secret and not open to the public. Grand jury secrecy ensures that untested and uncorroborated information is not leaked to the public. Secrecy also helps witnesses be more forthcoming and preserves the integrity of a criminal investigation. (The details of grand jury secrecy principles are discussed in a later section.) When testimony is presented to the grand jury, only certain people may be present: the AUSA; one witness at a time; an interpreter (if needed); a court reporter; and the members of the grand jury. Officers who testify will not be present to hear the testimony of other witnesses. When the grand jury is deliberating and voting on the indictment, only the grand jury members may be present.

Neither the target (possible defendant) of a grand jury, nor the target's attorney, has the right to be present. Infrequently, the AUSA may invite the target to testify before the grand jury.

Even if the target testifies, the target's attorney is not allowed to be present; however, at the AUSA's discretion the target may be allowed the opportunity to consult briefly with his attorney outside of the grand jury room. The target may refuse to testify if the testimony would be incriminating. The target could be given immunity and compelled to testify, but that is rarely done because immunized testimony cannot be used against the target at a later date.

The AUSA presents evidence to the grand jury. The evidence will consist of witnesses, documents, and other evidentiary items that are subpoenaed by the grand jury or that may be voluntarily submitted by a witness before the grand jury. The grand jurors may also ask questions. Because there is no defense counsel present, there is no cross-examination. Because a grand jury hearing is not a trial, the Federal Rules of Evidence (F.R.E.) (with the exception of privileges) do not apply. This means that hearsay may be used, and that the AUSA is not required to lay a full foundation for evidence. In a "routine" case, a one-officer presentation may be sufficient even though many officers worked the case. Because the burden of proof at a grand jury is only probable cause, an AUSA might not present all the available evidence. Nevertheless, the Department of Justice policy is that indictments are not to be sought unless the responsible AUSA has determined that the evidence, viewed in its totality, constitutes proof beyond a reasonable doubt of the defendant's guilt, the threshold of proof necessary for the trial jury to convict.

Though grand jury proceedings are secret, if a witness testifies at both a grand jury and the trial, the defense will receive a copy of the witness's grand jury testimony under the Jencks Act (addressed later in this chapter). Grand jury witnesses must be accurate in their testimony because they may and likely will be cross-examined concerning any conflicts between trial and grand jury testimony.



A “true bill of indictment” requires the agreement of at least 12 of the grand jurors that there is probable cause that a crime was committed, and that the defendant committed it. If the grand jury votes a true bill, the foreperson and AUSA sign the indictment. The indictment is then “returned” (reported) to the judge in open court unless the indictment is sealed. Once an indictment is returned, the indictment may be used to obtain an arrest warrant or summons. The warrant or summons will be signed by the clerk of court.

If less than 12 of the grand jurors vote for indictment, a “no bill” results, and that is reported to the judge. If the grand jury returns a no bill, the case may be presented again to the same or a different grand jury. This sometimes requires presentation of additional evidence and approval of senior DOJ officials.

#### 16.13.4 Sealed Indictments

Ordinarily, an indictment is returned in open court making it public. The AUSA may request that the judge keep the indictment secret until the defendant is in custody. This is a valuable tool. In many cases, especially those involving multiple defendants, if indictments are made public or defendants are arrested at different times, other defendants may flee or destroy evidence. Officers may also be involved in cases with indictments being sought in several districts.

By having an indictment sealed, the government may coordinate multiple arrests to avoid tipping off defendants. Fed. R. Crim. P. 6(e)(4).

#### 16.13.5 Post-Indictment Grand Jury Powers

The purpose of a grand jury is to investigate crime and return indictments. Once an indictment has been returned on a charge, the power of the grand jury to investigate that charge

ends. This rule means that the grand jury may not be used solely to obtain additional evidence against a defendant who has already been indicted. After indictment, however, the grand jury may issue subpoenas if the investigation is to seek a superseding (modified) indictment, the indictment of additional defendants, or indictment of additional crimes by an already-indicted defendant. In addition, the grand jury may not be used solely to assist the AUSA in pre-trial discovery or trial preparation.

## 16.14 Grand Jury Subpoenas

### 16.14.1 Power/Flexibility of Grand Jury Subpoenas

Grand juries have the power to subpoena testimony and other evidence. What a grand jury may subpoena is often beyond an officer's reach. Consider the following situations about how officers often collect evidence and in parentheses, the limitations faced.

- The officer may seek consent to search. (But the person may refuse consent.)
- A witness may agree to an interview. (But an officer cannot force a person to submit to an interview.)
- An officer may request a search warrant. (But there may not be probable cause for the warrant.)
- An officer may get a court order to obtain information. (But the request may take too long, or the judge may refuse to issue it.)

In the above examples, the officer should consider whether a grand jury subpoena would meet the needs of the government. In addition, subpoenas may be used to obtain the following (this list is by no means complete):

- corporate records that would reveal evidence of a crime;
- a copy of an apartment lease or car rental contract;
- fingerprints, handwriting or voice exemplars, or hair samples;
- phone records to see what calls were made;
- bank or credit card company records;
- shipping records from interstate carriers.

#### 16.14.2 Types of Grand Jury Subpoenas

A subpoena *Ad Testificandum* commands the appearance of a witness to testify. A subpoena *Duces Tecum*, commands the person to produce specific books, papers, data, objects or documents designated in the subpoena and to testify about them.

#### 16.14.3 Service of Subpoenas

While the Federal Rules of Criminal Procedure specifically provide for service by U.S. Marshals, officers may, and often will, serve subpoenas in their own cases. Unlike a summons that may be served upon a “person of suitable age and discretion” followed by mailing the summons, a subpoena must be personally served upon the person named in the subpoena. Substitute service is not permitted. The failure to comply with a properly served subpoena is punishable as contempt of court.

#### 16.14.4 Quashing or Modifying a Subpoena

A person who has been subpoenaed to provide information and who is subject to a privilege (such as the 5th Amendment or the spousal privilege) or who otherwise objects to the subpoena

may go to court to “quash” (cancel) the subpoena. The court may either grant or deny such a motion to quash, or may modify the subpoena to limit what the person must provide.

#### 16.14.5 Legal Requirements for a Subpoena

The item or testimony sought must be relevant to a grand jury investigation. “Relevance” is a much lower standard than probable cause. In the case of a subpoena *Duces Tecum*, the items sought must be particularly described so the person subpoenaed can comply. The production of the item also may not be “unreasonably burdensome.”

#### 16.14.6 Limitations of Grand Jury Subpoenas

- A grand jury may only investigate crimes in the district where they sit.
- A subpoena may not be used to investigate civil (non-criminal) matters.
- Fifth Amendment (self-incrimination) and other privileges apply. A subpoena may not compel a person to provide self-incriminating testimony. Persons who legitimately claim a privilege against self-incrimination may be compelled to testify if given a grant of immunity. Immunized testimony may not be used against the immunized witness though it could be used against another. In addition, a subpoena may not compel disclosure of information that is subject to other recognized privileges (attorney-client, psychotherapist-patient, husband-wife, and clergy-communicant). DOJ requires special permission before issuing subpoenas to the media and to non-target attorneys, doctors, and members of the clergy. The AUSA will have the details explaining how this can be accomplished.

- A subpoena may not be used to compel a person to submit to an interview. For example, believing that a witness might not give an interview, an officer serves a subpoena on the witness implying that if the witness submits to an interview, the subpoena will be withdrawn. This is an improper use of grand jury powers. On the other hand, if the officer serves a subpoena on a person, and if the witness then indicates willingness to be interviewed, the officer may lawfully conduct the interview. The AUSA may thereafter release the witness from the necessity of appearing before the grand jury to testify.
- Subpoenas may not be issued to investigate the offense(s) that have already been indicted.
- While the grand jury may be used to investigate crimes such as harboring or escape, DOJ policy prohibits its prosecutors from using the grand jury's subpoena power solely to aid in locating and arresting fugitives.

#### 16.14.7 Forthwith Subpoenas

In some cases, officers may have reason to believe that a person served with a subpoena for documents or other evidence may destroy the evidence or falsely deny having the subpoenaed item(s). With the approval of a U.S. Attorney, the officer may obtain a “forthwith” subpoena when there is a risk of flight or destruction of evidence. A forthwith subpoena must be approved by a Judge and, if approved, requires the recipient's immediate compliance with the production demands within the subpoena. Even using a forthwith subpoena, however, there still may be some opportunity to destroy evidence.

When a subpoena would allow a person to destroy or alter evidence, or falsely claim they do not have the item, the officer

should consider obtaining a search warrant. A search warrant has several advantages over a subpoena: the government selects when the search warrant is executed; officers can find the item themselves, thereby denying the suspect an opportunity to destroy the evidence; evidence found in plain view during the search can be lawfully seized; and evidence obtained by a search warrant is not subject to grand jury secrecy rules.

Subpoenas, on the other hand, are easier to obtain because they do not require probable cause and can usually be obtained by contacting the AUSA's office.

#### 16.14.8 The Mechanics of Obtaining a Subpoena

The exact procedure varies in each district. Ordinarily, after the grand jury has been empaneled, subpoenas are issued and signed in blank by the clerk of court. The AUSA or a grand jury subpoena coordinator in the AUSA's office keeps the subpoenas. The AUSA decides if a subpoena will be issued. When officers need a subpoena, they should contact the AUSA's office and request one.

### 16.14.9 Inspector General (IG) Subpoenas

In addition to grand jury subpoenas, IG subpoenas might also be available. Most IG subpoenas are authorized by the Inspector General’s Act, 5 USC App. §6(a)(4). The following text box contrasts some aspects between IG and grand jury subpoenas.

Grand Jury Subpoena	Inspector General Subpoena
Secrecy rules apply (Fed. R. Crim. P. 6(e))	No GJ secrecy rules
Criminal matters only	Criminal or civil matters
<i>Ad testificandum</i> or <i>duces tecum</i>	<i>Duces tecum</i> only
Can obtain delay in notice in certain banking records	Person will be notified when certain bank records subpoenaed
Can be relatively easy to obtain	Sometimes requires executive level approval

### 16.15 Secrecy Requirement

Fed. R. Crim. P. 6(e)(2) requires that grand jury proceedings, and “matters occurring before the grand jury,” may not be publicly disclosed and, subject to very specific exceptions noted below, must remain secret. The purpose of this secrecy rule is to encourage witnesses to come forward and testify freely and honestly, to minimize the risk that prospective defendants will flee or thwart investigations, and to protect accused persons who are ultimately exonerated from unfavorable publicity.

The following items are protected by grand jury secrecy rules and officers cannot disclose the item unless authorized to do so. Collectively, these items are known as “matters occurring before the grand jury,” or simply, “grand jury matters:”

- The names of witnesses (including that the officer was a witness);
- The testimony of a witness (including the officer's own testimony);
- Documents and other items that were subpoenaed by the grand jury; and
- Other grand jury matters including information provided by the AUSA, questions by grand jurors, and what occurred in front of the grand jury.

#### 16.15.1 Exceptions to Fed. R. Crim. P. 6(e)

Exceptions to Fed. R. Crim. P. 6(e)'s secrecy requirement are as follows:

##### a. The Non-Government Witnesses Exception

A private citizen (non-government employee) who testifies before a grand jury may lawfully disclose that they testified and the subject matter of their own testimony.

##### b. District Court or AUSA Disclosure

A district court judge can order disclosure of grand jury matters. Typically, with notice to a district court judge, the AUSA controls disclosure of grand jury matters. Requests to a district court judge are processed by the AUSA and do not involve officers. The remainder of this section will discuss only release of grand jury matters by the AUSA.

##### c. Access to Grand Jury Matters

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



however, may not be released to just anyone and may be released only for limited purposes on a “need to know” basis. The AUSA can give the following groups access to grand jury matters for the purposes indicated:

- Federal and state officers for the purpose of enforcing federal criminal law. Grand jury matters cannot be released for civil law purposes.
- Another AUSA for purposes of enforcing federal criminal laws.
- Another grand jury. If a grand jury in District A has matters useful to a grand jury investigation in District B, the AUSA may authorize disclosure of grand jury matters to the grand jury in District B.
- Under the Jencks Act and Fed. R. Crim. P. 26.2, the grand jury testimony of a person who later testifies at a trial or hearing will be provided to the defense. (The Jencks Act and Fed. R. Crim. P. 26.2 are discussed thoroughly in a later section.)
- Foreign intelligence and other persons and entities. There are other, limited situations when grand jury matters may be revealed that are beyond the scope of this course. For example, foreign intelligence information may be given to a wide variety of entities. Fed. R. Crim. P. 6(e)(3)(D) permits the disclosure of grand jury information involving intelligence information to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of official duties. This section requires notice to the court of the agencies to which information was disseminated and adds a definition of “foreign intelligence information” to Fed. R.

Crim. P. 6(e).

d. The 6(e) list

Officers need, and may use, grand jury matters to conduct criminal investigations. The AUSA who is assigned to the investigation may authorize officers to have access to grand jury materials for that purpose and on a case-by-case basis. If the officer needs access to grand jury matters, request approval from the AUSA. Officers from other agencies, or those in the chain of command who need grand jury information, must also obtain approval from the AUSA.

The AUSA is required to maintain a list of persons the AUSA has authorized to see grand jury matters. This is commonly known as “the 6(e) list.” Officers may disclose grand jury matters only to those on the 6(e) list.

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

- Officer is on a task force with officer B. The officer is on the 6(e) list; officer B is not. Officer B may not have access to grand jury matters until officer B is placed on the 6(e) list by the AUSA.
- Officer testified as a grand jury witness targeting a local politician. While out with friends at dinner, the friends (who are not on the 6(e) list) start discussing rumors that the politician is about to be indicted. The officer may neither disclose that he was a grand jury witness nor reveal testimony or other grand jury matters.

Information obtained independently of the grand jury is not subject to the restrictions of Fed. R. Crim. P. 6(e), even if the same information has previously been obtained using the grand jury or its subpoena power. For example, a copy of

Document X was obtained through a grand jury subpoena. The officer seized another copy of Document X during the execution of a search warrant. Copy 2, which was obtained by a source independent of the grand jury, may be given to anyone who needs to have it. Nevertheless, Fed. R. Crim. P. 6(e) still prohibits the officer's disclosure to anyone not on the 6(e) list that Copy 1 was obtained by the grand jury.

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

In general, government attorneys who are prosecuting a civil suit on behalf of the United States, or who are defending a civil suit against the United States, may not be given access to grand jury matters to help prepare the government's case. That is because grand jury matters ordinarily may not be used for civil proceedings. In rare instances based upon specific needs and legal issues not necessary to cover here, a District Court judge (not the AUSA or even a Magistrate Judge) may enter an order allowing such disclosure.

### **16.16 Defense Access to Government Evidence**

In preparing for trial, the defense is entitled by law to know what evidence the government has so that it may attack the government's case and mount a defense. Commonly referenced as “discovery material,” this information must be disclosed to

the defense under one or more of the following sources of authority: (1) the Brady doctrine; (2) the Giglio case; (3) the Jencks Act/ Fed. R. Crim. P. 26.2; and (4) Fed. R. Crim. P. 16. Additionally, most District Courts have local discovery rules that may require additional categories of information to be disclosed by the government and/or defense and that impose upon the parties certain time requirements for discovery.

### 16.16.1 The Brady Doctrine

In the Supreme Court case of Brady v. Maryland, 373 U.S. 83 (1963), the defendant was convicted and sentenced to death for first-degree murder committed in the course of a robbery. The government knew, but Brady did not, that Brady's accomplice had confessed to the actual murder. The United States Supreme Court later reversed Brady's conviction because this information was not disclosed to the defense and thus the "Brady Doctrine" was born.

The Brady doctrine requires that the government tell the defense of any exculpatory (favorable) evidence known to the government.

Exculpatory evidence is that which would cast doubt on the defendant's guilt or might lessen the defendant's punishment. The defense does not have to request the information - if the government knows of it, it must be disclosed. Brady materials must be provided a reasonable time in advance of trial so the defense may have a reasonable opportunity to decide how to use the information.

Examples of Brady material include:

- Evidence that another may have committed the charged offense;
- Information supporting an alibi;

- Information supporting an affirmative defense (such as entrapment or self-defense); or
- Exculpatory (favorable) material.

#### 16.16.2 Disclosure under Giglio

The Supreme Court case of Giglio v. United States, 405 U.S. 150 (1972), requires the government to disclose information that tends to impeach any government trial witness, including law enforcement officers. “Impeachment” is information that contradicts a witness or which may tend to make the witness seem less believable. Officers must tell the AUSA about potential Giglio information so AUSAs can decide what must be disclosed.

Information that may show the following situations must be disclosed to the AUSA:

- Affects the credibility or truthfulness of the witness to include having lied in an investigation, character evidence of untruthfulness, or any bias.
- Payment of money for information or testimony.
- Plea agreements or immunity.
- Past or pending criminal charges.
- Specific instances of inconsistent statements.
- Findings of a lack of candor during an administrative inquiry.
- Any credible allegation of misconduct that reflects upon truthfulness or bias that is the subject of a pending

investigation. Allegations made by a magistrate judge, district court judge, or prosecutor, and allegations that received considerable publicity must be disclosed to the AUSA even if determined to be unsubstantiated.

Information disclosed to the AUSA does not automatically go to the defense. The defense does not have an automatic and unrestricted right to see law enforcement personnel files. The government may be required to review files for Giglio information. If the AUSA does not believe that they alone can determine whether certain information must be disclosed to the defense, then the AUSA should produce that information for an in-camera inspection (by the judge only). The judge will then decide if the defense will get the information.

### 16.16.3 The Jencks Act and Fed. R. Crim. P. 26.2

The Jencks Act, created in response to Jencks v. United States, 353 U.S. 657 (1957), requires the AUSA to give the defense any prior “statements” of a trial witness that are in the possession of the government, so the defense can conduct an effective cross-examination of the witness. 18 U.S.C. § 3500. The Jencks Act requires the AUSA to deliver prior statements only after a witness testifies and before cross-examination begins. To avoid unnecessary delays during the trial, however, the AUSA usually will give Jencks Act statements to the defense in advance of trial.

Jencks Act “statements” include:

- A written statement made and signed, or otherwise adopted, by the witness, such as an affidavit or a letter. If the officer shows a witness notes taken during an interview, for example, to have the witness confirm the accuracy of the notes, the notes may thereby become that witness’s “adopted statement” for Jencks Act purposes.

- A stenographic, mechanical, electrical, or other recorded statement.
- A substantially verbatim transcript of an oral statement made at the time the witness was speaking.
- The transcript of the witness’s grand jury testimony.
- The officer’s own notes may qualify as a Jencks Act statement if the officer testifies or, as stated above, when a witness is shown the notes and vouches for their accuracy (an adopted statement). The officer must therefore safeguard notes, including original rough notes of interviews and other activities, even if they are later formalized or included in other reports. Determine agency and local AUSA policy concerning safeguarding notes.

Fed. R. Crim. P. 26.2 extends Jencks Act requirements beyond trials to other court proceedings such as suppression or detention hearings. While the statements of officers and other witnesses may not be discoverable by the defense under Fed. R. Crim. P. 16, Brady, or Giglio, anytime a witness testifies at a trial or hearing, prior “statements” of that witness must be given to the defense under the Jencks Act or Fed. R. Crim. P. 26.2.

- Example 1: A witness testifies at grand jury. Grand jury testimony is secret and will not be given to the defense. If the grand jury witness testifies at a hearing or trial, however, the grand jury testimony will be given to the defense under the Jencks Act or Fed. R. Crim. P. 26.2.
- Example 2: The signed or adopted statement of a government witness that they saw the defendant commit a crime (non-exculpatory statement) is not otherwise discoverable. If that witness testifies at a trial

or hearing, however, the statement must be given to the defense under the Jencks Act or Fed. R. Crim. P. 26.2.

#### 16.16.4 Discovery under Fed. R. Crim. P. 16

Upon a request by the defense at or following the defendant's arraignment, the government must disclose to the defense, and make the items available for inspection and copying, evidence in its possession, or of which it has knowledge, that falls within certain categories of information. The defense almost always makes a discovery request, so Fed. R. Crim. P. 16 materials are almost always provided to the defense. Fed. R. Crim. P. 16 discovery covers that which is in the possession and control of the government, that which the government should know, and in some instances, what the government could know.

Discovery requests are made by the defense to the AUSA. AUSAs, not the law enforcement officer, respond to discovery requests. The officer's role in discovery is to keep the AUSA informed about all the information in the case so the AUSA is aware of the materials in the government's possession that must be disclosed to the defense.

Evidence discoverable under Fed. R. Crim. P. 16 includes most statements made by the defendant to include:

- Any recorded or written statement made by the defendant that is relevant to the case to include any grand jury testimony. This includes not only recorded or written statements to law enforcement, but also to private citizens. For example, e-mails or letters between the defendant and friends, in the possession of the government, are discoverable.
- Oral statements made to a person the defendant knew was a government agent at the time the statement was



made. Oral statements a defendant makes to an undercover officer are not discoverable.

- The defendant's prior criminal record, to include any arrest record.
- Documents and tangible objects, to include books, papers, documents, data, and photographs that are important to defense preparation of the case, or which the government intends to offer at trial (trial exhibits).
- Items obtained from or that belonged to the defendant such as evidence that was subpoenaed from another or discovered during a search of the defendant or the defendant's property.
- Reports of examinations and tests such as handwriting, ballistic, or fingerprint comparisons.

Items that are not discoverable under Fed. R. Crim. P. 16 include:

- Reports of witness interviews or recorded (written or electronic) statements. (If a witness testifies at a hearing or trial, however, the Jencks Act requires that the government then disclose any prior recorded (written or electronic) statements by that witness to the extent that such recorded information is relevant to the substance of that witness' testimony.)
- Internal government documents made by you or the AUSA. This would include reports, memoranda, memoranda of interviews (MOIs), and reports of investigation (ROIs).

If the defense makes a discovery request, the government is also entitled to certain information (“reciprocal discovery”) from the defense. This will be handled by the AUSA.

<b><u>Brady</u></b>	Exculpatory evidence
<b><u>Giglio</u></b>	Impeachment of trial witnesses
<b><u>Jencks Act and Fed. R. Crim. P. 26.2</u></b>	Prior statements of witnesses
<b>Fed. R. Crim. P. 16</b>	Most of defendant’s statements, criminal history, scientific tests, property

### 16.16.5 eDiscovery in Federal Criminal Investigations and Prosecution

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

- **Electronically Stored Information (ESI):** For investigations, creating, obtaining, seizing, and maintaining ESI is primarily a function of case organization and management. There are numerous

software systems that perform well, and agencies typically pick one that fits their kind of cases best. For prosecutions, there are a number of case presentation software systems that perform well, and prosecution offices typically pick one that fits best.

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

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

#### 16.16.6 eCommunications: Defined

Many day to day communications make up eCommunications. They include e-mail, text messages, instant messages, and short message services such as tweets, pin-to-pin, social

networking sites, bulletin boards, and blogs. They can be broken down into three categories – Substantive, Logistical, and Privileged.

- Substantive Communications contain factual information about the case, including: information about investigative activity; information from interviews or interactions with victims, witnesses, potential witnesses, informants, cooperators, and experts; discussions about the merits of evidence; and information regarding the credibility or bias of witnesses.
- Logistical communications include those that contain: travel information, dates, times, and locations of hearings or meetings, and those that transmit reports. Generally, purely logistical communications are not discoverable.
- Privileged Communications include those that contain: attorney-client privileged communications; attorney work product communications; deliberative process communications; and protected communications, which are those covered by Fed. R. Crim. P. 16(a)(2). Generally, so long as any discoverable facts in them are disclosed in other materials, privileged and protected communications are not discoverable.

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

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

#### 16.16.7 Preserving eCommunications

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

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

As with all discovery materials, each person involved in the case must provide all potentially discoverable

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

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

#### 16.16.8 Continuing Duty to Disclose

Complying with discovery and disclosure requirements is a continuing obligation. If the defense asks for an item that does not exist at the time of the request, but later comes into existence, the government must disclose it once it learns that the evidence exists. For example, if a ballistics test has not been performed at the time of a discovery request, but later the test is performed, the government must disclose the results of the test.

#### 16.16.9 Sanctions for Non-Compliance

Failure to comply with discovery and disclosure requirements can have drastic consequences. While the AUSA is responsible for fulfilling discovery requirements, agent/officer must ensure the AUSA has all the information so that the AUSA can comply. Failing to comply with discovery requirements can result in government evidence being excluded, a trial continuance for the defense to evaluate newly discovered information, mistrial, and even a reversal of conviction if the non-compliance is discovered after trial.

## 16.17 Venue and Transfer

It is important for you to determine the venue for any offense under investigation. Venue controls what judge can perform certain functions, where you must obtain court documents, and where the defendant can be tried.

Jurisdiction is the power of a court to try a case. For example, a federal district court judge has the authority to try any federal criminal case. Venue means place. The U.S. Constitution provides that a defendant has the right to have their case tried in the state and district where the crime occurred.

Venue affects how an officer performs their duties. Each of the actions below must be performed in the district where the crime occurred (venue):

- Return of a grand jury indictment.
- Presenting a criminal complaint or filing an information.
- Obtaining an arrest warrant or summons.
- In most cases, a search warrant must be obtained in the district where the evidence is located.
- Trial of the defendant unless the judge permits otherwise.

In a typical case, venue is where the unlawful act occurred. For offenses begun in one district and completed in another, venue is in any district where the offense was begun, continued, or completed. 18 U.S.C. § 3237. In conspiracy cases, venue is in the district in which the agreement, any overt act in furtherance of the agreement, or termination of the conspiracy occurred. Special statutes control venue for those federal

offenses that occur outside of the jurisdiction of the U.S. or upon the high seas.

The defendant will be tried in the district where the crime occurred unless one of the below exceptions apply.

- **Transfer for Plea and Sentence (Fed. R. Crim. P. 20).** If a defendant is arrested in a district other than the one where the crime occurred and the prosecution is pending, the prosecution may be transferred to the district of arrest if the defendant states in writing a wish to plead guilty in the district of arrest and to waive trial in the district where the prosecution is pending, and the United States Attorneys and the judges in both districts agree. If the defendant thereafter changes their plea to not guilty, then the prosecution is transferred back to the district where the crime occurred and from which the prosecution was transferred.
- **Transfer for Trial (Fed. R. Crim. P. 21)** (“change of venue”). The defense may file a motion requesting a transfer of the prosecution to another district for trial or other disposition if the court finds that the prejudice against the defendant is so great in the district of venue (where the crime occurred) that the defendant cannot obtain a fair and impartial trial, or (b) that the prosecution, or one or more counts, against the defendant should be transferred to another district for the convenience of the parties and the witnesses and in the interest of justice.
- **To state and local officers,** “extradition” involves moving a defendant between states within the United States to stand trial. In the federal system, extradition is moving a defendant into the United States (or out of the United States) for trial. In other words, federal extradition is not the movement of a defendant between districts and



states, but between the United States and another nation. The process is a complicated one involving the Departments of State and Justice.

### 16.18 The Statute of Limitations

A statute of limitations prohibits prosecution of a defendant after a certain period of time has passed. The statute is designed to protect individuals from having to defend themselves against charges when the facts may have become obscured by time, or defense witnesses may have become unavailable to testify, and to encourage law enforcement officials to promptly investigate suspected criminal activity. If the defendant is indicted or an information is filed within the statute of limitations, then the prosecution may proceed. If not, then prosecution is barred.

The general statute of limitations requires the government to indict or file an information within five years from the date of the offense. 18 U.S.C. § 3282. Some crimes have their own statute of limitations. For example, the statute for Title 26 tax crimes is generally six (6) years; arson is ten (10) years. There is no statute of limitations for a capital offense.

It is helpful to view the statute as a clock. The clock starts, that is, the statute starts to run, the day after the offense is completed. The clock runs until the defendant is indicted or an information is filed. If at the time of indictment or information the clock is not yet at the five-year point, prosecution may proceed. If the clock has reached or passed the five-year point, prosecution is barred. A statute of limitations runs even though the government does not know the defendant's identity.

An example of the computation for the general statute of limitations:

- 8/31/2010: Crime committed.
- 9/1/2010: First day of running of the statute of limitations.
- 8/31/2015: Last day to secure indictment or information.
- 9/1/2015: Prosecution barred unless indictment or information was obtained.

The statute of limitations does not run while a defendant is a fugitive from justice. Using the clock example, the clock stops while the defendant is a fugitive. This is known as “tolling the statute.” A fugitive is a person who commits an offense and then intentionally flees from the jurisdiction of the court where the crime was committed, or who departs from his usual place of abode and intentionally conceals himself for the purpose of avoiding prosecution. Fleeing from justice means the person has left to avoid trial and punishment.

An example of the computation for the general statute of limitations in a fugitive case:

- 8/31/2010: Crime committed.
- 9/1/2010: First day of running of the statute of limitations.
- 10/1/2010 to 9/30/2011: Defendant is a fugitive from justice. The statute of limitations is tolled.
- 8/31/2016: Last day to secure indictment or information.
- 9/1/2016: Prosecution barred unless indictment or

information was obtained.

Some offenses are called “continuing offenses” which means that though the crime occurred on a certain day, the statute of limitations does not begin to run until a later date. For example, in a conspiracy case, the statute begins to run on the date of the last overt act even though the agreement may have occurred earlier. Certain frauds are also continuing offenses. The statute of limitations for mail or wire fraud, for example, begins to run on the date of the last mailing or wire transmission in furtherance of the scheme to defraud.

### **16.19 The Speedy Trial Act**

The Speedy Trial Act (18 U.S.C. §§ 3161-3174) establishes time limits for bringing a defendant to trial after arrest or service of a summons. The statute ensures the timely progression of the case and serves to implement the Sixth Amendment “...right to a speedy and public trial.”

No more than one hundred (100) days may elapse between date of arrest or service of a summons and the first day of the trial. The 100-day rule has two separate components:

- An indictment or information must be filed within 30 days of the date of arrest or service of a summons.
- The trial must begin within 70 days of the public filing of the indictment or information, or from the date the defendant appears before the court in which the charge is pending, whichever is later.

Many events may delay the start of a trial yet be excluded in calculating whether the Speedy Trial Act has been violated. These exclusions usually involve procedural matters that concern only the AUSA and are beyond your control. By way of example, the time to litigate pretrial motions or to perform

necessary mental evaluations of a defendant would be excluded from Speedy Trial Act time.

A law enforcement officer must appreciate that when a suspect is arrested, the Speedy Trial Act is triggered. That may, in turn, cause the AUSA to commence the prosecution of a case before the AUSA is ready to do so. Therefore, it is critical that the officer coordinate with the AUSA on the timing of discretionary arrests. If an immediate arrest is necessary to prevent harm, preserve evidence, or prevent flight, the office should notify the AUSA immediately.

## **16.20 Presentencing Investigations and Reports**

In the federal system for non-capital cases, defendants are sentenced by the trial judge. The judge will conduct a sentencing hearing. In a capital case (where the death penalty is authorized by statute), the judge may impose death if a jury recommends it. The defendant may waive the participation of a jury. 18 U.S.C. § 3593.

Each district has a U.S. Probation and Pretrial Services Office. Before the sentencing of a defendant, a U.S. Probation Officer will conduct a Pre-Sentence Investigation (PSI) that consists of interviewing witnesses and reviewing documents. Thereafter, the U.S. Probation Officer will prepare a presentencing report (PSR). The sentencing judge will use that report in determining an appropriate sentence. The report may contain a specific sentencing recommendation.

At a minimum, the PSR will include the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence. (Fed. R. Crim. P. 32.)

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

## Chapter 17 -

### Fifth and Sixth Amendments

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## 17.1 Introduction

Suspect's statements and eyewitness identifications are valuable evidence at trial. This chapter outlines the Fifth Amendment, Sixth Amendment, and case law principles that law enforcement officers need to know so that they can collect evidence to ensure that it is admissible at trial.

## 17.2 Motions to Suppress and Suppression Hearings

A defense lawyer knows that when a client plans to go to trial, doing a competent job of representing that client ordinarily demands attacking the admissibility of witness identifications and statements obtained from the defendant. A motion to suppress is the tool that defense lawyers use to accomplish this objective.

When a defendant moves to suppress a statement or identification, the court ordinarily conducts a pretrial evidentiary hearing. During that hearing, which takes place without the jury present, law enforcement officers and other witnesses testify about the circumstances under which statements or witness identifications were obtained. Consequently, the government's ability to defeat a motion to suppress requires law enforcement officers to make well-informed plans before questioning subjects or seeking identifications, follow key rules during such procedures, and carefully preserve evidence of what they did.

Based on the testimony and other evidence at the pretrial hearing on a defendant's motion to suppress, the court will decide whether to grant the defendant's motion. When a court grants that motion, it invokes the exclusionary rule and forbids the prosecution from exposing the jury to the suppressed evidence. Discussion of the exclusionary rule appears in the Fourth Amendment chapter. Because a successful motion to suppress can defeat a successful

prosecution, knowing and following the applicable principles and preserving the right evidence can be as important as the trial itself.

### **17.3 The Fifth Amendment Privilege Against Self-Incrimination**

Ensuring that a suspect's statements are admissible at trial requires understanding the Fifth Amendment privilege against self-incrimination ("the Privilege"), which is found in the Bill of Rights. The applicable provision provides, "No person...shall be compelled in any criminal case to be a witness against himself." Only voluntary statements are admissible under the Fifth Amendment.

As used in this section, the term "Privilege" refers solely to the Fifth Amendment privilege against self-incrimination. Do not confuse the Fifth Amendment privilege with common law evidentiary privileges that can protect communications between spouses, lawyers and clients, and the like. A discussion of evidentiary privileges appears in the Courtroom Evidence chapter.

The Privilege protects all human beings from government action compelling them to communicate testimonial evidence that could be used in a criminal prosecution. Because each human being's Privilege is personal, one person cannot assert their own Privilege to protect another person. Moreover, even though courts treat artificial entities such as labor unions, corporations, limited liability corporations, and other business entities as "persons" in other areas of the law, the Privilege only protects flesh-and-blood human beings.



### 17.3.1 The Three Privilege Triggers: When Someone Can Validly Claim the Privilege

A person may validly invoke the Privilege and refuse to communicate only when all three of the following conditions exist:

(a) The communication is compelled by the government, (b) it is testimonial, and (c) it is incriminating.

a. What is “government compulsion?”

Claiming the Privilege’s protections requires evidence of government compulsion, which can take place in both formal and informal situations. For example, subpoenas and court orders are forms of formal government compulsion because they require a person to speak or act as directed or suffer legal consequences.

In contrast, governments can also apply informal pressures that compel a person to speak or act. For example, a suspect answering police questions against their will, a government employee who responds to the boss’s questions under the threat of termination, and a parent who decides to answer a government child protective service worker’s questions rather than losing custody of a child are all subjected to informal government compulsion.

b. What is “testimonial evidence?”

To claim the Privilege’s protection, the communication at issue must also be “testimonial.” As is true in many areas of law, the term “testimonial” has a special meaning different from the way that people use the word in ordinary conversation. Where the Privilege is concerned, a communication is “testimonial” only when it communicates facts or discloses information from a person’s own mind.

Testimonial evidence includes more than just spoken and written words – it can also include gestures and actions. For example, an armed bank robber who points to their backpack when police ask where they put the gun communicates testimonial evidence because the gesture shows that they know which particular gun the questioner is asking about and where it is. Similarly, when the subject of a fraud investigation delivers their appointment book to a grand jury in response to a subpoena, they communicate that they know the appointment book exists, that they have it, and that the book is authentic.

In contrast, evidence is “non-testimonial,” and hence not protected by the Privilege, when it does not communicate the contents of a person’s mind. Government compulsion requiring the following acts generates only unprotected, non-testimonial evidence:

- Subpoenas and court orders requiring a person to provide fingerprints, handwriting samples, or voice samples for comparison and testing;
- Search warrants and court orders requiring a person to give a blood sample for analysis and testing; and
- Directives to perform sobriety tests needed to identify physical evidence of intoxication such as slurred speech, lack of muscular coordination, and other indicators.

c. What is “incriminating?”

Finally, to claim the Privilege’s protection, a communication must also tend to incriminate a person in any criminal proceeding. A communication is incriminating when the person communicating reasonably fears that it could be used to:

- Convict them of a crime;
- Furnish a link in the chain of evidence needed in a prosecution;
- Lead to incriminating evidence; or
- Identify sources of potentially incriminating evidence.

In contrast, the Privilege affords no protection for a communicator who fears:

- Incriminating someone other than themselves;
- Exposing themselves to civil liability, deportation, or an adverse administrative or financial consequence;
- Exposing themselves or someone else to physical danger or unpleasant circumstances; or
- Prosecution for a crime in another country.

### 17.3.2 When Can Someone Assert the Privilege?

Any human being can assert the Privilege and decline to act or answer questions in any type of proceeding – civil, criminal, administrative, judicial, congressional, investigatory, or adjudicatory. Once a person properly asserts the Privilege, absent a court order granting formal use immunity, also known as “statutory immunity,” or a Kalkines warning given to a government employee as discussed later in this section, no government can compel the person to make a statement so long as the person reasonably believes that the government could use it against them in a criminal prosecution or that it could lead to other evidence that might be so used.

For example, say that Congress subpoenas a person to testify before a congressional committee. If the person reasonably believes that their answers might tend to incriminate them, then that person is entitled to assert the Privilege and decline to answer questions.

### 17.3.3 Voluntariness: The Admissibility Key

A person's communications, including statements and confessions, are only admissible in a criminal trial if the government can prove that the person gave them voluntarily. Communications are voluntary when, under the totality of circumstances, the person chooses to communicate as an act of free will and unconstrained choice.

In contrast, a statement is involuntary, coerced, and inadmissible when circumstances present would have overcome a reasonable person's capacity for self-determination, critically impaired their free will, and undermined the ability to make a free, unconstrained choice to communicate. When courts deem a communication involuntary under the totality of the circumstances, they suppress it without regard to whether it is, in fact, true.

a. What factors are relevant to the totality of the circumstances?

While any circumstance that could affect a reasonable person's perception of free choice could be relevant, courts most commonly consider the following factors:

- Suspect characteristics
  - age
  - education level
  - degree of intelligence
  - drug or alcohol impairment

- physical condition
- mental condition
- experience with the criminal justice system
- understanding of the English language
- Conditions during communication or interrogation
  - location of the questioning
  - length of the detention, if any
  - length and duration of questioning
  - excessive heat or cold
  - whether the suspect had access to food, water, sleep, or bathroom privileges
- Law enforcement officer conduct
  - physical coercion or threats of physical coercion
  - exploiting a suspect's mental problems
  - administering drugs to facilitate an interrogation
  - threats made against a suspect's family members, including threats to arrest a spouse or place child in protective custody
  - threats to a suspect's job or livelihood
  - promises of leniency, a reduced sentence, or immunity

b. Voluntariness, the reasonable person, and the totality of circumstances

Courts decide whether a communication was voluntary by weighing the totality of the circumstances, both favorable and unfavorable, to decide whether a reasonable person facing them would have been coerced to communicate. Rarely will one single factor control the outcome.

Moreover, when multiple coercive factors are present, their combined effects can produce an inadmissible, involuntary

statement. For example, in Spano v. New York, 360 U.S. 315 (1959), law enforcement officers questioned a foreign-born, 25-year-old man with no experience with the criminal justice system, a limited education, and a history of emotional instability for eight straight hours during the night, and police used a ruse to get him to confess. The Supreme Court found the collective effects of those conditions rendered his confession involuntary because, under the totality of circumstances, official pressure, fatigue, and sympathy falsely aroused would have caused a reasonable person to confess against their will.

Although absolute control over all pertinent circumstances is rare in any situation, skilled law enforcement officers look for and use opportunities to safely create and maximize factors favoring voluntariness. Both practicalities and professionalism standards dictate that officers must also document and preserve the information necessary to testify accurately about the totality of circumstances, both favorable and unfavorable.

### c. Specific interrogation techniques

Modern law enforcement interrogation techniques rely on psychological tactics. In general, courts find that the following practices are unlikely, standing alone, to result in an involuntary communication:

#### 1. Promises to Bring Suspect's Cooperation to Attention of Authorities

Law enforcement officers' promises to report a suspect's cooperation to a prosecutor will not generally result in an involuntary statement.

## 2. Confronting Suspect with Evidence of Guilt

Law enforcement officers can confront a suspect with evidence of guilt. For example, courts have permitted showing a suspect the blood-covered clothes that officers found or the illegal controlled substances concealed in their vehicle.

## 3. Truthfully Informing Suspect of Legal Predicament

In general, a law enforcement officer may truthfully describe a suspect's legal predicament, including authorized sentences and the possible benefits of cooperation.

## 4. Appealing to Suspect's Emotion

Law enforcement officers can appeal to a suspect's emotion, for example, by referring to a suspect's religious beliefs or telling a suspect that their lies dishonor their family.

## 5. Some Forms of Trickery and Deception

Although trickery and deception about the nature or scope of a person's constitutional rights or their rights under Miranda v. Arizona, 384 U.S. 436 (1966), is unacceptable, courts have deemed some statements obtained using trickery and deception voluntary. In Frazier v. Cupp, 394 U.S. 731 (1969), for example, law enforcement officers questioned a suspect about a murder for approximately an hour. Faced with the suspect's continued denials that he was with anyone but his cousin, the officer untruthfully told the suspect that the cousin confessed. There, the Supreme Court found the full confession that followed voluntary despite the misrepresentation.

Before deciding to use trickery or deception, law enforcement officers should recognize the potential costs. Specifically, while constitutionally permissible under some circumstances, a

decision to use deception or trickery invites a criminal defense lawyer to attack an officer's truthfulness, credibility, and professionalism during cross-examination.

#### 17.3.4 Government Employer Internal Investigations

When a government employee or contractor is accused of misconduct affecting a government workplace, the employing agency may need to conduct a noncustodial interview that could result in administrative discipline. Because complex issues can arise when such investigations could also generate evidence of criminal misconduct, law enforcement officers must anticipate specific concerns that may arise in this context. Just as with other people, government employees and contractors have the Fifth Amendment privilege against self-incrimination. But because government employees and contractors owe their livelihoods to the government, interviewing them inevitably raises voluntariness concerns.

Federal courts addressed some of those concerns in Garrity v. New Jersey, 385 U.S. 493 (1967), Gardner v. Broderick, 392 U.S. 273 (1968), Lefkowitz v. Turley, 414 U.S. 70 (1973), and Kalkines v. United States, 473 F.2d 1391 (Ct. Claims 1973), cases where government employees and contractors' Privilege came into conflict with public employers' need to investigate misconduct allegations. In response to those cases and their progeny, the United States Department of Justice developed the Garrity and Kalkines warnings, the two types of warnings most pertinent to conducting noncustodial interviews of government employees and contractors. Knowing the difference between those warnings, and most importantly, knowing when **not** to give Kalkines warnings, is critical.

##### a. Distinguishing Garrity and Kalkines Warnings

Investigators give Garrity warnings when they must ensure that any statements that a public employee or contractor make



are voluntary and admissible should prosecution become necessary. In contrast, Kalkines warnings are reserved for two types of investigations – (1) ones that clearly relate only to administrative misconduct, and (2) ones in which prosecutors have declined to file criminal charges even though criminal misconduct is at issue.

The terms of the Department of Justice’s Garrity and Kalkines warnings bear out these distinctions. While the full text of the Department of Justice’s recommended Garrity warning appears in the *Legal Training Reference Book*, the parts most pertinent to this section read as follows:

This is a voluntary interview. Accordingly, you do not have to answer questions. No disciplinary action will be taken against you solely for refusing to answer questions.

Any statement you furnish may be used as evidence in any future criminal proceeding or agency disciplinary proceeding, or both.

Investigators give the Garrity warnings when they cannot rule out the possibility of a criminal prosecution and need to make sure that an interviewee’s statements will be admissible. When an investigator gives the Garrity warnings, the statements the investigator obtains and evidence derived from them will ordinarily be admissible in future criminal, civil, internal, and administrative proceedings targeting the interviewee.

The Kalkines warnings stand in stark contrast, and investigators should not give them if a future criminal prosecution is contemplated without first consulting with agency counsel and prosecutors. While the full text of the Department of Justice’s Kalkines warnings appears in the *Legal Training Reference Book*, the parts most pertinent to

this section read as follows:

The purpose of this interview is to obtain information which will assist in the determination of whether administrative action is warranted . . .

- You are going to be asked a number of specific questions concerning the performance of your official duties.
- You have a duty to reply to these questions, and agency disciplinary action, including dismissal, may be undertaken if you refuse to answer, or fail to reply fully and truthfully.
- The answers you furnish and any information or evidence resulting therefrom may be used in the course of civil or administrative proceedings.
- Neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action.

Because the Kalkines warnings threaten the interviewee with discipline, giving them will ordinarily render both statements and all evidence derived from them inadmissible in a future prosecution of the interviewee. The government can still use the statements and other evidence traceable to such an interview to impose discipline in connection with internal, agency, and civil proceedings.

## b. Effects of the Kalkines Warnings on Future Criminal Prosecutions

While Kalkines warnings do not automatically bar the government from prosecuting an interviewee in the future, their practical impact comes very close. Should the government decide to prosecute an interviewee subjected to the Kalkines warnings, that interviewee becomes entitled to a hearing outside the presence of the jury. In that hearing, the government will have to prove that every piece of evidence that it plans to offer at trial originated from a wholly independent source that could not have been tainted by the interviewee's coerced statement. Because satisfying that burden is so difficult, only on the rarest of occasions will the government try to prosecute a public employee or contractor after Kalkines warnings.

For these reasons, prior to conducting a noncustodial interview of a government employee or contractor accused of potentially criminal misconduct, investigators should always seek legal advice from both agency counsel and prosecuting authorities.

### 17.3.5 Special Circumstances

#### a. Federal Grand Jury Proceedings

Privilege issues often arise during federal grand jury proceedings. As discussed in more detail in this Handbook's chapter on Federal Court Procedures, one of a federal grand jury's powers is to investigate federal crimes. A grand jury investigates using subpoenas to compel witnesses to appear, testify, and produce documents, records, objects, and things.

##### 1. Scope and Nature of Protection for Testimony

While the Privilege can protect a witness subpoenaed to testify before a federal grand jury from answering an incriminating

question, its protection is not automatic. The Privilege only protects the witness who responds to an incriminating question by asserting it.

In contrast, the witness who chooses to answer an incriminating question cannot later assert that the Privilege protects the answer. By answering, that witness gives up, or in legal terms “waives,” the Privilege’s protections. Thereafter, that witness’s testimony will ordinarily be admissible to prove guilt in a criminal trial.

## 2. Use Immunity

Under rare, specialized circumstances, the government can ask a district court to compel a witness who otherwise validly invokes their Privilege to testify. When the court grants the government’s request, it issues an order that legally compels such a witness to testify. That same order must also give the witness a specific set of benefits known as formal “use immunity.”

Formal use immunity, also called “statutory immunity,” limits the way the government can use the compelled witness’s testimony in two critical ways. See 18 U.S.C. § 6002 and Justice Manual 9-23.110 - Statutory Authority to Compel Testimony.

First, the government cannot use the content of the witness’s testimony to prove that the witness is guilty of any crime other than committing perjury while giving the immunized testimony. Second, the government cannot use any evidence that it obtained solely because of what the witness said when testifying at the witness’s criminal trial. Once a court grants use immunity to a witness, that witness cannot lawfully refuse to answer any incriminating question.

The protection that use immunity affords to a witness is subject to two important limitations. First, use immunity does not protect the witness from prosecution when adequate evidence that is not the product of the compelled testimony is available. Second, because use immunity does not entitle a witness to lie, the government can still prosecute a witness who lies under oath for perjury.

### 3. Producing documents, records, objects, and things

The law requires that both artificial entities, such as corporations and labor unions, and human beings comply with a grand jury's subpoena for documents, records, objects, and things. While an artificial entity has no Privilege to invoke in the first place, even a human being's Privilege does not protect the contents of subpoenaed materials that exist at the time of the subpoena. Consequently, a criminal foolish enough to record their most private thoughts about their crimes in a handwritten, personal diary cannot rely on his personal Privilege to protect the diary's contents from a subpoena because the government did not compel them to write in the diary in the first place.

Although the Privilege does not protect the contents of subpoenaed materials, under some circumstances, it can nonetheless afford a limited form of protection called "act of production immunity." Recalling that a person can communicate incriminating testimonial evidence by acting, an individual human being who must comply with a subpoena by producing a document, record, object, or thing necessarily communicates mental information by doing so. Specifically, from the fact that the person produced the materials, a jury could infer that the person knew that they possessed the materials, that they were responsive to the subpoena, and that the materials were authentic, which are all important facts at trial. Consequently, courts protect individuals who claim the

Privilege under such circumstances by banning evidence showing that the person produced the materials.

Importantly, act of production immunity is a personal protection extended only to the individual, flesh-and-blood human being who produced materials. Moreover, artificial entities like corporations and other individuals are not entitled to any protection.

#### 4. Illustration

A telemarketing fraud investigation targets a small corporation, its CEO, and its information technology administrator. During the investigation, a reliable informant tells the investigating officer that the CEO keeps a personal diary on the corporation's servers. In it, the informant tells the investigator, the CEO has recorded their most personal thoughts, including details relating to how they orchestrated the fraud on behalf of the corporation. Consequently, the investigator obtains and serves a grand jury subpoena that orders the corporation's "record custodian," that is, a person who is responsible for maintaining the corporation's records, to produce an electronic copy of the diary. Thereafter, the investigator learns that the information technology administrator, who also serves as the corporation's record custodian, has responded to the subpoena by asserting his personal Privilege.

Understanding the answers to the following questions should help law enforcement officers feel confident that they have mastered the overwhelming majority of the Fifth Amendment's most important points:

- *What protections does the Privilege give the CEO?* None. Even though the diary contains information from the CEO's brain (testimonial evidence) that prosecutors could introduce at their criminal fraud trial

(incriminating), the CEO wrote her thoughts in the diary before the grand jury issued the subpoena (no government compulsion). Consequently, the CEO's Privilege is not triggered, which means that they cannot rely on it to prevent a corporate record custodian from complying with the subpoena, to exclude evidence about the record custodian's act of production, or to exclude the diary's contents at their trial.

- *What protections does the Privilege give the information technology administrator, who is responsible for producing the diary?* Act of production immunity only. The grand jury subpoena (government compulsion), requires the administrator to produce the diary that the government will try to admit into evidence at the administrator's trial to prove that the administrator is guilty of fraud (incriminating). At trial, the government will have to prove that the diary is what it purports to be. Because producing it to the grand jury confirms that the administrator knows the diary exists, that it is responsive to the subpoena, and that it is authentic (testimonial evidence), so long as the administrator asserts their Privilege before producing the diary, the court will give them act of production immunity. Consequently, the court will not allow the jury to know that the administrator produced the diary in response to the subpoena. If the government has no other evidence to show the diary is authentic, the administrator's Privilege will bar the government from introducing the diary or its contents at the administrator's trial.
- *What protections does the Privilege give the Corporation?* None. Even though the information technology administrator has limited, act of production immunity, the corporation has no Privilege because it is an artificial entity. Consequently, the corporation will not be able to use the Privilege to prevent its record

custodian from producing the diary, and the government can present evidence at the corporation's trial that the record custodian did so along with the diary's contents.

## 17.4 Miranda and Custodial Interrogation

Prior to the Supreme Court's decision in Miranda v. Arizona, the Constitution afforded every person the Fifth Amendment right to remain silent and the Sixth Amendment right to be represented by counsel once formally charged with a crime. Recognizing the physical and psychological coercion inherent in being held in custody in a police-dominated atmosphere, the Court mandated two additional rights. In doing so, the Court intended to mitigate the danger that coercion would lead to involuntary statements.

First, Miranda gave every suspect the right to have a lawyer present during custodial interrogation without regard to whether formal charges were pending. Second was the right most familiar today – the right to receive what is now known as the Miranda warnings prior to any custodial interrogation.

Law enforcement officers must master the conditions triggering Miranda rights and the necessary components of a valid waiver.

### 17.4.1 When are Miranda Warnings Required?

Knowing the three critical elements that trigger a suspect's right to receive the Miranda warnings is the first step to mastering necessary skills. Those three triggers are (1) a suspect in custody, (2) subjected to interrogation, (3) by a known law enforcement officer or government agent. If any one of the three triggers is absent, Miranda warnings are not required.



a. Trigger 1: Custody

Miranda warnings are only required when a law enforcement officer or other government actor arrests a suspect or holds them in “arrest-like” custody. Consequently, the mere fact that a person is a suspect does not entitle them to a Miranda warning.

Courts will determine a suspect is in custody for Miranda purposes if facts show that the suspect is (a) formally arrested or (b) subjected to conditions that amount to the functional equivalent of arrest. See the Fourth Amendment chapter for further discussion of the functional equivalent of arrest. While a formal arrest, marked with the telltale phrase “you are under arrest” or other, less-than-subtle physical tactics, is easy to spot, the functional equivalent of an arrest can be trickier.

1. The reasonable person test

Law enforcement officers subject a suspect to the functional equivalent of arrest when, considering the totality of circumstances, they restrain a suspect’s freedom of movement to such a degree that a reasonable person in the suspect’s position would believe that he they were under arrest.

When courts decide what a reasonable person would believe, only objective data capable of entering a person’s brain via one of the five senses (such as “suspect is in handcuffs,” “guns are pointed at suspect,” or “law enforcement officers ordered suspect to the ground”) is relevant. In contrast, because an individual person’s experiences of, impressions about, and conclusions based on the data that enters their brain (such as “I am under arrest,” “I feel threatened,” or “I am experiencing discomfort”) are subjective, they are not relevant. Consequently, when an officer decides to make an arrest but does not communicate that intent verbally or nonverbally, the officer’s unexpressed, subjective intent is irrelevant for

determining Miranda custody. Only information that an objectively reasonable person could perceive with one of the five senses matters.

One Supreme Court case, Orozco v. Texas, 394 U.S. 324 (1969), supplies a useful illustration of how courts apply the objective, reasonable person standard. There, law enforcement officers investigating an earlier murder learned that their suspect lived in a particular boarding house. Consequently, four police officers went to the boarding house at about 4:00 a.m., were admitted by an unidentified woman, and learned that the suspect was asleep in his bedroom. Thereafter, all four officers entered the bedroom and began to question the suspect. Because a reasonable person waking to find four police officers in his bedroom at 4:00 a.m. would have believed they were in arrest like custody, the Court found that Miranda warnings were required. Because the officers did not give the warnings, the Court suppressed the suspect's statements.

## 2. Factors relevant to the totality of circumstances

The totality of circumstances is the cumulative, combined effect of all relevant, objectively perceivable conditions present during a suspect's law enforcement encounter. While in theory, both relevant factors and their possible combinations are infinite, below are some of the most common factors that courts consider when deciding if a reasonable person would believe they were in custody for Miranda purposes:

- Law enforcement officer statements: Telling a suspect that they are under arrest weighs in favor of finding that the suspect is under arrest. Telling a suspect prior to beginning an interrogation that they are "not under arrest," "detained," "free to leave," or does not have to answer questions can weigh against custody.

- Presence or absence of physical restraints: Applying handcuffs or confining a person to a particular space weigh in favor of a finding that a suspect is in custody, whereas the absence of restraining devices and a suspect whose ability to move is not restricted weigh against such a finding.
- Encounter location: When an interrogation takes place in surroundings that are familiar to a suspect, such as their home or workplace, or in a neutral location, such as in public, such facts weigh against finding Miranda custody. When an encounter occurs inside a police station or law enforcement office, location can weigh in favor of custody.
- Duration of Encounter: The shorter an interrogation, the less likely the courts are to find that an interviewee was in Miranda custody.
- Juveniles: Where juveniles are concerned, as the age of the juvenile decreases, it weighs more heavily in favor of a finding that an interrogation is custodial.

Howes v. Fields, 565 U.S. 499 (2012), provides another useful example of how courts weigh the totality of the circumstances. There, beginning between 7:00 p.m. and 9:00 p.m., armed law enforcement officers conducted a five to seven hour interrogation of a previously convicted inmate incarcerated in a Michigan prison. The interrogation, which ended at or about midnight, took place in a well-lit, average-sized conference room, and an accompanying correctional officer was required to escort the inmate both to and from it. At the interrogation's outset and thereafter, interrogating officers told the uncuffed, unrestrained inmate that he could return to his cell whenever he wanted, but they did not tell him that he did not have to submit to an interview or give him Miranda warnings. During the encounter, the officers offered the inmate food and water,

and they sporadically left the conference room door open. Despite the place, duration, and hour of the interrogation, the Supreme Court found that no Miranda warnings were needed because the inmate was not in custody for Miranda purposes.

Other factors that courts in some circuits consider include whether a suspect has chosen to come to an interrogation, a law enforcement officer's tone of voice during the interrogation, and the officer's word choices.

### 3. Miranda Custody versus Fourth Amendment "Person" Seizures

Not all Fourth Amendment seizures of persons result in custody for Miranda purposes. As explained in the Fourth Amendment chapter, a person is "seized" when, viewing the totality of circumstances, a reasonable person would believe that they are not free to leave or otherwise terminate an encounter. See also Use of Force Legal Aspects chapter.

In contrast, Miranda custody arises only if a reasonable person in the suspect's position would experience a restraint on freedom to the degree associated with formal arrest. Because the following temporary seizures of persons do not ordinarily create the type of police-dominated atmosphere associated with a formal arrest, they do not ordinarily require Miranda warnings:

- Traffic Stops: Law enforcement officers are not ordinarily required to give Miranda warnings to people stopped for routine traffic violations before asking questions and obtaining statements.
- Terry Investigative Stops and Detentions: So long as the duration and scope of a Terry stop fall within proper limits, an officer need not give Miranda warnings prior to questioning a subject. See further discussion of Terry

stops in the Fourth Amendment chapter.

- Temporary Detentions during Search Warrants: Ordinarily, a law enforcement officer need not give Miranda warnings to someone detained during a search warrant so long as the detention is temporary and limited.
- Post-Conviction Prison Interrogations of Inmates Who Know They Are Free to Terminate the Encounter: Although courts require Miranda warnings and waivers before an officer interrogates a jail inmate in pretrial custody, warnings are not necessarily required to interrogate a convicted person serving a prison term. Reasoning that a convicted prison inmate does not experience the same kind of coercive pressures that concerned the Supreme Court in Miranda, courts do not ordinarily require Miranda warnings or waivers before an officer interrogates a prison inmate so long as the totality of circumstances show that the interrogation is voluntary. Consequently, while giving Miranda warnings and obtaining a valid waiver remains a safe approach, law enforcement officers who choose not to give warnings should, at a minimum, tell the inmate that they are free to terminate the encounter at any time.

#### 4. Best Practices When Miranda Custody is Questionable

While any police/suspect encounter can become the functional equivalent of an arrest, Fourth Amendment “person” seizures most commonly do so when they exceed the nature, scope, and/or duration of the circumstances justifying them. Once circumstances that constitute the functional equivalent of an arrest arise, law enforcement officers must give Miranda warnings prior to interrogation.

Unfortunately, the precise moment when a consensual encounter or a temporary “person” seizure becomes an arrest is not always clear. Moreover, some measures that are reasonably necessary under the circumstances, such as pointing guns at a detainee or placing themselves in handcuffs, tend to weigh heavily toward arrest. When confronted with such circumstances, law enforcement officers can consider the following mitigating options:

- Option 1: After securing the suspect, officers may give the Miranda warnings and obtain a knowing, voluntary, and intelligent waiver of those rights before questioning the person.
  - Option 2: After securing the suspect, officers may advise the suspect that they are (1) not under arrest, (2) merely temporarily detained, and (3) not required to answer any questions. Preferably, an officer should also seek affirmative, verbal confirmation that the suspect understands each point.
- b. Trigger 2: Interrogation (i.e. Questioning)

Under Miranda, interrogation occurs when a law enforcement officer uses words, actions, or a combination of the two to initiate questioning of a suspect who is in custody. Interrogation includes both express questioning and the functional equivalent of questioning.

### 1. The Functional Equivalent of Interrogation

A law enforcement officer engages in the functional equivalent of interrogation by using words or actions that they should reasonably expect are likely to elicit an incriminating response from someone in custody. Consider the following three illustrations in which federal circuit courts found that law

enforcement officers engaged in the functional equivalent of interrogation:

- An officer had a preexisting, antagonistic relationship with a suspect. During an encounter unrelated to the ultimate drug investigation, the officer held the suspect in Miranda custody. During ensuing, mutual verbal sparring, the suspect asked “sarcastically” whether the officer needed “anything else.” The court found that the officer’s response, “Oh, I don't know, you got any dope[?]” was the functional equivalent of interrogation because the officer should reasonably have expected it to elicit the suspect’s explosive, incriminating answer. United States v. Brown, 720 F.2d 1059, 1063 (9th Cir. 1983).
- An officer trying to locate a stolen firearm interrogated a suspect held in custody outside of a girlfriend’s apartment. When the suspect did not respond favorably to the officer’s hints that cooperation “would be met with leniency,” the officer went inside the apartment for several minutes, spoke to the girlfriend, and obtained written consent from her to search the apartment. Thereafter, signed consent form in hand, the officer exited the apartment and announced to everyone present, including the suspect, that he had consent to search. The court found the officer’s words and conduct constituted the functional equivalent of interrogation because, considered collectively, they were reasonably likely to illicit the incriminating comments that the suspect thereafter made. United States v. Jackson, 544 F.3d 351, 354-55 (1st Cir. 2008).
- During a rape and murder investigation, a conspirator confessed and implicated the suspect as a partner in the crime. Thereafter, officers dispatched the confessor, unescorted, to an interrogation room where the suspect was with instructions to tell the suspect about the

confession. The confessor followed the instructions, and the suspect thereafter made statements. The court found that even though neither the confessor nor police asked the suspect a question, sending the confessor to confront the suspect was a “psychological ploy” that could qualify as the functional equivalent of interrogation. Nelson v. Fulcomer, 911 F.2d 928 (3d Cir. 1990).

## 2. Neither Interrogation nor the Functional Equivalent

Clearly established law allows law enforcement officers to question suspects without first giving Miranda warnings under the following circumstances:

- Routine Booking Questions: Law enforcement officers may ask an arrestee routine booking questions such as name, address, height, weight, eye color, date of birth, and current age.
- Exigent Public Safety Concerns: When faced with exigent public safety concerns, Miranda warnings are not required so long as law enforcement officers ask only the questions necessary to address the safety concern. Questions such as “Where is the bomb?” or “Where is the gun?” fall squarely within this category. Questions such as “Who told you to put the bomb there?” and “Where did you get the gun?” do not.

For example, in one case, police chased a rape suspect into a supermarket, apprehended him at gunpoint, and handcuffed him. Seeing that the suspect was wearing an empty shoulder holster, an officer asked him where the gun was. After the suspect responded by nodding in a direction and saying, “the gun is over there,” the officer retrieved it. The Supreme Court said that the officer, without providing Miranda



warnings, was allowed to ask questions to locate the missing gun because the gun posed a danger to public safety.

- Law Enforcement Officer Safety Questions: “Do you have any guns or sharp objects on you?” falls within the public safety exception.
- Requests for Consent to Search: Because requesting consent to search does not seek testimonial evidence that the Fifth Amendment privilege against Self-Incrimination protects, the overwhelming majority of federal circuits agree that asking for consent to search is neither interrogation nor its functional equivalent.
- Physical Sobriety Test Dialogue: Law enforcement officers may engage in dialogue consisting primarily of carefully scripted instructions and limited to carefully worded inquiries to ensure that a suspect understands the instructions when administering physical sobriety tests.
- Implied Consent and Breathalyzer Dialogue: Explaining a breathalyzer test and the implied consent law, confirming that a suspect understands instructions, and confirming that the suspect wishes to submit to the test are not interrogation.

Moreover, courts admit unwarned, spontaneous, and volunteered statements from a custodial suspect so long as what the suspect said was unprompted by interrogation or its functional equivalent.

3. Trigger 3: A known law enforcement officer (or other government actor)

Finally, a custodial suspect is only entitled to Miranda warnings if the suspect knows the person asking questions is a law enforcement officer or government agent. Neither a purely private party's interrogation nor questioning by someone that the suspect does not know is a law enforcement officer or government actor, such as an informant or undercover agent, will suffice.

For example, in Illinois v. Perkins, 496 U.S. 292 (1990), a jail inmate made incriminating statements to an undercover agent posing as his cellmate. Pointing out that because the suspect, who did not know that the agent was a police officer, could not have believed that a fellow inmate had the power to influence pending charges, the court concluded that the police-dominated atmosphere that it crafted Miranda rights to guard against was not present. Consequently, the Supreme Court found the suspect's unwarned statements admissible at his trial.

#### 17.4.2 Miranda Warning Best Practices

The Supreme Court mandated that Miranda warnings precede all custodial interrogations as a procedural safeguard to ensure that every suspect has a full, fair understanding of their rights before questioning begins. Since the Miranda case, the Court has declined to mandate any one version of the Miranda warnings. Consequently, any agency-approved version with the below content will ordinarily suffice:

- You have the right to remain silent;
- Anything you say can and will be used against you in court;

- You have the right to consult with counsel before answering questions and to have counsel present during questioning;
- If you cannot afford a lawyer, one will be appointed before questioning; and
- You may choose to exercise these rights at any time.

Although courts do not require any particular version of the Miranda warnings, the best practice is for every new law enforcement officer to settle on a single card or other preprinted version of the Miranda warnings. Thereafter, that officer should use only that card to read the Miranda warnings, word for word, exactly the same way, every single time. The officer who follows these guidelines will always be able to testify truthfully and confidently to giving proper warnings in every case.

Equally important, law enforcement officers must be sure to read all of the warnings as written, even when a suspect claims not to need them or says that they already know the rights. Additionally, because courts require that warnings be “fresh,” the best practice favors re-administering Miranda warnings after a break in interrogation.

#### 17.4.3 The Three Components of a Valid Miranda Waiver

Before the government can present evidence of a custodial suspect’s responses to interrogation during its case-in-chief at trial, it must convince the court that the suspect validly waived their rights.

- a. A valid waiver satisfies three elements.

The government satisfies its burden of proving a valid waiver with evidence showing that under the totality of the

circumstances the suspect's waiver was (1) knowing, (2) intelligent, and (3) voluntary.

Satisfying the first two elements is ordinarily very straightforward. For a waiver to be knowing and intelligent, a suspect must be fully aware of the nature of the right at issue and the consequences of abandoning it. Ordinarily, proof that an officer correctly read all of the content on a legally sufficient agency-issued Miranda card, in a language that the suspect understands, suffices.

The showing needed to satisfy the third element – voluntariness – generally requires the same, detailed evidence needed to show that a suspect voluntarily waived their Fifth Amendment privilege against self-incrimination. Meeting this burden usually requires more than just testimony about the conditions present when law enforcement officers obtained a suspect's waiver. Most often, testimony must also describe the totality of circumstances present from the moment the suspect knew that a law enforcement officer or other government actor was present to the moment when the suspect's interrogation ended. Consequently, officers should take care to preserve the information needed to testify fully and accurately about the relevant conditions.

b. Forms of Miranda Waivers

A Miranda waiver can take two forms - express or implied. A suspect gives an express waiver by unequivocally acknowledging in spoken or written words that they understand the Miranda rights, wants to waive them, and does not wish to exercise them. A suspect gives an implied waiver by responding equivocally or not at all to Miranda warnings and thereafter making a voluntary statement.

While prosecutors prefer express waivers simply because they are strong proof of intent, a voluntarily given, implied waiver

is also effective. Moreover, an oral or implied waiver from a suspect who has refused to sign a written waiver is also valid.

#### 17.4.4 What to Do When a Suspect Invokes a Miranda Right

A suspect cannot validly invoke their Miranda rights unless and until the three required triggering conditions are present. Once they are present and a law enforcement officer administers Miranda warnings, that suspect has four options – (1) answer questions after waiving the Privilege and the Miranda right to counsel during custodial interrogation; (2) assert both rights; (3) assert only the right to remain silent; or (4) assert only the Miranda right to counsel.

When a suspect decides to do anything other than waive both rights and answer questions, all law enforcement officers must immediately stop all interrogation about all matters. Whether any law enforcement officer can thereafter reinitiate that suspect’s interrogation while they remain in custody depends on which right the suspect has invoked.

##### a. Suspect invoked the right to counsel

Courts view an invocation of the right to counsel as a suspect’s implicit assertion that they are incapable of undergoing custodial interrogation on any subject without a lawyer. Consequently, the general rule is that once a custodial suspect clearly invokes the right to counsel, either alone or with the right to silence, no law enforcement officer may reinitiate interrogation about any crime except under one of the following three very limited circumstances:

- a defense lawyer is with the suspect,
- the suspect is a pretrial detainee released from custody for at least 14 days before an officer reinitiates, or

- law enforcement authorities return an invoking prison inmate to ordinary prison life for at least 14 days before reinitiating.

Outside these three situations, once a custodial suspect invokes the right to counsel, courts will suppress the results of all custodial interrogations that follow. This rule applies even when a new officer who does not know the suspect invoked the right to counsel interrogates that suspect who is still in custody in good faith after obtaining a valid Miranda waiver.

### 1. Invocation must be clear

Suspects must communicate their intent to invoke the right to counsel clearly. Courts define “clear” invocations as statements that a reasonable officer should understand as requests for a lawyer.

Importantly, a suspect does not have to say “lawyer” or “attorney.” Instead, statements that, when viewed in context, communicate a desire for a lawyer, are sufficient. For example, the suspect who responds to an officer’s reference to the right to counsel with “Yeah – I’d like to do that” has unequivocally invoked the right to counsel.

### 2. Ambiguous Statements

In contrast, statements that would leave a reasonable officer unsure about whether the suspect wishes to invoke the right to counsel are not enough to trigger the obligation to stop asking questions. For example, because remarks such as “Maybe I should talk to a lawyer,” and questions such as “Do I need a lawyer?” are ambiguous, officers confronted with them may continue an interrogation. When confronted with unclear or ambiguous statements such as these, best practices favor asking whether a suspect actually wants a lawyer.

b. Suspect Invokes Only the Right to Silence

In contrast, if the suspect invokes only the right to silence, then no law enforcement officer may reinitiate interrogation of that subject about any crime prior to a “cooling off” period. A sufficient cooling off period must last more than two hours. A suspect can assert the right to remain silent by simply telling a law enforcement officer that they do not want to talk or using other words to the same effect.

c. Suspects Who Initiate Investigation-Related Conversation

While the type of Miranda right that a suspect invokes can limit or eliminate a law enforcement officer’s ability to reinitiate interrogation, none of those constraints apply when an invoking suspect thereafter reinitiates investigation-related communication. For example, a suspect who invokes the right to silence, the right to counsel, or both and thereafter asks to speak with an investigating officer “again,” reinitiates the interrogation. Similarly, the same suspect who asks questions such as “What is going to happen to me now?”, “What evidence do you have against me?”, or “What penalties am I facing?” also reinitiates interrogation.

Once a suspect reinitiates interrogation, officers may resume questioning. Under such circumstances, officers should administer “fresh” Miranda warnings if more than a very short period has elapsed since the initial warnings.

Law enforcement officers should be careful to distinguish reinitiating inquiries and questions from suspect communications that do not. Requests for water, a bathroom, to use a phone, and the like are not reinitiating inquiries. Likewise, a suspect who merely responds to booking questions has not reinitiated contact.

### 17.4.5 Effects of Miranda Violations

This section outlines the three most common types of Miranda violations, their consequences, and cures (to the extent that they are curable).

#### a. Simple Failure to Warn – Good Faith Errors are Curable

When a law enforcement officer does not give Miranda warnings before questioning a custodial suspect, the court suppresses the suspect’s resulting statements. Ordinarily, courts do not suppress physical or record evidence that officers used the unwarned statement to find.

So long as an officer did not purposely fail to give Miranda warnings during a first interrogation, and so long as the suspect is willing to waive Miranda rights and give a second interrogation, statements given during the second interrogation are admissible. Should such circumstances call for a second interrogation, best practices favor attempting it in a different location, using a different officer, and waiting long enough to “cleanse” coercion arguably lingering from the first interrogation.

In contrast, when evidence shows that a law enforcement officer deliberately decided to withhold Miranda warnings prior to an interrogation, courts suppress both the unwarned and the warned statements. Consequently, withholding warnings during an initial interrogation as a psychological or strategic ploy is not only improper but also ineffective.

#### b. Failure to Honor a Suspect’s Invocation of Right to Silence or Counsel – Not Curable

Courts also suppress statements obtained by interrogating a custodial suspect who has clearly invoked the right to silence



or counsel. As noted above, if the suspect only invoked the right to silence, then waiting more than two hours, reinitiating, giving proper Miranda warnings, and getting a valid waiver can still generate an admissible statement. Reinitiating too early or reinitiating repeatedly will result in suppression.

In contrast, law enforcement officers simply must not attempt to reinitiate an interrogation once a suspect invokes the right to counsel because courts will always suppress ensuing statements. Moreover, in some rare cases, courts have gone even further by suppressing both statements and evidence identified because of them when officers failed to honor a suspect's invocation of the right to counsel. Consequently, after a custodial suspect invokes the right to counsel, they are off limits to officers except under the very narrow circumstances described in Sections 17.4.4 b. and c.

c. Obtaining an Involuntary Waiver – Not Curable

Whether the Miranda or the Fifth Amendment voluntariness tests are at issue, courts assess voluntariness using the principles outlined in Section 17.3.3. Importantly, for most, if not all practical purposes, when a court finds that a suspect's Miranda waiver was involuntary, it prevents a violation of the suspect's Fifth Amendment rights by suppressing both the involuntary statement and all other evidence that the statement helped law enforcement officers identify pursuant to the exclusionary rule. See Fourth Amendment Chapter for discussion of the exclusionary rule. Consequently, all facts that come directly or indirectly from the suppressed statement will be inadmissible at trial unless the government can prove that it obtained them from an alternative, wholly independent source unrelated to the original, tainted interview.

## 17.5 The Sixth Amendment Right to Counsel

Under the Sixth Amendment, every person formally accused of a crime has the rights to consult with a lawyer, have the lawyer investigate the case, and be represented in all critical stages of proceedings related to the crimes charged. Unlike the Miranda right to counsel, which can attach before formal accusation happens, only “formal charging” triggers the Sixth Amendment right to counsel.

### 17.5.1 Trigger: Formal Charging

A suspect is formally charged when any one of the following events occur:

- the suspect has their initial appearance in court;
- a grand jury returns a criminal indictment charging the suspect with a crime; or
- a prosecutor files a criminal information charging the suspect with a crime.

Any one of these events – initial appearance, indictment, or information (I-I-I) – triggers the Sixth Amendment right to counsel. These events are discussed fully in the Federal Court Procedures chapter.

### 17.5.2 Nature and Scope of the Sixth Amendment Right to Counsel

Once triggered, the Sixth Amendment right to counsel gives a suspect the right to insist on having counsel present to help during all critical stages of criminal proceedings relating to the charged conduct. Because both (1) interactions by and on behalf of government actors that “deliberately elicit” statements from a suspect about the pending charges and (2)

in-person lineups conducted to identify a suspect are critical stages criminal proceedings for Sixth Amendment purposes, absent a valid, informed waiver, every formally charged suspect has the right to have a lawyer present when these events occur.

a. Deliberate elicitation

The Sixth Amendment right to counsel forbids all government actors from deliberately eliciting statements from a formally charged suspect about the charged crime unless a lawyer is present or the suspect waives that right. Government actors “deliberately elicit” statements by asking questions or engaging in other conduct, either directly or indirectly through another person, to draw out a suspect’s statements about a charged crime.

1. Distinguishing Deliberate Elicitation from Miranda Interrogation

Unlike Miranda interrogation, which cannot take place unless the suspect knows that the questioner is a police officer or other government actor, using an undercover agent or an informant to elicit information from a charged suspect qualifies as deliberate elicitation that violates the Sixth Amendment. Consequently, once formal charges trigger the Sixth Amendment right to counsel, unless the suspect validly waives their right, any action beyond paying passive and unquestioning attention to a suspect’s spontaneous, unsolicited statements violates the suspect’s Sixth Amendment right to counsel – even when the actor is an undercover agent, confidential informant, secret cooperator, or cellmate assisting the government.

For instance, in Massiah v. United States, 377 U.S. 201 (1964), the government arrested a suspect indicted for drug charges. Days after the court released the suspect on bond, agents

outfitted a cooperating codefendant's car with a radio transmitter. Thereafter, acting at agents' direction, the cooperator engaged the suspect in a "lengthy conversation" while parked on a New York street with an agent listening remotely. The Supreme Court found that sending the cooperator to speak with the indicted suspect fell squarely within the scope of "deliberate elicitation" that could not take place without either a waiver or the defense lawyer's presence. Consequently, the Court suppressed the suspect's statements.

## 2. Scope of Sixth Amendment Protection Compared to Miranda

While the Sixth Amendment right to counsel and the Miranda right to counsel seem similar, they have at least two additional, critical distinctions. First, whereas Miranda gives a suspect the right to insist on having counsel present for interrogations that take place in custody, the Sixth Amendment right to counsel protects only charged suspects from both custodial and non-custodial government questioning.

Second, whereas the Miranda right to counsel protects custodial suspects against interrogations about any crime, the Sixth Amendment right to counsel only protects formally charged suspects against inquiries about a formally charged crime.

### b. In-person lineups

The Sixth Amendment right to counsel applies to in-person lineups. Consequently, once an initial appearance, criminal indictment, or criminal information triggers a suspect's Sixth Amendment right to counsel, unless they waive the right, the suspect is entitled to have counsel present when law enforcement officers conduct an in-person line-up. Identification procedures are discussed later in this chapter.

### 17.5.3 Waiving the Sixth Amendment Right to Counsel

Once a suspect is formally charged, the Sixth Amendment right to counsel requires a law enforcement officer to take one additional, crucial step. Specifically, regardless of whether the officer or the suspect initiates the encounter, and regardless of whether the suspect has a lawyer, before asking questions about charged conduct, the officer must administer warnings and obtain a valid waiver.

Courts require warnings and a valid waiver even for a suspect charged in a sealed indictment or information who does not know about the charges. Moreover, once circumstances trigger the Sixth Amendment right to counsel, warnings and a waiver are required regardless of whether the suspect has a lawyer.

While the Sixth Amendment right to counsel, the right to counsel under Miranda, and the Fifth Amendment privilege against self-incrimination are separate, distinct rights, the considerations and procedures for seeking and obtaining waivers are, for all practical purposes, identical. Once an indictment, criminal information, or initial appearance triggers a suspect's Sixth Amendment right to counsel, law enforcement officers wishing to question that suspect must simply administer Miranda warnings just as they would to a person held in custody.

So long as the charged suspect thereafter waives their right to counsel knowingly, intelligently, and voluntarily under the totality of the circumstances, a law enforcement officer may question the suspect.

### 17.5.4 Avoiding a Bad Career Move

Because conducting an initial appearance, obtaining a grand jury indictment, and filing a criminal information all require a prosecutor's help in the federal system, a prosecutor becomes

involved in a criminal case no later than formal charging. Moreover, in many cases, a prosecutor begins work on a case early in an investigation and well before these events.

Knowing when a prosecutor has become involved in a case is critical because at that moment, for the reasons outlined below, the prosecutor becomes ethically responsible for the conduct of every member of the investigative team regardless of whether they know about or approve the conduct. Because ethics rules subject prosecutors to very serious professional discipline when an investigative team member deliberately contacts a suspect who is represented by a lawyer, once a prosecutor becomes involved in any case, no law enforcement officer should ever approach a suspect, whether formally charged or not, without first obtaining guidance from the prosecutor. Any other practice may subject the prosecutor to significant professional discipline up to and including, disbarment and termination.

## 17.6 Prosecutorial Ethics and the McDade Amendment

Wholly independent of the Fifth Amendment, Miranda, and the Sixth Amendment, the McDade Amendment, found at 28 U.S.C. § 530B, requires every federal prosecutor to follow the ethical rules that apply to lawyers in each state where the prosecutor holds a bar license. Because the overwhelming majority of states deem efforts by one lawyer to contact someone represented by a different lawyer, either directly or indirectly, unethical, the law enforcement officer who tries to speak to a represented suspect jeopardizes the prosecutor's license to practice law and the prosecutor's job.

The practical implications of these rules mean that once a prosecutor is assigned to work on a criminal investigation or prosecution, that prosecutor becomes ethically and professionally accountable for everything that every investigative team member does – including actions that the

prosecutor neither knew about nor approved. Consequently, to ensure trusting, productive relationships with prosecuting authorities, once a prosecutor is assigned to work on a case, investigators must consult with that prosecutor to vet potential interrogation targets carefully.

### **17.7 Fifth Amendment Due Process and Identification Procedures**

Identification procedures are techniques that investigators use to prove that a specific person is connected in some way to a crime. During an identification procedure, a potential witness has the opportunity to observe a suspect's physical appearance, voice, handwriting, or other potentially identifying characteristic and decide whether they recognize it.

To be admissible in a criminal trial, law enforcement identification procedures must comply with the Due Process clause of the Fifth Amendment. That standard requires that under the totality of the circumstances, the procedure was not unnecessarily suggestive or conducive to an irreparable mistaken identification.

An identification procedure is unnecessarily suggestive when law enforcement officers orchestrate it so that one particular suspect stands out from the others to implicitly suggest that the suspect is the perpetrator. The Supreme Court has long recognized that when a witness mistakenly identifies an innocent person, the witness may become convinced that the person they identified is the perpetrator of the crime. Therefore, courts have condemned unnecessarily suggestive identification procedures.

## 17.7.1 Types of Identification Procedures

Law enforcement officers use at least three types of procedures to determine if a witness or victim can identify the perpetrator of a crime – line-ups, photo arrays/displays and show-ups.

### a. Line-Ups

In a line-up, a witness simultaneously views at least six physically present people to decide if the perpetrator is among them. While in-person line-ups are rarely used in federal law enforcement, the legal principles controlling them can aid understanding of undue suggestiveness.

For example, a line-up is unduly suggestive if a suspect meets the description of the perpetrator previously given by the witness - and the other line-up participants obviously do not. Further, line-ups where a suspect is the only participant wearing distinctive clothing or otherwise exhibiting an important characteristic in the witness's description increase the danger of misidentification substantially. However, a line-up of “clones” is not required.

### b. Photo Arrays

During a photo array, a witness views at least six photographs of persons either simultaneously or in sequence to determine whether the crime's perpetrator is shown in them. Because presenting improper photo arrays can cause witnesses to misidentify a suspect, avoiding impermissible suggestiveness by observing the following guidelines is critical:

- The Number of Photographs: In general, any array must contain at least six photographs.
- Persons Depicted in the Photographs: All of the persons depicted in a photo array should have the general



characteristics that the witness described for the perpetrator. Further, the suspect's picture should not stand out in relation to the other pictures. However, assembling a photo array of "clones" is not required.

- Details in Photographs: When assembling a photo array, law enforcement officers must pay attention to details in the pictures that could cause a suspect's picture to stand out in relation to "filler" photographs. A photograph that stands out from the others implicitly suggests to the witness that the perpetrator appears in it.
- Presenting Photos to a Witness: Officers use two primary methods for conducting photo arrays – the simultaneous method and the sequential method. Either identification method can meet the due process standards of the Fifth Amendment. In the simultaneous method, officers show all of the pictures to the witness at the same time. The sequential method involves showing a series of individual photographs to a witness one after the other. When using the sequential method, officers should place a known suspect's picture no earlier than sixth in the sequence and preferably not last in the sequence. Additionally, officers must not emphasize any photograph or show a particular suspect's picture repeatedly.
- Providing Information about a Suspect: Telling a witness that one or more suspects were arrested can lead a witness to assume that a photograph of the arrested person will be in the array. Further, the witness can feel pressure to make an identification, even if they are not fully confident, for fear of jeopardizing the case. Consequently, some courts recommend affirmatively telling a witness not to assume that the perpetrator's picture will be in an array.

- Double-Blind Procedure: Some law enforcement agencies use a "double-blind" method when presenting a photo array. In that procedure, the officer showing the photo array to the witness does not know who is and is not a suspect. Using this procedure minimizes the risk that an administering officer will inadvertently cue a witness before, during, or after viewing photographs in an array.
- Preserve Photo Arrays as Evidence: Once law enforcement officers present a photo array to a witness, it becomes evidence that must be cataloged with a chain of custody and preserved without regard to whether the witness recognized anyone.

c. Show-Ups

During a show-up, a law enforcement officer displays a single suspect to a witness either in person or using a photograph to determine whether the witness recognizes the suspect. To be admissible at trial, the identification must ordinarily have taken place close in time and space to the witness's original exposure to the suspect.

Despite their inherently suggestive nature, courts allow properly conducted show-ups because confirming that an individual apprehended close in time and place to a crime scene is, in fact, the perpetrator can help officers avoid mistakenly arresting innocent people. Further, allowing immediate show-ups before a suspect has a chance to alter their appearance and while the witness's memory is fresh can also help avoid misidentifications.

While disfavored, properly conducted show-ups, including show-ups conducted while a suspect is in handcuffs, are not unduly suggestive. For example, in one case, a court admitted evidence that the witness identified the suspect during a show-

up when the procedure occurred less than an hour after the crime, police apprehended the suspect in the immediate vicinity of the crime, the police told the witness they did not know if the suspect was the perpetrator, and the police did not show incriminating evidence to the witness prior to the procedure. See United States v. Hawkins, 499 F.3d 703 (7th Cir. 2007).

Courts are more likely to allow show-ups that take place shortly after a crime. Consequently, as more time passes after a crime, law enforcement officers should transition from show-ups to photo arrays or line-ups when interviewing prospective witnesses.

Law enforcement officers get some leeway when they, rather than a civilian witness, identify a suspect in a show-up. For instance, in Manson v. Brathwaite, 432 U.S. 98 (1977), an undercover officer used a single photograph to identify a suspect the officer met undercover two days after the encounter. Although the Supreme Court criticized the method and found it suggestive and unnecessary, because the record showed that the officer was alone when he looked at it, that he looked at it with care and reflection, and that he was not subjected to undue pressure to make a positive identification, the likelihood of an irreparable misidentification was minimal. Consequently, the Court agreed that allowing the officer to testify about the pretrial identification and to identify the suspect at trial did not violate the Fifth Amendment Due Process clause.

## Chapter 18 -

### Fourth Amendment

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## 18.1 Introduction

The Fourth Amendment prohibits government intrusion upon the privacy and property rights of the people. The Fourth Amendment to the United States Constitution states that:

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

The Fourth Amendment contains two distinct parts. The first part defines the right, which requires that all government searches and seizures be reasonable. The second part (the Warrants Clause) states that the government must establish probable cause to obtain search or arrest warrants, and that those warrants must particularly describe the place(s) to be searched and persons or things to be seized.

## 18.2 Government Action

The Fourth Amendment regulates the actions of government officials. The term “government” does not refer solely to law



enforcement conduct. Instead, the Fourth Amendment acts as a restraint on the entire government. For instance, the Court has held the Fourth Amendment applies to the activities of civil authorities such as building inspectors, Occupational Safety and Health Act inspectors, firefighters entering a privately owned premises to battle a fire, public school officials, and state hospital administrators.

The Fourth Amendment does not regulate private conduct, regardless of whether that conduct is reasonable or unreasonable. If a private citizen obtains evidence of a crime through a “private search,” the evidence may be admissible against a defendant, even if the private citizen acted illegally in conducting the search.

While the Fourth Amendment may not apply to a “private search” by a private citizen, it does apply when that citizen is acting as an instrument or agent of the government. The issue in such a search necessarily turns on the degree of the government’s participation in the private party’s activities. That question can only be resolved in light of all the circumstances. In making this determination, the courts typically focus on three factors: (1) Whether the government knows of or acquiesces in the private actor’s conduct; (2) whether the private party intends to assist law enforcement officers at the time of the search; and (3) whether the government affirmatively encourages, initiates, or participates in the private action.

### **18.3 A Fourth Amendment “Search”**

The Fourth Amendment prohibits unreasonable “searches” and “seizures.” Because of this, an officer must first understand what exactly a “search” or “seizure” is for purposes of the Fourth Amendment. This section will focus on the definition of a “search,” while the following section will discuss the legal definition of a “seizure.”

The Supreme Court applies two separate tests to determine whether government conduct is a “search” within the meaning of the Fourth Amendment. If the facts satisfy either test, then a search has occurred. As a result, the Fourth Amendment protects both privacy and property.

### 18.3.1 The Jones Test: Physical Intrusion to Protected Area

When the Fourth Amendment was adopted, the traditional definition of a “search” was based on a common-law trespass analysis and required a physical intrusion onto one of the four constitutionally protected areas (persons, houses, papers, and effects). A defendant could not make a successful Fourth Amendment challenge to a government “search” of property unless the defendant owned or had a lawful right to possess the property. Ownership or rightful possession of property remained a necessary requirement in the definition of a Fourth Amendment “search” until the 1967 Supreme Court decision of Katz v. United States, 389 U.S. 347 (1967) as described below.

In United States v. Jones, 565 U.S. 400 (2012), officers installed a global positioning satellite (GPS) tracking device on the undercarriage of a vehicle that the defendant’s wife owned, and the defendant drove with his wife’s permission. The officers used the GPS tracking device to monitor the vehicle’s movements for twenty-eight (28) days. Although the officers initially obtained a warrant authorizing the installation of the tracking device, the installation was not completed in compliance with the warrant’s requirements.

The Supreme Court found that the defendant’s vehicle was an “effect” – a constitutionally protected area listed in the text of the Fourth Amendment. By attaching the GPS tracking device to the defendant’s vehicle, the government physically intruded (trespassed) upon a constitutionally protected area. In

addition, the government trespassed with the intent of obtaining information about the vehicle's whereabouts during the tracking period.

The Supreme Court applied the traditional common-law trespass analysis, holding the government's physical intrusion and subsequent monitoring was a "search." As applied to GPS tracking devices on vehicles, the installation in Jones was the physical intrusion, and the subsequent monitoring provided the required intent to gather information. The Supreme Court held in Jones that a physical intrusion by the government into a "constitutionally protected area" for gathering information was a "search" under the Fourth Amendment.

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

### 18.3.2 The Katz Test: Reasonable Expectation of Privacy

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

The Katz reasonable expectation of privacy test added to, but did not replace, the common-law trespass test. In Katz v. United States, the Supreme Court held that an individual who enters a public telephone booth and shuts the door is entitled to privacy in his conversation. The defendant did not have an ownership or possessory interest in the public phone booth, so the traditional common law trespass test, as outlined in Jones above, did not apply. However, the Supreme Court recognized that the Fourth Amendment protects privacy, not just places.

For Fourth Amendment purposes, an individual must have a subjective expectation of privacy that is also objectively

reasonable in the eyes of society. First, by entering the phone booth and shutting the door, the individual has exhibited a subjective expectation of privacy. Second, this expectation is one that society is prepared to recognize as reasonable, based on, among other things, the fact that a door on a phone booth exists to allow those who use the phone to prevent people outside the booth from overhearing the conversations going on inside.

Accordingly, what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The government's use of a bugging device to eavesdrop on a conversation, as in Katz, would violate REP. On the other hand, if a nosy eavesdropper outside the booth who surreptitiously moved his unaided ear closer to a gap in the booth's door could overhear the phone booth occupant's words, the occupant would have no REP in those overheard words.

In Katz, the Supreme Court established the standard for determining whether REP exists. The test for REP is two-pronged:

- First, the individual must have exhibited an actual (subjective) expectation of privacy, and
- Second, that expectation must be one that society (as determined by the courts) is prepared to recognize as reasonable (objective).

The absence of either prong of the test means that no REP exists, and the government has not conducted a "search" under the Katz REP test. It is not a "search" to observe conduct that occurs openly in public, such as on a public street. Observations made from a lawful vantage point that develop probable cause are not "searches" under the Fourth Amendment. This is sometimes referred to as the Public View

Doctrine. This principle applies to perceptions made through seeing, hearing, or smelling.

### 18.3.3 Common “Search” Areas

Listed below are some of the more common trespass and REP “search” areas and situations.

#### a. The Body

Whether obtaining evidence from a person’s body is a search may depend on whether the evidence sought is internal or external. A physical intrusion, such as penetrating beneath the skin, infringes on an expectation of privacy that society is prepared to recognize as reasonable. Obtaining internal evidence such as blood, saliva, or urine samples from a person is a “search,” requiring a warrant, consent, or exigency. This rule applies to removing a physical object (such as a bullet) located beneath a person’s skin. Winston v. Lee, 470 U.S. 753 (1985). A breathalyzer test may be required, without a search warrant, as part of the search incident to arrest for impaired driving. Birchfield v. North Dakota, 579 U.S. 438 (2016). It is not a “search” to obtain external evidence such as fingerprints, handwriting, or voice samples from a lawfully seized suspect. The government can also obtain external evidence from a subject by subpoena or a court order. Fingerprints left behind by a suspect, such as on an interview table have no reasonable expectation of privacy; therefore, securing them and using them creates no Fourth Amendment issue.

#### b. Containers

Most personal containers (e.g., purses, briefcases, backpacks, etc.), are “effects” within the definition of the Fourth Amendment, one of the areas of constitutional protection.

Under the Katz test, an individual has REP in his or her containers, at least where the design of the container does not reveal its contents (such as a see-through backpack). Furthermore, a container is a protected “effect” under the Jones search test. Letters and other sealed packages are in the general class of effects in which the public at large has a reasonable expectation of privacy. The government agent’s knowledge of the contents does not necessarily deprive the owner of REP in the container; there is still the problem of access. An officer may need to obtain a warrant or articulate an exception to the warrant requirement, such as consent or a search incident to arrest, to search the container.

c. Vehicles

An individual’s reasonable expectation of privacy in a vehicle depends on whether the government is examining the exterior or interior of the vehicle. There is no expectation of privacy in the exterior of a vehicle. This applies to what officers may see from a lawful vantage point. The owner/operator generally has REP for the interior of a vehicle, at least against physical intrusion. An officer may lawfully observe an item sitting on the front seat in plain view. This does not necessarily give the officer the right to access the item seen, but it may provide probable cause to allow entry and seizure. Since vehicle identification numbers (VIN) are required by law to be located in an area that can be observed from the exterior of the vehicle, there is no REP in the VIN.

Passengers in a vehicle that they neither own nor lease typically do not have REP in that vehicle, although passengers will retain an expectation of privacy inside any personal property brought into the car with them (e.g., a purse or backpack). A passenger’s personal items are generally subject to a search or frisk when the officer is authorized to search or frisk the vehicle itself. (However, the owner/operator’s consent

to search the vehicle does not authorize the officer to search a passenger's personal items.)

A person listed as an authorized driver on a rental agreement will have REP in the vehicle, at least for the duration of the rental period. As a general rule, an individual otherwise in lawful possession and control of a rental vehicle has a reasonable expectation of privacy in it, even if the rental agreement did not list that individual as an authorized driver.

#### d. Homes

The Supreme Court has repeatedly emphasized that the warrantless entry and search of a home is the chief evil against which the Fourth Amendment is directed. Courts have recognized this protection in many circumstances, including shared dwellings, hotel rooms, and even tents. Whether or not a Fourth Amendment “search” of a dwelling has occurred requires an application of both the Jones trespass test and the Katz REP test. Under the Jones test, a government physical intrusion or trespass into a person's home with the intent to obtain information is a “search” under the Fourth Amendment. This may include the area immediately surrounding the home.

An individual has a high expectation of privacy within the confines of his or her home. REP exists even if the home is temporarily unoccupied. For example, occupants who are away on vacation retain REP in a primary residence. Owners have REP in their vacation home even when they are not currently occupying them.

The Supreme Court has also held that, in some circumstances, a visitor may have a reasonable expectation of privacy in someone else's house. In such cases, REP depends on the visitor's purpose for being at the home. For example, overnight guests of a homeowner are entitled to REP in the host's home.

Minnesota v. Olson, 495 U.S. 91 (1990). A social visitor normally does not have REP in the home visited. However, a person who is a frequent visitor to a home, and who has free access to and authority to control the premises at times, may have REP in the home. A commercial visitor generally has no REP in the home visited because of the purely commercial nature of the visit, the relatively short period of time on the premises, and the lack of any previous connection with the homeowners or occupants.

The protection afforded to homes extends to hotel and motel rooms. No less than a tenant of a house or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. In determining whether a person has Fourth Amendment protection in a hotel or motel room, courts typically consider: (a) whether the person was a registered occupant of the room; (b) whether the person shared the room with another to whom it was actually registered; (c) whether the person ever checked into the room; (d) whether the person paid for the room; and (e) whether the person had the right to control or exclude others' use of the property. Generally, a person's Fourth Amendment protection in a hotel or motel room ends at checkout time, although this may not always be the case if some past practice allowed the individual to retain the room past checkout time. Tenants of hotels, motels, and even apartment and condominium buildings typically have no Fourth Amendment protection in the common areas of those structures (e.g., the stairwells, hallways, or lobbies).

e. Curtilage and Open Fields

Homes have a significant degree of constitutional protection. Included within the protections afforded a home are those areas that fall within a home's "curtilage," but not those areas of an individual's property that are considered "open fields." The term "curtilage" means the area in which the intimate



activity associated with the sanctity of the home and the privacies of life takes place. For Fourth Amendment purposes, curtilage is treated as part of the home itself. Therefore, an individual has REP in the curtilage surrounding his or her dwelling. The Supreme Court applied the Jones test to curtilage in Florida v. Jardines, 568 U.S. 237 (2013), which involved taking a drug detection K9 to the front porch door of Jardines’s residence to perform a free-air sniff for marijuana. The Court held the front porch was curtilage and the government trespassed in the attempt to obtain information regarding drug manufacturing. However, this does not prohibit an officer from conducting a knock-and-talk under the judicially-recognized “knock and talk” exception.

In contrast, “open fields” may include any unoccupied or undeveloped area outside of the curtilage. An “open field” need not be “open” or a “field,” but could instead be a large tract of thickly wooded area on a person’s property. An “open field,” unlike curtilage, is not one of the protected areas enumerated in the Fourth Amendment. Therefore, the physical trespass by the government onto “open fields,” even in an attempt to obtain information, is not a “search” under the Jones test. In addition, there is no REP in “open fields.” Even if the area is fenced and the owner has posted “No Trespassing” signs, law enforcement officers may enter upon open fields for legitimate law enforcement purposes without a warrant or an exception to the warrant requirement. Although officers can enter open fields without any Fourth Amendment justification, they may not intrude into structures on open fields (such as sheds, barns, or other containers) without a warrant or an exception to the warrant requirement, as an owner/occupier may retain REP in those places. In addition, it is likely that any physical trespass into structures in an attempt to find evidence or obtain information may be a Fourth Amendment “search” under the Jones test.

In most instances, it is easy to define the boundaries of a home's curtilage, especially in a suburban area. However, in more rural settings, it can be more difficult to determine where "curtilage" ends and "open fields" begin. In United States v. Dunn, 480 U.S. 294 (1987), the Supreme Court set out four factors that courts must consider when determining whether a given area is part of a home's curtilage:

- The proximity of the area claimed to be curtilage to the home itself, although courts have repeatedly refused to fix a specific distance at which curtilage ends;
- Whether the area is within a single enclosure (natural or artificial) that also surrounds the home;
- The use of the area;
- The steps taken by the resident to protect the area from observation by people passing by.

No one factor controls, and courts must consider all four to answer the question of whether the area within the property surrounding a dwelling is that in which the intimate, daily, activities of private life occur.

#### f. Government Workplaces

In O'Connor v. Ortega, 480 U.S. 709 (1987), the Supreme Court addressed whether a government employee may establish REP in a government workspace. Government employees can, and often do, have reasonable expectations of privacy in their government offices, filing cabinets, and computers. In determining whether a government employee has REP in his or her workspace, courts use a variety of factors. Among the most important are:

- Prior notice to the employee, such as through computer

banners, that limit REP or state that no REP exists;

- Common practices and procedures of the employer;
- Openness and accessibility to the area or item in question;
- Whether the position of the employee requires a special trust and confidence (e.g., a position that has security requirements);
- Whether the employee has waived any REP in the workspace, such as through the collective bargaining process.

If an employee has REP in his or her workspace, an intrusion into that workspace is a “search” for Fourth Amendment purposes.

Special rules for workplace searches take into consideration a government supervisor’s dual responsibilities of ensuring the public’s work is done while still protecting a government employee’s Fourth Amendment right to be free from unreasonable searches and seizures. Even when a government employee has REP in a workspace, a supervisor may search that space without a warrant while looking for work-related items, files, or materials. In addition, a supervisor who has reasonable suspicion of employee work-related misconduct, which may or may not also be criminal, is entitled to search the employee’s workspace without a warrant to determine if misconduct is occurring. The supervisor is limited in scope to searching only those areas where the evidence of misconduct could be located. Search of a government employee’s workspace purely for evidence of criminal misconduct unrelated to work requires either a search warrant or an exception to the warrant requirement.

How and to what extent the Jones test will affect government workplace searches in the future remains unclear.

g. Abandoned Property

There is no REP or Jones interest in abandoned property. Abandonment occurs when an individual, either through words or actions, indicates an intention to permanently reject any interest in the item or place. An individual may “abandon” an expectation of privacy in an object by denying knowledge or ownership of it, such as when a person, previously seen in possession of a suitcase, denies owning it. An expectation of privacy in an object may also be “abandoned” by discarding it, such as when an individual being pursued by law enforcement officers throws the object away. If unlawful police conduct causes an individual to abandon property, a court may find the abandonment was involuntary, and exclude any evidence or contraband the government found as a result. There must be a “nexus,” or connection, between the police misconduct and the abandonment for a court to find the abandonment involuntary. For example, a court might find an abandonment involuntary if it directly resulted from unlawfully seizing someone’s body.

Garbage poses its own problems. The key to determining whether an individual has REP in garbage is the location of the garbage at the time the officer encounters it. A person has REP in garbage located inside a home. However, there is no REP in garbage placed on the curb of a public street for final pick-up by a third-party (e.g., a trash collector).

A more difficult situation arises when trash is located outside a home but still within the home’s curtilage. Generally, an individual’s REP will increase the closer the trash is to the home. It is reasonable to believe the courts will apply the Jones test to garbage located on a suspect’s property. Therefore, the courts would likely consider a physical trespass onto curtilage

with the intent to gain information or evidence from garbage to be a Fourth Amendment “search” without regard to REP.

h. Mail

A person has REP in the contents of first class and higher mail sent through the U.S. Postal Service. Postal inspection regulations govern intrusions into lower class mailings. There is no REP in the outside of a letter or package (e.g., words written on an envelope). There is REP in the contents of letters and packages sent through private carriers such as FedEx, DHL, and UPS.

18.3.4 Methods and Devices

a. Canine Sniffs

Using a dog to sniff a container, such as luggage, located in a public place does not intrude into REP and is not a “search” for Fourth Amendment purposes. REP does not extend to the airspace around luggage or a container. Illinois v. Caballes, 543 U.S. 405 (2005).

b. Sensory Enhancements

Whether using a device to enhance an officer’s senses is a search generally turns upon (1) the sophistication of the device, and (2) whether the activity the officer views occurs in public or in private. Binoculars and telescopes are fairly unsophisticated devices, so using them to observe public conduct does not generally turn surveillance into a search. However, when an officer uses these devices to observe conduct taking place inside a person’s home, their use may be a “search.” An officer’s use of flashlights and searchlights for illumination is not a “search,” and officers can point them into a car, barn, or even a detached garage. Darkness does not create REP that would not otherwise exist in daylight. The use

of thermal imaging to detect heat emanating from inside a residence is a “search” requiring a warrant or an exception to the warrant requirement. Kyllo v. United States, 533 U.S. 27 (2001).

c. Aircraft Overflights

Using overflights to detect criminal activity is common in law enforcement. When conducting overflights, officers may operate in navigable airspace (as determined by FAA regulations) to the same extent as private persons. In such situations, the Fourth Amendment does not require the government traveling in the public airways to obtain a warrant to observe what is visible to the naked eye. Observations of “open fields” from aircraft do not implicate the Fourth Amendment. It is unclear how the courts will treat drones in this analysis.

d. Cell Site Location Information

In Carpenter v. United States, 585 U.S. 296 (2018), a majority of the Supreme Court held that the continuous tracking of the movements of a suspect with cell site location information from cellular service providers required a search warrant. The Court determined that individuals have a “reasonable expectation of privacy in the whole of their physical movements.” Accordingly, continuous monitoring of a suspect’s location, even in public places, and even based on historical information held by third parties, constitutes a search under the Fourth Amendment.

## 18.4 A Fourth Amendment “Seizure”

Not every interaction between a law enforcement officer and a citizen amounts to a “seizure” under the Fourth Amendment. Some encounters are purely voluntary. When an officer’s encounter with a citizen is completely consensual, the Fourth

Amendment does not apply. However, words and actions on an officer's part may convert a voluntary, consensual contact into a "seizure." Consequently, law enforcement officers must understand exactly when an individual is "seized" for purposes of the Fourth Amendment.

A person is "seized" when either of two situations occurs: (1) the individual submits to a police show of authority and a reasonable person would not feel free to leave or otherwise terminate the encounter; or (2) police intentionally apply force upon a person with the intent to stop that person's freedom of movement. The latter is a seizure even if the person does not submit to the officer and is not subdued by the officer. A seizure occurs from the moment force was applied. Torres v. Madrid, 592 U.S. 306 (2021).

Property is "seized" when there is some meaningful governmental interference with an individual's possessory interest in that property.

#### 18.4.1 Police-Citizen Encounters

There are three types of police-citizen encounters: (1) a consensual encounter; (2) an investigative detention or "Terry stop;" and (3) an arrest. Only the Terry stop and the arrest are Fourth Amendment "seizures." The Fourth Amendment applies only when a "seizure" occurs.

#### 18.4.2 Consensual Encounters (Voluntary Contacts)

A consensual encounter is a brief, voluntary encounter between a law enforcement officer and an individual. An encounter is consensual if a reasonable person feels entitled to terminate it and leave at any time. A voluntary contact is not a "seizure" and therefore is not controlled by the Fourth Amendment.

When conducting a consensual encounter, the officer may take any or all of the following actions without turning the contact into a “seizure.” First, the officer may approach an individual and ask questions, even incriminating questions. Second, the officer may request, but not demand, to see an individual’s identification. Third, the officer may identify him or herself and display credentials. Fourth, the officer may seek consent for a search or a frisk.

In contrast, the officer might take actions during an encounter that could change the nature of the contact into a “seizure.” A court will scrutinize the officer’s actions during a voluntary contact to determine whether the encounter became a “seizure.” Factors courts will examine to determine whether a contact is a seizure include:

- The time, place, and purpose of the encounter;
- The words the officer uses;
- Language or tone of voice indicating that compliance with the officer’s request is mandatory;
- The number of officers present;
- Whether the officer displays a weapon;
- Any physical touching of the individual and the amount of force used;
- Retention of the individual’s identification or personal property; and
- Whether the officer notified the individual of the right to end the encounter (though this is not a requirement for courts to find that a contact is voluntary).



### 18.4.3 Investigative Detentions (Terry Stops)

Prior to 1968, encounters between law enforcement officers and citizens were categorized either as voluntary contacts, with no suspicion necessary, or arrests, which required probable cause. In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court recognized a third type of police-citizen encounter, known as an investigative detention (“Terry” stop). An investigative detention is a compelled, brief, investigatory stop. To make an investigative detention, a law enforcement officer must have a reasonable, articulable suspicion that criminal activity is afoot and the person detained is somehow involved.

#### a. The Requirements

To conduct a valid investigative detention of a person, an officer must have facts supporting a “reasonable suspicion” that criminal activity is afoot. The officer does not have to know that a crime is being committed, or even that he or she is stopping the right suspect. In allowing investigatory detentions, Terry accepts the risk that officers may stop innocent people. While “reasonable suspicion” is a lower standard than “probable cause,” an officer must still have explainable (articulable) reasons to justify a temporary seizure of a person. “Criminal activity is afoot” means that the officer must reasonably suspect that:

- A crime is about to be committed;
- A crime is being committed; or
- A crime has been committed.

Some courts have disallowed investigative detentions for completed misdemeanors, unless some ongoing danger to the public still exists (e.g., recent reckless driving). However, if

there is no other way to identify the subject who committed a misdemeanor, the court may still find the detention reasonable. Detentions to prevent or stop a misdemeanor from occurring are, of course, permissible with reasonable suspicion. When an officer has reasonable suspicion that a piece of personal property, such as luggage, contains contraband or evidence of a crime, they may detain it in the same manner that the officer may detain a person.

To determine whether reasonable suspicion exists, courts look at the “totality of the circumstances” of each case. An officer must be able to articulate facts establishing the possibility that the person stopped is connected to criminal activity. The “totality of the circumstances” includes an officer’s specialized training and experience, which together with the facts, might lead the officer to a conclusion that an untrained person would not reach. For example, the officer may observe conduct that they believe is consistent with “casing” a store for a robbery. In such a situation, the officer’s training and experience allows him or her to determine that reasonable suspicion of criminal activity exists, even though all of the suspect’s conduct might appear perfectly innocent to an untrained observer.

#### b. Establishing Reasonable Suspicion

Law enforcement officers may use a variety of different investigative techniques to obtain enough information to establish reasonable suspicion to detain a person. For example, an officer’s personal observations may establish reasonable suspicion to conduct an investigative detention. Courts give a great deal of deference to an officer’s personal observations. Additionally, officers may establish reasonable suspicion from information provided by other law enforcement officers, sometimes referred to as “collective knowledge.” Information from an identified third party, such as a victim or witness, can also provide the facts to establish reasonable suspicion. Finally, officers may use information provided by

reliable informants to establish reasonable suspicion for an investigative detention.

Often, informants or anonymous sources provide the information to establish reasonable suspicion. While this practice is permissible, an officer sometimes needs to corroborate the informant's information. The reliability of a tip provided by an informant depends on both the "quantity" and "quality" of the information. A tip from a confidential informant with an established, positive track record is usually considered reliable enough to establish reasonable suspicion with little or no corroboration. An anonymous tip, standing alone, is insufficient to establish reasonable suspicion, particularly when the source's truthfulness and basis of knowledge (i.e., how did the source acquire the information?) is unknown. In determining whether a tip contains enough verifiable information to establish reasonable suspicion, courts look to and rely upon the following factors:

- The amount of detail the source provided;
- Whether the source accurately predicted the suspect's future behavior;
- Whether and to what extent law enforcement officers corroborate the source's information;
- Whether the information is based on the source's first-hand observations;
- Whether, by providing the information, the source is putting their anonymity in jeopardy;
- Whether the source provided the information in a face-to-face encounter with law enforcement officials; and
- The timeliness of the source's report, that is, whether the

information is “stale.”

Reasonable suspicion is a lower standard than probable cause, both as to the amount of evidence needed (“quantity”) as well as how strongly it establishes that criminal activity is afoot (“quality”).

### c. Factors Justifying Investigative Detentions

An officer must be able to explain to a court why he or she decided to conduct an investigative detention of a suspect (i.e., what the officer heard, saw, or learned that led the officer to reasonably suspect that criminal activity was afoot). Many factors can justify an investigative detention. Even seemingly innocent or wholly lawful conduct can, in appropriate instances, establish reasonable suspicion that criminal activity is afoot. For example, an officer may reach different conclusions about the legal purchase of a crowbar by a person with an extensive criminal record for burglary than the same purchase by a carpenter with no criminal record. Some common factors officers can use to justify investigative detentions include, but are not limited to:

- A suspect’s nervous behavior, although this factor alone is of limited value, and the officer should consider it in conjunction with the surrounding circumstances;
- A suspect’s criminal history, although standing alone, this factor will not establish reasonable suspicion;
- An officer’s knowledge of recent criminal conduct;
- The time and location of the situation;
- A suspect’s flight upon observing law enforcement officers, at least when combined with other factors;

- A suspect's presence in a high crime area, at least when combined with other factors; and
- A suspect's non-responsive behavior.

d. Duration of an Investigative Detention

An investigative detention must be reasonable in length. It is a temporary detention and can last no longer than needed to carry out the stop's purpose. The officer should use the least intrusive investigative methods reasonably available to confirm or dispel the suspicion in a short period. There is no "bright line" rule as to the time limit for an investigative detention. The courts consider whether the officer diligently and reasonably pursued the investigation to confirm or dispel suspicions. The court may also consider the amount of force the officer used and the level of restriction the officer placed on the subject's movement. A Terry stop must be reasonable in time, place, and manner.

e. Use of Force During an Investigative Detention

An officer's use of force during an investigative detention must be objectively reasonable based on the totality of the circumstances known to the officer at the time. The Supreme Court has long recognized that the right to make an investigatory stop includes the right to use some degree of physical coercion, if needed, to carry out that stop. For example, an officer may handcuff a subject who will not comply with lawful orders or point a gun at a suspect the officer believes to be armed and dangerous.

To determine whether the amount of force used during an investigative detention has turned a stop based on reasonable suspicion into an arrest, which requires probable cause, courts consider a number of factors, including:

- The number of officers involved;
- The nature of the crime and whether there is reason to believe the suspect is armed;
- The strength of the articulable, objective suspicions;
- The need for immediate action; and
- The presence or lack of suspicious behavior or movement by the suspect.

a. Transitioning from Investigative Detention to Arrest

An investigative detention may lead to a lawful arrest only if the officer develops probable cause to arrest. While an investigative detention requires only reasonable suspicion that criminal activity is afoot and that the suspect is involved, an arrest requires probable cause to believe that the suspect is committing or has committed a crime. An officer who lacks facts to support every statutory element of a specific crime does not have probable cause.

If an officer extends an investigative detention beyond the time necessary for a reasonable officer to confirm or dispel his or her suspicions, a judge may find that the officer has made a “de facto” arrest. In determining whether an officer has made a de facto arrest, courts consider a variety of factors, including:

- The purpose of the stop and the nature of the crime;
- Whether the officer diligently conducted the investigation;
- The amount of force used and the need for such force;

- The extent to which the officer restrained a suspect's freedom of movement;
- The number of officers involved;
- The length and intensity of the stop;
- The time and location of the stop; and
- The need for immediate action.

A de facto arrest unsupported by probable cause is an illegal arrest that violates the Fourth Amendment. Any evidence the officer obtained after an unlawful arrest (for example, evidence found in a suspect's pocket during a subsequent search incident to arrest) will be inadmissible unless an exception to the exclusionary rule applies.

#### 18.4.4 A Terry Frisk

In Terry, the Supreme Court outlined the requirements for conducting what has become known as a Terry frisk. If, during an investigative detention, an officer develops reasonable suspicion that a suspect is presently armed and dangerous, he or she may conduct a limited search of that suspect for weapons. The purpose of the frisk is to discover weapons that the individual could use against the officer during an investigative stop. The officer may not use a Terry frisk to look for evidence of a crime. There are two requirements for a Terry frisk: (1) the detention leading to the frisk must be lawful; and (2) the officer must reasonably suspect that the person is presently armed and dangerous. Arizona v. Johnson, 555 U.S. 323 (2009).

A Terry frisk is a limited search for weapons. The officer may conduct the frisk after handcuffing the suspect. The officer may check the outside of the suspect's clothing for weapons or

any hard objects that could potentially be a weapon. Once the officer identifies a potential weapon or hard object that the suspect could use as a weapon, the officer is entitled to go inside the suspect's clothing and retrieve the object. When dealing with winter clothing, the officer may reach inside and beneath a heavy jacket and frisk underneath it to avoid missing potential weapons. The officer may also frisk the area under the suspect's immediate control, which can include easily accessible containers in the suspect's possession and containers the suspect may possess once the Terry stop ends.

a. Factors Used to Justify a Terry Frisk

As with investigative detentions, an officer may establish reasonable suspicion that a suspect is presently armed and dangerous through a variety of methods, including personal observations, information from other officers, and information from third parties, such as informants. The list of factors an officer may use to justify a Terry frisk is extensive.

The following are some of the most commonly-recognized factors:

- A suspect's known criminal history or association with violent gangs, giving him or her a reputation for being armed and dangerous;
- A bulge in a suspect's clothing indicating a weapon may be present;
- Movements consistent with checking or adjusting a hidden weapon or ensuring that it remains concealed;
- A suspect's words and actions, such as refusing to comply with directions to display open hands;
- A tip from a reliable informant that the suspect is armed



and dangerous;

- Reasonable suspicion of a crime, such as armed robbery, burglary, or drug trafficking, that by its nature supports a reasonable inference that the suspect could be armed and dangerous.

This list is not exhaustive. Courts examine the totality of the circumstances to determine whether sufficient facts support a reasonable suspicion that a suspect was presently armed and dangerous.

#### b. The “Plain Touch” Doctrine

While the sole purpose of a Terry frisk is to discover weapons, not evidence of a crime, the Supreme Court has held that an officer, under very specific circumstances, may seize contraband identified during a lawful Terry frisk. This principle is known as the “plain touch” doctrine.

To seize evidence lawfully under the “plain touch” doctrine, an officer must satisfy two requirements. First, the frisk that leads to discovering the evidence must be lawful. Second, the incriminating nature of the item must be immediately apparent to the officer without manipulation. Specifically, an officer must have probable cause to believe that the object encountered is contraband or evidence based on what he or she initially feels during a frisk. An officer may not manipulate soft objects to determine whether they are incriminating. Minnesota v. Dickerson, 508 U.S. 366 (1993). An officer may retrieve hard objects if he or she can articulate why the object could be a weapon, and can seize any evidence or contraband encountered in that process.

## 18.4.5 Detaining Vehicles

The Fourth Amendment applies to seizures of a person, including brief investigatory stops such as the stop of a vehicle. Stopping an automobile and detaining its occupants is a Fourth Amendment “seizure,” even though the stop’s purpose is limited and the resulting detention quite brief. Whether stopping a person on foot or in a vehicle, the standard is the same. An officer must have, at a minimum, reasonable suspicion that the person stopped is engaged in criminal activity (Terry stop). An officer may also conduct a stop if he or she has reasonable suspicion that a person in the vehicle is wanted for past criminal conduct, or reasonable suspicion the vehicle is carrying contraband. In Brendlin v. California, 551 U.S. 249 (2007), the Supreme Court held that a passenger inside a vehicle is “seized” under the Fourth Amendment when the driver is stopped for a traffic offense. Consequently, as discussed later in this chapter, a passenger has “standing” to challenge the legality of the vehicle stop.

### a. Permissible Actions During Vehicle Stops

The Supreme Court has long recognized the very real dangers officers face when confronting suspects in vehicles. For that reason, during vehicle stops officers may take reasonably necessary steps to protect themselves by:

- Ordering the driver and passengers out of a vehicle;
- Ordering the driver and passengers to remain in a vehicle;
- Using a flashlight to illuminate the interior of a vehicle;
- Conducting license and registration checks of a driver or authorized user; and

- Questioning a driver regarding his or her travel plans.

b. Terry “Frisk” of a Vehicle

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court expanded the scope of a Terry frisk to include vehicles. Long provides that if an officer has reasonable suspicion that a driver or passenger in a vehicle is dangerous and may gain immediate control of a weapon, the officer may “frisk” that person, as well as the entire passenger compartment of the vehicle, including any unlocked containers in the passenger compartment. Some, but not all, federal appellate courts have extended this rule to include locked containers such as a locked glove compartment, when an occupant would have immediate access based on availability of the key. However, officers may not “frisk” the trunk of a vehicle.

c. Duration of Vehicle Stops

As with traditional investigative detentions, an investigative detention that occurs in a vehicle must be temporary and last no longer than is necessary to carry out the stop’s purpose. Consequently, once an officer issues a citation or warning and conducts all records checks, the stop must end, and the officer must release the driver. Should the detention continue past this point, the officer must show that the driver consented to the extension or that the officer established reasonable suspicion during the original stop of additional criminal activity afoot. If the officer fails to establish either of these additional requirements for extending the stop, the court may find the continued detention unreasonable under the Fourth Amendment.

d. Pretextual Vehicle Stops

Pretextual traffic stops are permissible. A “pretextual” traffic stop occurs when an officer uses a legal justification (e.g., an

observed traffic violation) to stop an individual to investigate a different, more serious crime for which no reasonable suspicion exists (e.g., drug trafficking). In Whren v. United States, 517 U.S. 806 (1996), the Supreme Court upheld pretextual traffic stops, noting that the constitutionality of a traffic stop does not depend on the actual motivation of the individual officer involved. While permissible, pretextual stops can create issues under Department of Justice profiling guidelines. (See below).

#### 18.4.6 Arrests

The third type of “citizen-police” encounter is an arrest based on probable cause. See the sections discussing Arrests and Arrest Warrants in this chapter.

### 18.5 The Use of Listed Characteristics in Law Enforcement

Using protected characteristics to make law enforcement decisions can raise constitutional concerns. In light of these concerns, in June of 2003 the Department of Justice (DOJ) published a document entitled “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.” On June 1, 2004, the Department of Homeland Security (DHS) explicitly adopted that DOJ policy.

The Guidance was updated in 2014 to include ethnicity, gender, national origin, religion, sexual orientation and gender identity, and in 2023 the Guidance was updated to include disability. This superseding document is entitled “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Gender Identity, and Disability.” The Guidance reaffirmed the federal government’s deep commitment to ensuring that its law enforcement agencies conduct their activities in an unbiased manner.

The 2023 Guidance applies to all federal law enforcement officers, as well as state, local, territorial, and Tribal law enforcement officers while participating in Federal law enforcement task forces or other federal law enforcement activities, including those related to national security and intelligence operations. The Guidance also applies to non-law enforcement Federal personnel when engaged in or directly supporting law enforcement or intelligence activity conducted by Federal law enforcement agencies. It defines the circumstances in which federal law enforcement officers may take into account a person’s race, ethnicity, gender, national origin, religion, sexual orientation, gender identity, or disability (referenced collectively as “listed characteristics”).

### 18.5.1 The Constitutional Framework

The Constitution protects individuals against the invidious use of irrelevant individual characteristics. See Whren v. United States, 517 U.S. 806 (1996). Such characteristics should never be the sole basis for a law enforcement action. The 2023 Guidance established policy requirements beyond the legal constitutional minimum that shall apply to the use of listed characteristics by federal law enforcement officers.

Specific examples concerning the use of listed characteristics when making law enforcement decisions or in law enforcement activities can be found in the 2023 Guidance, which is also published in the *Legal Training Reference Book*. Section 18.5.2, below, contains direct excerpts from the 2023 Guidance.

### 18.5.2 Guidance for Federal Law Enforcement Officers

Effective Federal law enforcement operations depend on intelligence and information that are reliable and trustworthy. Characteristic information has increased potential to lack trustworthiness when it is considered on its own, not combined

with context and content-specific details that ensure its reliability. Accordingly, Federal law enforcement personnel may not consider race, ethnicity, gender, national origin, religion, sexual orientation, gender identity, or disability in law enforcement or intelligence activities unless the following conditions are met:

(1) There is trustworthy context and content-specific information, with sufficient details regarding factors such as locality, time frame, method, and purpose to provide assurance that the information is reliable and links persons possessing a particular listed characteristic to: an identified criminal incident, scheme, or organization; a threat to national or homeland security; a violation of Federal immigration or customs law; or an authorized intelligence activity; and

(2) Law enforcement personnel reasonably believe the law enforcement activity, including national or homeland security operations or intelligence activity to be undertaken is merited under the totality of the circumstances, weighing all factors, including any temporal exigency or the nature of any potential harm to be averted.

This standard applies to all Federal law enforcement and intelligence activity conducted by Federal law enforcement agencies, including when carried out solely or in part by automated systems or artificial intelligence and substantively similar tools. This standard applies even when the use of a listed characteristic might otherwise be lawful.

## Application of Guidance for Federal Law Enforcement Officers

In making decisions and engaging in law enforcement and intelligence activities, Federal law enforcement agencies, their officers, and personnel act on varying levels of information. The amount of trustworthy information and intelligence they have affects the propriety of relying on listed characteristics.

Officers enforcing traffic laws, engaged in foot patrols, making custodial and noncustodial stops, conducting searches of persons or property, or undertaking routine screening activities that are core to their job function, may have no information beyond their immediate observations regarding specific criminal activities or the prevention of harm to national or homeland security. Absent additional information, law enforcement and intelligence responsibilities should be carried out without any consideration of race, ethnicity, gender, national origin, religion, sexual orientation, gender identity, or disability to mitigate the risk that law enforcement decisions could rest on stereotypes or generalized assumptions instead of information and intelligence that is reliable and trustworthy.

### a. Prohibited Uses

Reliance on generalized assumptions or stereotypes involving a person's race, ethnicity, gender, national origin, religion, sexual orientation, gender identity, or disability is forbidden. This bar extends to the use of pretexts as an excuse to target individuals with a particular protected characteristic. Law enforcement personnel must not use such pretexts. Moreover, other facially neutral factors may not serve as a proxy for overtly targeting persons because they possess a protected characteristic. This concern arises most frequently when law enforcement efforts are focused on areas associated with high crime rates.

The issue is ultimately one of motivation and evidence; certain seemingly characteristic-based efforts, if properly supported by reliable, empirical data can in fact be neutral and appropriate. It is unacceptable and thus prohibited under [the Guidance] for law enforcement personnel to act on the belief that possession of a listed characteristic signals a higher risk of criminality or dangerousness. This is the core of invidious profiling and must not occur.

b. Required Conditions for Use of Listed Characteristics

1. The information must be trustworthy.

In determining whether information is trustworthy, law enforcement personnel should consider the totality of the circumstances, such as the reliability of the source, the specificity of the information, other applicable legal standards, and the context in which it is being used. Where the information relied upon by law enforcement personnel linking a person possessing a listed characteristic to potential criminal activity, a threat to national or homeland security, a violation of Federal immigration or customs law, or an authorized intelligence activity is too generalized and unspecific, reliance upon that characteristic to take law enforcement action is prohibited. Characteristic information, when not combined with context- and content-specific details that ensure its reliability, has limited evidentiary value.

2. The information must be context and content-specific.

Any information that law enforcement personnel rely on concerning a listed characteristic possessed by persons who may be linked to a specific criminal activity, a threat to national or homeland security, a violation of Federal immigration or customs law, or an authorized intelligence



activity must be context- and content-specific, *e.g.*, contain details such as locality, time frame, method, or purpose.

In the context of routine or spontaneous law enforcement decisions, such as ordinary traffic stops, this requirement prohibits Federal law enforcement personnel from using race, ethnicity, gender, national origin, religion, sexual orientation, gender identity, or disability to any degree, except that officers may rely on the listed characteristics in a specific suspect description or as necessary to make reasonable modifications to afford equal opportunity to people with disabilities.

When law enforcement has specific information, based on trustworthy sources, to “be on the lookout” for specific individuals identified at least in part by a specific listed characteristic, the personnel do not act based on a generalized assumption about individuals possessing certain characteristics; rather, they are helping locate specific individuals previously identified as involved in a crime.

3. Characteristic-based information must always be specific to particular suspects or incidents; identified criminal activities, schemes, or enterprises; a threat to national or homeland security; a violation of federal immigration or customs law; or an authorized intelligence activity.

These standards contemplate the appropriate use of both “suspect-specific” and “incident-specific” information. Law enforcement personnel may not use information linking persons possessing a listed characteristic to a particular incident, criminal activity, scheme, or ongoing criminal enterprise, a threat to national or homeland security, a violation of Federal immigration or customs law, or an authorized intelligence activity unless the information is

reliable and locally or temporally relevant, regardless of whether there is a description of any individual suspect. In certain cases, the surrounding circumstances will point strongly to a perpetrator possessing a specific listed characteristic, even though law enforcement personnel lack an eyewitness account.

In addition, law enforcement personnel may not use a listed characteristic in connection with source recruitment, unless that characteristic bears on the potential source's placement and access to information relevant to an identified criminal incident, scheme, or organization; a threat to national or homeland security; a violation of Federal immigration or customs law; or an authorized intelligence activity.

4. The action must be reasonably merited under the totality of the circumstances.

Finally, when law enforcement personnel rely on a listed characteristic in undertaking an action, they must have a reasonable belief that the action is merited under the totality of circumstances. This standard ensures that under the circumstances, they are acting in good faith when relying in part on a listed characteristic to act.

## **18.6 Probable Cause (PC)**

The Fourth Amendment provides that “no Warrant shall issue but upon probable cause ....” In cases in which the Fourth Amendment requires a search warrant, courts will use “probable cause” as the standard to decide if the search meets the constitutional requirement of reasonableness. Officers may perform some searches lawfully without a warrant; however, many of these warrantless searches require the officer to establish probable cause.

Probable cause is also required to obtain an arrest warrant or to arrest someone without a warrant. The facts necessary to establish probable cause to obtain a warrant are the same as those required to proceed without a warrant in those cases where probable cause is required.

### 18.6.1 Defining Probable Cause

It is impossible to articulate the precise meaning of “probable cause.” Probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts -- “not readily, or even usefully, reduced to a neat set of legal rules.” Nonetheless, the courts have established some basic definitions for probable cause to “arrest” or “search.” Probable cause to “search” exists where the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found in the place to be searched. Probable cause to “arrest” exists when the known facts and circumstances are sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense. The term “reasonable belief” is often used to help define probable cause.

### 18.6.2 The Test for Probable Cause

Courts use a “totality of the circumstances” test to determine whether probable cause exists. Applying this test, courts consider all facts known to the officer. The focus in determining probable cause is not on the certainty that a crime was committed, but on the reasonable belief that a crime was committed. The court will affirm an officer’s determination of probable cause for an arrest if the facts support a reasonable inference that a specific suspect engaged in criminal conduct in violation of a criminal statute. Evidence must support that every element of the particular criminal statute has been met. Likewise, probable cause to search a location requires facts

showing a reasonable belief that contraband, evidence, fruits, and/or instrumentalities of a crime (for which the officer has probable cause) will be found in the location the officer wants to search.

### 18.6.3 Establishing Probable Cause

An officer can establish probable cause in a number of ways. First, an officer can establish probable cause through direct observations (e.g., an officer smells the odor of marijuana coming from a vehicle). An officer can also rely on facts establishing probable cause that he or she learns from another law enforcement officer. Similarly, an officer can establish probable cause from “collective knowledge” shared amongst many law enforcement officers, each of whom has some fact available that, when taken in sum, establishes probable cause. An officer can rely on his or her training and experience in making a probable cause decision so long as the officer can articulate the training or experience relied upon and how it is relevant to the circumstances of the case. Officers can also use non-human sources, such as a trained, drug-sniffing dog, to establish probable cause. Information provided solely by victims and/or witnesses can be sufficient to establish probable cause, given a proper basis of knowledge, when there is no evidence indicating that either the information or the victim/witness is not credible. An officer can establish probable cause from information that a confidential informant, other cooperating party, or anonymous source provides. When a confidential informant or anonymous source is the source of the information, however, the officer must consider and address certain issues relating to the credibility of the source and the accuracy of the information the source provides.

#### 18.6.4 Using Confidential Informants to Establish Probable Cause

Using confidential informants, other cooperating parties, such as defendants, or anonymous tips in criminal investigations is fairly routine. However, the use of this particular investigative tool can raise concerns regarding the informant's truthfulness and reliability.

In Illinois v. Gates, 462 U.S. 213 (1983), the Court held that a "totality of the circumstances" test should be used to determine whether information obtained from an informant was sufficiently reliable to establish probable cause. Credibility of the informant and the informant's basis of knowledge are two important, but not exclusive, factors courts rely on in making this determination. Any facts supporting either of these factors should be clearly articulated by the officer.

In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court outlined a two-prong test that might prove helpful in determining whether information provided by a confidential informant is sufficiently reliable to establish probable cause and thus pass the totality of the circumstances test under Gates.

The two prongs of the Aguilar test are (1) the credibility of the informant, and (2) the informant's basis of knowledge.

##### a. Credibility of the Informant

When the government uses an informant to establish probable cause, it must establish that the informant is credible (worthy of belief). The government can establish credibility in a variety of ways, including those listed below.

- **Proven Track Record:** The informant has a track record of supplying reliable information in the past.

- **Statements Against Interest:** When an informant makes statements that are against their penal interest (that is, the statement could get them in trouble, too), the information is more likely to be reliable. People do not lightly admit to a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime carry their own indicia of credibility - sufficient at least to support a finding of probable cause.
- **Corroboration:** Independent corroboration of some information provided by an informant increases the likelihood that other information the informant provides is accurate.
- **First-Hand Information:** The personal observations of an informant are more likely to be credible.
- **Face-to-Face Meetings:** A face-to-face encounter with an informant allows an officer to personally assess an informant's demeanor and credibility.
- **Consistency between Independent Informants:** Credibility increases when two or more separate, unrelated informants provide consistent information.
- **The Degree of Detail Provided:** The greater the detail, the more likely it is that the information is accurate.

b. Basis of Knowledge

In addition to assessing an informant's credibility to determine whether he or she is reliable under the totality of the circumstances, an officer should also assess whether the informant has a basis of knowledge by asking how the informant claims to have learned reported facts. An informant has a basis of knowledge when circumstances reliably

demonstrate that the informant is in a position to know the facts that he or she reports. An informant who represents that he or she has first-hand knowledge of the following information is more likely to have a basis of knowledge:

- Who is involved in the criminal activity;
- What criminal activity is taking place;
- Where the criminal activity occurred or is occurring; and
- When the criminal activity occurred.

## 18.7 The Exclusionary Rule

### 18.7.1 The Rule

The Fourth Amendment does not, by its own terms, require courts to suppress evidence obtained in violation of its mandates. Instead, the Supreme Court developed the “exclusionary rule.” The rule essentially states that evidence obtained as a result of an unlawful search and/or seizure is inadmissible in criminal trials. Suppression is the result even if the evidence that officers seized was not a direct result of the Fourth Amendment violation. Evidence that a law enforcement officer indirectly derives from information the officer learned illegally is also inadmissible. This principle is called the “fruit of the poisonous tree” doctrine. For example, although searching an arrestee incident to an arrest is generally permitted, evidence found in a search incident to a warrantless arrest which was not supported by probable cause would be inadmissible. Stolen property would be inadmissible if officers retrieved it by following a map they found during an illegal search of a suspect’s home. The purpose of the exclusionary rule is to deter police misconduct by creating negative consequences for disregarding Fourth Amendment requirements. However, the exclusionary rule does not

prohibit the introduction of illegally seized evidence in every situation.

Courts have developed a number of exceptions to the exclusionary rule. If an exception applies, then evidence would be admissible even though it was seized in violation of someone's constitutional rights.

## 18.7.2 The Exceptions

### a. No Standing to Object

Fourth Amendment rights are personal. To claim the protection of the Fourth Amendment, a defendant must demonstrate that they personally have an expectation of privacy in the place searched, and that their expectation is reasonable or they have a Jones interest in the place to be searched. Unless the government has violated a defendant's Fourth Amendment rights, the defendant will not benefit from the exclusionary rule's protections because he has no standing to object. For example, a car thief would have no standing to object to the admission of the tool he used to break into the car he stole after officers found it by searching the stolen car. Nor would a drug dealer have standing to object to the admission of drugs he duped an unsuspecting neighbor into storing in the neighbor's house, even if officers found the drugs during a warrantless search conducted without a valid exception to the warrant requirement. Nor would a passenger in a vehicle have standing to object to the admission of a stolen wallet the passenger concealed under a car seat if an officer conducted a search of the car without a warrant or a valid exception to the warrant requirement after the driver was pulled over for a speeding violation.



## b. Impeachment

When a defendant takes the witness stand and testifies falsely, the government may cross-examine the defendant and impeach, or attack his or her credibility, with evidence that the government obtained in violation of the Fourth Amendment. Under the impeachment exception, the government may use illegally obtained evidence to impeach (1) a defendant's testimony on direct examination, or (2) a defendant's statements in response to proper cross-examination. For these reasons, it is important to maintain evidence in compliance with agency policy and at least until appeals are exhausted even if the evidence is suppressed.

## c. Good Faith

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court established a "good faith" exception to the exclusionary rule. Evidence seized in "good faith" reliance on a warrant issued by a neutral and detached judge based upon facts the government reasonably believes show probable cause will be admissible even if a court later concludes that no probable cause existed. Since the purpose of the exclusionary rule is to deter police misconduct, if the officers were following the law in good faith when they applied for and executed the warrant, and there is no misconduct, then the evidence will not be excluded.

The "good faith" exception will not apply when:

- The government knowingly or with reckless disregard for the truth misleads the issuing judge by including information in an affidavit that the government knew was false or by omitting information from an affidavit knowingly or with reckless disregard for the truth;

- The judge issuing the warrant abandoned a “neutral and detached” role;
- The warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or
- The warrant is so “facially deficient” that no officer could reasonably believe it is valid, for example, when a warrant fails to particularly describe the place to be searched or things to be seized.

#### d. Inevitable Discovery

The court should admit evidence if the prosecution can establish by a preponderance of the evidence that it ultimately or inevitably would have been discovered by lawful means. This is the “inevitable discovery” exception. The federal circuits are split on whether the “inevitable discovery” exception requires that law enforcement officers be actively pursuing an alternative investigation at the time the constitutional violation occurred.

All circuits recognize the exception when two investigations are occurring at the same time. The First, Sixth, Ninth, and Tenth Circuits have held that the “inevitable discovery” exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct.

#### e. Miscellaneous Exceptions

In addition to the exceptions to the exclusionary rule outlined above, there are miscellaneous exceptions that apply in a given case. The exclusionary rule does not apply, for example, in

deportation proceedings, grand jury proceedings, sentencing proceedings, or civil tax proceedings.

## 18.8 The Plain View Seizure Doctrine

The plain view seizure doctrine allows officers to seize evidence or contraband they discover while in a public place or lawfully inside a constitutionally protected area (Jones) or an area where someone has a reasonable expectation of privacy (Katz). There are three requirements the government must meet for a permissible plain view seizure. First, the officer must lawfully be in a position to observe the item; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have a lawful right to access the object.

### 18.8.1 Lawful Position of Observation

The first requirement of any plain view seizure is that the officer must have a lawful reason to be in the location from which he or she observed the item. A lawful reason to be in a dwelling would be a warrant or one of the exceptions to the warrant requirement. For example, if the officer conducted a lawful protective sweep (See Section 18.11) while serving an arrest warrant and observed a sawed-off shotgun in a bedroom closet immediately adjacent to the place of arrest, the officer could seize the shotgun under the plain view doctrine. If the officer exceeded the lawful scope of a protective sweep by opening the medicine cabinet, however, any evidence or contraband observed inside the medicine cabinet would fall outside the plain view doctrine.

### 18.8.2 The Incriminating Nature of the Item Must Be Immediately Apparent

Second, not only must the officer perceive the item from a place the officer has a legal right to be, but its incriminating

character must also be immediately apparent. Satisfying this criterion requires the officer have probable cause to believe that the object is contraband or immediately recognizable as evidence, fruits, or an instrumentality of a crime. If the officer must conduct further examination or manipulation to establish probable cause to believe that the item is contraband, evidence, fruit, or an instrumentality of a crime, then its incriminating character is not immediately apparent, and the plain view doctrine cannot justify its seizure. The standard is not high, and a plain view seizure is ordinarily reasonable, provided there is probable cause to associate the property with criminal activity.

In determining whether an item's incriminating nature is immediately apparent, courts will examine factors such as

- The nexus, or connection, between the seized object and the items particularized in a search warrant;
- Whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and
- Whether probable cause is the direct result of the executing officer's instantaneous sensory perceptions.

### 18.8.3 Lawful Right of Access

Finally, even if an officer can see the object from a place where he or she is lawfully present, the officer may not seize it unless he or she also has a lawful right of access to the object itself. An officer's personal observations may establish that evidence is inside a premises. However, even when the evidence is contraband, the government may not enter and seize it without a warrant or an exception to the warrant requirement.

For example, an officer may stand on the public sidewalk and see a marijuana plant inside someone's living room. Without additional facts, however, the officer may not enter the residence and seize the plant because he or she has no lawful right of access to the living room where the plant is located. If the resident were to give the officer consent to enter, however, or if the resident saw the officer through the window and began destroying the plant, the officer could lawfully enter the house and seize the marijuana. The plain view doctrine is not a tool that allows officers to search for items without a warrant or another exception, but only to seize an item when conditions satisfy the doctrine's criteria.

## 18.9 Arrest Warrants

There are several ways to obtain a federal arrest warrant. A federal judge can issue an arrest warrant on a criminal complaint. The clerk of court can issue an arrest warrant following a grand jury's return of an indictment or following the U.S. Attorney's filing of an Information. Federal Rules of Criminal Procedure (Fed. R. Crim. P.) 4 and 9 govern the form and issuance of arrest warrants.

### 18.9.1 Arrest Warrant Upon Criminal Complaint

Fed. R. Crim. P. 4 addresses the issuance of federal arrest warrants based upon a criminal complaint (a complaint). Subsection (a) of the rule provides that "if the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it." A "complaint" is defined by Fed. R. Crim. P. 3 as "a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer."

## 18.9.2 Arrest Warrant Upon Indictment or Information

Fed. R. Crim. P. 9 addresses the issuance of federal arrest warrants based upon an indictment or information. Subsection (a) of the rule provides that “the court must issue a warrant - or at the government’s request, a summons - for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it.” An information is similar to a criminal complaint except that an Assistant U.S. Attorney (AUSA) prepares it. An indictment is the result of a grand jury’s decision that there is probable cause to believe that a crime was committed, and the defendant committed it.

## 18.9.3 The Form of a Federal Arrest Warrant

A federal arrest warrant must contain the following:

- **Signature of an Authorized Official:** The warrant must be “signed by the magistrate judge” or by whatever judge issues the warrant. For arrest warrants based upon an indictment, the warrant “must be signed by the clerk.”
- **Name of the Defendant:** The warrant must contain “the defendant’s name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty.”
- **The Offense Charged:** The warrant must “describe the offense charged in the complaint.” For arrest warrants based upon an indictment or information, the warrant “must describe the offense charged in the indictment or information.”

- **Command to Arrest:** The warrant must “command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.”

#### 18.9.4 Technical Aspects of Executing Arrest Warrants

Fed. R. Crim. P. 4(c) describes the manner in which arrest warrants must be executed.

- **Who Can Execute?** “Only a marshal or other authorized officer may execute a warrant.” The arresting officer need not be the one who obtained the warrant.
- **Territorial Limits:** An arrest warrant “may be executed ... within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.”
- **Time Limits:** Unlike a search warrant, there is typically no timeframe within which an arrest warrant must be executed.

#### 18.9.5 Manner of Execution

A warrant is executed upon the arrest of the defendant. “Upon arrest, an officer possessing the warrant must show it to the defendant.” There is no requirement, however, that the arresting officer have the warrant in their possession at the time of the arrest. “If the officer does not possess the warrant, the officer must inform the defendant of the warrant’s existence and of the offense charged and, at the defendant’s request, must show the warrant to the defendant as soon as possible.”

## 18.9.6 Return of the Arrest Warrant

Both Fed. R. Crim. P. 4 and Fed. R. Crim. P. 9 provide for a return of the arrest warrant. When an officer arrests someone on a warrant issued upon a complaint, indictment, or information, the officer must return the warrant to the judge who will conduct the defendant's initial appearance. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

## 18.10 Arrests

A warrant is not always required for an arrest to be lawful. However, when a law enforcement officer arrests an individual, both statutory and constitutional requirements must be satisfied. The three requirements for a lawful arrest are (1) probable cause, (2) arrest authority, and (3) a lawful right of access to the suspect.

### 18.10.1 Arrest Authority

In the federal system, the authority to make arrests varies from agency to agency. The scope of arrest authority is established by statute. Officers must know the extent of their authority granted by these statutes. For some, authority and jurisdiction are limited to certain geographical areas; for others, authority is limited to certain subject matter.

For example, a United States Park Police officer can enforce almost all federal laws, but only within specific physical boundaries. On the other hand, an Internal Revenue Service agent may enforce only internal revenue laws but may do so anywhere within the jurisdiction of the United States. Officers may not make an arrest just because a federal crime has been



committed but may do so only if they have the statutory authority to arrest for that specific crime.

Authority to make arrests comes from three different sources.

a. Statutory Authority

Most federal law enforcement officers have statutory grants of authority provided to them by Congress. For example, 18 U.S.C. § 3056 outlines the arrest authority for officers and agents of the United States Secret Service, whereas 22 U.S.C. § 2709 provides the arrest authority for special agents of the Department of State.

b. Peace Officer Status

Federal officers may make arrests for violations of state law when they have “peace officer” status under the laws of a particular state. An officer’s agency policy may restrict federal officer’s authority use state peace officer status.

c. Citizen’s Arrest Authority

Numerous states still have statutes granting “citizen’s arrest” authority, which allows a citizen with probable cause to make an arrest for certain crimes. The requirements for and scope of “citizen’s arrest” authority vary from state to state. An officer’s reliance upon “citizen’s arrest” authority should be rare and most likely will not be in the “scope” of employment.

### 18.10.2 Arrests Based on Outstanding Arrest Warrants

On occasion, federal officers encounter persons subject to an arrest warrant during the course of their regular duties. Officers typically learn of the existence of the warrant through an identity check run with the Treasury Enforcement

Communications System (TECS) or National Crime Information Center (NCIC).

a. Outstanding Federal Arrest Warrant

To execute a federal arrest warrant, the officer must have lawful authority originating from statutory law. The officer should verify that the warrant is still valid and that the person arrested is the individual specified on the warrant. If an officer encounters a person with an outstanding federal arrest warrant for a crime outside the scope of the officer's statutory arrest authority, he or she should detain the individual until an officer with the proper authority can make the arrest.

b. Outstanding State Arrest Warrant

Unless authorized by statute, federal law enforcement officers may not arrest individuals on outstanding state warrants. Very few agencies have such statutory arrest authority. See 38 U.S.C. § 902 Enforcement and Arrest Authority of Department [of Veteran Affairs] Police Officers for a rare exception to the general rule. However, a federal law enforcement officer might make such arrests with state peace officer authority, depending on the law of the state in which the arrest is made.

If faced with this situation, the best practice is for the federal law enforcement officer to contact the state or local police department listed on the warrant to determine if that department wants the individual detained. If so, the federal law enforcement officer may detain the individual for a reasonable period until state or local police officers can make the arrest.

The discovery of a person with a pending state arrest warrant may indicate a violation of federal law. For example, 18 U.S.C. § 1073 prohibits persons from traveling in interstate commerce

with the intent to avoid prosecution or to avoid giving testimony in any felony criminal proceeding.

### 18.10.3 Right of Access: Entering a Home to Arrest

The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Welsh v. Wisconsin, 466 U.S. 740 (1984). For that reason, entering a home to arrest a person without a warrant or an exception to the warrant requirement is typically a violation of the Fourth Amendment, regardless of whether the officer has probable cause to arrest the suspect. An officer who enters a person’s home to make an arrest must have: (1) a warrant; (2) consent; or (3) an exigent circumstance.

#### a. Entering the Suspect’s Home to Make an Arrest

“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” Payton v. New York, 445 U.S. 573 (1980). In essence, an officer must have: (1) a reasonable belief that the suspect lives at the home, and (2) a reasonable belief that the suspect is currently present in the home.

In determining whether a suspect is present in the home before executing the arrest warrant, courts look to the totality of the circumstances known to the officer at the time of the entry. In deciding this issue, courts typically consider several factors, including:

- Any surveillance information indicating the suspect is in the home, although the actual viewing of the suspect is not required;
- The presence of the suspect’s vehicle, which may

indicate his or her presence;

- The time of day (e.g., 8:30 a.m. on a Sunday morning);
- Observation of lights or other electrical devices, such as televisions or stereos;
- The circumstances of a suspect's employment, which may indicate when the suspect is likely to be home; and
- Information from third parties (e.g., confidential informants or neighbors) indicating that the suspect is present in the home.

b. Entering a Third-Party's Home to Make an Arrest

An arrest warrant does not allow the government to enter a home where the target does not reside to make an arrest. To enter the third-party's home to make an arrest, the government must have: (1) a search warrant; (2) the consent of the third-party homeowner/occupier; or (3) an exigent circumstance. Steagald v. United States, 451 U.S. 204 (1981).

#### 18.10.4 Warrantless Arrests

Probable cause required to make a warrantless arrest is the same as that required to obtain an arrest warrant. Assuming it is supported by probable cause, the legality of a warrantless arrest depends on whether the crime is a felony or a misdemeanor, and whether the suspect is in a public or private area.

a. Felonies

When an authorized officer has probable cause to believe that a suspect located in a public place has committed a felony offense, he or she may make a warrantless arrest of that

person. If the person for whom the officer has probable cause is inside a residence, the officer must have consent or an exigent circumstance to enter the residence to make an arrest without a warrant.

b. Misdemeanors

If an authorized officer has probable cause to believe that an individual has committed a misdemeanor offense in his or her presence, the officer may arrest the offender. An officer has probable cause to believe a misdemeanor is taking place “in his or her presence” when the facts and circumstances as observed by the officer through his or her senses are sufficient to warrant an officer of reasonable caution to believe that an offense is occurring.

Neither the Constitution nor the Supreme Court mandates that a misdemeanor offense occur “in an officer’s presence” for an arrest to be authorized. However, the vast majority of statutes that provide federal law enforcement officers with arrest authority incorporate the “presence” requirement for warrantless misdemeanor arrests.

As with a felony, lawful entry into a person’s home to make a warrantless arrest for a misdemeanor requires either consent or an exigent circumstance. The exigent circumstance of “hot pursuit,” discussed later in this chapter, is only available when pursuing a suspect who the officer believes has committed a “serious crime.” While some misdemeanors may qualify, the hot pursuit exigency is most often limited to use in felony pursuits.

## 18.11 Protective Sweeps

### 18.11.1 What is a Protective Sweep?

A protective sweep is a quick and limited search of a premises incident to an arrest or a search conducted to protect officers and others from persons who might pose a danger. It is narrowly confined to a cursory visual inspection of places where a person might be hiding.

### 18.11.2 Scope of a Protective Sweep

A protective sweep is not a full search of a dwelling. Officers may only “sweep” spaces where an individual might be found. For example, a search inside a medicine cabinet is outside the scope of a permissible protective sweep because a person could not reasonably hide inside a medicine cabinet.

An officer who finds incriminating evidence during a lawful protective sweep may seize the evidence under the plain view doctrine. This discovery of evidence does not justify a subsequent, warrantless search of the residence for additional evidence. Officers may use the incriminating evidence to establish probable cause to obtain a search warrant for the premises.

### 18.11.3 Timing of a Protective Sweep

The Supreme Court has ruled that a protective sweep may last “no longer than it takes to complete the arrest and depart the premises.” Maryland v. Buie, 494 U.S. 325 (1990). Although there is no bright-line rule on how long protective sweeps may last, they are generally measured in minutes. The longer officers take to complete a protective sweep, the more likely a court will find the sweep excessive. For example, a court upheld a protective sweep when the special response team opened doors only to areas large enough to harbor a person;

there was no evidence that the officers opened drawers or that the sweep of the house was over extensive; and the sweep was short, lasting only about a minute. A court held a two-hour protective sweep unlawful because it appeared to be a fishing expedition for evidence and because it greatly exceeded the permissible scope. Courts have found protective sweeps lasting as little as thirty minutes unlawful.

#### 18.11.4 Three Kinds of Protective Sweeps

The Supreme Court has identified three types of protective sweeps. The first two, which require no articulable suspicion, involve looking in closets and other people-sized places immediately adjoining the place of arrest or the area the officers are going to search pursuant to a search warrant or with consent. The third type of protective sweep requires reasonable suspicion and allows a greater intrusion into the premises.

##### a. Search Warrant/Consent Search Sweeps

Prior to searching pursuant to a search warrant or with consent, officers may perform a protective sweep of the area they are authorized to search. For example, prior to beginning a search pursuant to a premises search warrant, officers may perform a protective sweep of the entire premises.

##### b. Automatic Protective Sweeps

Officers armed with an arrest warrant may enter a premises and search for their arrestee in any area that could conceal a person. Once the arrestee is located and the arrest is made, as a precautionary matter and without probable cause or reasonable suspicion, officers may look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Although the limited search is for people, officers may seize any contraband, evidence, fruits, and instrumentalities they find in plain view.

### c. Extended Protective Sweeps

Sweeping beyond the area immediately adjacent to the place of arrest requires articulable facts which, taken together with the rational inferences from them facts, would warrant a reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the scene.

Facts establishing a reasonable suspicion that another, dangerous person is present at the scene include an occupant's demeanor, suggestive utterances or actions by an occupant, noises indicating that additional persons are present at the residence, and cars in the driveway registered to criminal associates of the suspect. An agency policy mandating an automatic sweep of the entire premises during every arrest – regardless of the circumstances – is invalid under the Fourth Amendment. Such a policy cannot justify an extended sweep where no facts support reasonable suspicion that additional persons are present.

#### 18.11.5 When the Arrest Occurs Outside the Home

No bright-line rule prohibits officers from performing a protective sweep of a home when an arrest occurs outside of the residence. Instead, as with an extended protective sweep, officers must have reasonable suspicion to believe that a third party who poses a danger is inside the home. If facts supporting reasonable suspicion exist, whether the arrest occurred inside or outside the home is irrelevant.

#### 18.12 Searches Incident to Arrest

Conducting a search incident to a lawful arrest is a reasonable search under the Fourth Amendment and a valid exception to the warrant requirement.



### 18.12.1 Rationales for the Rule

In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court outlined three distinct reasons for permitting searches incident to arrest: (1) to discover weapons; (2) to prevent the destruction or concealment of evidence; and (3) to discover any means of escape.

Officers do not have to believe that an arrestee possesses evidence, weapons, or a means of escape before a search incident to arrest is justified. A suspect's lawful arrest automatically enables an officer to conduct a search incident to arrest.

### 18.12.2 Requirements for a Search Incident to Arrest

There are three requirements for a valid search incident to arrest. First, there must be a lawful custodial arrest. Satisfying this criterion requires an actual arrest supported either by an arrest warrant or probable cause to believe that the arrestee committed a crime.

An officer may not conduct a search incident to arrest if an actual custodial arrest does not take place. For example, officers may not conduct a search incident to arrest in a Terry-type situation. A search incident to arrest is more intrusive than a frisk for weapons. An officer may not conduct a search incident to arrest when an individual receives only a citation for an offense, such as a traffic violation, even if the officer could have taken the individual into custody. Knowles v. Iowa, 525 U.S. 113 (1998).

The second requirement for a lawful search incident to arrest is that the search must be “substantially contemporaneous” with the arrest. New York v. Belton, 453 U.S. 454 (1981). The exact meaning of this phrase is open to interpretation, but it generally means that an officer must conduct a search incident

to arrest at about the same time as the arrest. A search too remote in time or place from the arrest cannot be justified as incident to the arrest. “Substantially contemporaneous” is determined in light of the Fourth Amendment’s general reasonableness requirement, taking into consideration all of the circumstances surrounding the search. While a search conducted 10 minutes after an arrest might be valid, a search 30 to 45 minutes after the arrest might not.

The contemporaneous requirement does not have a significant effect on the ability to search the suspect’s body (officers often search suspects at the scene, and again later as part of jail security measures). It becomes a critical issue for searching the area surrounding the suspect or searching items that may have been within the suspect’s control, such as bags or containers. A search of these areas and items must take place at the time of arrest to be valid.

The third requirement for a lawful search incident to arrest is that the area the officer searches must be currently accessible, at least in some measure, to the arrestee. If officers have removed the arrestee from the area, there is no longer a justification for finding weapons or destructible evidence, and officers should not search. Arizona v. Gant, 556 U.S. 332 (2009) (“If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”) Some courts may even consider a well-secured arrestee (handcuffed, with multiple officers present) to lack access to the surrounding area.

In limited circumstances, the search may take place before the actual arrest occurs. “Where the formal arrest follow[s] quickly on the heels of the ... search of [the defendant’s] person,” it is not “particularly important that the search preceded the arrest rather than vice versa.” Rawlings v. Kentucky, 448 U.S. 98 (1980). In such cases, officers may not use any of the evidence

found during the pre-arrest search as probable cause for the arrest.

### 18.12.3 Scope of a Search Incident to Arrest

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

#### a. The Person of the Arrestee

When an officer makes a custodial arrest of an individual, the officer is entitled to search the arrestee's person. In the case of a lawful, custodial arrest, a full search of the person is reasonable under the Fourth Amendment and is a valid exception to the warrant requirement. Officers may search for weapons, evidence, and any means of escape. Officers may seize any evidence found on the person of the arrestee even if the evidence is unrelated to the crime of arrest.

To be reasonable as part of a search incident to arrest, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons. The manner of the search, including the place in which the officer conducts it, must also be reasonable. Generally, it is unreasonable to conduct a strip search in an area exposed to the general view of persons known to be in the vicinity, whether or not anyone actually viewed the search. However, compelling circumstances, such as those that pose potentially serious risks to the arresting officer or others in the vicinity, would make an otherwise unreasonable strip or visual body cavity search reasonable.

Federal law defines a strip search as the exposure of a person's naked body for the purpose of a visual or physical examination. Federal courts have held the following conduct by law enforcement officers was a strip search:

- Pulling down a suspect’s pants and underwear in public; and
- Moving a suspect’s clothing to facilitate the visual inspection inside the suspect’s underwear.

Notably, some federal courts have turned to state law to determine what constitutes a strip search. For example, one Seventh Circuit court noted an Illinois statute defining a strip search as “having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.” *Stanley v. Henson*, 337 F.3d 961, 964 (7th Cir. 2003) (quoting 725 Ill. Comp. Stat. Ann. 5/103-1 (2016)).

Based on such state law definitions, one can argue that simply arranging an arrestee’s clothing to permit inspection of part of the underwear qualifies as a strip search.

#### b. The Area within the Arrestee’s “Immediate Control”

In addition to the person of an arrestee, an officer is also entitled to search any area within the suspect’s immediate control. Included are any containers within the arrestee’s immediate control at the time of arrest, such as a wallet, purse, backpack, briefcase, or luggage. The phrase “immediate control” means the area from within which an arrestee might gain possession of a weapon, means of escape, or destructible evidence.

However, in *Riley v. California*, 573 U.S. 373 (2014), the United States Supreme Court specifically held that warrants are generally required to search cell phones seized during a lawful arrest. The Court applied the *Chimel* factors cited above and found that: (1) once officers have seized a phone, an

arrestee cannot use it as a weapon; and (2) officers can take reasonable measures to prevent remote wiping of data by placing a cell phone in a Faraday container or powering it off and removing the battery. Although officers cannot search a cell phone incident to arrest, the Court also stated that traditional exigent circumstances could justify a warrantless search of a cell phone's data after an arrest.

Whether an area is within an arrestee's immediate control is determined on a case-by-case basis and should take into consideration a variety of factors, including:

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

The reference point for the area within the arrestee's immediate control is the location of the person at the time of arrest. Once officers remove the suspect from that location, the right to conduct a search incident to arrest of that area is generally lost (but not the right to search the suspect's body).

This rule does not allow officers to move an arrestee from one place to another within a house to justify a search incident to arrest of a different area. The officers can move the arrestee from a room as needed for safety and control reasons, or

perhaps to obtain clothing, but this does not justify a search of the new location. The officer may accompany the arrestee, of course, and seize evidence observed in plain view during the relocation. Should the arrestee need to obtain clothing or to sit down on a chair or other piece of furniture, the officer may check the item or area prior to allowing the subject access. Note that an arrest outside of a home will not justify a search incident to arrest inside the home.

#### 18.12.4 Vehicles and Searches Incident to Arrest

The rule that allows officers to search the area within the immediate control of an arrested suspect also applies to vehicles. Custodial arrest of an occupant of a vehicle is required before an officer may conduct a search incident to arrest of the vehicle. There is no search incident to citation. There is no requirement that the occupant arrested be the owner or driver of the vehicle. The term “occupant” could include someone located outside the vehicle at the time of arrest, so long as the person arrested is a “recent occupant” of the vehicle. Thornton v. United States, 541 U.S. 615 (2004).

As with other searches incident to arrest, the purpose is to search for potential weapons, means of escape, and evidence that the arrestee could destroy. This search could include the entire passenger compartment of the vehicle, along with containers in that part of the car. As stated above, however, when “there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search ... the rule does not apply.” Arizona v. Gant 556 U.S. 332 (2009).

A “container” is any object capable of holding another object and includes closed and open glove compartments, consoles, and other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. While this definition does not expressly address “locked” containers, several federal circuits have held that

locked containers are within the scope of a lawful search incident to arrest. The inaccessible trunk of a vehicle, however, is not within the immediate control of an arrestee, and officers cannot search it incident to arrest.

The Supreme Court also created a second rule that applies only to vehicles, in that the Court allows a search incident to arrest even when the standard Chimel rule does not. As a result, there are two possible situations when officers can search a vehicle's passenger compartment incident to arrest.

The first situation arises when an arrestee is close to a vehicle and can readily access its passenger compartment. This situation will be rare in practice, as safety and good sense dictate controlling an arrestee early, often by securing them in handcuffs and taking them away from the car. Where circumstances dictate that an arrestee remains nearby and not fully secured, officers can perform a search incident to arrest of the vehicle.

For example, if just one officer is present, even a handcuffed arrestee could conceivably access the interior of a vehicle. When there are multiple officers present, or once officers secure an arrestee in the back of a patrol car, officers may not search a vehicle's passenger compartment incident to arrest. An officer should not detain an arrestee next to a vehicle for the sole purpose of justifying this type of search.

If an arrestee is no longer in a position to access a vehicle, there is a second situation in which an officer can search a vehicle's passenger compartment incident to arrest. This situation arises when it is reasonable to believe the vehicle contains evidence of the crime of arrest. This circumstance does not authorize an officer to search for evidence of other crimes the arrestee may have committed.

For example, if the arrest is for passing counterfeit currency, it is reasonable to believe the vehicle contains evidence of that crime (additional notes, etc.). If, however, the arrest was for driving on a suspended license, it would not be reasonable to believe additional evidence of that crime would be found in the car, so a search incident to arrest would not be justified.

If neither of these rules applies, an officer may not search the vehicle incident to arrest. However, other exceptions to the Fourth Amendment warrant requirement might permit a search. For example, if there was a reasonable suspicion that another individual close enough to access the car was armed and dangerous, an officer could frisk the passenger compartment. If there is probable cause to believe a readily mobile car contains evidence of a crime, an officer could search based on the Carroll doctrine. Finally, if a vehicle is lawfully impounded, officers may conduct an inventory if the standards for that type of search are met.

### **18.13 The Knock and Announce Statute – 18 U.S.C. § 3109**

Title 18 U.S.C. § 3109 is commonly referred to as the “knock-and-announce statute.” It places specific requirements upon federal law enforcement officers when executing warrants in dwellings. The statute requires more than simply knocking and announcing. Although the Fourth Amendment does not specifically require such an action, the Supreme Court has held the knock-and-announce statute to be part of the Fourth Amendment’s reasonableness requirement. The statute requires that before the government executes a search or arrest warrant in a residence, it must first announce its authority and purpose.

#### **18.13.1 The Statute**

Titled “Breaking Doors or Windows for Entry or Exit,” the statute provides as follows:



The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The plain language of the statute appears to limit its application to the execution of search warrants. However, case law has made the statute equally applicable to the execution of arrest warrants.

### 18.13.2 The Primary Purposes of the Statute

The requirement to knock-and-announce has three primary purposes: (1) to reduce the potential for violence to both officers and occupants of a house; (2) to prevent, or at least reduce, needless destruction of private property; and (3) to recognize an individual's right of privacy in his or her home.

### 18.13.3 A "Breaking" Under the Statute

Although the phrase "break open" implies some use of force, force is not the only manner in which the government can violate § 3109. Section 3109 essentially prohibits an unannounced intrusion into a dwelling. "Break open" includes:

- Breaking down a door;
- Forcing open a chain lock on a partially open door;
- Opening a locked door using a passkey; or
- Opening a closed but unlocked door.

#### 18.13.4 Requirements Under the Statute

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

##### a. The Government Must Give Notice of its Presence

Section 3109 contains no explicit “knock” requirement. It only requires the government to give notice of its “authority and purpose.” While the practice of physically knocking on a door is preferred by federal courts, it is only one method the government can use to give notice of its presence. Other methods include placing a phone call to the residence or using a bullhorn, police loudspeaker, or public address system.

##### b. Announcement of Authority and Purpose

In addition to providing notice, § 3109 requires that the government announce its authority and purpose for being there. No special words are necessary to satisfy this requirement. Announcing the title of the agency, such as “Office of the Inspector General,” is overly complex and difficult for people to understand. Instead, simply announce, “Police with an arrest (or search) warrant; open the door!” Officers meet the requirements of the knock and announce statute if they alert the occupants of the residence that the government is outside and seeks entry to execute a warrant.

##### c. Officers Must Be Refused or Denied Admittance

The final requirement under § 3109 is that officers may not break in unless they are refused or denied admittance. They can then use force to “break” into the residence and execute the warrant.

Sometimes an occupant explicitly refuses or denies officers admittance. Frequently, however, officers infer refusal or denial of admittance from the circumstances. Some of the most common circumstances indicating a refusal of admittance are:

- Silence. Officers can infer a refusal to comply with an order to “open up” from silence following that order. However, officers can infer a refusal from silence only after waiting a reasonable time. Unfortunately, neither the Supreme Court nor any federal court has established a definitive timeframe that an officer must wait before entering a residence after knocking and announcing. Instead, courts consider what constitutes a “reasonable” amount of time on a case-by-case basis. The courts will consider facts known to officers in judging reasonable waiting times for purposes of § 3109. Factors that courts have considered in making this determination include: (1) the time of day; (2) the size and physical layout of the residence; (3) the nature of the crime at which the warrant is directed; (4) any evidence indicating guilt of the suspect; (5) the nature of the evidence sought and the time it would take to begin destroying evidence once knock-and-announce is performed; and (6) any other observations supporting a forced entry, such as defensive measures taken by the residents of the premises.
- Sounds of flight by occupants.
- Sights or sounds indicating destruction of evidence.
- Verbal refusal. For example, an occupant yells, “Go away!”
- Gunfire from inside the residence.

### 18.13.5 Exigent Circumstances and § 3109

The Fourth Amendment does not require the government to comply with § 3109 in all instances prior to using force to enter a residence. Instead, the statute has an “exigent circumstances” exception, which allows officers to dispense with the knock-and-announce requirement in certain situations. To lawfully use force to enter a residence without complying with the knock-and-announce requirements, officers must have a reasonable suspicion, under the particular circumstances, that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. The primary exigent circumstances that allow officers to dispense with the requirements of § 3109 are:

- **Danger to officers or third parties:** Reasonable suspicion exists that knocking and announcing would result in danger to law enforcement officers or third parties.
- **Destruction of evidence:** Reasonable suspicion exists that knocking and announcing would result in the destruction of evidence.
- **Useless gesture:** Knocking and announcing would be a “useless gesture” because the suspect is already aware of a law enforcement presence.
- **Hot pursuit:** Officers are not required to pause at the front door of a residence to “knock and announce” their presence when they are in “hot pursuit” of a felony suspect.
- **Ruses or decoys:** In the detection of many types of crime, the government is entitled to use decoys to conceal the identity of its agents. For that reason, an entry obtained

without force by ruse or deception is not a violation of § 3109. If an attempted entry by ruse fails, the knock-and-announce rule applies to a later forcible entry.

In a memorandum dated September 13, 2021, the Department of Justice issued policy changes applicable to its law enforcement components on “no knock” entries. Specifically, law enforcement agents of the Department of Justice are limited to using “no knock” entries to those circumstances in which the agent has reasonable grounds to believe at the time the warrant is sought that knocking and announcing the agent’s presence would create an imminent threat of physical violence to the agent and/or another person. Or, if an agent did not anticipate the need for a “no knock” entry at the time the warrant was sought, the agent may conduct a “no knock” entry only if exigent circumstances arise at the scene such that knocking and announcing the agent’s presence would create an imminent threat of physical violence to the agent and/or another person.

Therefore, in accordance with the Department of Justice memorandum, “no knock” entries solely to prevent the destruction or removal of evidence are no longer permitted by components within the Department of Justice.

However, it is likely that U.S. Attorney’s Offices across the United States will not concur in the application of “no knock” warrants nor support “no knock” entries to prevent the destruction of evidence from any law enforcement agency, including those agencies outside the Department of Justice.

This is a policy change within the Department of Justice, Congress has not made any changes to 18 U.S.C. § 3109, and case law continues to support “no knock” entries to prevent the destruction of evidence. As a practical matter though, because the concurrence of the U.S. Attorney’s Office is required on all search warrant applications, all federal law enforcement

officers will need to comply with the Department of Justice memorandum on “no knock” entries.

#### 18.13.6 Violations of § 3109 and Suppression of Evidence

The common law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one and a command of the Fourth Amendment. Hudson v. Michigan, 547 U.S. 1096 (2006). Not every Fourth Amendment violation, however, triggers the exclusionary rule. Violations of knock-and-announce, alone, will not result in suppression of evidence because officers with a warrant inevitably would have entered the residence and discovered the evidence inside. Suppression of that evidence, therefore, would have a high societal cost and little deterrent effect. Of course, it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the statute’s requirements for lawful entry. They are required to comply with § 3109 and remain susceptible to civil liability and administrative discipline for violations.

#### 18.13.7 No-Knock Warrants

Under certain circumstances, officers may request a “no-knock” warrant, which dispenses with the requirements of § 3109 to knock and announce before entry. “The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time.” Richards v. Wisconsin, 520 U.S. 385 (1997). When the government anticipates exigent circumstances before searching, officers should ask for pre-search judicial approval to enter without knocking. The issuance of a warrant with a no-knock provision potentially insulates the government against a subsequent finding that exigent circumstances did not exist.

The facts that justify a no-knock warrant are the same as those needed to justify an officer's on-site decision to dispense with the knock-and-announce requirement. The officer should have reason to believe that an exigency exists, that knocking will create an exigency, or that knocking would be futile. A judge's decision to refuse authorization of a no-knock entry does not preclude officers, when executing a warrant, from concluding that it would be reasonable to enter without knocking and announcing if circumstances warrant it when they reach the scene.

When the government obtains a no-knock warrant, it does not have to reaffirm the circumstances at the scene. However, the government may not disregard reliable information clearly negating the existence of exigent circumstances when it receives such information before executing the warrant. Under such circumstances, the government must reevaluate its plan to enter without knocking and announcing.

#### 18.14 The Carroll Doctrine (Mobile Conveyance Exception)

The Supreme Court established the Carroll Doctrine in the 1925 case, Carroll v. United States, 267 U.S. 132 (1925). The courts also refer to the Carroll Doctrine as the mobile conveyance exception or the automobile exception to the warrant requirement. It provides that if officers have probable cause to believe that a mobile conveyance located in a public place contains contraband or evidence, fruits, or instrumentalities of a crime or contraband, officers may search the mobile conveyance without a warrant.

##### 18.14.1 Rationales for the Rule

There are two separate and distinct rationales underlying the mobile conveyance exception to the warrant requirement. First, the inherent mobility of vehicles typically makes it impractical to require officers to obtain a search warrant

because an operator can move a vehicle quickly out of the locality or jurisdiction where the officer would seek the warrant.

Second, while Carroll focused on a vehicle's inherent mobility, recent cases have focused on an individual's reduced expectation of privacy in a vehicle to support a warrantless search based on probable cause. Pennsylvania v. Labron, 518 U.S. 938 (1996). For example, most vehicles have windows, making items inside easily visible from the outside. In addition, individuals have a reduced expectation of privacy due to pervasive regulation of vehicles traveling on public roads.

#### 18.14.2 Prerequisites for a Search Under the Carroll Doctrine

There are two requirements for a lawful search under the mobile conveyance exception. First, there must be probable cause to believe that contraband or evidence, fruits, or instrumentalities of a crime is located in the vehicle. Consequently, before conducting a warrantless search of a vehicle, officers must have sufficient facts available to obtain a search warrant. Under the Carroll Doctrine, however, officers are not required to obtain a search warrant.

Officers may establish probable cause to search a vehicle in a number of ways. For example, officers establish probable cause based on a tip provided by a reliable confidential informant. They may establish probable cause through their personal observations of evidence or contraband in plain view inside a vehicle. The plain-smell corollary to the plain view doctrine may also allow officers to establish probable cause to search a vehicle based on their sense of smell.

The second requirement for a valid search under the mobile conveyance exception is that the vehicle be readily mobile at



the time the officers encounter it. “Readily mobile” means the vehicle reasonably appears to be currently operational, or operational with minor effort or repair. A vehicle stuck in the mud, for instance, is readily mobile even though the driver cannot drive it immediately. Similarly, a vehicle that is out of gas or has a flat tire or dead battery is readily mobile. On the other hand, a vehicle that will obviously remain immobile for a long time – such as a car up on blocks – is not readily mobile under the Carroll Doctrine.

There is no requirement that a mobile conveyance actually be moving or even occupied at the time of a search, so long as it is currently operational and there is probable cause to believe it contains contraband, evidence, fruits, or an instrumentality of a crime.

#### 18.14.3 No “Exigency” Required to Conduct a Search Under the Carroll Doctrine

There is no exigency required to conduct a warrantless vehicle search; all that is required is a mobile conveyance and probable cause. Even if the government had the opportunity to obtain a warrant and failed to do so, the search will still be valid if it meets the Carroll Doctrine’s requirements.

#### 18.14.4 Timing of a Search Under the Carroll Doctrine

Once officers have probable cause to search a readily mobile conveyance, they may conduct the search immediately or later at another location. There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. The justification to conduct such a warrantless search does not vanish once the government secures the car. Carroll Doctrine searches are lawful regardless of the unlikelihood that anyone will remove the car or tamper with its contents during the period required to obtain a warrant.

Even though the courts have given the government wide latitude in deciding when to conduct a vehicle search, officers are still required to act reasonably and may not indefinitely retain possession of a vehicle and its contents before completing a search. If, for example, officers knew they would not be searching a car for two weeks after seizing it, they should obtain a search warrant to support the search.

#### 18.14.5 Scope of a Search Under the Carroll Doctrine

In United States v. Ross, the Supreme Court defined the permissible scope of a search conducted pursuant to the mobile conveyance exception: “We hold that the scope of the warrantless search authorized by [the mobile conveyance] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” If a search warrant could authorize officers to search for an item in a particular location, such as the passenger compartment or trunk of the vehicle, they may search there without a warrant under the mobile conveyance exception to the warrant requirement.

Probable cause to search does not automatically entitle the government to search every part of a vehicle. Scope of search applies to warrantless searches just as it does to searches authorized by a warrant. The nature of the object of the search limits the scope of the search.

For example, if officers have probable cause to believe that a vehicle contains a full-size shotgun used in a crime, they may not lawfully look inside the glove compartment during the search. However, if officers have probable cause to search the entire vehicle and discover a closed container during the search, they may search the container, whether locked or unlocked, if what they are seeking could be concealed inside it.

Officers are generally not required to have a “particularized” belief that evidence (e.g., drugs) is located in the trunk before they may lawfully search that area. For example, if officers find drugs (or drug paraphernalia) in the passenger compartment of a vehicle, they may typically search the trunk for additional drugs. This is true even if the drugs found in the passenger compartment are small, “personal use” amounts.

If the government has probable cause to believe a specific container inside a vehicle contains contraband, evidence, fruits, or an instrumentality of a crime, officers may stop and search the vehicle to retrieve that container. Once retrieved, they may search the container without a warrant under the vehicle exception. California v. Acevedo, 500 U.S. 565 (1991). However, the probable cause relating to the specific container does not support a general search of other areas of the vehicle (e.g., the passenger compartment, glove compartment, or trunk). If officers wish to extend their search to the entire vehicle, they must have some additional justification to do so, such as additional probable cause they develop after the stop, consent, or a search incident to arrest.

Finally, the Supreme Court has extended the mobile conveyance exception to include a passenger’s belongings. When officers have probable cause to search a car, they may search passengers’ belongings found in that car, that are capable of concealing the object of the search. Wyoming v. Houghton, 526 U.S. 295 (1999).

#### 18.14.6 Homes/Curtilage and the Carroll Doctrine

In Collins v. Virginia, 584 U.S. 586 (2018), the Supreme Court held that the Carroll Doctrine did not permit an officer who did not have a warrant or another exception to enter the curtilage of a suspect’s home to search a motorcycle located in the driveway. The Court stressed that an officer must have a

lawful right of access to a vehicle to search it under the Carroll Doctrine.

### 18.15 Searches Based on Exigent Circumstances

It is a well-established rule of law that searches conducted without warrants are presumptively unreasonable, subject to only a few limited exceptions. A warrantless search based upon an exigent circumstance is one such exception. Exigent circumstances exist when a reasonable person would believe that, based on the available facts, an immediate entry or search is necessary to prevent the escape of a suspect, the destruction of evidence, or the death or injury of a person. Exigent circumstances could apply to persons, containers, dwellings, vehicles, or anywhere a person has a reasonable expectation of privacy under Katz or rightful property or possessory interest under Jones.

The government always has the burden of proving a lawful search when it acts without a warrant. For this exception to the warrant requirement, the government must prove both the existence of probable cause and the exigent circumstance. Factors considered by courts in determining whether exigent circumstances exist include: (a) the gravity or violent nature of the offense with which a suspect is to be charged; (b) a reasonable belief that a suspect is armed; (c) probable cause to believe a suspect committed the crime; (d) strong reason to believe a suspect is in the premises being entered; (e) the likelihood that a delay could cause the escape of a suspect or destruction of essential evidence; and (f) the likelihood that the safety of officers or the public will be jeopardized by delay.

The scope of a warrantless search is “strictly circumscribed by the exigencies which justify its initiation.” Mincey v. Arizona, 437 U.S. 385 (1978), and Terry v. Ohio 392 U.S. 1 (1968). Once the exigent circumstances that justified the warrantless

search no longer exist, the right to conduct a warrantless search also ends.

The definition of exigent circumstances covers a number of situations. Below are the three types of exigent circumstances officers are likely to encounter.

### 18.15.1 Hot Pursuit

The Supreme Court established the parameters of the hot pursuit exception in Warden v. Hayden, 387 U.S. 294 (1967) and United States v. Santana, 427 U.S. 38 (1976). In general, the following conditions must exist for hot pursuit to be a lawful exigent circumstance:

- Probable Cause to Arrest. Probable cause must exist to arrest the suspect.
- Serious Crime. The warrantless entry into the home must be for a “serious” crime. The more serious the crime, the more likely that the warrantless entry to effect the arrest will be upheld. “[I]t is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.” Welsh v. Wisconsin, 466 U.S. 740 (1984) and Lange v. California, 141 S. Ct. 644 (2020).
- Immediate or Continuous Pursuit. There must be an “immediate or continuous” pursuit of the suspect. This does not require that an officer actually observe the suspect commit the crime, nor does it require that an officer actually see the suspect flee from the scene of the crime.
- From a Public Place. “Hot pursuit” occurs when an officer is pursuing a suspect from a public place into an

area where someone has REP or into a constitutionally protected area. A suspect may not evade arrest by escaping to a private place.

- Probable Cause to Believe That the Suspect is in the Private Space. Officers must have probable cause to believe the suspect is inside. Officers may base probable cause on their own observations or on information provided by reliable sources.

### 18.15.2 Destruction of Removal of Evidence

A second common exigent circumstance involves the actual or potential destruction or removal of evidence. This exception allows officers to make a warrantless search of an area or item when they have sufficient facts that would lead a reasonable person to believe that evidence is being, or will be, destroyed or removed in the time it would take to obtain a traditional or telephone search warrant. The test is an objective one, focusing on what a reasonable person in an officer's position would believe based on the facts available at the time.

As an example, when an occupant of a home, upon seeing law enforcement officers standing on her porch, hurriedly begins to pour illegal drugs down a drain, the potential destruction of evidence may allow a warrantless entry.

Federal circuit courts differ in what they require for a lawful warrantless search to prevent destruction of evidence. The majority rule (followed in the Sixth, Eighth, and D.C. Circuits), holds that a warrantless search to prevent destruction or removal of evidence in a home is justified if the government can prove two factors: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent.

In contrast, the Tenth Circuit has announced a four-part test to determine whether imminent destruction of evidence will justify a warrantless entry: (1) any entry should be made pursuant to clear evidence of probable cause; (2) a warrantless entry is available only for serious crimes and in circumstances where destruction of evidence is likely; (3) the entry must be limited in scope to the minimum intrusion necessary; and (4) the entry must be supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

### 18.15.3 Emergency Scene

The need to protect or preserve life typically justifies actions that would otherwise violate the Fourth Amendment. Numerous state and federal cases have recognized that the Fourth Amendment does not bar the government from making warrantless entries and searches when its officers and agents reasonably believe that a person within is in need of immediate aid.

Examples of “emergency” situations in which courts found exigent circumstances include: (a) a report of a woman and child in danger in a crack house; (b) a report that a victim had been stabbed; (c) an explosion in an apartment; (d) a report that children had open access to controlled substances; (e) the need to render medical aid to a defendant shot by police; (f) reports of gunshots from inside a residence; (g) finding a blood puddle on a driveway with a trail of blood leading into a home; and (h) the existence of a methamphetamine lab.

A valid emergency scene search must usually meet two requirements: (1) officers must have objectively reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; and (2) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

In the context of an emergency scene, the term “probable cause” means facts exist that would lead a reasonable person to believe that a person is in some type of danger.

As with any lawful warrantless search, officers or other government agents may seize contraband, evidence, fruits, and instrumentalities in plain view during their legitimate emergency activities. For example, firefighters responding to a call may seize evidence of arson in plain view.

Finally, there is no murder-scene or crime-scene exception to the Fourth Amendment’s warrant requirement. Officers may enter an emergency scene without a warrant to tend to victims and locate suspects. However, after those tasks are complete, the emergency is over. When the emergency ends, so does an officer’s right to be present in the location without a warrant or another valid exception. If officers stay behind and process a scene without first obtaining a warrant or valid consent, the evidence they gather will probably not be admissible.

In three separate cases, the Supreme Court refused to adopt a crime-scene exception. In Mincey v. Arizona, the Court declined “to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.” Later, in Thompson v. Louisiana, 469 U.S. 17 (1984), the Court found a “murder scene” exception “inconsistent with the Fourth and Fourteenth Amendments.” Finally, in Flippo v. West Virginia, 528 U.S. 11 (1999), the Court reiterated its earlier rejections of a “murder scene exception” to the Warrant Clause of the Fourth Amendment.”

### 18.16 Consent Searches

“It is ... well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”



Schneckloth v. Bustamonte, 412 U.S. 218 (1973). When the government obtains valid consent to search a given area or object, neither reasonable suspicion nor probable cause is required. In situations where officers have some evidence of illicit activity but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence. Consent may be expressly sought from and given by a suspect (e.g., “May we search your vehicle?”).

For a consent search to be valid:

- The consent must be voluntarily given, and
- The individual who consents must have either actual or apparent authority over the place to be searched.

#### 18.16.1 Voluntariness

The Fourth Amendment requires an individual give consent voluntarily. Officers cannot use coercion, force or threats, either explicit or implicit, to obtain consent. An individual who provides consent must do so voluntarily, not as a result of duress or coercion. Courts look at the totality of the circumstances surrounding a grant of consent, analyzing all the circumstances to determine whether it was voluntary or coerced. Factors a court will consider in deciding whether consent was voluntary include:

- The age, education, and intelligence of the individual granting consent;
- The individual’s knowledge of the right to refuse consent;
- The length of the individual’s detention, if any;

- The repeated and prolonged nature of any questioning;
- Whether the consent was in writing;
- The use of physical punishment, such as the deprivation of food or sleep;
- Whether the individual cooperated in the search, such as by assisting law enforcement officers in opening a locked container;
- Whether the individual was in custody when consent was given (although custody alone is not enough in itself to demonstrate coercion);
- The presence of coercive police procedures, such as displaying weapons or using force;
- The individual's past experience in dealing with law enforcement officers;
- Whether the individual was under the influence of drugs or alcohol;
- Whether officers notified the individual of his or her Miranda rights or told the individual that he or she had the right to refuse consent. While the law does not require either statement, one who consents after being so informed will have a very difficult time challenging the voluntariness of his or her consent;
- Whether police made promises or misrepresentations to the individual to obtain consent;
- The location where the individual gave consent (i.e., on a public street or in the confines of a police station);

- Whether officers told the individual they could obtain a search warrant; and
- Whether officers made repeated requests for consent.

Acquiescence to a law enforcement officer's show of authority is not voluntary consent. If an officer falsely asserts an independent right to search, consent is not valid.

For example, when a defendant consented only after an officer falsely claimed to have a warrant, the court found the consent was not truly voluntary because the officer was "announcing in effect that the [individual had] no right to resist the search." Bumper v. North Carolina, 391 U.S. 543 (1968). Likewise, falsely informing a suspect that a warrant is on the way also makes consent involuntary. The government has the burden of proving that consent was voluntary. It is not enough to show mere acquiescence to a claim of lawful authority.

Officers may infer consent from a suspect's words or actions. For example, assume an officer knocks on a door and asks for permission to enter a residence when a person answers. If the person steps back and clears a path for the officer to enter, the officer can infer consent from the person's actions, even if the person does not say anything.

#### 18.16.2 Actual or Apparent Authority

The second requirement is that the individual who consents must have either actual or apparent authority over the place to be searched. Actual authority comes "from the individual whose property is searched." Illinois v. Rodriguez, 497 U.S. 177 (1990). A third party "who possesses common authority over or other sufficient relationship to the ... effects sought to be inspected" also has actual authority to consent to a search. United States v. Matlock, 415 U.S. 164 (1974). Ownership of

property does not solely determine common authority. Any person with joint access to or control over property has authority to consent to search. All joint users of property assume the risk that one of them might permit a search of a shared area or item.

An underlying principle behind all consent searches is that the person giving consent must have actual or apparent authority over the particular item to be searched. For example, while two or more people, including husbands and wives or parents and children, may have authority to give consent to search a car, a home, or a room, they would not have authority to give consent to search personal items over which they have no control, access, or dominion in that location.

However, consent of one party who has authority over a place to be searched is not valid if another party with authority is physically present and expressly refuses consent. Georgia v. Randolph, 547 U.S. 103 (2006); Fernandez v. California, 571 U.S. 292 (2014). Officers are not required to attempt to locate any or all people who might have authority over a premises to determine whether they are willing to consent to search. The removal of a potential objector must be objectively reasonable, such as an occupant who is absent due to a lawful detention or arrest. Fernandez, 571 U.S. at 292. On the other hand, officers may not isolate or remove the potentially non-consenting party just to avoid a possible objection to the search.

Officers may also obtain valid consent to search from an individual who has apparent authority over the place or item to be searched. Someone has apparent authority when an officer reasonably, but mistakenly, believes the consenter has common authority over the object or area. If the officer's belief is reasonable considering the facts available at the time of the search, the search will still be valid, even though the consenting party lacked actual authority to give consent. Illinois v. Rodriguez, 497 U.S. 177 (1990).

### 18.16.3 Scope of a Consent Search

“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?” Florida v. Jimeno, 500 U.S. 297 (1991). In answering this question, courts look at not only the words used by both the officer and the consentor, but also the overall context in which the exchange took place. For example, in a situation involving a consent search of a vehicle, a general grant of permission to “search the car” allows an examination of the entire vehicle, to include any containers or compartments within it that could hold the item(s) sought. An owner/operator’s consent to search a vehicle does not authorize an officer to search a passenger’s personal items.

It is typically unreasonable, however, to believe that an individual who has given a general consent to search is consenting to damage or destruction of property. Officers should seek additional, express permission to search a locked container (e.g., a locked briefcase) and proceed only if the individual consents. To support the reasonableness of any such search, an officer should refrain from damaging or destroying a container in the process of opening it.

An individual may limit the scope of any consent by saying something like, “You may search all the rooms except the bedrooms.” The government must honor such a limitation. An individual may also revoke consent. When an individual revokes consent, the government must stop searching, unless another exception to the Fourth Amendment’s warrant requirement (e.g., probable cause to search a vehicle) is present.

#### 18.16.4 Common Authority Situations

Officers may confront a variety of situations where multiple people have authority to consent to a search. The following are some of the most frequently occurring situations:

##### a. Spouses

Absent an affirmative showing that the consenting spouse has no access to the property searched, the courts generally hold that either spouse may consent to a search all of the couple's property. Several federal circuits have held that a spouse's consent may be effective even after he or she leaves the marital home. As discussed above, however, the consent of one party with authority is not valid if another party with authority is present and expressly refuses to give consent for the premises search. Georgia v. Randolph, 547 U.S. 103 (2006).

##### b. Parent - Child

Consent in parent-child situations can be divided into cases in which the child is a minor and those where the child is eighteen years of age or older.

In cases where the child is a minor, a parent can usually consent to a search of the child's belongings or living area, such as a bedroom.

Circuit courts have addressed the issue of whether a minor may consent to a search of a parent's home or property. Assuming that the child has authority over the area, these circuits hold that the fact that the child is a minor, per se, does not bar a finding of actual authority to grant consent. A child's minority is simply a factor in determining the voluntariness of the consent. Officers should exercise caution and obtain additional guidance from the appropriate legal advisor in any situation involving the consent of a minor.

When an adult child lives in a parent's home, the issue of parental consent is more complicated. In determining whether a parent may consent to a search of an adult child's living areas, courts have focused on two distinct questions.

First, does the adult child pay rent to live in the home? When an adult child pays rent, courts typically treat the relationship as landlord-tenant rather than parent-child.

Second, has the adult child taken any steps to deny the parent access to or use of the property or living area in question? Examples include the installation of locks on a bedroom door or an explicit or implicit agreement between the parties that the parent will not access the area. The more steps the adult child has taken to deny parents access, the more likely those parents will be unable to validly consent to a search of the child's property or living area within the parents' home.

#### c. Roommates

An individual who shares a residence with another person assumes the risk that the other person might consent to a search of all common areas of the residence, as well as all areas to which the other person has access. However, one roommate may not generally give valid consent to search the personal property or exclusive spaces (e.g., bedroom) of the other.

### 18.17 Inventory of Impounded Property

An inventory is a well-defined exception to the warrant requirement of the Fourth Amendment. An inventory occurs when law enforcement officers search a vehicle or other container, locate and identify its contents, and secure the contents if necessary. Once law enforcement officers have lawfully impounded an item (e.g., a car), they can conduct an inventory if they do so "reasonably." South Dakota v. Opperman, 428 U.S. 364 (1976).

Inventories are routine, non-criminal searches that do not require probable cause or a warrant. An inventory must not be a ruse for a general search for incriminating evidence. Rather, the policy or practice governing inventories should be designed to produce a list of personal property found in a vehicle or container. An inventory is invalid when conducted in bad faith or for the sole purpose of conducting a criminal investigation.

An officer may seize contraband, evidence, fruits, and instrumentalities of crime found during a lawfully conducted inventory under the plain view doctrine. Seized evidence may provide probable cause for a warrant or for a more thorough search under an exception to the warrant requirement, such as the Carroll Doctrine.

#### 18.17.1 Justifications for an Inventory

The Supreme Court has recognized three justifications for the warrantless inventory of lawfully impounded property. First, law enforcement must protect an owner's property while it remains in government custody. Second, an inventory protects officers against claims or disputes over damaged, lost, or stolen property. Third, an inventory protects officers from potential dangers that the property may pose.

#### 18.17.2 Requirements for an Inventory

There are two requirements for a lawful inventory. First, officers must have lawful custody of the property they are inventorying. Second, officers must conduct the inventory pursuant to a standardized policy.

##### a. Lawful Impound

An inventory is not valid unless officers have property in their custody lawfully. Impounding an individual's property must be based upon either: (a) probable cause, such as a violation of



local or state motor vehicle laws (e.g., multiple parking violations), or (b) law enforcement’s “community caretaking” function.

#### b. Standardized Policy

Inventories are valid only if the government agency has a standardized inventory policy, and officers know and follow it. Standardized policies promote the underlying rationale for the inventory exception to the Fourth Amendment warrant rule by removing officer discretion to determine the scope of the inventory. This absence of discretion ensures that officers will not use inventories as a purposeful and general means of discovering criminal evidence.

While a standardized inventory policy is required, several courts have upheld unwritten policies based upon testimony regarding standard practices within an agency. Nonetheless, the best way for law enforcement agencies to avoid potential legal challenges is to maintain a written standardized inventory policy. Law enforcement agencies may establish their own standardized policies, so long as they reasonably construct the policies to accomplish the goals of inventories and conduct inventories in good faith.

#### 18.17.3 Scope of an Inventory

The standardized inventory policy of a particular agency defines the lawful scope of an inventory. Generally, inventories may not extend any further than is reasonably necessary to discover valuables or other items for safekeeping.

For example, inventorying a vehicle, officers would not be justified in looking inside the heater ducts, the door panels, the gas tank, or the spare tire. Ordinarily, individuals do not keep valuables in such locations.

Officers may inventory of passenger compartments, including the glove compartment, since it is a customary place for documents of ownership and registration as well as a place for the temporary storage of valuables. Courts have also found inventories of the trunk valid. Officers may inventory contents of containers, locked or unlocked, so long as the standardized policy permits. Excessive or unnecessary destruction of property during an inventory may violate the Fourth Amendment, even though the entry itself was lawful and the fruits of the search not subject to suppression. Officers should use keys or other tools to enter a locked trunk to comply with the Fourth Amendment. In addition, a valid inventory may include examining the engine compartment of a vehicle.

#### 18.17.4 Location of an Inventory

Although inventories typically occur at an agency station or an impound facility, rather than at the place of the arrest, the Fourth Amendment does not require that the government conduct an inventory at any particular location. Officers may conduct an inventory on-site, before impounding property.

### 18.18 Administrative Searches

The Supreme Court has allowed searches for certain administrative purposes, without particularized suspicion of misconduct, if those searches are appropriately limited. Generally known as “inspections,” these types of administrative searches can include inspections of both personal and real property (for example, offices and places of business).

Inspectors must conduct administrative searches as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as a part of a criminal investigation to secure evidence of a crime. The regulatory scheme must have a properly defined scope and limit the discretion of the officers

conducting the search. Officers cannot use an inspection as a subterfuge to avoid Fourth Amendment requirements to obtain criminal evidence.

Inspectors may seize evidence, fruits and instrumentalities of criminal activity, and contraband they discover, during a valid administrative search, under the plain view doctrine, and law enforcement officers may use it to establish probable cause to obtain a criminal search warrant.

#### 18.18.1 Sobriety Checkpoints

The use of highway sobriety checkpoints does not violate the Fourth Amendment. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990). In reaching this conclusion, the Supreme Court found that a state's interest in preventing accidents caused by drunk drivers outweighed the minimal intrusion caused by temporarily stopping drivers.

#### 18.18.2 Driver's License and Registration Checkpoints

In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court suggested that a Sitz type roadblock to verify driver's licenses and vehicle registrations would be permissible. Several federal circuits have since expressly approved them.

#### 18.18.3 Information-Gathering Checkpoints

"[S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion." Illinois v. Lidster, 540 U.S. 419 (2004). This is the case when law enforcement officers set up a checkpoint to gather information regarding a previous crime.

In Lidster, police set up a checkpoint in the area of a fatal accident one week after it occurred. The police were trying to find motorists who may have been witnesses to the accident.

The Supreme Court upheld the checkpoint after finding that no individualized suspicion was necessary when the stop's primary law enforcement purpose was not to determine whether a vehicle's occupants committed a crime, but rather to ask them, as members of the public, for help in providing information about a crime, in all likelihood, committed by others.

#### 18.18.4 Checkpoints for General Crime Control Purposes

The Supreme Court has never approved a checkpoint program, the primary purpose of which was to detect evidence of ordinary criminal wrongdoing. In City of Indianapolis v. Edmond, 531 U.S. 32 (2000), police officers set up a checkpoint to discover drugs. The Supreme Court held the checkpoint was unlawful because its primary purpose was to advance "the general interest in crime control." Individualized suspicion is required when police employ a checkpoint primarily for investigating crimes.

#### 18.18.5 Administrative Inspections of Businesses

Inspections of businesses, such as those in the food and drug industry, are relatively commonplace. These businesses are subject to inspection for a variety of reasons, including ensuring compliance with fire, health, and safety regulations. Generally, inspectors must conduct these types of administrative searches with "administrative" warrants.

Issuance of an administrative warrant does not require probable cause in the criminal law sense. Instead, courts will look to see if a valid public interest justifies the inspection. If it does, then there is probable cause to issue a warrant for a limited administrative inspection. Specific evidence of an existing violation or reasonable legislative or administrative standards for conducting an inspection will provide probable cause for an administrative warrant.

A regulatory scheme must be in place that authorizes the administrative search. Legislative, administrative, or judicially prescribed standards for conducting an inspection must exist before there is probable cause to issue an administrative warrant.

Officers should seek consent to conduct an administrative search and seek a warrant only after entry is refused.

Special rules apply to administrative inspections of what the law designates as a closely regulated industry. Firearms and alcohol industries are among the most “closely regulated” industries. Inspections of closely regulated industries ordinarily do not require an administrative warrant.

There are two justifications for allowing warrantless administrative searches of closely regulated industries. First, closely regulated businesses deal in products that are potentially hazardous for various reasons. If an administrative inspection of businesses carrying those products is to be effective and serve as a credible deterrent, then unannounced, even frequent, inspections are essential. Second, the owner or operator of commercial premises in a “closely regulated” industry has a reduced expectation of privacy.

Warrantless searches of closely regulated industries must still be reasonable. Inspectors may not use them as a pretext for gathering criminal evidence.

#### 18.18.6 Sensitive Government Facilities and Airports

Security screening at sensitive government facilities and airports generally consists of using magnetometers, explosives detectors, and x-ray machines to examine individuals and their containers. The use of both magnetometers and x-ray machines to scan individuals and their belongings is a search implicating the Fourth Amendment. The courts evaluate these

searches under the presumption that warrantless searches are unreasonable unless they fall within one of the recognized exceptions to the warrant requirement.

a. Searches at Security Checkpoints

Security screening searches at facilities such as airports, military bases, courthouses, and other sensitive government facilities fall within the class of administrative searches that are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime. The government has a substantial interest in preventing the introduction of dangerous material onto airplanes and into sensitive government facilities, which outweighs the minimal intrusion on the liberty of the individual who is the subject of the search. Therefore, searches of those who present themselves for entry into those areas are reasonable when carried out in accordance with a regulatory scheme.

b. Searches Before and After Security Checkpoints

Different standards apply to searches conducted at designated security checkpoints as opposed to those conducted in other areas of airports or sensitive government facilities. In airports, for instance, persons who have not attempted to access the secure terminal are not subject to an administrative search. Intrusions into their REP requires some other Fourth Amendment justification, like a Terry frisk.

The same applies at a federal courthouse or a military base. Prior to the time a person presents for entry into the facility, officers cannot compel him or her to undergo an administrative search. If people choose to enter the area, however, they must pass through the security checkpoint.

The administrative search at the checkpoint must be no more intrusive than necessary to accomplish the agency's regulatory purpose. Once people have successfully passed through the checkpoint, the administrative search is over, and the exception no longer applies. A warrant or other Fourth Amendment exception will be required to justify any further intrusions.

c. The Point of No Return

Individuals wishing to fly on an airplane or enter a sensitive government facility are required to participate in the security screening process. Those not willing to undergo security screening have the option of choosing not to travel by air or not to enter the government facility. In fact, administrative screening searches are valid only if they recognize the right of a person to avoid a search by electing not to enter the security checkpoint area.

While an individual has the right to avoid a search by choosing not to enter a secure area, that right is not without limits. Someone who begins the security screening process no longer has the right to avoid a search by turning back. A rule allowing someone to leave without a search after an inconclusive x-ray scan would encourage terrorism by providing a secure exit whenever detection was likely. A security-screening agent has a duty to locate firearms and explosive devices carried by persons seeking entry. The agent could not fulfill this duty if the agent could not conduct a visual inspection and limited hand search after an inconclusive x-ray scan. Thus, one who chooses to avoid a search must elect not to enter the controlled area before placing baggage on the x-ray machine's conveyor belt or walking through the magnetometer.

### 18.18.7 Border Searches – In General

The government has a very strong interest in border protection -- repelling invasion, intercepting dangerous persons and contraband, collecting duties, and preventing the entry of diseases. Courts generally find this compelling government interest greatly outweighs an individual's reduced expectation of privacy when crossing a border. Accordingly, the courts are likely to find government intrusions at the border reasonable in many types of circumstances. Because of the breadth of border search authority, the power to conduct border searches is restricted to certain categories of federal law enforcement officers.

Federal courts have focused on two factors in analyzing the reasonableness of such intrusions:

- The category of the intrusion, and
- The geographic limits of the government's border authority.

There are two categories of border intrusions: (1) routine and (2) non-routine. The reasonableness standard of the search depends on the search category. Those standards apply regardless of the direction of travel. In other words, searches of travelers leaving the nation are subject to the same standards that apply to searches of arriving travelers.

### 18.18.8 Routine Border Search

#### a. Scope

The traveler's own reduced expectation of privacy when crossing the border determines, in part the scope of a routine border search. Travelers arriving at a border checkpoint expect to: (1) be briefly detained; (2) have their vehicles and



luggage opened and visually searched; and (3) be asked to remove their topcoats and empty their pockets. Although the following actions, if the agent requires them, are slightly more intrusive, they are still within the scope of a routine border search: (1) remove shoes; (2) empty the contents of wallets or purses; and (3) lift shirts or skirts.

b. Basis

Properly designated officers may conduct a border search even when they have no suspicion that the traveler is violating the law. Agency policies may set some restrictions on those officers with regard to conducting the searches and choosing which travelers to search. Violating those restrictions may expose the officers to disciplinary action but will not usually result in suppression of any evidence found.

18.18.9 Non-Routine Border Search

a. Scope

The traveler's own expectations also determine, at least in part, the scope of a non-routine border search. Some inspections are a customary part of crossing an international border. Others are very intrusive and therefore non-routine. A full strip search, an x-ray examination of the body, a demand to remove an artificial leg and a body cavity search are examples of non-routine border searches. Certain detailed searches of vehicles and other belongings may also be non-routine. Detailed disassembly and partial destruction of personal effects and drilling holes in car bodies are non-routine border searches. Finally, the courts may consider lengthy detentions of persons (those lasting hours rather than minutes) non-routine seizures of the individual.

b. Basis

At a minimum, officers must have reasonable suspicion of a violation for non-routine border searches and seizures. Some courts have required more. In one case, a court order founded on reasonable suspicion was required before a person could be involuntarily x-rayed. In another case, officers were required to obtain a court order founded on reasonable suspicion within 48 hours before they could continue to detain a suspected drug-containing balloon swallower. Only medical personnel can conduct body cavity searches. Agents cannot open sealed letters that apparently contain only correspondence without consent or a search warrant.

18.18.10 Geographic Limits of the Border

Border search authority exists only when there is some connection, or “nexus,” to the border. Agents can conduct border searches lawfully in three areas: (a) the actual border; (b) the functional equivalent of the border; and (c) the extended border. Agents do not have to intercept persons and objects within inches of the border, and border stations do not have to be directly at the border. However, mere entry of a person or object into the United States does not mean that authority to conduct a border search persists no matter where and when law enforcement discovers that person or object.

a. Actual Border

Agents can conduct a border search at the actual land border between the United States and Canada or Mexico. Determining the nation’s sea borders over water is more complex. The air border extends above the surface from the nation’s land and sea borders.

b. Functional Equivalent of the Border

Sometimes seaports and airports receiving international shipments and passengers are many miles inland from the nation's actual borders. For example, ships departing Singapore may first dock in Philadelphia (well inland on the Delaware River), and flights leaving Paris may first touch American soil in Kansas City. In such situations, the Philadelphia dock and the Kansas City airport are the functional equivalent of the border.

The concept of "functional equivalent of the border" applies to searches and seizures at places other than international airports and seaports. For example, imported items may be stored temporarily in a bonded warehouse before legally entering the United States. The courts have upheld searches of persons exiting those facilities as searches at the functional equivalent of the border. The courts have upheld searches of foreign mail, persons who have access to bonded shipments, and, in very limited circumstances, foreign merchandise held in a Foreign Trade Zone for purposes other than those listed in the Foreign Trade Zone Act of 1934 as searches at the functional equivalent of the border.

Even if the person or object crossed the border or its functional equivalent some time before, certain federal officers can conduct a border search if they can articulate reasonable suspicion that criminal activity is afoot. Properly designated officers cannot assert extended border search authority unless:

- The officer is reasonably certain that a nexus exists between the person or object and either a border-crossing by them or contact by them with something that has itself crossed the border;
- The officer is reasonably certain that no material change has occurred to the object or person since this nexus has

formed; and

- The officer had reasonable suspicion that the officer will uncover criminal activity by the stop or search.

c. Extended Border Search Authority

Officers sometimes rely on extended border search authority when they follow smugglers from the border to their in-country rendezvous point, to catch other members of the smuggling conspiracy waiting there.

#### 18.18.11 Persons and Objects Entering the Country

Properly designated officers may stop and search persons and objects entering the United States if the following conditions exist:

- The officer is reasonably certain that either a nexus exists between the person or object and a border crossing by the person or contact by the person with something that has itself crossed the border;
- The officer is reasonably certain that no material change has occurred to the object or person since this nexus has formed, and
- The officer stops and/or searches at the first practical detention point after the nexus has formed.

#### 18.18.12 Persons and Objects Leaving the Country

Properly designated officers may stop and search persons and objects leaving the United States if the following conditions exist:

- The officer is reasonably certain that a nexus will arise

between the person or object and either a border-crossing by them or contact by them with something that will itself cross the border;

- The officer is reasonably certain that no material change will occur to the object or person before this nexus has formed; and
- The officer stops and/or searches at the last practical detention point before the nexus has formed.

### 18.19 Foreign Searches

Neither the Fourth Amendment nor the exclusionary rule applies to foreign searches and seizures. However, for United States citizens and resident aliens, the Fourth Amendment applies to foreign searches and seizures: (1) conducted exclusively by the United States government; (2) conducted by the United States in a “joint venture” with foreign authorities; or (3) when foreign authorities act as agents for the United States.

#### 18.19.1 Searches by Foreign Authorities

The exclusionary rule does not require the suppression of evidence seized by foreign officials during a search, even when the target of that search is an American citizen, unless:

- The conduct of the foreign officials would “shock the judicial conscience.”
- United States law enforcement agents or officers substantially participate in the foreign search or seizure or use foreign officials as agents of the United States. In situations where law enforcement officers of the United States engage in a “joint venture” with foreign officials, the protections of the Fourth Amendment will apply, and

application of the exclusionary rule may result. Courts will determine on a case-by-case basis whether the participation of federal law enforcement officers renders a search a “joint venture.” The mere presence of federal officers will not automatically make the search a “joint venture,” nor will simply providing information to a foreign official.

#### 18.19.2 Foreign Searches of Non-Resident Aliens by American Law Enforcement Officers

In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court addressed the issue of whether the Fourth Amendment applies to the search and seizure by United States agents of property located in a foreign country that a nonresident alien owns. The Court answered this question in the negative, holding that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; the provision was never intended to restrain the actions of the federal government against aliens outside United States territory. The Court noted, however, that aliens receive constitutional protections when they are within the territory of the United States and have substantial connections with the country.

Although the Fourth Amendment does not apply to foreign searches of a non-resident alien’s property, controls exist over the investigative activities of American agents operating in foreign countries. Besides the obligations imposed by the host countries themselves, Congress has restricted American agents’ foreign activities. For example, in the narcotics area, Congress has prohibited American agents from directly effecting an arrest in any foreign country as part of any foreign police action with respect to narcotic control efforts. Congress has also prohibited American agents from interrogating or being present during the interrogation of any United States

person arrested in any foreign country with respect to narcotic control efforts. Additionally, the United States has entered into agreements and treaties with other countries, which provide for mutual legal assistance and establish procedures for obtaining evidence in criminal investigations abroad. The Office of International Affairs can be reached through the DOJ Main Switchboard (202) 514-2000. This office provides advice and assistance regarding the requirements for these agreements and maintains a current list of mutual legal assistance agreements and treaties.

### 18.19.3 Searches of U.S. Citizens and Resident Aliens in Foreign Countries

The Fourth Amendment applies to searches and seizures against U.S. citizens and resident aliens while abroad when conducted by, on behalf of, or jointly with the United States Government. The Fourth Amendment applies to overseas searches in three related situations: (1) when only United States law enforcement personnel conduct the search; (2) when foreign officials acting on behalf of the United States Government conduct the search; and (3) when the search is a “joint venture” between the United States and foreign officials.

Foreign searches raise privacy issues that do not always have clear solutions. Except for U.S. embassies overseas, Fed. R. Crim. P. 41 does not authorize a federal judge to issue a search warrant for a location outside the United States.

The Clarifying Overseas Use of Data Act (the “CLOUD” Act) authorizes United States federal judges to issue search warrants for electronic communications stored on the servers of Internet Service Providers (ISPs) that are subject to United States jurisdiction, regardless of whether the ISP server is located within or outside the United States.

In fact, even if such a warrant were issued, it would be a dead letter outside the United States. Even when no warrant is required, American agents must articulate specific facts giving them probable cause to undertake a search or seizure to comply with the Fourth Amendment. Any search that American agents conduct must also meet the reasonableness requirements of the Fourth Amendment.

## **18.20 Applying for a Federal Search Warrant**

Federal Rule of Criminal Procedure 41 is the primary authority governing application for and execution of federal search warrants. Before issuing a warrant pursuant to Rule 41, most judges ordinarily require officers to appear in person, often in the company of an Assistant U.S. Attorney, with a prepared search warrant package described below.

### **18.20.1 Prerequisites to Applying for a Federal Search Warrant**

Federal Rule of Criminal Procedure 41 and 18 U.S.C. § 2703(a) and (b) outline the most pertinent rules governing who may apply for a federal search warrant, which judges may issue one, and where law enforcement officers must apply.

#### **a. Who May Apply for a Federal Search Warrant?**

Although either a federal law enforcement officer or an attorney for the government may apply for a federal search warrant, ordinarily a law enforcement officer performs that task. A federal law enforcement officer is a government agent who enforces the criminal laws and is authorized by the United States Attorney General to request a search warrant. Assistant U.S. Attorneys are attorneys for the government. Absent rare circumstances, federal regulations require officers to secure an Assistant United States Attorney's concurrence before applying for a federal search warrant.



b. Which Judges May Issue a Traditional Federal Search Warrant?

United States Magistrate Judges, District Court Judges, Court of Appeals Judges, Supreme Court Justices as well as judges of state courts of record may issue federal search warrants. United States Magistrate Judges issue the bulk of federal search warrants, but federal law also allows state court judges to issue federal search warrants because they are more numerous than federal magistrate judges. Although state law determines whether a court is a court of record, to qualify, at a minimum, a court must make and keep permanent records of its proceedings.

c. Which Courts have Jurisdiction to Issue Which Search Warrants?

Successfully obtaining a search warrant requires identifying a court with the power to issue the type of warrant an officer needs. In the simplest cases, an authorized federal or state court with power over a specific geographic area can issue a warrant to search a person or property located within its boundaries.

For example, a United States Magistrate Judge in the Southern District of Georgia can issue a warrant to search a home located in the Southern District of Georgia. Likewise, a Glynn County, Georgia Superior Court judge can issue a valid search warrant for a home located in Glynn County, Georgia. But in an ordinary case, neither the United States Magistrate Judge from the Southern District of Georgia nor the Glynn County Superior Court judge could issue a valid warrant to search a home located in the Northern District of Florida.

In the following situations, however, federal judges may issue search warrant affecting people or property outside the geographic boundaries of their home districts:

- **Terrorism:** A federal judge with jurisdiction over a geographic location where activities related to domestic or international terrorism occurred can issue a warrant to search a person or property located outside that district.
- **Tracking Devices:** So long as an item subject to tracking is in the district where the issuing federal judge presides when the judge issues the warrant, and so long as officers perform any necessary installation in the district, officers may track the item wherever in the United States or its territories it goes.
- **Stored Wire and Electronic Communications:** A federal judge in a district where a crime is properly under investigation may issue a search warrant requiring a service provider, such as Google or Xfinity, to disclose stored wire and electronic communications in its possession incident to serving a customer without regard to where in the United States or its territories the provider stores the communications. In contrast, law enforcement officers seeking warrants for a service provider's records or information that fall outside the scope of stored electronic or wire communications must apply for their search warrant before a judge in the venue where the records or information are stored. What materials fall within the scope of stored electronic and wire communications remains unsettled.

d. Judges Must be Neutral and Detached

The Founding Fathers required warrants to ensure that a “neutral and detached” referee stood between citizens and officers investigating crimes. Consequently, only a “neutral and detached” judge with no personal stake in an investigation's outcome may properly issue a search warrant.

A judge with a financial interest in the outcome of a case cannot satisfy this requirement. Neither can a judge with a close, personal relationship with the applying law enforcement officer or prosecutor.

### 18.20.2 The Components of a Traditional Federal Search Warrant Package

An officer whose job description requires preparing search warrants needs a comprehensive command of the principles necessary to satisfy Fourth Amendment standards. Gaining that understanding and putting it into practice is essential to achieving minimal competence and satisfying professional standards.

#### a. Understanding context can help

The Founding Fathers' mandate that courts could issue "no Warrants . . . but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized" signaled their strong rejection of the general, exploratory government rummaging, known as a general search, permitted under British law in their time. Because of this mandate, every search warrant issued in this country must include a showing of facts supporting both probable cause and explaining which particular items are in the particular place an officer wants to look at the moment the officer applies for the warrant. Moreover, the Founding Fathers' insistence that facts supporting every warrant be made under "Oath or affirmation" underlines the gravity with which they viewed the process.

Satisfying this mandate requires an officer applying for a traditional search warrant to take two preprepared documents to the judge. Each of those documents must stand on its own and cannot incorporate parts of the other by reference.

## 1. Application for Search Warrant – the “Request” Document

The first document is an Application for Search Warrant (Application), the document that frames an officer’s request by explaining why the court should issue a warrant and what the officer wants authority to do pursuant to it. An Application must contain every piece of information the court needs to make its decision and cannot validly incorporate facts from documents or records outside of its four corners.

The Application, a multi-page document, ordinarily consists of the following items:

- (1) A form cover sheet, very often specific to the particular district, that identifies the address of the premises, the statute or statutes violated, a court-assigned case number, general classes of items an officer wants to seize, and statements incorporating all necessary attachments by reference;
- (2) An attachment particularly describing the premises that the officer wants to search;
- (3) An attachment specifically listing and describing items the officer wants to seize; and
- (4) An affidavit that outlines pertinent facts supporting the request.

## 2. Search Warrant – The “Action” Document

The second document in a search warrant package is the proposed Search Warrant, also a multi-page document that captures the full scope of the actions that the government hopes the court authorizes executing officers to take. If the court grants the government’s Application under the terms requested, it will sign the proposed Search Warrant that the government presents.

A Search Warrant's validity hinges on it containing every piece of information that a reasonable officer would need to correctly identify the premises to search and items the court authorized him or her to seize. A Search Warrant is ordinarily composed of the following items:

- (1) A form cover sheet identifying the premises address, the Application's court-assigned case number, an execution deadline, statements incorporating all necessary attachments by reference, and the name of the judge to whom officers should make the return;
- (2) A copy of the Application's attachment particularly describing the premises; and
- (3) A copy of the Application's attachment listing items subject to seizure.

Unlike the Application, the Search Warrant does not include an affidavit.

b. Preparing an Attachment Particularly Describing a Place to Search

Ordinarily, officers supply the required particularized description of the place to be searched in an attachment that they append to their Application and proposed Search Warrant. In this context, the Fourth Amendment's particularity requirement demands accurate details sufficient to enable any officer to identify the correct premises with reasonable effort relying exclusively on the information in the warrant. Descriptions leaving a reasonable probability that an officer could search the wrong premises by mistake fail to satisfy the standard.

Given that reasonableness supplies the standard, courts have tolerated minor errors. For example, one court declined to invalidate a warrant even though its premises description

listed the house number as “4612” instead of “4216” because the remainder of the description was sufficiently accurate to enable law enforcement officers to identify the correct place. Nonetheless, should an officer discover an error prior to executing a warrant, best practices favor correcting it before proceeding.

Attachments should contain detailed narratives describing the premise’s appearance, a color photograph, and directions to it from a fixed, easily recognizable point when applicable. Below are some general guidelines for drafting descriptions of homes, people, and vehicles and conveyances.

## 1. Homes

Sufficient descriptions of homes and dwellings vary broadly. Factors pertinent to a description’s adequacy include the type of home at issue, where it is located, and characteristics of nearby buildings and structures, among others.

Sufficient descriptions ordinarily contain the following information:

- type of dwelling (e.g., house, apartment, mobile home, etc.),
- a complete address, including street number, street name, town, state, and zip code,
- physical attributes of the home that are not easily altered, including the number of stories, construction materials (e.g. brick, wood, etc.), roofing (e.g. shingle, slate, metal, etc.), color, number and location of doors and windows, chimneys, garage or carports, mailboxes, and fencing,
- the location where the house, apartment, or lot number

appears on the premises, and

- features on curtilage, including visible outbuildings such as sheds and barns.

Multi-unit dwellings pose special concerns. When a home is in a multi-unit structure such as an apartment complex, an adequate description must include the unit or apartment number. Similarly, when a dwelling is in a duplex, a description should specify that officers only want to search the part of the structure where the dwelling is located.

## 2. People

Ideally, descriptions of people should include the following information:

- name,
- known aliases,
- age,
- sex,
- race,
- eye color,
- hair color,
- weight,
- height,
- distinguishing scars, marks, and tattoos, and
- where the person is located if known.

## 3. Vehicles and Conveyances

Ideally, descriptions of vehicles and conveyances should include the following information:

- make,
- model,
- year,
- color,
- license plate number,

- vehicle identification number,
- owner name,
- a description of any unique markings, and
- location.

c. Preparing a Reasonably Particular Attachment Listing Items to Seize

Ordinarily officers also list and describe the items that they want to seize in an attachment to their Application, a copy of which is attached to the proposed Search Warrant. Conforming to the constitutional standard in this context requires a particularized list for three reasons.

First, the list constrains executing officers' discretion by limiting the spaces where they may look to only places reasonably capable of containing a listed item. Second, the list explicitly limits officers' authority, allowing them to seize only items within the list's scope. Third, the list informs non-law enforcement officers with interests in the search what items officers may seize.

For at least three reasons, officers must give careful consideration when drafting a list of items to seize. First, a list of items subject to seizure is not a "fantasy" list. Officers must back up their requests to seize each listed item with facts in an affidavit explaining why that item is pertinent to the specific crime and located at the specific premises. Courts deny requests to seize items when they are not supported by facts in the affidavit.

Second, maximizing the scope and nature of the items listed insulates both the case and the officer from liability because seizures made pursuant to a warrant are presumed reasonable. Absent a knowing or reckless statement or omission in an affidavit, once a court has issued a warrant authorizing officers to seize an item, any decision to seize an



item that arguably falls within the scope of the warrant's description becomes almost unassailable. In contrast, absent a new warrant, any defendant with standing is entitled to an evidentiary hearing to challenge a warrantless seizure.

Third, because a warrant will only authorize officers to look in places where listed items could reasonably be, officers should draft their lists with an eye toward securing authorization to look in the broadest possible range of private spaces, both physical and virtual.

### 1. Classes of Items Subject to Seizure

Although a search warrant's particularized list must be reasonably specific given the circumstances, items that officers can include on it must fall into at least one of the following five general classes:

- Evidence of a crime;
- Contraband;
- Fruits of crime, or other items illegally possessed;
- Property designed for use, intended for use, or used in committing a crime; or
- A person to be arrested or a person who is unlawfully restrained.

Often, items can fall into more than one class. For example, photographs depicting child pornography are evidence of a crime, contraband, fruits of a crime, and items illegally possessed.

## 2. How Particular is Particular Enough?

Precisely how specifically a warrant must describe an item or class of items depends on circumstances and context. For example, requests to seize “drug paraphernalia,” “drug proceeds,” and “ledgers” in a drug investigation are generally acceptable. Similarly, requests to seize “child pornography,” “depictions of sexual conduct between adults and minors,” and “materials depicting minors engaged in sexually explicit activity” are appropriate in a child pornography case.

In contrast, asking to seize a generic class of items such as “contraband,” “evidence,” or “instrumentalities” will not satisfy the particularity requirement. Such terms sweep too broadly by encompassing a vast array of divergent items. For example, “contraband” includes items such as illegal drugs, child porn, stolen property, explosive devices, firearms requiring registration, and nuclear materials.

Similarly, when a warrant seeks items that could implicate First Amendment rights, such as books and written materials, courts require more specific descriptions. Requests to seize stolen property can also require more specific descriptions, especially when listed items are of a common nature, such as jewelry.

## 3. Interplay Between Search Warrants and the Plain View Doctrine

While executing search warrants, officers can encounter items that they need to seize that fall outside the scope of the authorized list. When that happens, the plain view doctrine can sometimes help, but officers must recognize its shortcomings.

To illustrate, imagine that officers are executing a warrant authorizing them to seize only 27” televisions. That warrant

allows them to look in spaces where 27” televisions could be and seize all 27” televisions they find. Because the court will presume that all seizures of 27” televisions are valid, a defendant will not be entitled to an evidentiary hearing on a motion to suppress without first convincing the court that the warrant itself could have been defective.

In contrast, when officers executing that same warrant encounter a photograph containing child pornography face up in a bedroom closet, somewhere a 27” television could be, their warrant does not authorize them to seize the photograph because it is not a 27” television. The officers may nonetheless lawfully seize the photograph pursuant to the plain view doctrine because its incriminating nature is immediately apparent without manipulation.

Officers may not thereafter lawfully expand the scope of their search by looking in spaces too small to contain 27” televisions without another warrant or an exception to the warrant requirement. Moreover, a defendant with standing who moves to suppress the photograph will be entitled to an evidentiary hearing where law enforcement officers must testify, undergo cross examination, and ultimately convince a court that seizing the photograph was reasonable under the plain view doctrine.

#### d. Drafting the Affidavit

Every Application for a federal search warrant must be accompanied by an affidavit. An affidavit is a sworn narrative that outlines all facts necessary to show probable cause. While drafting and formatting conventions vary, most federal affidavits share some basic features.

First, officers must write federal affidavits in paragraph and subparagraph, complete sentence, narrative form. Officers must also identify each paragraph with a consecutive number

and letter or number all subparagraphs. Unnumbered bullets are not acceptable.

Second, officers must organize an affidavit's narrative logically into sections introduced by appropriate headings and subheadings when needed. A basic affidavit ordinarily contains an Introduction section, a Statement of Probable Cause, and a Conclusion Section, each of which serve the functions described below.

### 1. The Introduction Section

An affidavit's Introduction section usually contains at least three subparts. The first subpart states the affidavit's purpose by identifying the place to be searched, the statutory violations at issue, and the items to be seized while also incorporating all attachments by reference.

The second subpart, often called the "hero" statement, introduces the affiant, that is, the officer who swears to the affidavit. That section, which quantifies an officer's experience and training, establishes his or her basis of knowledge for giving opinions about investigative and law enforcement matters and drawing inferences from facts. Every federal officer whose duties include preparing search warrants should maintain a stock "hero" statement ready to drop into an affidavit and tailor to address the needs of a specific case at a moment's notice.

The third, critical subpart is designed to protect an affiant. That subpart contains statements that notify the court that the affidavit does not include every fact or investigative event in the case, but rather, includes only facts pertinent to probable cause. It further explains that absent quotations, the affidavit describes statements and conversations in summary form. Often, it also informs the court that the affiant will base opinions in the affidavit on his or her training and experience.

Finally, it discloses that the affiant did not personally perceive every fact described, but rather, relies on information obtained from third parties described by class, a perfectly acceptable, expected practice.

## 2. The Statement of Probable Cause

The Statement of Probable Cause is an affidavit's "meaty" section. There, an affiant must disclose each fact upon which he or she relies. When drafting a statement of probable cause, an affiant's mission is to make issuing the warrant as easy as possible for a judge.

Toward that end, every paragraph, sentence, phrase, and word should contribute to one of the following four purposes: (a) showing probable cause to believe that items subject to seizure are pertinent to a specific crime or set of crimes and are in a specific place at the time of the Application, (b) explaining why a source of information upon which probable cause depends is reliable under the totality of the circumstances, (c) disclosing all facts that could arguably undermine probable cause or any information source's credibility, or (d) explaining transitions from one pertinent investigative step to the next. Because words that do not serve one of these purposes annoy judges and make pertinent facts harder to find, they do not belong in federal affidavits.

To ensure that a probable cause statement includes all pertinent data, an affiant must first identify the statutory elements of the crime or crimes at issue. Then, an affiant must ensure that the narrative includes facts satisfying every element. Knowing that the court will strike all unsupported requests, an affiant must also include facts explaining why every item to be seized is relevant to the specific crime or crimes at issue.

e. Staleness – Dates Matter

Because a probable cause statement must explain why an affiant believes that the items subject to seizure are still on the premises at the time of the Application, dates are crucial. Consequently, a court always wants to know when officers learned information discussed in an affidavit and when events described took place as precisely as available information allows.

Affidavits that rely on outdated, “stale” information cannot establish probable cause. Courts assess staleness under the totality of the circumstances considering the following factors:

- When did officers obtain the information upon which they rely?
- When did pertinent events occur?
- Was the criminal activity a discrete, one-time event, such as a bank robbery, or is the crime ongoing, as a long-term fraud scheme or drug trafficking operation could be?
- Are items officers want to seize of a type that tend to remain in one place for a long period, for example, child pornography, or are they instead of a nature that tends to be consumed, destroyed, or moved, for example, illegal drugs or guns used in violent crimes?
- Does the suspect own or occupy the premises, and if so, for how long?

f. Facts Pertinent to Reliability

Critically, because the court must independently assess every information source’s reliability, it is entitled to *all* information

that reflects positively *and negatively* on this issue. Consequently, officers must vigilantly report facts that support and undermine every source's credibility and basis of knowledge. Moreover, while corroboration is not strictly required to show probable cause, telling the court that officers learned the same facts from more than one source is not redundant, but rather, bolsters probable cause.

With informants and cooperators, this task ordinarily begins by describing in general terms the number of instances when the source gave information that led to tangible results such as seizures or arrests and/or by noting that officers have corroborated the source's information. Correspondingly, an affidavit must include the informant's or cooperator's "baggage," including but not limited to the reason why he or she is helping police (for example, for payment or in hopes of a more favorable outcome with respect to pending charges), all felony convictions, arrests and convictions for crimes involving false statements or representations, drug use, mental illness, and past instances of untruthfulness or unreliability.

While hopefully informants and cooperators will be the only information sources with "baggage," a probable cause statement must also disclose information that undermines credibility or reliability of any other type of source, too. Whether a cooperator, informant, or some other source of information is at issue, knowingly or recklessly failing to disclose unfavorable information can prompt a Franks hearing, described in more detail below.

#### g. Other Useful Guidelines

While approaches vary, adhering to the following guidelines can help new officers draft competent affidavits.

- Attribute facts to their original sources: This rule is the single most important one. An affiant must tell the court

who perceived or recorded each, individual piece of data. Officers should never write a sentence that so much as implies that they have personal knowledge of a fact that they did not personally perceive.

- Absent a good reason, describe events in the sequence in which the investigation revealed them: Chronological order is a law enforcement officer's best friend. Because investigations ordinarily proceed from one logical step to the next, and because officers draw facts from a limited range of sources during each investigative event, using the investigation's chronology to organize an affidavit's narrative provides a generally reliable, logical way to structure an affidavit. Doing so not only helps an officer explain critical transitions from one investigative event to the next, but also makes accurately and unambiguously sourcing each fact much easier. For instance, officers who limit the information in a single, numbered paragraph can begin that paragraph with a sentence that makes clear that all of the information in the remainder of the paragraph came from a single investigative source on a specific day, for example, "On May 25, 2025, officers interviewed Michael Smith, and he made the following statements:" or "On June 7, 2025, agents who conducted surveillance in Brunswick, Georgia made the following observations:". Then, so long as an affiant confines the facts in the remainder of that paragraph to facts that came from the specified source on the date noted, sourcing is unambiguous.
- Interrupt a chronological narrative only to "qualify" a person with questionable motives: The first time an affidavit references an informant, cooperater, or other person with questionable motives, officers should interrupt the chronological narrative to "qualify" that person under Gates and Aguilar by disclosing both favorable information and unfavorable information that



could arguably undermine credibility.

- Develop the ability to distinguish between facts and conclusions: This skill is one of the hardest to master. Facts are discrete pieces of data, whereas conclusions assess the significance of collections of facts. An affidavit cannot state conclusions without stating the individual facts upon which the conclusions rely. Remember the algebra teacher's insistence that students show their work and follow that instruction in affidavits by outlining facts prior to asserting conclusions.
- Use recognized shortcuts to communicate information more efficiently: The first time an affidavit refers to a person, address, agency, organization, or entity that it will reference more than once, spell out the entire name, choose a shorthand name or acronym, and write that shorthand name or acronym in parenthesis immediately following the full name. Thereafter, unless officers need to quote, they may use only the shortened name or acronym so long as they do so consistently. Additionally, refer to anyone who is a target and any premises that is the subject of a search warrant in all capital letters to draw the court's eye to the most important players and locations. Do not capitalize the names of items, persons, or places that are neither targets nor a premises to be searched.
- Safeguard sensitive information: Unless a court insists, affidavits should not name officers other than an affiant. Moreover, because defendants are entitled to copies of search warrant affidavits in discovery, addresses, telephone numbers, and personal identifying information for witnesses should not appear.
- Develop a healthy sense of paranoia: No officer should ever swear to an affidavit prior to taking every

reasonable measure to ensure accuracy to the best of his or her knowledge and belief. Moreover, while officers are entitled to rely on information from other officers and third parties, that reliance must be reasonable. The duty to think critically is not delegable. Because following this rule requires an affiant to read every word an affidavit contains, officers must appreciate that blindly cutting and pasting can end a career.

### 18.20.3 Special Case – Anticipatory Search Warrants

An anticipatory search warrant is a warrant based upon an affidavit showing that at some future time probable cause will exist to believe that an item subject to seizure is in a specified place. A judge can issue an anticipatory search warrant upon deciding that probable cause will exist when an objectively observable, “triggering event” occurs.

In many cases, the triggering event is a controlled delivery of drugs or other contraband by law enforcement officers. An officer must specifically describe the triggering event in the affidavit, and it must be something other than mere passage of time. Officers may not execute an anticipatory search warrant unless and until the triggering event specified in the affidavit occurs.

### 18.20.4 Motions to Suppress Evidence Seized Pursuant to Federal Search Warrants

When a defendant moves to suppress evidence seized pursuant to a federal search warrant, he or she faces significant but not insurmountable barriers. To get a court to set an evidentiary hearing on a motion to suppress items seized pursuant to a federal search warrant, a defendant must allege facts sufficient to make a “substantial preliminary showing” (a) that an affidavit contained untrue facts that the affiant included knowingly, intentionally, or in reckless disregard for the truth

that could have affected probable cause; (b) that an affidavit omitted material facts that could have affected probable cause knowingly, intentionally, or in reckless disregard for the truth; or (c) both.

The following circumstances can help a defendant make the required showing: (a) affidavits containing facts at odds with facts in reports, memoranda, and other discoverable materials without explanation; (b) affidavits that omit unfavorable credibility and basis of knowledge information pertinent to sources upon which probable cause depends; and (c) affidavits with collections of careless but otherwise seemingly innocuous factual misrepresentations and omissions sufficient to raise an inference of wholesale recklessness.

If a defendant succeeds in making the required showing, a court will schedule an evidentiary hearing. At such a hearing, called a Franks hearing, the officer who swore to the affidavit will have to defend every arguably misleading word chosen and every decision to omit a fact against a defense lawyer's cross examination. Should a court find that an officer lied or recklessly disregarded the truth by a preponderance of the evidence, the court will then excise any untrue facts or incorporate any facts omitted and decide whether the revised affidavit shows probable cause. If the revised affidavit fails to show probable cause, the court will void the search warrant and suppress all evidence seized pursuant to it.

Regardless of the outcome of the motion to suppress, findings made after a Franks hearing can have grave consequences for a law enforcement officer. Any court's finding that an officer lied or recklessly disregarded the truth becomes a permanent stain on that officer's credibility that every prosecutor has a constitutional duty to disclose to the defense every time that officer needs to testify on behalf of a government in any criminal proceeding. Consequently, officers cannot be too careful when preparing affidavits.

## **18.21 Telephone Warrants – An Alternative Way to Apply for a Federal Search Warrant**

Although courts allow warrantless entries under exigent circumstances when an ongoing crisis clearly precludes obtaining a warrant in advance, unless a vehicle or conveyance is at issue, they require officers who can apply for a warrant to do so. When an exigency has not yet come to fruition, but instead, is looming or impending, officers who do not have time to obtain a traditional, “wet signature” search warrant may still have sufficient time to obtain a warrant without appearing in person under Fed. R. Crim. P. 4.1.

Drafted to encourage officers to obtain advance warrants rather than making warrantless, exigent circumstances entries, officers who can apply remotely must. The officer who instead allows a looming exigency to develop into an actual one rather than applying remotely can expect the court to suppress the fruits of any warrantless entry. Because, absent bad faith, Rule 4.1 expressly precludes any argument that securing a warrant under its terms was unreasonable under the particular circumstances, remote warrants offer good protection for a case and an officer.

Rule 4.1 outlines the procedures that the court, prosecutor, and officer must follow. Under that Rule, a federal magistrate judge may entertain an emailed or faxed search warrant package without an officer appearing in person. Moreover, in appropriate circumstances, a judge may rely entirely on officer’s verbal, sworn statement. Unlike traditional federal search warrants, state court judges are not authorized to issue telephonic federal warrants.

## **18.22 Executing Federal Search Warrants**

Once equipped with a federal search warrant, officers must know the nature, scope, and limitations of the authority that

document grants. Although officers have broad discretion to make operational decisions relating to serving a search warrant and effectuating their searches, Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C. §§ 3103-3105, 21 U.S.C. § 879, and the Supreme Court cases described below set some limitations.

### 18.22.1 Who May Search?

Pursuant to 18 U.S.C. § 3105, a federal search warrant

[M]ay in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

Although a federal law enforcement officer must direct the search, state and local law enforcement officers may assist, whether “cross-designated” as federal law enforcement officers or not. Such officers may only act within the scope of the authority that the warrant grants.

Additionally, when three conditions are satisfied, a private citizen may lawfully assist federal officers. First, the government must need the citizen’s help. For example, the government often needs computer technicians to ensure against data loss when seizing evidence from a server.

Second, the citizen’s role must be to aid the government rather than to serve some private end unrelated to the warrant’s purpose. Third, like state and local officers, private citizens may only do things that the warrant authorizes federal officers to do.

## 18.22.2 Timing and Duration for Executing Premises Search Warrants

Unlike federal arrest warrants, federal search warrants expire. While a federal premises warrant can afford up to 14 days to execute, a court has the discretion to allow less time. The face of the warrant ordinarily lists the execution deadline.

Officers “execute” a federal premises search warrant by simply making entry. So long as they know that a judge has issued a warrant authorizing the search, officers need not wait for a physical copy of the warrant to arrive on scene before entering.

Once they have entered, officers’ search must be ongoing and continuous until complete. Officers may and should remain on the premises for as long as is reasonably necessary to search everywhere a listed item could be, seize items found, and prepare the inventory discussed below, for once all officers leave the premises, a new warrant or an exception is required to reenter. Moreover, a search warrant authorizes officers to search a premises without regard to whether its occupants are present.

Also unlike federal arrest warrants, officers must make entry pursuant to a federal premises search warrant during the daytime absent special authorization. “Daytime” hours fall between 6:00 a.m. and 10:00 p.m. local time.

Officers who need to execute a search warrant during nighttime hours, that is, between 10:00 p.m. and 6:00 a.m., may request authorization to do so in their affidavits. For warrants unrelated to controlled substances offenses, an officer secures nighttime authority with facts showing reasonable cause to believe that the measure is necessary to alleviate danger or prevent evidence destruction. In controlled substances cases, an affidavit showing probable cause to believe that a controlled substance is likely present suffices to

allow a judge to authorize nighttime execution.

### 18.22.3 Timing for Executing a Tracker Warrant

Warrants that authorize installing a tracking device “must command the officer to complete any installation authorized by the warrant within a specified time no longer than 10 calendar days” from the date the judge issues the warrant. Officers must install the tracking device in the daytime, unless a judge finds good cause to warrant nighttime execution. While a court may authorize officers to track for up to 45 days pursuant to the warrant, the court has the discretion to set a shorter period.

### 18.22.4 Use of Force During a Search Warrant

As with all other uses of force, courts look at the totality of the circumstances present at the time to decide whether handcuffing a premises’ occupant during a search warrant or some other application of force was objectively reasonable. Factors that courts consider include the following: (a) the crime’s severity; (b) whether an occupant posed an immediate threat to officers or others; (c) whether a suspect actively resisted or attempted to evade officers by fleeing; (d) the number of occupants; (e) whether force applied could lead to injury; and (f) whether a suspect was elderly, a child, or suffering from illness or medical disability.

### 18.22.5 Presenting the Warrant Prior to Beginning the Search

In jurisdictions other than the Ninth Circuit, officers are not required to present a copy of the search warrant to an occupant prior to beginning a search. However, when circumstances permit, best practices favor giving an occupant a copy of the warrant. Absent a “justifiable reason” to the contrary, Ninth Circuit courts require officers to give a copy of the warrant to

an occupant before beginning a search. Although a warrant includes both its cover sheet and all attachments, an occupant is not entitled to a copy of an Application for Search Warrant or any affidavit supporting it.

#### 18.22.6 Activities Permitted While Executing a Premises Search Warrant

Although a search warrant carries inherent authority to engage in some acts while on a premises, that authority is not unlimited. This section outlines actions falling within the permissible scope of a search warrant's authority and distinguishes them from actions arguably permissible pursuant to exceptions to the warrant requirement.

##### a. Temporary Weapon Seizures

When officers encounter a dangerous weapon on a premises that they do not have authority to seize pursuant to their warrant, Terry allows them to seize it temporarily for safety reasons. When such a weapon is neither contraband nor readily apparent evidence of a crime subject to seizure pursuant to the plain view doctrine, officers should safely return it to occupants or owners upon concluding a search.

##### b. Detaining Occupants - The Summers Doctrine and Its Progeny

Under the Summers Doctrine, a premises search warrant that lists any type of contraband among items subject to seizure authorizes officers to detain people they encounter on a premises for the duration of the search without probable cause to arrest and without any particular suspicion that the person is involved in crime or poses a specific danger. See Michigan v. Summers, 452 U.S. 693 (1981). An item is contraband if possessing it is a crime. Contraband includes but is not limited



to controlled substances, certain firearms, destructive devices, child pornography, and stolen property.

The Summers Court granted this detention authority for contraband warrants for three reasons. First, it recognized that detaining occupants was appropriate to minimize potential threats to searching officers. Second, it deemed detention a reasonable measure to prevent occupants from interfering with ongoing searches and because occupants could prevent unnecessary damage and delay by opening locked doors and containers. Third, it recognized a legitimate government interest in preventing occupants from fleeing before officers could determine whether contraband was, in fact, present.

While the Summers Doctrine authorizes detaining people found on a premises to be searched, it can also authorize detaining people who arrive during a search. Moreover, the doctrine can authorize detaining people leaving a premises when officers are about to make entry as well as people in the “immediate vicinity” of a premises if they pose a “real” threat to safely and efficiently executing the warrant. While courts decline to specify distances that fall within a premises’ “immediate vicinity,” the farther a person is from the premises, the less likely the court will uphold the detention.

Search warrants for evidence that is not contraband, such as financial records, fingerprints, and DNA, do not fall squarely within the Summers Doctrine. However, when contraband is not among the items subject to seizure, lower courts allow officers to detain occupants for the time reasonably necessary to identify them, determine their relationship to the premises, and determine their relationship to the investigation. If officers determine that someone they encountered on a premises is not an occupant, is unconnected to the investigation, and does not pose a threat of harm, officers should release that person promptly.

c. Frisking and Searching Persons on the Premises

Although a premises search warrant gives officers limited, implicit authority to detain people they encounter thereon, that same warrant provides no authority to search or frisk anyone's body. To perform such tasks absent a warrant containing an explicit, authorizing provision, officers must identify a viable, factually supported exception to the warrant requirement.

Asking for consent is usually a good place to start, but when consent fails, Terry can sometimes supply a second, potentially viable choice. Under Terry, an officer executing a premises search warrant for contraband or evidence, fruits, or instrumentalities of a crime should be able to articulate a reasonable suspicion that crime is afoot and that persons present on the premises could be involved. Consequently, so long as the officer can also articulate facts supporting a reasonable suspicion that the particular person is also presently armed and dangerous, courts allow a frisk. "The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized search is taking place." Ybarra v. Illinois, 444 U.S. 85 (1979).

Additionally, the officer who arrests someone while executing a search warrant, either with or without an arrest warrant, may search the arrestee's person and immediately accessible effects and areas incident to that arrest.

d. Damaging and Destroying Property

Occasionally, damaging or even destroying property may be necessary to effectuate a complete, thorough search. So long as the court agrees that the damage was reasonably necessary, such actions will not result in suppression, although they may

prompt a compensation demand under the Federal Tort Claims Act.

e. Answering a Ringing Telephone

Officers may answer a ringing telephone without violating the Fourth Amendment while executing a search warrant. Any incriminating evidence acquired from those telephone calls is not subject to suppression on grounds of constitutionally protected privacy concerns.

18.22.7 What Areas are Included in a “Premises”?

A premises search warrant authorizes officers to examine the interior of every area on a premises where an object subject to seizure could reasonably be found regardless of how many secured doors or other physical barriers officers must breach to gain access. Consequently, courts ordinarily deem structures, outbuildings, and curtilage part of a premises by default, although best practices favor describing them with particularity to eliminate ambiguity.

Similarly, by default a premises warrant also authorizes officers to search all vehicles on curtilage if they reasonably appear to be owned by or under the dominion and control of a premises’ owner or occupant, even when the warrant does not list them particularly, so long as the vehicle is parked on the curtilage. Officers in the Fifth and Seventh Circuits may also search vehicles on curtilage that are not owned or controlled by the owner so long as they have some other logical connection to the premises.

In contrast, vehicles present on curtilage only incidentally, such as delivery or service vehicles, fall outside the scope of the warrant. Again, best practices favor listing known vehicles with specificity.

Although a warrant ordinarily carries authority to search any container on a premises capable of holding an item subject to the warrant, when a container appears to belong to someone merely visiting the premises, rules differ depending on jurisdiction.

The First and Fifth Circuits focus on the relationship between the visitor and the premises to decide whether the warrant authorizes a search of the guest's containers. In these circuits, the more closely connected a visitor is to the premises, the more likely the court is to find that the warrant encompasses the visitor's personal possessions. Under this approach, a warrant would lawfully encompass searching containers belonging to an overnight guest. Searching containers belonging to casual visitors such as dinner guests or pest control technicians, on the other hand, would not be authorized.

The D.C. Circuit, in contrast, focuses on whether a container is in physical possession of a visitor. Under this approach, a search warrant would not authorize searching a container in a visitor's physical possession because the court would deem the container an extension of the visitor's person. Containers not on a visitor's person, in contrast, would be subject to search.

#### 18.22.8 Administrative Obligations

Upon completing their search of a premises, officers must satisfy a series of administrative responsibilities. Specifically, officers must prepare an inventory, provide a copy of the warrant and inventory as required by Federal Rule of Criminal Procedure 41, and return the warrant and inventory to the issuing judge as outlined below.

a. Preparing an Inventory

Prior to leaving a premises, an officer present during the execution must compile a sworn list of all items seized called an “inventory.” Courts prefer that the inventorying officer perform this task “in the presence of another officer and the person from whom, or from whose premises, the property was taken.” If neither another officer nor the person whose property is being seized is present, “the officer must prepare and verify the inventory in the presence of at least one other credible person.” Officers should list items seized under the plain view doctrine in a separate inventory from items seized pursuant to the warrant.

b. Providing a Copy of the Warrant and Inventory

In ordinary cases, before leaving a premises, the inventorying officer must provide a copy of the warrant, the inventory, and a receipt for all property seized to the person from whom, or from whose premises, the property will be taken. When no occupant or owner is present, the officer must instead leave a copy of the warrant with all attachments, inventory, and receipt somewhere a returning occupant will be likely to find it. Officers are not obligated, however, to share or leave a copy of the Application or any affidavit supporting it.

Under special circumstances, a court may relieve the government of its obligation to immediately notify occupants and owners that a search warrant was executed pursuant to Fed. R. Crim. P. 41(f)(2)(C) (warrants for electronic tracking devices), and 18 U.S.C. § 3103a(b) (“sneak and peek” or “covert entry” warrants).

c. Completing the Return

Once served, an officer who executed the warrant must promptly return it, along with the inventory, to the magistrate

judge designated on the warrant's face, making sure to keep a copy for the officer's records.



## Chapter 19 -

### Government Workplace Searches

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#### 19.1 Introduction

There are a variety of reasons why a government supervisor might look in a government employee’s workplace. A supervisor might wish to locate a needed file or document, discover whether the employee is misusing government property such as a government- owned computer, or look for evidence of a crime such as using the internet to download child pornography.

Is it a “search” under the Fourth Amendment when a government supervisor looks in an employee’s workplace? Does the government employee have a reasonable expectation of privacy (REP) in the office, desk, computer, and/or filing cabinet? If REP exists, what standards must a supervisor follow to lawfully conduct a warrantless search of those areas? Is probable cause required, or is a search permitted on some lesser standard of suspicion? While the Supreme Court addressed some of these questions in O’Connor v. Ortega, 480



U.S. 709 (1987), it has fallen to lower courts to address many others.

As a government supervisor, when considering the search of a government employee's workplace, consider using this two-part analysis to simplify the process. First, determine whether the employee has REP in the area or item to be searched. Second, if REP does exist, determine if a search would be reasonable under the totality of the circumstances. Before turning to those issues, however, it is necessary to first define exactly what is meant by the term "workplace."

## 19.2 The Workplace – Defined

"Workplace" as defined in O'Connor includes those areas and items that are related to work and are generally within the employer's control, including offices, desks, filing cabinets, computers, and government vehicles. However, not everything found within the business address can be considered part of the workplace. As a general rule, a government employee has REP in personal belongings, such as closed personal luggage, a handbag, or a briefcase, even when in the "workplace." A public employee's private property may be considered a part of the workplace when the employee is using the personally owned property as part of the workplace.

In the Seventh Circuit Court of Appeals case of Gossmeier v. McDonald, 128 F.3d 481 (7th Cir. 1997), Gossmeier was employed by the Illinois Department of Children and Family Services (DCFS) as a Child Protective Investigator. Her position required her to investigate instances of child neglect and abuse, and to photograph evidence for use in court proceedings. Because of a lack of storage space, Gossmeier, at her own expense, purchased two storage cabinets in which she kept photographs, photographic equipment, files, documents, and other various items. In response to a tip that Gossmeier had pornographic pictures in these cabinets, IG agents

conducted a warrantless search of Gossmeyer’s office, storage cabinets, and desk. Gossmeyer asserted that the storage cabinets she had personally bought were not part of the “workplace.” The court refused to find an expectation of privacy in the cabinets simply because Gossmeyer bought them herself. As noted by the court: “The cabinets were not personal containers which just happened to be in the workplace; they were containers purchased by Gossmeyer primarily for the storage of work-related materials. These items were part of the ‘workplace,’ not part of Gossmeyer’s personal domain.”

Many years after O’Connor, in 2015, a Michigan state court judge challenged local authorities’ search of a personal locked safe within her office. James v. Hampton, 592 F. App’x 449 (6th Cir. 2015). The Sixth Circuit concluded that the judge had a reasonable expectation of privacy in both her office and the personal safe. The court reasoned that although the judge’s office was clearly part of her workplace as described in O’Connor, the safe was more similar to a personal piece of closed luggage, and not within the employer’s control. The safe was used for personal storage, not work-related materials.

### 19.3 Fourth Amendment Searches

There are two tests applied to determine whether a Fourth Amendment “search” has occurred. They are derived from two Supreme Court cases, Katz v. United States, 389 U.S. 347 (1967), and United States v. Jones, 565 U.S. 400 (2012).

The Jones Supreme Court held that a physical intrusion by the government into a constitutionally protected area for the purpose of gathering information constitutes a “search” under the Fourth Amendment. This is sometimes described as the common law trespass test. Unfortunately, there is a lack of caselaw on how this test might be applied to government workplaces. Therefore, an analysis of government workplace

searches requires a more detailed understanding of the other test for a Fourth Amendment “search.”

The more common test applied to government workplace searches is the reasonable expectation of privacy test from Katz v. United States. In Katz, the Supreme Court held that a Fourth Amendment “search” occurs when the “government” intrudes upon an individual’s REP. Two concepts about this definition are important in the government workplace search context. First, the term “government” does not apply only to law enforcement. Instead, the Fourth Amendment acts as a restraint on the entire government. The Supreme Court has never limited the Fourth Amendment’s prohibition on unreasonable searches and seizures to operations conducted by law enforcement. If an employee has a reasonable expectation of privacy in their workplace, then an intrusion into that area qualifies as a “search” even when the government acts simply as employer. Second, “motive” is not a component of the definition of “search.” An intrusion into a workplace REP is a “search” even when it is not a quest for criminal evidence.

### 19.3.1 Reasonable Expectation of Privacy (REP)

As with all Fourth Amendment analysis, the first step is to determine whether the government employee has REP in that area or item. REP exists when (1) an individual exhibits an actual expectation of privacy, and (2) that expectation is one that society is prepared to recognize as being objectively reasonable. Katz v. United States. This analysis must be specific to the area or item to be searched. REP may exist in a desk drawer, a file cabinet, or a computer even though there is no REP in the office itself. If there is no REP, a workplace intrusion is not controlled by the Fourth Amendment, regardless of its nature and scope.

Government employees can, and often do, establish REP in all or part of their government offices, desks, computers, and filing cabinets. A cursory glance into any government office will show that individual government employees typically expect some form of privacy based on the intermingling of their personal and professional lives (e.g., pictures of kids on desks and diplomas on walls). However, a government employee's REP is limited by the operational realities of the workplace. Whether an employee has REP must be addressed on a case-by-case basis.

REP does not turn on the nature of the property interest in the searched area or item, but instead on the reasonableness of the employee's privacy expectation. Government ownership of the property to be searched (e.g., a government-owned desk or computer assigned to a government employee) is an important consideration; but does not, standing alone, mean that there is no REP. Courts consider a variety of factors when determining whether a government employee has REP in the workplace. Among the most important are the following:

a. Prior Notice to the Employee (Legitimate Regulation)

Prior notice, such as signs, personnel policies, and computer banners, advising government employees that their employer has retained rights to access or inspection, can eliminate REP in the workplace. Conversely, the absence of such notice is a factor supporting REP. In the Fourth Circuit Court of Appeals case of United States v. Simons, 206 F.3d 392 (4th Cir. 2000), Simons worked for the Foreign Bureau of Information Services (FBIS), a division of the Central Intelligence Agency. FBIS had an Internet usage policy that (1) specifically prohibited accessing unlawful material, (2) prohibited use of the Internet for anything other than official business, and (3) noted that FBIS would "periodically audit, inspect, and/or monitor the user's Internet access as deemed appropriate." When a

keyword search indicated that Simons had been visiting numerous illicit web sites from his government computer, multiple searches of his hard drive were conducted from a remote location, which resulted in the discovery of child pornography. The court held that in light of the FBIS Internet policy, Simons did not have a legitimate expectation of privacy in the record or fruits of his Internet use. Through its language, this policy placed employees on notice that they could not reasonably expect that their Internet activity would be private.

In the Seventh Circuit Court of Appeals case of Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002), the court noted that it was possible to have REP in employer-owned equipment furnished to an employee for use in the workplace. For example, if the employer equips the employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, he can assume that the contents of the safe are private. Muick was employed by Glenayre at the time of his arrest for receiving and possessing child pornography on the laptop computer furnished to him by Glenayre. Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees. This notice destroyed any REP that Muick might have had. As stated by the court:

The laptops were Glenayre's property and it could attach whatever conditions to their use it wanted. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible.

Likewise, a departmental policy which provides, in part, that “all departmental vehicles (to include all enclosed containers) shall be subject to search and inspection ...at any time, day or night” can defeat a claim of REP in a government vehicle.

b. Common Practices and Procedures

Even in the absence of written policies and procedures, actual office practices and procedures may eliminate REP in the workplace. An employer who actually conducts searches or inspections dispels in advance any expectations of privacy. Conversely, even when written policies and procedures exist, failure to implement them may permit a government employee to establish REP in an area where one would otherwise not exist. For example, in the Third Circuit Court of Appeals case of United States v. Speights, 557 F.2d 362 (3rd Cir. 1977), Speights was a police officer who retained a locker at his police headquarters, secured by both a personal lock and a lock that had been issued by the department. There were no regulations that addressed the issue of personal locks on the police lockers, nor was there any regulation or notice that the lockers could be searched. There was also no regulation as to what a police officer might keep in the locker. Upon receiving information that Speights had a sawed-off shotgun in his locker, supervisors opened the locker with a master key (for the police-issued lock) and bolt cutters (for Speights’ personal lock). They recovered a sawed-off shotgun during the search, and Speights was later convicted of illegally possessing the weapon. The court held that in the absence of regulations, Speights had REP in the locker that could be defeated only if the police department had a practice of opening lockers with private locks without the consent of the user. While there had been scattered instances of inspections of the lockers for cleanliness (3-4 in 12 years), there was insufficient evidence to conclude that the police department practice negated Speights’ REP.

Other federal courts in analogous cases have reached similar conclusions. The search of a locker maintained by an employee of the United States Mint was upheld because, among other things, the locker was “regularly inspected by the Mint security guards for sanitation purposes.” No reasonable expectation of privacy could be expected in an office or credenza due to “extremely tight security procedures,” to include frequent scheduled and random searches by security guards. In each of these cases, the courts relied on specific regulations and practices in finding that an expectation of privacy was not reasonable.

c. Openness and Accessibility

There is no REP in areas that are, by their very nature, “open” and “public.” REP may exist in a private space (such as a desk) within an otherwise public space (such as a government building). REP in an item or area is more likely to exist when that item or area is given over to an employee’s exclusive use. Locking office doors and the use of passwords to restrict an employer’s access to computer files is evidence of the employee’s subjective expectation of privacy.

The more accessible the item or area is to others, the less likely that REP exists. Offices that are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits may be so open to fellow employees or the public that no expectation of privacy is reasonable. Nevertheless, the fact that others may be permitted access to an employee’s office, desk, computer, or filing cabinet does not, by itself, automatically destroy REP. Privacy does not require solitude. The existence of a master key, or an employee’s failure to consistently shut and lock an office door, does not automatically sacrifice any expectation of privacy in that area.



The Second Circuit Court of Appeals case of Leventhal v. Knapek, 266 F.3d 64 (2nd Cir. 2001), illustrates how the realities of the workplace can result in a finding that REP does exist. Leventhal had a private tax preparation business. In running the business, he violated agency policy by impermissibly loading unauthorized software on his government computer. He committed a second violation when he improperly used agency computer equipment to print private tax returns. A warrantless search of his computer in response to an anonymous tip uncovered the unauthorized software. After disciplinary actions were completed, Leventhal filed suit alleging the warrantless search of his computer was a Fourth Amendment violation. In finding that he had REP in the computer, the court noted:

Leventhal occupied a private office with a door. He had exclusive use of the desk, filing cabinet, and computer in his office. Leventhal did not share use of his computer with other employees in the Accounting Bureau nor was there evidence that visitors or the public had access to his computer.

While support personnel may have had access to Leventhal's computer at all times, "there was no evidence that these searches were frequent, widespread, or extensive enough to constitute an atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable."

#### d. The Position of the Employee

REP is less likely for jobs with high security requirements. REP is less likely in industries that are subjected to pervasive regulation to ensure the safety and fitness of its employees. REP is less likely in certain forms of public employment even with respect to personal searches.



Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Law enforcement is in this special category. The government has the power to regulate the conduct of its police officers even when the conduct involves the exercise of a constitutionally protected right. While law enforcement officers do not lose their constitutional rights, there is a substantial public interest in ensuring the appearance and actuality of police integrity. This interest in police integrity may justify some intrusions on the privacy of police officers which the Fourth Amendment would not otherwise tolerate.

e. Waiver of Rights / Consent

Government employees may actually waive their expectation of privacy as a precondition of receiving a certain benefit from their employer such as lockers, government vehicles, or computers. Employees are often required to sign forms acknowledging inspection and search policies, waiving any objections, and consenting to those policies. In the Sixth Circuit Court of Appeals case of American Postal Workers Union v. United States Postal Service, 871 F.2d 556 (6th Cir. 1989), postal employees were eligible to receive personal lockers at their postal facility. Before being allowed to do so, however, each employee had to sign a waiver that noted the locker was “subject to inspection at any time by authorized personnel.” The administrative manual of the Postal Services noted that all property provided by the Postal Service was “at all times subject to examination and inspection by duly authorized postal officials in the discharge of their official duties.” Finally, the collective bargaining agreement for these employees “provided for random inspection of lockers under specified circumstances.” In light of the clearly expressed provisions permitting random and unannounced locker inspections under the conditions described above, there was no REP in the lockers.

REP exists in the workplace when the employee has a subjective expectation of privacy that is objectively reasonable, based on the totality of the circumstances (especially those discussed above).

#### **19.4 Searches by Government Supervisors**

Even though there is a strong preference that searches be performed pursuant to warrants, courts have recognized that in certain special situations, the requirement to obtain a warrant is impractical. Such is the case with public employers who find themselves in a somewhat unique position. On the one hand, there is the obligation to follow the mandates of the Fourth Amendment; on the other is the responsibility for ensuring the efficient and proper operation of the department or agency. In cases involving searches conducted by a government supervisor, courts balance the invasion of the employees' REP against the government's need for supervision, control, and the efficient operation of the workplace. As noted by the Supreme Court in O'Connor:

Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is away from the office. Or ... employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance. In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who

would otherwise have no reason to be familiar with such procedures, is simply unreasonable.

For public employers, there is an exception to the probable cause and warrant requirements. In O'Connor, the Supreme Court outlined two basic categories of workplace searches: (1) searches for work-related purposes (either non-investigatory or for the purpose of investigating workplace misconduct), and (2) searches for evidence of criminal violations. Special needs, beyond the normal need for law enforcement, make the probable cause requirement impracticable for legitimate work-related, non-investigatory intrusions as well as for investigations of work-related misconduct. Even though not a component of the definition of “search,” motive is an essential factor in determining the reasonableness of a government workplace intrusion.

#### 19.4.1 Searches for Work-Related Purposes

For the probable cause and warrant exception to apply, the search must be work-related. This element limits the exception to circumstances in which government supervisors who conduct the search act in their capacity as employers, rather than law enforcers. Work-related intrusions by public employers are justified by the need for the efficient and proper operation of the workplace. Work-related searches typically fall within one of two similar, but distinct, circumstances.

##### a. Non-Investigatory Purpose

A warrantless search of a government employee’s workplace may be conducted for a work-related, non-investigatory purpose, such as retrieving a needed file. Operational efficiency would suffer if employers were required to have probable cause before they entered an employee’s desk for the purpose of finding a file, a piece of office correspondence, a book, or a compact disk. For this reason, public employers

must be given wide latitude to enter employee offices for work-related, non-investigatory reasons.

b. Work-Related Misconduct Investigations

A warrantless search of an employee's workspace may be performed during an investigation into allegations of work-related misconduct, such as improper computer usage. As noted by the Supreme Court in O'Connor:

Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe.... In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

c. Reasonable intrusions

In either of the above situations, the search must be "reasonable" based on the totality of the circumstances. Generally, a government supervisor's search of an employee's REP is reasonable when the measures used are reasonably related to the objectives of the search and not excessively

intrusive in light of its purpose. Under this standard, the search must meet two requirements: the search must be: (1) justified at its inception and (2) permissible in scope. This is the equivalent of the “reasonable suspicion” standard outlined by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968).

d. Justified at the Inception

A warrantless search of an employee’s REP for a non-investigatory, work-related purpose, such as to retrieve a needed file, will be “justified at its inception” when the supervisor reasonably believes that the sought object is located there. A search of a government employee’s REP for evidence of work-related misconduct will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence of such misconduct. A supervisor must have an articulable reason (or reasons) for believing that work-related materials or evidence of work-related misconduct are located in the place to be searched.

e. Permissible In Scope

A search is “permissible in scope” when the measures used are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct. This means that the search is limited to only those areas where the item sought is reasonably expected to be located. For example, it is reasonable to look in a desk drawer for a highlighter. It is not “permissible in scope” to boot up the computer when looking for a highlighter.

f. Plain View Seizures

The plain view doctrine allows seizure of evidence discovered while lawfully inside an REP area. There are three requirements for a permissible plain view seizure of evidence. First, the officer must lawfully be in a position to observe the

item; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have a lawful right of access to the object itself. See the Fourth Amendment chapter of this book for a detailed explanation of the plain view seizure doctrine.

Criminal evidence discovered during a government workplace search for a work-related purpose will be admissible as a plain view seizure so long as the search meets the criteria discussed above.

#### 19.4.2 Searches for Evidence of Criminal Violations

Although in O'Connor the Supreme Court specifically declined to address the appropriate standard for searching for evidence in government workplaces, several lower courts have done so when an employee is being investigated for criminal misconduct that does not violate some workforce policy. They have found that the rationale for the lesser burden O'Connor places on public employers is not applicable in a purely criminal investigation. Where the sole motivation behind a workplace search is to uncover evidence of criminal wrongdoing, the appropriate standard is probable cause.

The line between a work-related search and a search for criminal evidence may be clear in theory but is often blurry in fact. This is especially true when the personnel conducting the search are members of an agency or department that is undeniably in the business of investigating the violation of the criminal laws. The mere involvement of law enforcement personnel will not automatically convert a work-related search into a criminal investigation. An agent's dual role as an investigator of workplace misfeasance and criminal activity does not invalidate the otherwise legitimate work-related workplace search. On the other hand, when a supervisor's role is no longer that of a manager of an office but that of a criminal investigator for the government and when the purpose is no

longer to preserve efficiency in the office but to prepare a criminal prosecution against the employee, searches and seizures by the supervisor or by other government agents are governed by the Fourth Amendment admonition that a warrant be obtained in the absence of exigent circumstances. In determining whether the investigation is criminal in nature, the proper focus is not on the positions or capabilities of the persons conducting the search, but rather on the reason for the search itself. Factors considered by courts in making this determination include whether a criminal investigation has been opened, whether a workforce policy was violated, and the position of the individual who conducted the search.

### 19.4.3 Dual-Purpose Searches

There are situations in which a government employee's misconduct might also be criminal. For example, a government employee may be receiving and downloading child pornography on a government computer for personal use. This conduct would constitute a violation of workforce policy rules on appropriate government computer/Internet usage and is clearly criminal in nature. In such a situation, a public employer has two purposes in conducting a search: (1) to uncover evidence of the administrative violation, and (2) to uncover potential criminal evidence.

When a government supervisor receives information that an activity is occurring that violates both workforce regulations and criminal statutes, what standard must be followed when searching the employee's workplace? Because of the work-related misconduct that is occurring, will the lesser standard of O'Connor suffice? Or, because of the criminal nature of the allegations, must the traditional probable cause and warrant requirements be met? The courts have adopted fairly generous interpretations of O'Connor when confronted with mixed-motive searches.

Even assuming that the dominant purpose of the warrantless search is to acquire evidence of criminal activity, the search remains within the O'Connor exception to the probable cause and warrant requirement. The government does not lose the capacity and interests of an employer - its special need for the efficient and proper operation of the workplace - merely because the evidence obtained is also evidence of a crime.





## Chapter 20 -

### Natural Resource Law

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#### 20.1 Introduction to Natural Resource Law -- What Follows?

This course is intended for the Land Management Police Training program. It consists of a collection of criminal statutes that protect some of our most precious natural resources. The statutes are divided into three groups.

The first group of statutes is consistent with “Preserving Lessons from the Past.” The Archaeological Resources Protection Act was intended to preserve archeological resources that tell us about how we once lived. The Paleontological Resources Protection Act protects fossils that tell us about more ancient life. Finally, the Native American Graves Repatriation Act prohibits the commercial exploitation of Native American remains and cultural items.

The second group of statutes is premised on “Ensuring the Continuing Abundance of Wild Animals and Plants.” Congressman John Lacey championed the Lacey Act in 1900. Congressman Lacey saw the decimation of the American bison and other species. The Lacey Act was intended to protect wild animals, fish, and plants from commercial exploitation. In much the same way, the Migratory Bird Treaty Act specifically protects migrating birds like wild geese and ducks.

Finally, the third group is in accordance with “Ensuring the Continued Survival of Certain Animals and Plants.” The Endangered Species Act protects animals and plants from extinction. The Marine Mammal Protection Act ensures the continued abundance of whales, dolphins, and other marine mammals. The Bald and Golden Eagle Protection Act provides for the continued success of populations. This act brought back our nation’s symbol, which was once on the brink of extinction.

### 20.1.1 Studying the Statutes

In this chapter, each statute is divided into five parts, 1) Statutory History, 2) Explanation of Terms, 3) Prohibited Acts, 4) Elements, and 5) Penalty. We will see some overlap between statutes because the same conduct may violate more than one statute. For example, the unlawful taking of a bald eagle may violate not only the Bald and Golden Eagle Protection Act but also the Lacey Act and the Migratory Bird Treaty Act.

### 20.1.2 Jurisdiction

Jurisdiction refers to the power to act. (Refer to the Authority and Jurisdiction chapter). Before a federal court can assume jurisdiction over a case, the prosecutor must prove there is a federal jurisdictional nexus between the defendant's conduct and the natural resource. There are multiple ways for the government to prove federal jurisdictional nexus. The defendant may take the resource from federal land. Another is when there is an interstate or foreign commerce connection between the defendant's conduct and the resource. Additionally, some of the statutes were enacted pursuant to Congress's treaty powers with foreign nations.

While a federal nexus must exist, the prosecutor generally does not have to prove that the defendant knew or understood the connection. The defendant's exclamation, "I did not know that I was on federal land!" is generally not a defense. However, this statement could potentially be used in defense of "I thought I was on private land." See United States v. Quarrell, 310 F.3d 664 (10th Cir. 2002) (stating the government was not required to prove the defendants, alleged to have violated ARPA, knew they were on public land, but that the defendants could present evidence that they believed they were lawfully excavating private land).

### 20.1.3 Criminal Intent

Another common theme is Congress's obvious desire to protect these natural resources. It is the citizens' responsibility to know and follow the law when taking natural resources. Most of the statutes only require the defendant's general intent. A general intent criminal statute only requires the defendant to be aware of the facts that made his conduct illegal, not that he knew his conduct was illegal. (Refer to the Federal Criminal Law Chapter.) For example, a hunter may claim, "I thought the bag limit was four geese instead of two." The issue is

whether the defendant knowingly possessed more geese than allowed. In short, ignorance of the law is not a defense.

#### 20.1.4 Theories of Liability

Individuals, corporations, and partnerships may be prosecuted. We refer to the perpetrator as the person who commits the crime. Others assisting the perpetrator may also be prosecuted/punished. (Refer to the Federal Criminal Law Chapter for more general information.)

An aider and abettor is someone who aids, abets, counsels or commands another in the commission of an offense. The aider and abettor must commit some affirmative act for purposes of committing the offense. (Refer to the Federal Criminal Law Chapter for more on parties.) To put it in a natural resource context, this could be an outfitter that rents a boat, gun, and duck decoys to a hunter, intending these items be used to take migratory birds out of season.

An aider and abettor must know about the criminal venture. Consider someone who unwittingly loans his boat to another who uses it to poach game without the owner's knowledge. The boat owner is not an aider and abettor in the commission of the offense committed by the poacher. Additionally, the crime must be completed under an aiding and abetting theory.

However, an attempt to commit a crime is also punishable. An attempt requires proof that the defendant had the specific intent to commit the crime and took a substantial step forward in its completion. Consider a defendant who intends to poach a bear and pays someone for guide services. However, the guide is an undercover agent for the U.S. Fish and Wildlife Service. The defendant can be prosecuted for an attempted poaching. This is true even if the agent affects the arrest before the bear is taken. The poacher had the specific intent to poach the bear and took a substantial step forward in doing so (hiring

a guide). What's more, impossibility (i.e., that the agent stopped the defendant before the bear was taken) is not a defense.

## **20.2 The Statutes: Preserving Lessons From the Past**

Due to the commercial attractiveness of certain antiquities, Congress passed laws to protect what was seen as an irreplaceable part of our nation's heritage. In 1979, Congress passed the Archaeological Resources Protection Act (ARPA) with the aim of securing the protection of remains of human life that are at least 100 years old and of archaeological interest (archaeological resources) for the present and future benefit of Americans. Congress later passed the Paleontological Resources Preservation Act (PRPA) in 2009 to preserve fossilized remains that provide information about the history of life on our planet. Finally, we will discuss the Native American Graves Protection and Repatriation Act (NAGPRA), passed in 1990, which prohibits the unauthorized sale of Native American human remains and cultural items.

### **20.2.1 Archeological Resources Protection Act (ARPA)**

#### **a. Statutory History**

ARPA was enacted because Congress found that archaeological resources on public lands and Indian lands are/were an accessible and irreplaceable part of the Nation's heritage. Additionally, it was noted that these resources are/were increasingly endangered because of their commercial attractiveness. Federal laws existing at the time did not provide adequate protection to prevent the loss and destruction of archaeological resources and sites resulting from uncontrolled excavations and pillage. The purpose of the act was said to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to

foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of enactment of the Act [enacted October 31, 1979].

b. Explanation of Terms

1. Archeological resource.

An archeological resource is any material remains of past human life or activities that are of archaeological interest, as determined under uniform regulations pursuant to the act. This would include, but not be limited to pottery, basketry, bottles, weapons, weapon projectiles, tools, structures (to include portions of), pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, etc. To be considered an archaeological resource, the item must be at least 100 years old.

Consider the Little Bighorn National Battlefield in Montana. In late June 1876, Lieutenant Colonel George Armstrong Custer and members of the 7th Cavalry were defeated and killed by Sioux, Arapaho, and Cheyenne warriors along the Little Bighorn River. Bullet casings found on The Little Bighorn are likely “material remains of past human life or activities which are of archeological interest ... and at least 100 years of age.” Why? An archeologist would likely state that the casings mark the movements and battle lines of the people who fought and died there. Archeologists and historians know that the Springfield Trapdoor carbine in caliber 45/55 and an 1873 Colt single-action revolver in caliber .45 were the weapons issued to troopers of the 7th Cavalry. Native American warriors, on the other hand, carried an assortment of firearms of different calibers. As a result, 45/55 shell casings likely mark the positions and possibly the last stand of a

member of the 7th Calvary. Other casings likely mark the positions of Native American warriors.

## 2. Archaeological Interest

The words “of archaeological interest” mean capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics. Archeologists and historians make those decisions through the application of scientific or scholarly techniques. Such techniques by archaeologists include controlled observation, contextual measurement, controlled collection, analysis, interpretation, and explanation.

### c. Prohibited Acts

**Unlawful Excavation from Public (Federal) or Indian Lands:** No person may excavate (remove, damage, otherwise alter or deface, attempt any of these actions) any archaeological resource located on public or Indian land unless such activity is pursuant to federal or Indian law.

**Unlawful Sales after Violating Federal Law:** No person may sell (purchase, exchange, transport, or receive) any archaeological resource if it was excavated or removed from public or Indian lands in violation of any federal or Indian/tribal law.

**Unlawful Sales After Violating State Law:** No person may sell (purchase, exchange, transport, or receive) any archeological resource in interstate or foreign commerce in violation of state or local law.



d. Elements of ARPA

1. Unlawful Excavation from Public (Federal) and Indian Lands:

- That the defendant knowingly excavated (removed, damaged, altered, defaced, or attempted any of these actions) an archeological resource;
- That the archeological resource was located on public or Indian land; and,
- That the defendant did so without a permit or in violation of any provision of federal or Indian law.

2. Unlawful Sales After Violating Federal Law:

- That the defendant knowingly sold (purchased, exchanged, transported, or received) an archaeological resource;
- That the archaeological resource was from public or Indian lands; and,
- That its excavation or removal was done in violation of any rule or regulation under federal law or Indian/tribal law.

3. Unlawful Sales After Violating State Law:

- That the defendant knowingly sold (purchased, exchanged, transported, or received) an archeological resource;
- That the item was in interstate or foreign commerce; and
- That the item was excavated (removed, sold, purchased,

exchanged, transported, or received) in violation of any state or local law.

e. Defendant's Intent

ARPA is a general intent crime. The prosecutor must prove that the defendant was aware of the facts that made the conduct illegal, not that the defendant knew the acts were illegal. A defendant who pulls a rusty old rifle out of the ground at the Little Bighorn has likely "removed" an archeological resource in violation of ARPA. No damage needs to occur to the rifle. A defendant's exclamation, "I didn't know it was an archeological resource!" is no excuse. By intentionally pulling the rifle out of the ground the defendant was aware of the facts that made the conduct illegal. Excavation and removal must be in accordance with authorized tribal permits and federal law. Further, the responsibility is on the citizens to know and follow the regulations. "I didn't know I needed a permit" is not a defense.

f. Exceptions

The following does not violate ARPA:

- Items lawfully possessed before October 31, 1979 (the date of the statute's enactment);
- Paleontological specimens not found in an archaeological context;
- Coins, bullets, and unworked minerals and rocks ... unless found in a direct physical relationship with another archaeological resource; and
- Arrowheads found on the surface of the ground.

g. Jurisdictional Nexus

A federal court may assume jurisdiction over an ARPA violation that occurs on public or Indian lands. Another federal nexus is for the resource to be moved in interstate or foreign commerce. Public lands, for ARPA purposes, include land owned and administered by the United States. Indian land could be one of the many tribal lands in the United States. Interstate commerce or foreign commerce means that the resource was moved between the states, territories, or possessions of the United States or from one country to another. An interstate commerce nexus could be a situation where the defendant excavated archeological resources while violating only Montana's state trespassing laws but then moved the items out of state to Georgia. Foreign commerce means between any part of the United States and another country. It is not necessary for the defendant to know or understand the federal nexus.

h. Penalties

Anyone who knowingly violates the statute shall be fined not more than \$10,000 or imprisoned not more than one year, or both. Felony penalties are authorized depending on the value of the resource (generally calculated by an archaeologist or other expert). If the commercial or archaeological value of the resources involved and the cost of restoring it exceeds the sum of \$500 such person shall be fined not more than \$20,000 or imprisoned not more than two years, or both. In the case of a second violation and conviction, such person shall be fined not more than \$100,000, imprisoned not more than five years, or both. Additionally, civil penalties and forfeitures may also be imposed for an ARPA violation.

## 20.2.2 Paleontological Resources Protection Act (PRPA)

### a. Statutory History

PRPA was made part of the Omnibus Public Land Management Act of 2009. Congress implemented PRPA to provide for the preservation, management, and protection of the National Forest System's paleontological resources and ensure these resources remain available for current and future generations. PRPA was modeled after ARPA and became law on March 30, 2009.

### b. Explanation of Terms

**Paleontological Resource:** Paleontological resource means any fossilized remains, traces, or imprints of organisms preserved in or on the earth's crust that are of paleontological interest and provide information about the history of life on Earth. However, the following are not paleontological resources:

- Any materials associated with an archaeological resource (may be an ARPA violation); or
- Any cultural item as defined under the Native American Graves Repatriation Act (may be a NAGPRA violation).

### c. Prohibited Acts

**Unlawful Excavation from Federal Lands.** It is unlawful to excavate (remove, damage, otherwise alter or deface, or attempt any of these actions) any paleontological resources located on federal land without a lawful permit.

**Unlawful Exchange After Violating Federal Law.** It is unlawful to exchange (transport, export, receive, or offer to exchange, transport, export, or receive) any paleontological resource if the person knew or should have known it had been

excavated or removed from federal land unlawfully.

**Unlawful Sales from Federal Land.** It is unlawful to sell or purchase (or offer to sell or purchase) any paleontological resource if the person knew or should have known such resource to have been excavated or removed from federal land in violation of Federal law.

**False Labeling.** It is unlawful to make or submit any false record (account, or label for, or any false identification of) any paleontological resource excavated or removed from federal land.

d. Elements

1. Unlawful Excavation from Federal Lands:

- That the defendant knowingly excavated (removed, damaged, otherwise altered or defaced, or attempted any of these actions) a paleontological resource;
- That the resource was on federal land; and
- That the defendant did so without or in violation of a lawful permit.

2. Unlawful Exchanges After Violating Federal Law.

- That the defendant knowingly exchanged (transported, exported, received or offered to exchange, transport, export, or receive) a paleontological resource; and,
- That the defendant knew or should have known such resource to have been excavated or removed from federal land in violation of any federal law.

3. Unlawful Sales from Federal Land:

- That the defendant sold or purchased (or offered to sell

or purchase) a paleontological resource; and,

- That the defendant knew or should have known such resource was excavated, removed, sold, purchased, exchanged, transported, or received from federal land.

4. False Labeling.

- That the defendant made or submitted a false record (account, or label of, or made any false identification of) a paleontological resource; and
- That the said resource was excavated (or removed) from federal land.

e. Defendant's Intent.

While a federal nexus must exist, the prosecutor is generally not required to prove that the defendant knew or understood it. PRPA appears to be the exception. For mere trafficking (no money is involved) the government must prove that the defendant knew or should have known that the resource was unlawfully removed from federal land. Congress may have been protecting some unwitting person coming into possession of a fossil. But apparently Congress had less sympathy for defendants in the business of selling paleontological resources. In that case, the government need only prove that the defendant knew or should have known that the resource came from federal land, not necessarily that the defendant knew it was removed unlawfully.

f. Exceptions to PRPA

The following does not violate PRPA:

Casual Collecting. Casual collecting means the collecting of reasonable amounts of fossilized common invertebrates and

plants for non-commercial personal use. The collection is by surface collection or with the use of non-powered hand tools that result only in negligible disturbance to the earth's surface. Collectors must follow regulations.

**Resources Possessed Prior to the Act:** The statute does not apply to paleontological resources in one's lawful possession prior to March 30, 2009, the date of the Act.

g. Jurisdictional Nexus

A person who knowingly violates or counsels another to violate one of the Prohibited Acts shall be imprisoned not more than five years; but if the sum of the cost of restoration is less than \$500, imprisoned not more than two years. Upon the second or subsequent violation, a defendant's penalty may be doubled. Additionally, civil penalties and forfeiture are also available.

20.2.3 Native American Graves Protection and Repatriation Act (NAGPRA)

a. Statutory History

NAGPRA was enacted on November 16, 1990, to address the repatriation and disposition of Native American human remains funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants, Indian tribes, and Native Hawaiian organizations. The need for this Act came from the desecration of resting places and the removal of remains and objects belonging to Native Americans and Native Hawaiian Organizations. The Act addresses the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations over these items found in Federal agencies and institutions that receive federal funds. It also addresses the trafficking of these items by private individuals.

## b. Explanation of Terms

### 1. Native American.

The term “Native American” means relating to a tribe, people, or culture that is indigenous to the United States. NAGPRA applies to both Native Americans and Native Hawaiians. State v. Taylor, 126 Haw. 205 (2011) (citing 25 U.S.C. § 3001). “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes Hawaii.

### 2. Native American Human Remains and Native American Cultural Items.

This statute protects Native American human remains and Native American cultural items, which consist of funerary objects, sacred objects, and cultural patrimony.

- Funerary objects are objects placed with human remains at the time of death or later.
- Sacred objects are specific ceremonial objects that are needed by traditional Native American religious leaders for practicing traditional Native American religion.
- Cultural patrimony is an object of ongoing historical, traditional, or cultural importance central to the Native American group or culture rather than one owned by a Native American individual.

### 3. Right of Possession

“Right of possession” generally means the buyer obtained the remains or cultural items from someone having “authority of alienation,” meaning that the person had the right to sell or transfer the item.



c. Prohibited Acts

Sales of Native American Human Remains Without the Right of Possession. A person may not sell (purchase, use for profit, or transport for sale or profit) the human remains of a Native American without the right of possession as provided in NAGPRA.

Sales of Native American Cultural Items in Violation of NAGPRA. A person may not knowingly sell (purchase, use for profit, or transport for sale or profit) any Native American cultural item obtained in violation of NAGPRA.

d. Elements

1. Sales of Native American Human Remains Without the Right of Possession.

- That the defendant knowingly sold (purchased, used for profit, or transported for sale or profit) human remains;
- That the human remains were of a Native American; and,
- That the defendant did not have the right of possession to those remains as provided in NAGPRA.

2. Sales of Native American Cultural Items in Violation of NAGPRA.

- That the defendant knowingly sold (purchased, used for profit, or transported for sale or profit) certain items;
- That the said items were Native American cultural items; and,
- That said items were obtained without the right of

possession in violation of NAGPRA.

e. Defendant's Intent

NAGPRA requires only general intent. As one case points out succinctly, the goal is to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items. United States v. Kramer, 168 F.3d 1196, 1202 (10th Cir. 1999) (Defendant sold cultural items at a consignment store in Albuquerque, NM, without right of possession). With both human remains and funerary objects, such transactions are illegal unless the items have been released by someone who has the right to possess them. Items are lawfully released when they were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization.

f. ARPA and NAGPRA

A violation of NAGPRA could be charged in conjunction with ARPA when these remains are taken from public or Indian lands. Native American remains and cultural items likely “satisfy the definition of an archeological resource. Be mindful, however, that a NAGPRA violation also requires additional proof that the resource was sold or used for profit, not necessarily required for an ARPA violation.

g. Federal Jurisdictional Nexus

Note that the federal jurisdictional nexus for NAGPRA is different than the other statutes. Federal jurisdiction will apply when Native American remains and cultural items are (1) in federal possession or control; (2) in the possession or control of an institution or State or local government receiving federal funds; or (3) excavated intentionally or discovered

inadvertently on federal or tribal lands. See 43 C.F.R. § 10. The difference is that NAGPRA is primarily designed to return Native American remains and cultural items to their rightful descendants. Those having the right of possession may sue state museums and other institutions receiving federal funding for their return. In short, NAGPRA is largely a civil statute. It is designed to reach its goals through civil proceedings and administrative mandates; however, criminal actions are still possible when there is a profit motive behind the possession of these sacred objects.

#### h. Penalties

The bulk of NAGPRA is dedicated to repatriation. However, the United States Criminal Code was amended to create the misdemeanor offense of illegal trafficking in Native American human remains and cultural items. The first offense is a misdemeanor. A subsequent violation is a felony, with a maximum penalty of five years in prison.

### **20.3 Ensuring the Continuing Abundance of Fish, Wildlife, and Wild Plants**

Through the years, Congress was also concerned with the over-commercialization of our nation's fish, wildlife, and plant species. The Lacey Act was originally passed in 1900 and later amended, but it was originally signed in 1894 due to the commercial exploitation of plants and animals in Yellowstone National Park. Certain weaknesses of the Lacey Act ultimately led to the passage of the Migratory Bird Treaty Act (MBTA) in 1918. The MBTA worked to ensure the survival and abundance of listed migratory bird species (50 C.F.R. § 10.13) and enforce treaties with several other countries regarding bird species.

## 20.3.1 Lacey Act

### a. Statutory History

The Lacey Act is said to be the single most effective law to protect wildlife and plants and combat wildlife crime in the United States. It was the first federal wildlife protection law in the Nation. Senator John Lacey (Iowa) introduced the Act, which was signed into law by President William McKinley on May 25, 1900. It was originally directed at the preservation of game and wild birds by making it a federal crime to poach (take without a permit) game in one state with the purpose of selling the game in another state. Later amendments to the Lacey Act added a prohibition on invasive species (zebra mussels, Cuban tree frogs, pythons, etc.), which threaten our native ecosystems and industries if illegally imported or smuggled into the country. People are not only within the Lacey Act's reach, but partnerships, corporations, and even instruments or agents of federal or state governments may also be prosecuted.

### b. Explanation of Terms

#### 1. Fish, Wildlife and Plants (F-W-P-)

Unless classified as an injurious species, the Lacey Act protects four kinds of living things and usually their remnants, to wit:

- **Fish or Wildlife:** This means any wild animal, dead or alive, whether or not born or bred in captivity. It includes their parts, products, eggs, or offspring.
- **Plants:** This means any wild member of the plant kingdom, including roots, seeds, parts, or products thereof. It includes trees from either natural or planted forest stands. Excluded are domesticated plants,

scientific specimens to be used for laboratory or field research, and plants that will be replanted.

- **Prohibited Wildlife Species:** This means any live species of lion, tiger, leopard, cheetah, jaguar, cougar, or hybrids of such species.

## 2. Injurious/Invasive Species

This modern addition prohibits the importation of injurious non-native species that threaten our natural environment and agriculture. Some of the invasive species are listed in the statute. They include zebra mussels and big head carp. See 18 U.S.C. § 42. Others have been added via regulations issued by the Fish and Wildlife Service.

## 3. Take

- The term “taken” means captured, killed, or collected and, with respect to a plant, also means harvested, cut, logged, or removed.
- The term “take” means the act by which fish, wildlife, or plants are taken.

## 4. Illegal Guide or Outfitting Services

It is an illegal sale of fish or wildlife when, for money or other considerations, someone offers or provides guiding or outfitting services for the illegal taking of fish or wildlife. It is an illegal purchase of fish or wildlife when, for money or other considerations, a hunter or fisherman obtains guiding or outfitting services for the purpose of taking fish or wildlife illegally.

c. Prohibited Acts

Taken in Violation of United States or Indian Law. It is unlawful for any person to import, export, transport, sell, receive, acquire or purchase any fish or wildlife or plant (F-W-P-) taken, possessed, transported, or sold in violation of any law of the United States or in violation of any Indian tribal law.

Transporting After Violating State or Foreign Law. It is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any F-W-P- that was taken, possessed, transported or sold in violation of any law of any state or foreign law.

Unlawful Possession Within the Special Maritime or Territorial Jurisdiction. It is unlawful for anyone to possess within the special maritime or territorial jurisdiction of the United States any F-W-P- that was taken, possessed, transported, or sold in violation of any state, foreign, or Indian tribal law.

Attempt. It is unlawful to attempt to commit any act described in the three preceding paragraphs. Attempt is a separate subsection within the Lacey Act.

False labeling. It is unlawful for anyone to make or submit any false record, account, or label for any F-W-P- that has been or is intended to be moved in foreign or interstate commerce.

Guide Services. It is unlawful to sell or purchase guiding or outfitting services or invalid licenses or permits for the illegal taking, acquiring, receiving, transporting, or possessing fish or wildlife.

Injurious/Invasive Species. It is unlawful to import into the United States (including the District of Columbia, the

territories of the United States or its possessions) or to ship between those geographic areas injurious F-W-P- listed in regulation.

d. Elements

1. Taking in Violation of United States or Indian Law.

- That the defendant knowingly imported, exported, transported, sold, received, acquired, or purchased any F-W-P-; and
- That F-W-P- was taken, possessed, transported, or sold in violation of any law, treaty or regulation of the United States or Indian law.

2. Transporting in Violation of State or Foreign Law.

- That the defendant knowingly imported, exported, transported, sold, received, acquired, or purchased any F-W-P-;
- In interstate or foreign commerce; and,
- That the defendant did so in violation of state or foreign law.

3. Possession Within the Special Maritime or Territorial Jurisdiction.

- That the defendant possessed F-W-P- within the special maritime or territorial jurisdiction of the United States; and
- That the F-W-P- was taken, possessed, transported, or sold in violation of any state, foreign, or Indian tribal

law.

#### 4. Attempt

- That the defendant made a significant step towards completion
- Of one of the following prohibited acts:
  - Taking F-W-P- in violation of United States or Indian law,
  - Transporting F-W-P- in violation of state or foreign law, or
  - Possession of F-W-P- within the special maritime or territorial jurisdiction of the United States.

#### 5. False Labeling.

- That the defendant unlawfully made or submitted a certain record;
- That the record was false; and
- That the record was for F-W-P- moved or intended to be moved in foreign or interstate commerce.

#### 6. Guide Services

- That the defendant unlawfully sold or purchased guiding or outfitting services or invalid licenses or permits;
- For the illegal taking, acquiring, receiving, transporting, or possessing fish or wildlife.



## 7. Injurious/Invasive Species

- That the defendant imported certain F-W-P- into the United States (the District of Columbia, U.S. territories, or possessions) or shipped between those geographic areas certain F-W-P-; and
- That the F-W-P- was an injurious species as listed in statute or regulations.

### e. Defendant's Intent

Similar to the statutes above, the Lacey Act is a general intent crime. The government must prove the defendant intended to do the act, not that the defendant knew the act was prohibited.

### f. Jurisdictional Nexus

To meet the federal jurisdictional nexus, the defendant could take the F-W-P- in violation of federal or Indian tribal law. When on federal land, a federal court may also assimilate or adopt the surrounding state law. For example, this could be a situation where someone poaches an elk on the Buffalo National River in violation of Arkansas' hunting laws. Arkansas state hunting laws essentially become federal law through adoption. See 36 C.F.R. section 2.2 for an example of the adoption of state law within the Lacey Act. Another nexus is for the resource to be moved in interstate or foreign commerce. For example, the defendant may poach a deer on private property in Missouri but move the venison across state lines to Illinois. Finally, the defendant may possess the F-W-P- on the special maritime or territorial jurisdiction (SMTJ) of the United States. An example of this could be a case where the defendant poaches a deer in violation of state law, but instead of transporting the deer over state lines the defendant transports, or otherwise possesses the deer on the exclusive or concurrent jurisdiction of the United States (SMTJ) within the

state where it was taken. Consider a hunter that poaches a deer on private land in violation of North Carolina's hunting laws. The hunter then brings the venison to Marine Corps Base Camp Lejeune (Jacksonville, North Carolina) and stores the venison in a freezer in base housing on Tarawa Terrace. Camp Lejeune is an area of exclusive jurisdiction of the United States. See the Authority and Jurisdiction chapter.)

g. Penalty

The Lacey Act imposes felony penalties (up to five years in prison and/or maximum \$20,000 fine) if the defendant engages in conduct that involves the sale of wildlife with a market value of more than \$350 while knowing that it was taken in violation of law. Failure to exercise due care in their acquisition, possession, or transfer is a misdemeanor (one year and/or \$10,000). Violations of the importing/exporting injurious wildlife are punishable with a fine and or up to six months in imprisonment. Additionally, civil remedies and forfeitures are also available.

20.3.2 Migratory Bird Treaty Act (MBTA)

a. Statutory History

In the 1800s and prior to the Lacey Act several native bird species were extinct (Labrador Ducks and Great Auks). The issue with bird species, in part, was the desire to wear hats adorned with ornamental feathers. The Lacey Act (1900) was aimed at market hunters selling poached game across state lines. In 1913, Congress passed the Weeks-McLean Migratory Bird Act, which banned spring shooting of migratory game and insectivorous birds and further declared those birds to be under the custody and protection of the federal government. Two district courts later ruled the Weeks-McLean Migratory Bird Act unconstitutional. In 1916, a treaty was entered with Great Britain (for Canada) to stop all hunting of insectivorous

birds and establish hunting seasons for game birds. Congress passed the Migratory Bird Treaty Act in 1918, to assist with implementing the treat. After the passage of the Migratory Bird Treaty Act, the United States entered into treaties with other countries, similar to the one covering Canada. In 2004, Congress amended the MBTA in what is known as the Migratory Bird Treaty Reform Act. The reformation more clearly defined “native migratory bird” and required the U.S. Fish and Wildlife Service to also publish a list of all nonnative, human-introduced bird species to which the MBTA does not apply.

b. Explanation of Terms

**Migratory Bird:** The MBTA protects migratory birds that are native to the United States or its territories and that are listed on 50 C.F.R. § 10.13. To be a “migratory bird” it must be listed on the C.F.R. The MBTA also protects the bird’s parts, nest, and eggs.

**Baiting:** “Baiting” migratory birds means scattering salt, grain, or other feed that could serve as a lure or attractant over areas where hunters are attempting to take them. It does not include taking birds over standing crops, flooded fields, or where grain is put out for normal agriculture purposes.

c. Prohibited Acts

**Unlawful Taking of Migratory Birds:** Except as permitted by regulation, it is unlawful at any time, by any means or in any manner to pursue, hunt, take, capture, kill, attempt to do any of these actions or sell, barter, purchase, offer these actions, ship, export, or import, etc., any migratory bird.

**Baiting Migratory Birds:** It is unlawful to take any migratory bird by the aid of baiting or take on or over any baited area, if the person knows or reasonably should know the area is a

baited area OR place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird.

**Unlawful Transportation of Any Bird:** It is unlawful to ship, transport, or carry, by any means, from one state, territory, or district to or through another (including foreign country) any migratory bird that was taken or transported in violation of the state, territory, or district law in which it was taken or transported from.

d. Elements

1. Unlawful Taking of Migratory Birds

- That the defendant unlawfully pursued, hunted, took, captured, killed, attempted to do any of these actions or sold, bartered, purchased, offered any of these actions, shipped, delivered, exported, or imported a certain bird, its parts, eggs, or nest; and,
- That the bird species was listed as a migratory bird in 50 C.F.R. § 10.13.

2. Baiting Migratory Birds

- That the defendant unlawfully took a migratory bird as listed in 50 C.F.R. § 10.13;
- That the taking occurred on or over a baited area; and,
  - That the defendant knew or should have known that the area was baited; or
  - That the defendant placed bait on, or adjacent to, an area for the purpose of taking the bird.

### 3. Unlawful Transportation of Migratory or Other Birds:

- That the defendant transported any bird in interstate or foreign commerce; and
- That the bird was taken (or transported) in violation of state, territory, or district law.
- The bird taken was listed in 50 C.F.R. § 10.13.

#### e. Defendant's Intent

The MBTA requires only general intent. The prosecutor must prove that the defendant was aware of the actions done, not that the defendant knew those acts were illegal.

#### f. Jurisdictional Nexus

The MBTA was enacted pursuant to the United States' treaty-making powers under the U.S. Constitution. Note that a violation need not occur on federal land. A violation may occur on private property without an interstate or foreign commerce connection. The United States signed treaties with foreign nations (Great Britain for Canada, Mexico, Japan, and Russia) protecting migratory birds. The MBTA implements and enforces these treaties. It also makes punishable the unlawful transportation of any bird moved in interstate or foreign commerce.

#### g. Taking of Migratory Birds

Taking migratory birds must be in accordance with regulations published by the Secretary of Agriculture and Interior. Nothing in the MBTA prevents the states and territories from enacting additional laws for the protection of migratory or other birds, so long as these laws are not

inconsistent with federal law. For example, in addition to a federal duck stamp, a hunter will likely need a state hunting license to hunt geese and ducks. Depredation permits may also be issued if the birds are deemed destructive.

#### h. Penalty

Taking migratory birds without a hunting or depredation permit is a misdemeanor, punishable by not more than six months imprisonment and/or a \$15,000 fine. Selling listed birds or taking them with the intent to sell them is a felony punishable by not more than two years imprisonment and/or a \$2,000 fine.

### **20.4 Ensuring the Continued Survival of Certain Animals and Plants**

The final three statutes show how Congress works to help protect species from extinction. The Endangered Species Act (ESA) was passed with the goals of protecting endangered and threatened species, as well as the habitats of those species, and supporting treaties that focus on certain species. In order to keep optimum sustainable populations of marine mammals (those species adapted to marine environment) Congress passed the Marine Mammal Protection Act (MMPA). Finally, the bald eagle is a success story because it was delisted from the Endangered Species Act in 2007. However, Congress wanted to ensure the success of our national symbol and passed the Bald and Golden Eagle Protection Act (BGEPA). The BGEPA places restrictions on the taking of Bald and Golden Eagles, their carcasses, parts (including feathers), nests, and eggs.

## 20.4.1 Endangered Species Act (ESA)

### a. Statutory History

The ESA was enacted after Congress found that various species of fish, wildlife, and plants within the U.S. went extinct due to economic growth and development coupled with inadequate concern and conservation. Congress also found that population numbers of some species showed those species were/are in danger of extinction or their numbers were/are threatened with extinction. Since its enactment, the ESA has sought to protect over 2,000 species of plants and animals (vertebrate and invertebrate). The ESA is administered by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Domestic and foreign species may be listed as endangered or threatened. Once a species is listed, the ESA provides tools to aid in conservation and recovery and to protect habitats.

### b. Explanation of Terms

#### 1. Endangered Species and Threatened Species:

The ESA has a simple set of goals: Prevent the extinction of animal and plant species, restore their populations to the point that they are no longer threatened, and protect the ecosystems which support their survival. To receive protection, the fish, wildlife or plant (F-W-P-) must be listed as either endangered or threatened by the designating agency.

- Endangered Species: 16 U.S.C. § 1532(6) defines an endangered species as “any species [of animal or plant] which is in danger of extinction throughout all or a significant portion of its range. It does not protect insects that constitute a pest and whose protection under the provisions of this Act would present an overwhelming and overriding risk to people.

- Threatened Species: 16 U.S.C. § 1532(20) defines threatened species as plants or animals “which are likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”
- Some examples follow:
  - Endangered Land and Freshwater Animals: Florida panther, shortnose sucker, woodland caribou, and red-cockaded woodpecker.
  - Threatened Land and Freshwater Animals: Northern American wolverine, eastern indigo snake, slender chub, and northern spotted owl.
  - Endangered Saltwater and Anadromous Animals: Sea Turtles (kemp’s ridley, leatherback, various populations of loggerhead, and green), largemouth sawfish, various populations of Atlantic sturgeon, killer whales.
  - Threatened Saltwater and Anadromous Animals: American crocodile, oceanic whitetip shark, African coelacanth.

## 2. Taking An Endangered or Threatened Species

A “taking” includes taking their parts. It could mean taking/possessing the products made from them, taking their eggs, offspring, or dead body. An endangered or threatened plant includes its seeds and roots. In the case of fish or wildlife, taking endangered or threatened species includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to do any of these actions. In the case of plants, it includes removing, possessing, cutting, digging up, damaging, or destroying.



Taking can also mean destroying their critical habitat.

c. Prohibited Acts

**Taking Endangered Fish or Wildlife:** Except as provided, it is unlawful for any person subject to the jurisdiction of the United States to import into the U.S., export out of the U.S., take, possess, sell, or transport an endangered species of fish or wildlife, or to violate any regulation pertaining to an endangered or threatened species.

**Taking an Endangered Plant:** Except as provided, it is unlawful for any person subject to the jurisdiction of the United States to import into the U.S., export out of the U.S. take, transport, or sell an endangered plant or to violate any regulation pertaining to an endangered or threatened species of plant.

d. Elements

1. Taking an Endangered or Threatened Fish or Wildlife:

- That the defendant was a person subject to the jurisdiction of the United States; and
- That the defendant unlawfully committed one or more of the following acts with respect to a listed endangered or threatened fish or wildlife species:
  - imported or exported the endangered species;
  - took the species while it was in the United States or territorial seas or on the high seas;
  - possessed, transported, or sold the species after it had been so imported, exported, or taken;

- transported it in interstate or foreign commerce in the course of a commercial activity;
- sold or offered it for sale in interstate or foreign commerce;
- violated any regulation pertaining to an endangered species; or,
- That the defendant violated any regulation pertaining to a threatened species.

## 2. Endangered or Threatened Plant

- That the defendant was a person subject to the jurisdiction of the United States; and
- That the defendant unlawfully committed one or more of the following acts with respect to a listed endangered plant species:
  - imported or exported the endangered species;
  - removed it from federal jurisdiction;
  - damaged it while in an area of federal jurisdiction;
  - damaged it in violation of state law or in the course of state trespass law;
  - violated any regulation pertaining to the endangered species, or
- That the defendant violated any regulation pertaining to a threatened plant species.

e. Exceptions

Alaskan natives may take endangered species so long as the “taking is primarily for subsistence purposes and is not accomplished in a wasteful manner.” (Permit is still required)

A taking may occur when the animal poses a significant threat of bodily harm.

Federal permits for taking them may be obtained for scientific purposes, enhancement of propagation or survival, for incidental taking, or in limited circumstances to prevent economic hardship.

f. Conservation Efforts Successful

Finally, when conservation efforts have succeeded and the species is no longer deemed endangered (or threatened), it may be delisted; however, it is likely to be protected under Lacey, the MBTA, or the Marine Mammal Protection Act.

g. Jurisdictional Nexus

In enacting the ESA, Congress found that protecting endangered and threatened species of F-W-P- has esthetic, ecological, educational, historical, recreational, and scientific value to the United States. What’s more, the United States, through its treaty powers, has pledged its cooperation in the international community to conserve various species of F-W-P- facing extinction.

h. Penalty

Violating the ESA is a misdemeanor punishable by a \$50,000 fine and or one year in prison. Additionally, civil penalties and forfeiture are available.

## 20.4.2 Marine Mammal Protection Act (MMPA)

### a. Statutory History

Prior to enacting the MMPA, Congress found that certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of human activities. These marine mammals were found to have proven themselves to be resources of great significance internationally, esthetically, recreationally and economically. Congress vowed that such species and population stocks should not be permitted to diminish below their optimum sustainable population or beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.

### b. Explanation of Terms

#### 1. Marine Mammal

This includes (1) “any mammal which is morphologically adapted to the marine environment, including sea otters and sea cows, seals, walruses, dolphins, and whales, or (2) any mammals which primarily inhabit the marine environment such as the polar bears. For purposes of this Act, a marine mammal includes any part of the mammal including fur.

#### 2. Marine Mammal Product

This includes an item or merchandise which consists or is composed in whole or in part of any marine mammal.

#### 3. Population stock

“Population stock” or “stock” means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

#### 4. Taking a Marine Mammal

This includes harassing, hunting, capturing, or killing, or attempting to harass, hunt, capture, or kill any marine mammal. Harassment means any act of pursuit, torment, or annoyance which – (1) has the potential to injure a marine mammal or marine mammal stock in the wild, or (2) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. Feeding dolphins could be harassment because dolphins may become dependent on a human food source. Feeding does not include routine discard of bycatch during fishing operations if the discharge is otherwise legal.

##### c. Prohibited Acts

**Unlawfully Taking Marine Mammals:** Except as provided, it is unlawful for any person or vessel subject to the jurisdiction of the United States to take any marine mammal.

**Unlawfully Importing Marine Mammals That were Pregnant, from a Depleted Species, or Taken Inhumanely:** Except as provided, it is unlawful to import into the United States any marine mammal that was (1) pregnant at the time, nursing at the time (or less than eight months old, whichever is later), (2) from a depleted stock, or (3) that was taken inhumanely.

**Unlawfully Importing Marine Mammal Products:** It is unlawful to import into the United States any marine mammal that was taken unlawfully or taken in violation of the law of the country of its origin.

d. Elements

1. Unlawful Taking Marine Mammals:

- That the defendant was a person (or vessel) subject to the jurisdiction of the United States; and
- That the defendant unlawfully committed one or more of the following acts:
  - took a marine mammal on the high seas;
  - took a marine mammal in waters or on lands under the jurisdiction of the United States;
  - used a port (harbor, or other place) under the jurisdiction of the United States to take or import a marine mammal (or marine mammal product);
  - possessed a marine mammal (or product) that was taken unlawfully;
  - transported, purchased, sold, exported, or offered to do those things with respect to any marine mammal (or marine mammal product) taken in violation of this Act; or
  - used in a commercial fishery any means or methods of fishing in contravention of regulations issued by the Secretary to prevent the incidental taking of marine mammals.

2. Importing Marine Mammals that were Pregnant, from a Depleted Species, or Taken Inhumanely:

- That the defendant was subject to the jurisdiction of the United States; and

- That the defendant unlawfully imported a marine mammal under one or more of the following conditions:
  - while it was pregnant at the time;
  - while nursing (or less than eight months old);
  - from a species or population stock which the Secretary had designated as a depleted; or,
  - taken in a manner deemed inhumane by regulation of the Secretary.

### 3. Importing Marine Mammal Products:

- That the defendant imported into the United States any of the following:
  - a marine mammal taken unlawfully;
  - a marine mammal taken in violation of the law of the country of its origin;
  - a marine mammal product that is illegal to possess under United States law;
  - a marine mammal product that is illegal to possess under the law of the country of its origin;
  - fish, if such fish were caught in a manner contrary to the manner proscribed by the Secretary for the protection of marine mammals which might be taken incidentally during commercial fishing, whether taken or not.

e. Exceptions

1. Marine Mammals Taken Incidentally to Commercial Fishing.

It is not unlawful to take a marine mammal (e.g., a dolphin) incidental to commercial fishing if the fishing was done in accordance with regulations proscribed by the Secretary, which reduce the chance of incidental taking. Failure to follow these regulations is a crime regardless of whether a marine mammal was taken or not.

2. Authorized Deterrence Measures.

Authorized people may deter marine mammals from endangering public safety or damaging personal or government property (including fishing gear) so long as the mammal is not seriously injured.

3. Alaskan Natives.

Native Americans indigenous to the North Pacific or Arctic Ocean may be authorized to take marine mammals for subsistence or creating and selling handcrafts and clothes.

4. Self-Defense.

Taking a marine mammal is authorized when necessary for self-defense or the defense of others from an imminent threat. The taking must be reported within 48-hours.

f. Jurisdictional Nexus

Congress found that marine mammals and their products either move in interstate commerce or affect the balance of marine ecosystems in a manner that is important to other animals and animal products in interstate commerce. The



protection of marine mammals and their habitats is necessary to ensure the continuing availability of those products that move in interstate commerce, thereby moving Congress to ensure the continued existence of marine mammal species.

g. Penalty

A fine of not more than \$20,000 and/or imprisonment for one year or less. Additionally, civil penalties and forfeitures are available.

20.4.3 Bald and Golden Eagle Protection Act (BGEPA)

a. Statutory History

The Continental Congress of 1782 adopted the bald eagle as the national symbol. (That Benjamin Franklin argued for the wild turkey is a myth.) By the 1930's, bald eagle populations were on a frightening decline. In 1940, Congress enacted The Bald Eagle Act finding that the bird was the symbolic representative of a new nation under a new government and in a new world. But more had to be done. Populations continued to plummet due to hunting and the destruction of habitat and nesting areas. DDT was also a significant factor. The insecticide infested streams and waters, infecting the fish. The eagles ate the fish and were poisoned. DDT weakened their eggs, and they frequently broke during incubation. In 1962, Congress added the golden eagle for its protection finding their numbers were also declining. Additionally, it was believed that hunters could confuse a juvenile bald eagle for a golden eagle since the characteristic yellow bill, white head and tail feathers take several years to develop on a bald eagle. The bald eagle was listed as an endangered species in 1978; but fortunately, conservation efforts were a success. The bald eagle was delisted from the ESA in 2007; however, it remains protected under the BGEPA, the Lacey Act, and MBTA.

b. Explanation of Terms.

Taking:

Taking includes pursuing (shooting at, poisoning, capturing, trapping, collecting, molesting, or disturbing) the bird. Bald or golden eagles include their parts, nests, or eggs. Taking includes molesting or disturbing bald or golden eagles. Individuals, corporations, and partnerships may be prosecuted for such acts.

c. Prohibited Acts

It is unlawful for anyone to knowingly, or with wanton disregard of the consequences, take, possess, sell, purchase, barter, or offer to sell, purchase, or barter, transport, export, or import a bald or golden eagle without following the permitting process.

d. Elements

- That the defendant did knowingly, or with wanton disregard of the consequences, one or more of the following acts with respect to a bald or golden eagle (to include parts, eggs or nest):
  - possessed the bird;
  - sold it;
  - purchased it;
  - offered to sell or purchase it;
  - transported it, or imported or exported it; and
- That the defendant did so unlawfully without following

the permitting procedures.

e. Exceptions

Taking bald and golden eagles must be as strictly proscribed by the Secretary of Interior. Permits for taking them may be granted for scientific, exhibition, Native American religious purposes, and for the protection of wildlife or livestock. Golden eagles may be taken for falconry if they would otherwise be taken for the protection of wildlife or livestock.

f. Jurisdictional Nexus

The BGEPA has general federal applicability. The U.S. Fish and Wildlife Service (USFWS) has enforcement authority. The USFWS may enter into agreements with state fish and wildlife agencies to assist with the enforcement of the Act.

g. Penalty

A fine of not more than \$5000 and/or imprisonment of not more than a year. Upon a second or subsequent conviction, a defendant may be fined up to \$10,000 and/or imprisoned for up to two years. Note: Up to \$2,500 is to be given to the person or persons giving information that leads to the conviction. Additionally, civil penalties are also available under the BGEPA.

## Chapter 21 -

### Officer Liability

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## 21.1 Introduction

Law enforcement work is dangerous. Contact with the public is constant, often confrontational and charged with emotion. Within this context, law enforcement officers are responsible for preventing and investigating crimes but they must perform their duties in accordance with the Constitution and federal law. If officers perform these duties in an unreasonable, reckless, or indiscriminate manner, or in a manner outside the scope of their employment, they may be charged with a crime and/or sued civilly for perceived violations of a citizen's rights. In today's society, lawsuits may be filed by anyone at anytime, for any reason. The filing of any lawsuit is beyond an officer's control. However, by performing duties in a professional and appropriate manner, any officers can likely prevent and avoid the negative consequences of any filed lawsuit.

Despite experience, training, and dedication, the nature of law enforcement can expose officers and agents to potential claims of liability. These claims can potentially be expensive. Law enforcement officers and agents have certain legal protections available to them as they pursue their duties.

### 21.1.1 Civil Rights

The Constitution guarantees and federal law protects individual's "civil rights." Constitutionally enumerated civil rights include, but are not limited to, the First Amendment's freedom of speech, freedom of religion, and freedom of assembly; the Fourth Amendment's protection against

unreasonable searches and seizures; the Fifth Amendment's right of due process and the protection against self-incrimination; and the Eighth Amendment's protection against cruel and unusual punishment. Federal statutes add to the list of civil rights, including rights prohibiting discrimination in the areas of education, employment, voting, and access to public facilities and accommodations. Through the 14th Amendment, these rights have all been applied to state governments.

### 21.1.2 Civil Liability

#### a. Definition of a Tort

The civil liability of a federal law enforcement officer is predominantly an issue of tort law. Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. The remedy can involve money damages or an injunction. An injunction is an order from a court that prohibits someone from doing something.

#### b. Torts versus Crimes

Torts differ from crimes in many respects, primarily in the interests affected by each and in the remedies afforded by each. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. As such, a federal criminal prosecution is captioned as "United States v. Defendant." A tort, on the other hand, is a civil action commenced and maintained by the injured person. A civil lawsuit is captioned as "Plaintiff (the injured party) v. Defendant (the wrongdoer)."

The intent of a criminal prosecution is to protect and vindicate the interests of the public as a whole by punishing offenders,

removing them from society (incarceration), reforming them, and deterring the offender and others from committing similar acts. The penalty upon conviction of a crime is a fine, imprisonment, and sometimes death. Criminal law is not primarily concerned with compensating the victim, although restitution and victim assistance programs may accomplish this end.

Tort actions are intended to compensate the victim for the damage suffered, at the expense of the wrongdoer. A defendant who loses a lawsuit may be required to pay money damages (usually the amount that will compensate the victim, but, in certain cases, punitive damages may be awarded). Torts are **private** matters that are not usually a concern of the government or the public (unless, of course, the government is a party).

Both criminal prosecutions and civil lawsuits require the proof of “elements.” In a criminal prosecution, the government must present evidence that proves each and every element of each offense charged beyond a reasonable doubt. However, civil cases are easier to prove in court than criminal cases. In a civil action, the plaintiff must prove each and every element of each tort alleged by a preponderance of the evidence.

Although there are significant differences between crimes and torts, the remedies are not mutually exclusive. The same act or conduct can be the subject of both criminal prosecution and a civil suit. For example, an assailant who punches his victim could be charged with the crime of assault by the government and sued by the victim for money damages. It is not unusual for both civil and criminal cases to be filed based on the same set of circumstances.

## 21.2 Federal Criminal Remedies

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

### 21.2.1 Title 18 U.S.C. § 241 - Conspiracy Against Rights

This statute allows the federal government to prosecute anyone, including federal, state, and local law enforcement officers, who conspires to violate a person's civil rights. It reads, in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the property of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured...

The statute provides penalties, including fines, imprisonment, and in certain instances, death.

There are two distinct crimes under this statute.

1. The elements of the first crime are:
  - A conspiracy;
  - To injure, oppress, threaten, or intimidate;
  - Any person;



- In the exercise or enjoyment of any constitutional or federal civil right.

The conspiracy under this statute is an agreement between two or more persons to injure, oppress, threaten, or intimidate any person in the exercise of a constitutional or federally guaranteed right. Section 241 differs from 18 U.S.C. § 371, the general federal conspiracy statute, by not requiring an overt act; that is, an act in furtherance of the conspiracy. Under § 241, the agreement by two or more persons, coupled with the specific intent to violate a person's civil rights, is sufficient to establish the crime. "Any person" should be taken literally and includes citizens, visitors, legal, and even illegal aliens.

2. The elements of the second crime are:

- Two or more persons go in disguise on the highway or property of another;
- To prevent or hinder;
- Any person;
- In the exercise or enjoyment of any constitutional or federal civil right.

The historical context of this law is apparent as it was specifically designed to deal with the activities of the Ku Klux Klan. The crime is a felony, punishable by up to death.

21.2.2 Title 18 U.S.C. § 242 - Deprivation of Rights Under Color of Law

This statute empowers the federal government to prosecute federal, state, and local law enforcement officers and other public officials who, under the mantle of their official authority

(“color of law”), intentionally violate the civil rights of prisoners, suspects, or other persons. It reads, in pertinent part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be...

The statute provides penalties including fines, imprisonment, and in certain instances, death.

The elements of this crime are:

- An activity “under color of law;”
- With the specific intent (willfully);
- To deprive any person;
- Of any constitutional or federal civil right.
  - a. “Under Color of Law”

“Under color of law” is a broader legal concept than “within the scope of employment.” Misuse of power, possessed by virtue of law and made possible only because the wrongdoer is clothed with the authority of law, is action taken “under color of law.” Even if the law enforcement officer does not purport to have acted in the line of duty, and even if the conduct clearly

violates the law or agency policy, it will still be treated as “under color” of his authority if his status as a law enforcement officer materially facilitated the wrong. An officer may not remove, literally or figuratively, the badge or mantel of authority by disavowing it, and thereby avoid prosecution under this statute. Therefore, an officer can act outside the scope of employment and even contrary to law, policy, and practice and still be determined to have acted “under color of law.”

“Under color of law” necessarily involves actions on the part of a law enforcement officer or public official, but not everything done by a law enforcement officer is done “under color of law.” If status as a law enforcement officer did not materially facilitate the wrong committed, the officer is deemed to have acted in a purely private capacity and will not be criminally liable under this statute.

Certainly, when an officer does an act of a general law enforcement nature, such as make an arrest, conduct a search, etc., the officer will be considered to have acted “under color of law.” Whether the officer was in uniform or “on duty” are important but not controlling factors in determining whether an officer was acting under color of law. Law enforcement officers can act “under color of law” even while off duty and out of uniform.

Private persons can act “under color of law” if they act in concert and jointly engage with law enforcement in the violation of civil rights.

b. “Specific Intent (Willfully)”

It is not enough that the officer intended to do the act that resulted in the deprivation of a constitutional or federal civil right. To convict an officer of violating § 242, the government must prove the officer possessed specific intent to deprive a

person of a civil right. There must be the specific intent to punish or prevent the exercise of a constitutionally guaranteed right. In other words, an officer must specifically intend to cause the civil rights violation.

“Willfully” implies not merely the conscious purpose to do wrong, but intent to deprive a person of a right which has been made specific either by the terms of the Constitution or federal law, or by court decisions interpreting them. As in most criminal offenses, the requisite intent can be established by all attendant circumstances.

### **21.3 Federal Civil Remedies - Constitutional Torts and State Law Torts**

In addition to criminal prosecution, law enforcement officers can also be sued in civil court by individuals seeking monetary damages and sometimes an injunction (court order) directing the officer or the agency they work for to do things differently in the future. Civil claims such as these can take one of two forms: (1) a constitutional tort that alleges a violation of their constitutional or other federal civil rights and/or (2) a state law tort that alleges not that the officer violated their constitutional or other federal civil right but that they did something in a negligent or intentional manner that caused them to suffer some kind of injury that merits compensation. We will discuss each of these tort claims below.

#### **21.3.1 Constitutional Torts under Title 42 U.S.C. § 1983 and Bivens**

Title 42 U.S.C. § 1983 reads, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute provides a civil cause of action against state and local law enforcement officers who, acting under color of law, deprive an individual of any constitutional right. It is not a criminal statute, but a civil one that permits an aggrieved party to sue state and local law enforcement officers in federal court for civil rights violations.

In order to establish a civil lawsuit claim under § 1983, the plaintiff must prove, by a preponderance of evidence, the following elements:

- An act;
- Under color of law of a state, territory, or the District of Columbia;
- Depriving any person (a citizen or other person within United States jurisdiction);
- Of rights, privileges, or immunities secured by the Constitution or federal laws.

“Under color of law” is the same principle as discussed above regarding 18 U.S.C. § 242. However, by its express language, this statute applies only to state and local law enforcement officials and does not apply to federal officers and agents.

Unlike 18 U.S.C. § 242, no specific intent to violate a Constitutional or federal civil right is required. The plaintiff must only prove intent to do the act that results in the

deprivation of civil rights. For example, if an officer is sued under 42 U.S.C. § 1983 based on a claim that the officer used excessive force in violation of their Fourth Amendment right to be free from an unreasonable seizure, the plaintiff would only have to prove that the officer used force intentionally (i.e. that the officer's force wasn't the result of an accidental or unintentional act). The plaintiff would not have to also prove that the action was taken with the specific intent to violate the plaintiff's Fourth Amendment rights. Recall from your use of force legal aspects chapter that an officer's subjective intent is irrelevant when determining whether an officer's use of force was objectively reasonable and therefore constitutional. The only relevant question when determining the constitutionality of an officer's use of force is whether an objectively reasonable police officer could have taken the same action if faced with the same facts and circumstances. The test is objective, not subjective, in nature.

If a plaintiff can prove that the elements of their claim under 42 U.S.C. § 1983 (i.e. that the officer took an action, under color of law, that resulted in the deprivation of their constitutional or other federal legal right), they may be awarded a judgment for actual (compensatory) damages, punitive damages, attorney fees, and/or an injunction.

### 21.3.2 Bivens

Until the 1971 Supreme Court decision, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 402 U.S. 388 (1971), a person whose civil rights were violated by a federal officer or agent was unable to sue a federal officer or agent in federal court. This was because 42 U.S.C. § 1983, by its express language, only created a constitutional tort action for violations committed by state and local officials. This statute did not authorize such claims against federal officials.

In the Bivens case, Webster Bivens alleged that agents from the Federal Bureau of Narcotics (now the Drug Enforcement Administration) arrested him and searched his apartment without a warrant and that his arrest was made without probable cause. Bivens filed a constitutional tort action against the federal agents in federal court. Bivens argued that the federal agents violated his Fourth Amendment Constitutional right to be safe in his own home from unreasonable searches and seizures.

Eventually, Bivens reached the Supreme Court on the issue of whether an aggrieved party may sue federal agents in federal court for violations of constitutionally protected rights. The Supreme Court decided the alleged behavior, if true, constitutes a federal constitutional wrong that should be determined by a federal court rather than a state court. The Supreme Court also held that since there was no remedy in state law for wrongdoing committed by federal agents, the Court should create such a remedy. Based upon the Bivens decision, federal agents are now subject to civil suits in federal court alleging civil rights violations.

In Bivens, the Supreme Court created an analogy to 42 U.S.C. § 1983 under which federal officers and agents may be sued in civil court for violating a person's constitutional rights. These types of suits are commonly called "Bivens Actions."

The following are the most common types of constitutional torts alleged against state and local officers under 42 U.S.C. § 1983 and federal officers under Bivens.

### 21.3.3 Arrests and Searches Without Probable Cause

When a law enforcement officer makes an arrest without probable cause or unlawfully conducts a search, an injured party can file a 42 U.S.C. § 1983 or Bivens suit against the officer.

In determining whether a suit for an unlawful, warrantless arrest is proper, the courts must determine whether a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the arresting officers possessed at the time. Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had “arguable” probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a reasonable, prudent, cautious officer in believing that the person arrested had committed or was committing an offense. Where “arguable” probable cause exists, law enforcement officers who reasonably but mistakenly conclude that probable cause is present are entitled to qualified immunity.

The same standard applies in unlawful search cases. In search cases, it is likewise inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. The relevant question is whether a reasonable officer could have believed the search to be lawful, in light of clearly established law and the information known by the searching officer.

#### 21.3.4 Knowingly Submitting False or Misleading Affidavits For Search or Arrest Warrants

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that a law enforcement officer violates the Fourth Amendment if, in order to obtain a search warrant, he perjures himself or testifies in reckless disregard of the truth. The Supreme Court has clearly established that the Fourth Amendment requires a truthful, factual showing sufficient to constitute probable cause. Specifically, the Court noted that:



Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is not sufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

A Franks violation can also occur when law enforcement officers obtain a warrant through the intentional or reckless omission of material facts.

Although the Franks standard was developed in the criminal context, it also defines the scope of qualified immunity in civil rights actions, including 42 U.S.C. § 1983 and Bivens suits.

When the information in an affidavit is reasonably believed to be true or appropriately accepted as true by the law enforcement officer, a 42 U.S.C. § 1983 or Bivens civil lawsuit may not be properly brought. However, an affidavit that contains information the officer knew to be false or would have known was false had the officer not recklessly disregarded the truth violates the Fourth Amendment. In such circumstances, a plaintiff may properly file a 42 U.S.C. § 1983 or Bivens suit because the law enforcement officer cannot be said to have acted in an objectively reasonable manner. In such cases, a court will likely not grant a motion to dismiss for qualified

immunity.

### 21.3.5 Fourth Amendment Excessive Force Claims

In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court established the proper framework for analyzing an individual's claim that a law enforcement officer used excessive force. The Supreme Court has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.

The issue in cases involving claims of excessive force is whether the arresting officer's actions were "objectively reasonable" in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent or motivation. A court must apply the "reasonableness" analysis from the perspective of a reasonable officer on the scene, and not with the 20/20 vision of hindsight.

### 21.3.6 Failure to Intervene When Excessive Force is Used

An individual has the right under the Fourth Amendment to be free from the excessive use of force by law enforcement officers. A law enforcement officer has an affirmative duty to intercede on the behalf of a person whose constitutional rights are being violated in his presence by other officers. Accordingly, an officer may, in certain circumstances, be sued under 42 U.S.C. § 1983 or Bivens for failing to intervene to protect a victim from another officer's unlawful use of excessive force. One who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.

Under this failure to intervene theory, it is not necessary that an officer actually participate in the excessive use of force to be held liable. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for his inaction. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers when that officer observes or has reason to know:

- That excessive force is being used; or
- That a citizen has been unjustifiably arrested; or
- That any constitutional violation has been committed by a law enforcement official.

Therefore, if a law enforcement officer fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer can be held liable under 42 U.S.C. § 1983 or Bivens. However, there must have been a realistic opportunity to intervene to prevent the harm from occurring. In order for the officer to be liable, the excessive force must be of sufficient duration to allow the officer to intervene. If so, the officer who stands by without trying to assist the victim becomes a “tacit collaborator.”

## 21.4 Immunity for Constitutional Violations

### 21.4.1 Sovereign Immunity

Sovereign (governmental) immunity has its common law roots in England under the theory that “the King can do no wrong.” This theory was an outgrowth of the divine rights of kings, and, in effect, prevented any and all lawsuits against the Crown.

When the individual sovereign was replaced by the modern state, this principle was adopted to provide that a suit against a ruling government without its consent was inconsistent with the very idea of supreme executive power. In the United States, public policy and necessity dictate that the United States as sovereign is immune from suit unless it consents to be sued. As an example, when Congress passed 42 U.S.C. § 1983, the federal government waived the usual protections of governmental immunity by allowing (or consenting to) constitutional tort claims against state and local government actors. The terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.

#### 21.4.2 Absolute Immunity

“Absolute immunity” avoids personal civil liability. It is conferred because of the status or position of the favored defendant. Officials, such as legislators in their legislative functions, judges in their judicial functions, and certain executive branch officials (the President, executive officer engaged in adjudicative functions, and prosecutors), whose special functions or constitutional status requires complete protection from suit, may assert the defense of absolute immunity. Once asserted, a valid claim of absolute immunity entitles the government official who has been sued to have the lawsuit filed against them dismissed.

#### 21.4.3 Qualified Immunity

Qualified immunity is immunity from civil suit and entitles a law enforcement officer who meets certain pre-conditions to avoid standing trial or facing the burdens associated with civil litigation. Unlike absolute immunity which provides absolute protection from any claims brought against certain government officials who have been sued for actions taken in their official capacity, qualified immunity is conditional. In other words, a government official (including law enforcement

officers) who wish to receive the protections of qualified immunity must convince the trial court of one of two things: (1) they acted reasonably; or (2) their conduct did not violate clearly established statutory or constitutional rights of which a reasonable law enforcement officer would have known.

The cases of Hanlon v. Berger, 526 U.S. 808 (1999), and Wilson v. Layne, 526 U.S. 603 (1999), illustrate the concept of “qualified immunity.” In both of these cases, the plaintiffs sued federal agents under Bivens, alleging violations of the Fourth Amendment when the agents brought the media along during the service of an arrest warrant and a search warrant. In Wilson, federal marshals took a newspaper reporter and photographer along when they attempted to serve an arrest warrant at the home of the suspect’s parents. In Hanlon, federal Fish and Wildlife Service agents took CNN along when they served a search warrant at the Berger ranch. Both followed established agency ride-along policies.

The Supreme Court had two questions to consider. First, was there a constitutional violation? The Supreme Court held that police violate the Fourth Amendment rights of homeowners by bringing members of the media or other third parties into homes during the execution of a warrant, when the presence of the third parties in the home is not in aid of the warrant’s execution. In other words, these federal agents had committed a constitutional tort.

Second, if the plaintiffs show the officer violated a statutory or constitutional right, was that right clearly established such that a reasonable law enforcement officer would have known he was violating that right? If not, the officers or agents are entitled to qualified immunity. In assessing whether a law enforcement officer is protected by qualified immunity, the test to be applied is one of “objective reasonableness.” The Supreme Court held in Hanlon and Wilson that the agents acted reasonably when they relied on their established agency policy

for media “ride-alongs,” and the fact that media ride-alongs were a widespread practice.

In assessing whether the right that was allegedly violated was “clearly established,” the Court said that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The Court held that it was reasonable for these agents to have believed that bringing the media along during the execution of an arrest or search warrant (even in a home) was lawful. As such, the right was not clearly established. Therefore, the agents were entitled to qualified immunity.

In sum, when the defense of qualified immunity is applicable in a lawsuit alleging a constitutional tort, officers will not be held personally liable as long as their actions are reasonable under current law.

## 21.5 Civil Liability Under State Tort Principles

As stated previously, tort actions brought against federal employees and agents in their individual and personal capacity can generally be classified as constitutional torts (based on a violation of rights found in the United States Constitution), and these tort actions are asserted under 42 U.S.C. § 1983 or Bivens. A plaintiff can also sue government officials for actions that do not rise to the level of a constitutional violation. For instance, following an arrest, the person arrested might file a constitutional tort alleging that the arrest violated his Fourth Amendment right to be free from an unreasonable seizure under 42 U.S.C. 1983 or Bivens. The plaintiff isn’t limited to constitutionally-based claims, however. The plaintiff might also file a claim alleging a state law tort. State law torts are a compilation of different legal theories that the courts have developed over time which permit one person to sue another person for damages in civil court. The traditional state law torts applicable to federal law

enforcement officers are: (1) negligent torts; and (2) intentional torts (such as battery, assault, and false imprisonment).

### 21.5.1 Negligent Torts

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

#### a. Duty

Generally, there is no affirmative duty to act. That is, the law does not usually require that people intercede, even in situations in which they could prevent property damage, injury, or loss of life at no risk to themselves. Failure to intercede will not create civil liability for death, injury, or property damage. There are, however, exceptions to this general rule. For example, there is an affirmative duty to act when the plaintiff's peril results from the defendant's own negligence. In this case, the defendant is expected to intercede to aid the plaintiff.

In the law enforcement context, the general rule is that there is no right to basic public services and no affirmative duty on law enforcement to act when members of the general public are imperiled. There are, however, exceptions to this general rule. Special relationships can exist between a person and law enforcement creating an affirmative duty to act such as when the police promise to protect the target of a threat (i.e., the Witness Protection Program), or when they assure a caller that they are responding to their request for assistance. Failure to do so can result in civil liability when reliance on those specific promises of protection causes the person to forego steps to protect themselves.

A special relationship will also exist when law enforcement officers have someone in their custody. Once the government takes a person into its custody, the law imposes a duty to assume some responsibility for the person's safety and general well-being. For example, federal officers were found to be liable when, while walking a disabled and intoxicated arrestee up a ramp and into the police station, the arrestee tripped and fell striking her head. As a result, the arrestee suffered a fracture and other injuries. The Court said that the arrestee would not have fallen were it not for the officers' negligence. The officers had a duty to assist the arrestee in walking to ensure that she did not fall since the arrestee's hands were cuffed behind her back. The officers breached that duty by failing to hold on to her securely to prevent her stumbling and by failing to break her fall.

Acting when not required to do so may create civil liability when there would otherwise be none. When there is no affirmative duty to act, one who gratuitously acts for the benefit of another assumes a duty to act like an ordinary, prudent, reasonable person. The actor may be civilly liable for injuries or property damage suffered by the person they are trying to aid. In response to such liability exposure, many states have enacted "Good Samaritan" statutes. These statutes are designed to encourage medical professionals to intervene to save lives and prevent serious injury when they would otherwise have no legal duty to do so. These laws protect licensed doctors, nurses, paramedics, EMTs, and similarly trained and skilled persons from civil liability when they voluntarily render emergency treatment. They are still liable, however, for gross negligence.

#### b. Breach of Duty

Plaintiff can prove breach of duty by showing that the defendant failed to meet the applicable standard of care. What is the applicable standard of care? When the defendant owes



someone a duty or when the defendant has assumed a duty, the basic standard of care required is that of an objective “reasonable person.” A fundamental question in a negligence action is, “What would a reasonable person have done under the same or similar circumstances?”

Sometimes, however, special standards will apply requiring a person to exercise care beyond that which would be expected of an ordinary “reasonable person.” For example, professionals are required to possess and exercise the knowledge and skill of a member of their profession in good standing and to use such superior judgment, skill, and knowledge as they may actually possess. For law enforcement officers and agents, for acts of a law enforcement nature within the scope of their duties, the fundamental question becomes, “What would a reasonable law enforcement officer or agent have done under the same or similar circumstances?”

A breach of duty can be shown by proving that:

- The care exercised was below the standard of care established by custom or usage;
- A violation of a pertinent statute such as a violation of statutory rules of the road by a federal employee in driving a motor vehicle in the course of employment; or
- A violation of agency policies and practices.

c. Causation

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

d. Damages

The plaintiff must suffer some form of damage. In civil suits,

the plaintiff may recover for the personal injury or property damage caused by defendant's breach of duty. The recovery is generally compensatory, designed to make the injured party whole by reimbursing actual expenses and providing for pain and suffering and permanent injury and damage. It may also include attorney's fees and costs of litigation. In intentional torts, it may also include punitive damages designed to punish the wrongdoer and deter future similar conduct.

### 21.5.2 Intentional Torts

The elements of an intentional tort are similar to those of a negligent tort except that the act that causes the damages must be willful and intentional.

Intentional torts can be against a person, or against property. Among the most common intentional torts in each category are the following:

#### a. Intentional Torts to Persons

- **Battery:** A harmful or offensive contact with the plaintiff's person by the defendant.
- **Assault:** A reasonable apprehension in the plaintiff of an immediate harmful or offensive contact with his person by the defendant.
- **False Imprisonment:** The defendant's confining or restraining the plaintiff to a bounded area; in certain cases confining the plaintiff's personal property may give rise to a suit alleging false imprisonment.
- **False Arrest:** A special category of false imprisonment involving the invalid use of the defendant's legal authority to confine the plaintiff.

- **Intentional Infliction of Emotional Distress:** The infliction of emotional distress on the plaintiff by a defendant who has engaged in extreme and outrageous conduct.

b. Intentional Torts to Property

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

## 21.6 The Federal Tort Claims Act (FTCA)

In 1946, Congress enacted the Federal Tort Claims Act (FTCA). This act makes the United States liable under the local law of the place where the tort occurs for the negligent or wrongful acts or omissions of federal employees within the scope of their employment in the same manner and to the same extent as a private individual under like circumstances.

The purposes of the FTCA are two-fold: (1) to provide persons injured by the torts of federal employees with an appropriate remedy against the United States (a waiver of sovereign immunity); and (2) to protect federal employees from personal liability for torts committed within the scope of their employment (absolute immunity).

### 21.6.1 Negligent Torts

The FTCA covers lawsuits for negligent or wrongful acts or omissions of federal employees acting within the scope of their employment that cause loss of property, personal injury or death. This remedy against the United States is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose

act or omission gave rise to the claim. In those cases, where the federal government has waived its sovereign immunity from torts, a tort action against the United States is the sole remedy available to a plaintiff. A suit against the individual federal employee is precluded under the FTCA, however the FTCA does not provide protection against lawsuits for constitutional torts asserted under Bivens.

In effect, the United States has partially waived sovereign immunity. The United States has consented to be liable in the same manner and to the same extent as a private individual under like circumstances while reserving the right to any other defense to which it is entitled.

### 21.6.2 Intentional Torts

The FTCA specifically does not apply to intentional torts committed by federal employees who are not law enforcement officers. However, intentional torts such as assault, battery, false imprisonment, false arrest, and malicious prosecution are common allegations against law enforcement officers. As a result, the Act was amended to provide additional protection for federal “investigative and law enforcement officers.”

The term “investigative or law enforcement officer” means any officer of the United States who is empowered by law to: (1) execute searches; or (2) seize evidence, or (3) make arrests for violations of federal law. Any one or more of these criteria will qualify. The FTCA now provides that if the act was that of an investigative or law enforcement officer, the government will permit itself to be sued with respect to assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process so long as the law enforcement officer was acting within the scope of their employment.

### 21.6.3 Scope of Employment

“Scope of employment” is defined by determining whether the employee was performing the employer’s (federal government) business at the time of the occurrence. All the facts and circumstances surrounding the incident are considered to make this determination. Factors such as the employee’s job description and any agency policies promulgated through directives and general orders must also be taken into account.

“Scope of employment” can be limited in a number of different ways. Law enforcement officers for some agencies and departments have broad authority to investigate and arrest anywhere for any federal crime. Others are limited to certain federal offenses or certain defined geographical areas. Exceeding these limitations can mean that the law enforcement officer is outside the scope of employment.

Generally, federal law enforcement officers who intervene in purely state and local criminal offenses are outside the scope of employment. There is no affirmative duty to intervene and, therefore, no civil liability for failure to do so. However, intervention in state and local incidents can create liability for both the individual federal law enforcement officer and the agency or department when there would otherwise be none. Even though states may grant varying degrees of peace officer status, up to full protection, to federal law enforcement officers, many agency and department policies prohibit officers and agents from getting directly involved in state and local incidents.

#### a. The Federal Law Enforcement Officers “Good Samaritan” Laws

Many federal officers and agents are reluctant to become involved in state criminal violations for fear of being outside their scope of employment. As a result, Congress enacted

legislation (28 U.S.C. § 1442 and 28 U.S.C. § 2671) that broadens the meaning of “scope of employment” to protect federal law enforcement officers from state criminal violations. The legislations apply only to law enforcement officers as defined in 5 U.S.C. § 8401(17).

Not every federal law enforcement officer is covered, but for those that are, the Act provides that they are within the scope of employment when taking reasonable action, including the use of force: (1) to protect an individual in the presence of an officer from a crime of violence; or (2) to provide immediate assistance to individuals who have suffered or who are threatened with bodily harm; or (3) to prevent the escape of any individual whom the officer reasonably believes to have committed a crime of violence in the presence of the officer .

In essence, the legislation extends the federal scope of employment to non-federal crimes of violence being committed in the federal officer’s presence. It does not expand federal arrest authority. Because this law is still relatively new, the contours of its protections are not clearly defined. Does it obligate the Department of Justice to provide legal counsel to the federal officer or agent? Does it mandate that the United States indemnify the officer or agent for any damages should the claim be successful? There are no clear answers. There remains a real risk that intervening in purely state and local incidents will be outside the scope of employment and outside the purview of the FTCA, exposing the individual officer or agent to personal, civil liability.

#### b. Scope of Employment and Government Vehicles

Another common scope of employment issue involves the use of government vehicles. When is the use of a government vehicle considered outside the scope of employment? Agency or department policies and procedures generally outline authorized and prohibited uses. State law often defines scope

of employment in the use of government vehicles in terms of “official business” and “personal frolic.” State laws vary over how much of a deviation (both in purpose and distance) is required to put the use outside the scope of employment.

A law enforcement officer found to have used a government vehicle outside the scope of employment will not be protected by the FTCA and will, therefore, be personally liable for the injury and damages caused. Therefore, KNOW, UNDERSTAND, AND FOLLOW pertinent agency policies and procedures. Once the facts are determined, the law of the state where the alleged injury occurred is applied to decide whether the employee was “within the scope of employment.”

#### c. Certification That Employee Was Acting Within the Scope of Employment

When presented with a claim, the agency makes the initial decision on scope of employment. If the agency refuses to certify that the employee was acting within the scope of employment, the employee may request the Attorney General to so certify. Upon certification by the Attorney General that the defendant employee was acting within the scope of employment at the time of the incident on which the claim is based, the United States will be substituted as the party defendant. If the Attorney General refuses to certify scope of employment, the employee may petition the U.S. District Court to find and certify that the employee was acting within the scope of employment.

#### 21.6.4 Initiating a Civil Lawsuit under the FTCA

Before initiating a civil lawsuit against the government, a claimant must first exhaust administrative remedies such as filing a claim under the FTCA. The agency may deny the claim or negotiate settlement of the claim within certain limits. Acceptance by a claimant of a settlement is final and

conclusive and constitutes a complete release of any claim against the United States and the employee of the government whose act or omission gave rise to the claim. The claimant may file suit only after the claim has been administratively denied or the claimant has refused the Government's final offer of settlement.

The United States District Court has exclusive jurisdiction over civil actions on FTCA claims against the United States. Furthermore, the trial in district court will be without a jury. A tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency within two years of the date of the injury or damage. Suit may be filed beyond that two-year limit so long as it is within six months of the date of the final denial of the claim by the agency to which it was presented.

The absolute immunity afforded federal employees under the FTCA against personal liability for torts does not apply in a Bivens action alleging a constitutional tort. Instead, the federal officer will likely rely upon qualified immunity regarding a constitutional tort claim.

#### 21.6.5 Defenses to Negligent and Intentional Torts

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

##### a. To Negligent Torts

- **Assumption of Risk:** If a plaintiff has voluntarily placed himself or herself in a position of harm, knowing the dangers involved, the defendant will not be responsible for the subsequent injury to plaintiff. Plaintiff has assumed the risk of such injury.



- **Contributory/Comparative Negligence:** If the plaintiff has been negligent, and that negligence is a cause of the plaintiff's damages, then, depending on the law of the state where the incident occurred, the plaintiff may be prevented from recovering anything against the defendant or may have the recovery apportioned according to the degree of culpability of each.

b. To Intentional Torts

- **Consent:** Knowing and voluntary consent by plaintiff will bar recovery against defendant. However, defendant's actions must stay within the bounds, or scope of the consent.
- **Self-Defense and Defense of Others:** Reasonable force may be used to defend against harmful or offensive bodily contact. "Reasonable force" is a fact-intensive concept.
- **Necessity:** A defendant who acts to prevent a threatened injury from some force of nature, or other cause, independent of the defendant is acting under necessity. Such a defendant may not be liable for a lesser harm committed to prevent or avoid a greater harm.

## Chapter 22 -

### Report Writing – Legal Aspects

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#### 22.1 Introduction

An effective and well-articulated police report, created as close-in-time as possible after a law enforcement encounter, is critically important. The initial report represents an officer’s first, best, and sometimes only opportunity to plainly and clearly set forth all critical facts known to the officer at the

time of the encounter and all of the relevant factors that went into an officer's decision-making process. A well-written report provides a solid foundation for any criminal or civil case that follows. Such a report will also prove invaluable to an officer who is called upon to testify weeks, months, and sometimes years after an event has occurred.

Just as a well-written report provides a solid foundation for all future criminal and civil proceedings, a poorly-written report can undermine subsequent prosecutions, open an officer and their employing agency up to civil liability, and provide an attorney conducting cross-examination of the officer with ammunition to impeach or undermine their credibility on the witness stand. This chapter focuses on the legal requirements and best practices involved in the critical skill of report writing.

## **22.2 Definition of a Law Enforcement Report**

A law enforcement report is an official record of a law enforcement agency. Its purpose is to accurately and concisely summarize facts and events which transpire during an encounter or incident occurring in the course of a law enforcement officer's official duties.

A report should include all important, relevant, and significant events which occurred during the encounter, but not every detail. The writer should not attempt to create a transcript, but rather a thorough statement of the relevant facts and information. A report should be written in plain and commonly-understood language (no police jargon) so that citizens who are unfamiliar with police work can thoroughly understand the situation confronting the officer and all relevant factors that led to the officer's actions and why they were taken.

## 22.3 The Role a Report Plays in the Criminal and Civil Justice Systems

Once a report is created and made an official record of the law enforcement agency, that report can be used for various purposes, depending on the subject of the report.

### 22.3.1 The Public

With just a few exceptions, police reports are public records subject to disclosure under freedom of information act laws. Every report should be written in plain language with the overall goal that a citizen who knows nothing about police work can pick up the report, read it, and understand what happened and why an officer took the action they took in any given situation. For example, when the officer has a legal basis to frisk an individual for weapons or hard objects as allowed by Terry v. Ohio, 392 U.S. 1 (1968), the officer should clearly and plainly articulate the facts which led them to conclude that the subject was presently armed and dangerous. For example, a mere statement that the subject “posed a threat to the officer’s safety” as a rationale for a Terry frisk would be insufficient as it fails to inform the reader why the subject posed a threat and why the officer reasonably suspected that the individual was presently armed and dangerous.

### 22.3.2 Prosecutors

Outside the law enforcement agency, the prosecutor will likely see the report first. The prosecutor’s office will use reports to determine if they should charge the suspect with a crime. If a report’s purpose is to establish probable cause for an arrest, it must contain enough information as to each and every element of the crime investigated. A prosecutor is more likely to accept the case and file charges when given a well-worded, accurate, and complete report.

Even after a case has been accepted for prosecution, reports continue to play a key role in its success or failure. Remember, prosecutors learn about cases through second-hand knowledge; they do not usually conduct their own independent investigations. They gain knowledge regarding the strengths and weaknesses of their case primarily through reports. Inaccurate, incomplete, or poorly-articulated police reports can undermine the strength of a prosecution and undermine the credibility of witnesses who are later called to testify regarding facts that are not set forth clearly and completely within a police report.

### 22.3.3 Defense attorneys

Defense attorneys will have access to law enforcement reports through the discovery process. They will use reports to gather information about the case against their clients and evaluate the strength of the case. For example, if a report omits facts necessary to establish that the officer complied with the Fourth, Fifth, or Sixth Amendments of the Constitution when interacting with their client, a defense attorney will have little choice but to file motions with the court requesting evidentiary hearings before the Court in an effort to get the charges dismissed or evidence suppressed. Poorly articulated, confusing, or factually insufficient reports are almost certain to prompt such motions. On the other hand, well-written and factually accurate reports are more likely to generate a quick resolution to the case and result in fewer trips to court for the officers involved.

### 22.3.4 The Court

Although police reports are generally not admissible to prove a crime, they may be considered by courts for a number of purposes including: determining conditions for pretrial release of offenders; evaluating whether an evidentiary pre-trial hearing is appropriate; setting parameters for witnesses'

testimony during direct and cross-examination; determining probable cause at probation violation hearings; identifying victims' losses at restitution hearings; and calculating of sentencing guidelines.

### 22.3.5 Civil Attorneys

Civil attorneys will thoroughly evaluate the contents of a police report when evaluating the strength and viability of a potential lawsuit against a police agency, individual officer(s), or both. For example, when a use of force report fails to fully explain the facts and circumstances that went into an officer's decision to use force, this lack of detail will make attorneys more likely to file suit (e.g. alleging excessive force, unreasonable searches and/or seizures and other constitutional violations).

## 22.4 Problems Associated with a Poorly-Written Report

While a well-written report provides a solid foundation for subsequent criminal and civil litigation, a report lacking sufficient detail regarding the facts and circumstances of an event can undermine an officer's credibility, sabotage criminal prosecution, and open the officer and their department up to scrutiny, criticism, and an increased potential for long and drawn-out civil litigation. For example:

- When critical facts and circumstances are omitted from a report, an officer who later attempts to testify to the omitted facts or circumstances will be subject to intense cross-examination on the witness stand. An effective cross-examination will suggest to the jury that your failure to include critical facts or circumstances was a result of sloppy report writing (at best) or outright fabrication of facts to justify your actions (at worst). A well-written report is an officer's best friend and ally on the witness stand.

- The effects of a poorly written report can also be felt in civil trials. When an officer's use of force report fails to set forth all of the critical factors that an officer considered when deciding to use force, detain or arrest a subject, or conduct a search, the officer's decision-making is more likely to be challenged in court in a civil lawsuit.
- A lack of important detail within a report can also undermine a criminal prosecution. A prosecutor may decline to issue charges when critical facts are missing from a report. If charges are issued, the missing facts are likely to form the basis of a well-crafted defense strategy at trial.

## 22.5 Necessary Components for Establishing Reasonable Suspicion and Probable Cause in a Report

A report must be written with the overall objective of identifying all facts and circumstances relied upon by the officer to meet the legal requirements for conducting a Terry stop, a Terry frisk, a seizure, and/or search of an individual in accordance with Fourth Amendment precedent.

### 22.5.1 Reasonable Suspicion

Reasonable suspicion for a Terry Stop and/or Frisk. An officer must have reasonable suspicion that criminal activity is afoot and that the suspect is involved to conduct a Terry stop and reasonable suspicion that the subject is presently armed and dangerous to conduct a Terry frisk. Terry v. Ohio. Courts look to the "totality of the circumstances" to determine whether reasonable suspicion exists. Factors a court might consider (and therefore factors we should include in our report) includes all information obtained from reliable sources. To name just a few:

- The officer’s personal observations and knowledge including such factors as recent criminal activity, the time and location of the encounter, a suspect’s flight coupled with other factors, and a suspect’s prior criminal or violent history if known to the officer at the time the action is taken.
- Information from other law-enforcement sources such as other officers, NCIC, and BOLOs (i.e. collective knowledge).
- Information from identified third parties (witnesses and victims).
- Anonymously provided information so long as the information provided has been corroborated by the officer or otherwise found to be reliable under the totality of the circumstances. Illinois v. Gates, 462 U.S. 213 (1983).
- The length of a Terry stop and the scope of a Terry frisk. A Terry stop which takes longer than is reasonably necessary for the officer to rule in or rule out criminal activity may be viewed by a court as an arrest requiring probable cause. Similarly, the Terry frisk of an individual or an automobile which goes beyond a reasonable attempt to locate weapons or hard objects may be viewed by a court as a search requiring probable cause.

### 22.5.2 Probable Cause

The Fourth Amendment provides that “...no Warrant shall issue but upon Probable Cause...” Probable cause is also required before an individual may be arrested for a criminal violation. “Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not



readily, or even usefully, reduced to a neat set of legal rules.” Illinois v. Gates, 462 U.S. 213, 232 (1983). See also, Maryland v. Pringle, 540 U.S. 366 (2003). Courts will evaluate the totality of circumstances to determine whether an officer’s search and/or seizure was done with the requisite level of probable cause. Officers may rely upon the same types of facts and circumstances typically used to establish probable cause. A report must carefully document all of the facts and circumstances relied upon when concluding that there is a sufficient legal basis to conduct an arrest and/or search. Compare and contrast the following descriptions an officer might use to establish reasonable suspicion and/or probable cause:

CONCLUSIONS	FACTS
Officer observed ‘suspicious conduct’ and pre-assault indicators	Officer observed suspect pacing continuously; wore heavy jacket in 100 degree heat; scanning the area; shifting weight; clenching fists; looking around for witnesses or exits which, based on officer’s training, suggests that an individual is planning to assault the officer.
Officer observed ‘furtive gestures’	Officer observed subject, upon seeing officer, reach quickly into an area out of the officer’s view; subject concealed object in wheel well of a nearby vehicle upon officer’s arrival
Officer was in a ‘high crime area’	Officer was in a known high-crime area based upon the number of arrests that occur in this area, the types of arrests, officer’s personal observations, statistics, crime complaints
Officer observed	Suspect was a white male,

subject that matched description	approximately 6’2” tall, 180 lbs., brown hair, green jacket, black pants, brown baseball cap, driving a white late model sedan heading north on Elmhurst Ave. BOLO was for a white male about 6’2” with brown hair and a green jacket driving a late model white sedan.
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Further discussion on reasonable suspicion and probable cause can be found in the Fourth Amendment chapter in this book.

## 22.6 Facts That Support the Fourth Amendment’s Objective Reasonableness Standard

Details matter. All claims of excessive force, deadly or not, are analyzed under the Fourth Amendment’s objective reasonableness standard. To determine whether a particular use of force is reasonable under the Fourth Amendment, courts will evaluate the “totality of the circumstances” surrounding its use. An effective use of force report must therefore contain a clear and complete description of all relevant circumstances that confronted an officer at the time a decision to use force was made. In many instances, the difference between a ‘reasonable’ and ‘unreasonable’ use of force under the Fourth Amendment boils down to a single fact or circumstance. For example, use of deadly force upon an unarmed suspect might be considered unreasonable but for the fact that poor lighting conditions in the area, combined with the way the suspect was holding an otherwise harmless object (such as a cell phone), would lead an objectively reasonable officer to believe that the item in the suspect’s hand was a gun. If an officer fails to fully describe the location of this encounter including a detailed account of the poor lighting conditions, a court might conclude that the officer’s use of force was unreasonable.

### 22.6.1 Factors Evaluated By the Court

Recall that the factors cited by the Court in Graham v. Connor, 490 U.S. 386 (1989), for evaluating a use of force incident under the Fourth Amendment are:

- Severity of the crime;
- Whether the suspect is an immediate threat to the safety of the officer or others;
- Whether the suspect is actively resisting arrest; and
- Whether the suspect is attempting to evade arrest by flight.

In addition, factors other courts have considered when evaluating the reasonableness of an officer's decision to use force include:

- The number of suspects and officers involved;
- The size, age, and condition of the officer and suspect;
- The duration of the action;
- Whether the force applied resulted in an injury;
- Previous violent history of the suspect if known to the officer at the time;
- The use of alcohol or drugs by the suspect;
- The suspect's mental or psychiatric history if known to the officer at the time;
- The presence of innocent bystanders who could be

harmed if force is not used;

- The availability of weapons, such as pepper spray, batons or Tasers.

When sitting down to draft a use of force report, an officer should run through the factors listed above in order to determine which, if any, of the factors were present during the underlying incident. Reference to these factors can provide an officer with a solid starting point when sitting down to draft the narrative portion of a use of force report. Although reference to these factors can provide a useful starting point, they should only be used as a guide. The ultimate goal must always be to identify all of the critical factors and circumstances confronting the officer at the time a decision to use force was made in a very logical, easy-to-understand, and thorough manner.

### 22.6.2 Facts Versus Conclusions

A well-written report contains facts - not conclusions - that are sufficient to convince the reader that the officer's actions were reasonable under the circumstances. A well-written use of force report will avoid the use of conclusions and will instead describe the scene factually. Compare and contrast the following descriptions an officer might use to justify a use of force encounter:

CONCLUSIONS	FACTS
Subject was 'assaultive'	His right hand was balled in a fist, and his arms were extended stiffly downward and slightly away from his body. The handgun appeared firmly grasped in Turner's hand, and I observed his left index finger on the trigger.

Subject was 'non-compliant'	Turner did not respond verbally, acknowledge my presence or commands, or deviate from his pace or track as he continued toward the door. I repeated the commands, with no response.
Subject was 'resistant'	Subject pulled away; folded arms; '1000-yard stare'; flexed arm muscles; became rigid; hid behind an object; was unresponsive to physical force.

Additional discussion on use of force and the objective reasonableness standard can be found in the Use of Force chapter in this book.

## Chapter 23 -

### Use of Force – Legal Aspects

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## 23.1 Introduction

"How will a court of law judge me if someone sues me for using excessive force?" That is a fair question from a law enforcement officer. This chapter focuses on the legal aspects of using force during an arrest, investigatory stop, or other seizure of a free citizen.

### 23.1.1 Graham v. Connor

The leading case on the use of force is the 1989 Supreme Court decision in Graham v. Connor, 490 U.S. 386 (1989). The Court held "...that all claims that law enforcement officers have used excessive force – deadly or not – during an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its objective reasonableness standard . . . ."

A person is 'seized' when either of two situations occurs: 1) police make a show of authority, and a reasonable person would not feel free to leave or otherwise terminate the encounter, or 2) police intentionally apply force upon a person with the intent to stop that person's freedom of movement. The latter is a seizure even if the person does not submit to the officer and is not subdued by the officer. A seizure occurs from the moment force is applied. Torres v. Madrid, 141 S. Ct. 989 (2021).

Applying these definitions, a 'seizure' can occur in various ways. Traffic stops, investigative detentions, and arrests are all Fourth Amendment seizures. When a seizure occurs, it must be done in an objectively reasonable manner. Objective reasonableness is the only standard that governs all use of force. The Fourth Amendment chapter discusses when, and for how long, someone can be seized. This chapter focuses upon *how* such a seizure may be accomplished in an objective reasonable manner.

### 23.1.2 The Facts in Graham

The Supreme Court set forth the objective reasonableness standard governing the use of force in Graham v. Connor, 490 U.S. 386 (1989). Mr. Graham had diabetes. He felt the onset of an insulin reaction, called his friend, Mr. Berry, and asked for a ride to a convenience store. Graham hoped to buy some orange juice. He thought that the sugar in the juice would counteract the reaction.

After the two men arrived at the store, Graham exited the car and "hastily" went inside. Unfortunately, the check-out line was too long, so Graham "hastily" returned to the car, got in, and told Berry to drive to another friend's house—maybe this friend would have some juice.

Officer Connor was waiting and watching outside the store. Connor had watched Graham hastily enter and leave the store, and suspecting criminal activity was afoot, Connor activated his overhead lights, signaling Berry to stop. Berry tried to explain that his friend was having a "sugar reaction," but Connor was unconvinced. Connor told the two men to wait at their car and directed another officer to return to the store to determine what happened. Things got worse from that point. Graham got out of the vehicle. He ran around the car two times, sat down on the curb, and momentarily passed out. Backup officers arrived. According to Graham, he was violently placed into the backseat of a cruiser. All this time, Berry and Graham (after he regained consciousness) tried to explain that Graham was having an insulin reaction. But their pleas had no effect. One officer commented that he thought Graham was drunk.

After several minutes, Officer Connor finally received the report from an officer at the store: nothing was amiss, and no criminal activity occurred during Graham's hasty visit and departure. Graham was released from the back of the cruiser,



but he later sued Officer Connor, alleging that the force used during his seizure was excessive. How would the Courts judge Officer Connor's actions? The law was far from clear. When Graham's lawsuit was filed, there was no clear legal standard for evaluating excessive force claims against officers. Some courts viewed such lawsuits as substantive due process claims under the Fifth Amendment. Others viewed them as possible cruel and unusual punishment claims under the Eighth Amendment. Eventually, Graham's case went to the Supreme Court, and the Court concluded that *all claims* of excessive force are governed by the Fourth Amendment, which prohibits unreasonable searches and seizures. The Court in Graham also clarified that all force used must be 'objectively reasonable' to comply with the Fourth Amendment. It's essential, therefore, to understand what the courts mean when they say force must be objectively reasonable.

### 23.1.3 The Objective Test and the Reasonable Officer

Graham clarifies that an officer's use of force must be 'objectively reasonable' to comply with the Fourth Amendment. To determine whether an officer's use of force is objectively reasonable, a court must first know the facts reasonably known to the officer at the moment force was used. Once the Court identifies the facts, it will consider whether a reasonable officer, faced with those same facts and circumstances, would conclude that the force was reasonable. Stated another way, facts make force reasonable. Therefore, the standard used by courts to evaluate force is objective. Again, facts make force reasonable – not an officer's subjective intent or motivations.

Because courts focus solely on facts reasonably known to the officer when force was used, officers must explain those facts in a clear and easy-to-understand manner without resorting to subjective terms or cop jargon. To illustrate the difference

between objective facts and subjective beliefs or opinions, consider the following ways that an officer might explain his decision to use force:

Example 1: The officer might state that he gave the suspect three commands to raise his hands above his head, but the suspect refused to do so and instead quickly reached into his right front pants pocket with his right hand, pulled out a knife with a four-inch blade, pointed the tip of the blade at the officer and yelled "I'm going to kill you" as he advanced towards the officer at a fast pace from a distance of approximately 6' away.

Example 2: An officer confronted with the same situation might merely state that he gave the suspect commands, the suspect was non-compliant, and posed a threat to officer safety.

Example 1 is an objective (fact-based) description of the facts and circumstances confronting the officer at the moment force was used. This example paints a picture, allowing someone who wasn't there to fully understand the circumstances facing the officer at the moment force was used. Example 2, by contrast, is a subjective statement about what occurred. It conveys the officer's opinion or conclusion that the suspect was non-compliant and posed a threat to officer safety without ever explaining the facts that led to those opinions or conclusions. To further illustrate, consider the following ways that an officer might describe a suspect's actions:

Example 1: I contacted the driver while standing outside the vehicle near the passenger-side window. The area of the stop was poorly lit, and I had limited visibility into the vehicle's interior. I ordered the suspect to keep his hands on the steering wheel of the car to prevent the suspect from reaching for a weapon or other item that might be used to harm me. Instead

of following my command, the suspect reached quickly under the driver's seat with his right hand. The area he reached was out of my view and is an area where I know, from previous training and experience, that suspects frequently conceal weapons and/or contraband.

Example 2: The suspect made a furtive movement.

Although many police officers describe a suspect and his conduct using subjective 'cop jargon' terms (describing the suspect as making furtive movements, adopting a bladed stance, behaving in a non-compliant, resistant, or aggressive manner, for example), these terms fail to convey the facts confronting an officer at the moment force was used. These subjective terms may describe the officer's opinion or conclusion about the suspect's actions and intentions. Still, they fail to shed any light on the facts reasonably known to the officer at the moment force was used. When officers use this type of subjective language instead of objective, fact-based terms, a court cannot determine whether an officer's use of force complied with the Fourth Amendment's reasonableness requirement.

A well-written use of force report is a report long on facts and short on subjective terms or cop jargon. Good fact articulation is more challenging than it may seem. High stress affects human perception. Officers may experience tunnel vision, auditory exclusion, and even memory loss. However, an officer must try to describe events leading up to his use of force with as much factual detail as possible. For example, while the officer may not remember exactly what the suspect said, the officer may remember that "He screamed at me and clenched his fists like a boxer."

#### 23.1.4 The “No 20/20 Hindsight” Rule

The term "20/20 hindsight" means that by looking back at a situation, we can generally see clearly (with 20/20 vision) what could have been done better. In Graham, the Court recognized that officers are often forced to make use of force decisions under circumstances that are "tense, uncertain and rapidly evolving." After force has been used, additional facts might come to light which, had the officer known them at the time, may have caused him to use a different force option or no force at all. For example, if a suspect points a toy gun at an officer and the officer reasonably believes that the weapon is real, the officer may respond with deadly force to stop the perceived threat to his life. If the officer reasonably believed the gun was real, his force may be objectively reasonable. Information that comes to light only after the force was used (such as learning that the gun was a toy and not real) is a perfect example of 20/20 hindsight. If the officer had the benefit of this information when he decided to use deadly force, he probably would have used a different force option or no force at all. But courts don't evaluate an officer's decision to use force with the benefit of 20/20 hindsight. Instead, the Court freezes the moment when a decision to use force is made and considers only those facts that are reasonably known to the officer at that moment. In our example, if an officer reasonably (albeit mistakenly) believed that the gun was real, his decision to use deadly force could still be deemed objectively reasonable by the courts even though the suspect was technically 'unarmed.'

Looking back at what happened to Mr. Graham, the force seems unreasonable. Now we know (from the officer who returned to the store) that Graham had committed no crime. However, using the backup officer's report would violate the hindsight rule. The report was not a fact confronting Connor at the time. But what if Connor had learned the next day that Graham had a violent criminal record? It would not be a fact

reasonably known to Officer Connor at the time force was used. Therefore, this 20/20 hindsight would not be considered by the Court when determining if the force he used was objectively reasonable.

### 23.1.5 Perfect Answers vs. Range of Reasonableness

The Fourth Amendment does not require officers to make a 'perfect' decision regarding force, only a 'reasonable' one. As explained by Graham, "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." *Id.*, at 396. We could ask Officer Connor what he would do differently. In that case, he might say, "Knowing what I know now, I would have bought Mr. Graham a bottle of orange juice." But there are seldom perfect answers in situations where "reasonableness at the moment applies" and "...officers [are] forced to make split-second judgments – in circumstances that are often tense, uncertain, and rapidly evolving..." See Graham. There may be more than one way to effect a seizure - and while hindsight may prove one option better than another - what matters is whether the officer's conduct fell within the range of reasonableness based on the facts reasonably known to him at the moment force is used.

### 23.1.6 The Graham Factors – Reasons for Using Force

Determining whether a particular use of force is reasonable requires carefully balancing the nature of the intrusion on the suspect's liberty (the officer's conduct/or force he used) against the countervailing governmental interest at stake (the facts confronting the officer). Courts have long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion

or threat thereof to effect it. See Terry v. Ohio, 392 U.S. 1, 22-27 (1986). Because the test of reasonableness is incapable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each case with an emphasis on specific critical facts identified in Graham. These facts, often referred to as the Graham factors, include the severity of the crime, the immediacy of the threat, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. These are also known as the SIRF factors – an acronym for **S**everity, **I**mmediacy, **R**esistance, and **F**light. Although the Graham factors (otherwise known as the SIRF factors) are not the only factors a court will consider when determining whether force was objectively reasonable, they always provide a starting point for a Court's analysis.

Not all of the Graham factors will apply in every case. For example, an officer may reasonably use force on someone even if the suspect is not actively resisting arrest or attempting to evade arrest by flight. Consider, for example, police officers who are responsible for transporting an unwilling paranoid schizophrenic patient to a psychiatric hospital for treatment. The patient has likely not committed any crime and is not actively resisting or attempting to evade arrest by flight. He may, however, pose an immediate threat to the safety of the officer or others due to his actions. In this scenario, the immediacy of the threat may be the only factor driving the officer's decision. The immediacy of the threat is often the most important, and sometimes the only, Graham factor relevant to the Court's analysis of reasonableness. Other times, it combines Graham factors pertinent to the Court. The ultimate question for the Court is always whether the officer's actions were objectively reasonable, and the Graham factors provide a helpful starting point for courts when analyzing this question.

a. The Severity of the Crime

The “severity of the crime” generally refers to the reason for seizing someone in the first place. When discussing the severity of the crime, it is essential to note that courts evaluate the severity of the crime *when force is used*. If, for example, an officer conducts a traffic stop for a low-level traffic infraction such as speeding, the severity of the crime at the beginning of the encounter may be very low. Things can change very quickly, however. Sometimes, a ‘routine traffic stop’ can turn into a deadly encounter when the driver decides to run from the officer, physically assault the officer, or threaten the officer with a weapon. Although the severity of the crime was minimal at the time the seizure began, it can quickly escalate. When courts evaluate the severity of the crime, they focus on the crime occurring *at the moment force was used*.

b. The Immediacy of the Threat

The immediacy of the threat is generally considered the most critical Graham factor. In other words, does the suspect pose an *immediate threat* to the officer or others? The fact that a suspect poses a *potential threat* of harm won’t make force reasonable. The focus is always on what the suspect is doing at the moment force is used. Did his actions pose an immediate (not potential) threat of harm? And what about his actions, specifically, made the threat of harm seem imminent? Was it something he said? Was he within close striking distance of the officer? Did he have access to a weapon? How close was he to the officer or other innocent bystanders? Was he under the influence of alcohol or drugs? Was the officer aware of a history of violent or assaultive behavior by the suspect? These are just some of the questions courts might ask to determine whether

the suspect posed an immediate threat of harm to the officer or others at the moment force was used.

c. Actively Resisting Arrest

Resisting an arrest or other lawful seizure prevents the officer from effecting an arrest or investigating a crime. Active resistance may be physically fighting or struggling against an officer to avoid a seizure. However, active resistance can also encompass a suspect's failure to follow an officer's lawful commands. For instance, if an officer has a lawful basis to detain a suspect and gives the suspect several verbal commands to raise his hands above his head, and the suspect refuses to follow those commands, this failure to obey lawful commands also falls under the category of 'active resistance' under Graham. When describing a suspect's resistance, officers should carefully document his legal basis for giving the commands he gave, the exact commands that were given, how many commands were given, and what the suspect did (or didn't do) in response to those commands. A conclusory statement that the court gave commands and the suspect failed to comply will not provide the court with enough information to assess whether the suspect was actively resisting arrest or the officer's commands.

d. Attempting to Evade Arrest by Flight

When an officer has a lawful basis to conduct a seizure (a topic discussed in detail in the Fourth Amendment chapter), the officer also has the authority to use objectively reasonable force to effectuate the seizure. Suppose a suspect attempts to flee from an officer during an arrest, investigatory stop, or seizure. In that case, courts will consider this flight when evaluating the reasonableness of the force used to accomplish the



seizure.

### 23.1.7 Other Factors

While the Graham factors provide a useful starting point when evaluating the reasonableness of an officer's actions, they are not the only factors a court will consider. Courts have identified many 'other factors' relevant to determining whether the force used was objectively reasonable. These 'other factors' include:

- **The number of officers vs. The number of suspects.** Was the officer outnumbered? Was the suspect?
- **The size, age, and condition of the officer vs. the suspect.** Was the officer disadvantaged regarding size, age, or condition relative to the suspect? For instance, was the officer 5'8, 160 pounds, and in average physical condition, while the suspect was 6'3, 260 pounds, and in excellent physical shape? Courts will consider these discrepancies when determining whether an officer's use of force was objectively reasonable. Note the one physical characteristic that the courts do not consider: gender. Courts do not make allowances for the gender of the officer or suspect when determining whether an officer's force was objectively reasonable.
- **Previous violent or psychiatric history of the suspect.** Known criminal history or psychiatric history is important, but reasonable force always depends on the facts. The mere fact that a suspect has a previous history of violent behavior or acting in an erratic or aggressive manner when off his medication does not render the use of force necessary or reasonable. The focus is always upon what the suspect is doing at the moment force is used. Consider, for example, Armstrong v. Village of Pinehurst, 810 F.3d 892 (4th Cir. 2016), where a known

history of paranoid schizophrenia and resistance did not justify shocking a man several times with an electronic control device. While the man had been involuntarily committed, he had committed no crime. Surrounded by police officers and hospital staff, he became frightened and grabbed a pole. After refusing to release his grip, an officer shocked him several times with a Taser. The static stalemate did not create an immediate threat nor justify the force used.

- **Suspect's use of alcohol or drugs.** Courts recognize that suspects often act in an irrational and sometimes violent manner when under the influence of drugs or alcohol.
- **Presence of innocent bystanders.** Police officers may act to protect themselves and others from harm. Therefore, the presence of innocent bystanders is a relevant consideration for courts when evaluating the objective reasonableness of force. Consider *Kisela v. Hughes*, 584 U.S. 100 (2018), where police were called to a residence after reports that Hughes was engaging in erratic behavior with a knife. They had been there perhaps a minute when an officer shot Hughes when they observed her taking steps towards another woman while holding a kitchen knife. Although the officers had given at least two commands to Hughes to drop the knife, she continued to move toward the other woman with the knife in hand. Although the officers themselves were in no apparent danger, Hughes posed a threat of immediate harm to an innocent bystander. The officer's decision to use deadly force was deemed objectively reasonable.
- **Duration of the action.** Finally, time is an essential factor. See *Graham*, 490 U.S. at 397. The calculus for reasonableness must embody allowance for the fact that officers are often forced to make split-second judgments

about the amount of force necessary in a particular situation - in situations that are tense, uncertain, and rapidly evolving. When a suspected armed robber reaches towards his waistband when confronted by an officer, the officer may have only a split-second to respond. Courts consider the amount of time an officer has to respond to a situation when evaluating whether the officer's actions are objectively reasonable. But not every situation happens so quickly. Consider the paranoid schizophrenic who grabbed the post. There was time to consider other, less intrusive options besides shocking him.

- **Whether force applied resulted in injury.** The mere fact that an injury or death occurred will not render the use of force objectively unreasonable. Other facts, besides the injury sustained, will help courts determine whether the force applied was objectively reasonable.
- **The availability of weapons.** This factor refers to traditional weapons, such as guns and knives. It also includes items that can be used as a weapon, such as a vehicle, nearby rock, broken beer bottle, or hammer.

When evaluating whether force is objectively reasonable, the Graham (a.k.a. SIRF) factors provide a useful starting point for assessing what an objectively reasonable officer would do if confronted with a specific set of facts. The 'other factors' listed above are also relevant to the analysis. One factor, such as the immediacy of the threat, may be enough to render the force reasonable. Other times, it may be a combination of factors relied upon by the Court. Remember, however, that the Court will consider only those facts reasonably known to the officer at the time force was used. Courts make no allowance for 20/20 hindsight.

## 23.2 Deadly Force

Although there is no universally accepted definition of the term 'deadly force,' it generally refers to the force that can reasonably be expected to cause serious bodily injury or death. Shooting someone with a firearm is deadly force. So, too, is making contact with a suspect's vehicle during a police chase at high speeds. See Scott v. Harris, 550 U.S. 372, 384 (2007).

Although electronic control devices (ECDs) are generally thought of as intermediate weapons, the use of an ECD under some circumstances (such as when a suspect is near flammable materials, pregnant, or standing on an elevated surface) can constitute 'deadly force. Similarly, a baton is also generally considered to be an intermediate weapon. However, if an officer were to use the baton to crush a suspect's airway or strike the suspect on the head, courts would consider these actions to constitute deadly force as they would be likely to cause death or serious bodily injury. Ultimately, it is not the implement that determines if the force is deadly but the way it is used.

When evaluating the use of force, courts weigh the nature of the intrusion (the force used by the officer) against the countervailing governmental interest at stake (the facts confronting the officer). The use of force that causes (or is likely to cause) death or serious bodily injury represents a significant intrusion on someone's freedom of movement. Such a significant intrusion requires a commensurately strong governmental interest to be reasonable under the Fourth Amendment. The standard for deadly force is the same standard that governs all use of force: objective reasonableness. In Tennessee v. Garner, the Court provided officers guidance on when using deadly force may be reasonable under the Fourth Amendment.

### 23.2.1 Tennessee v. Garner

In Tennessee v. Garner, 471 U.S. 1 (1985), the Supreme Court held that it was unreasonable to kill an unarmed burglary suspect by shooting him in the back of the head. Garner ran out of the house where the officer was investigating a home burglary. The officer yelled stop, but Garner continued to flee and managed to reach and climb to the top of a fence. At that point, the officer had two options: let Garner escape to the other side of the fence or shoot. The officer shot Garner in the back of the head, and he died a few hours later on the operating table.

The officer admitted that he did not believe Garner posed a significant threat to himself or others. After all, the officer didn't observe any weapons in the suspect's hand or any bulges in his clothing that might indicate he was armed. The officer said he used deadly force simply to prevent the suspect from escaping. To the officer's credit, Tennessee law at that time (1974) authorized all necessary force to stop a fleeing felon, and the officer assumed the law allowed him to shoot Garner. But the Supreme Court held that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to stop an apparently unarmed, nondangerous fleeing suspect. As explained by the Court, even if an officer has probable cause to believe that a crime has been committed, he may not always seize the individual by killing him. In the Court's words, "It is not better that all felony suspects die than that they escape."

So, when would the use of deadly force be reasonable? Ultimately, the question of reasonableness depends upon the facts known to the officer at the moment force is used. Each situation is different and must be considered on its own merits. In Tennessee v. Garner, the Supreme Court concluded that the use of deadly force must be reserved for situations where the government has a compelling governmental interest in

subduing a suspect. As explained by the Court, “*where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.*” *Id.*, at 11. According to the Court in *Garner*, a compelling government interest might exist: (1) when the suspect threatens the officer with a weapon or the life of another is so endangered, or (2) when the officer has probable cause to believe the suspect poses a significant threat of death or serious bodily injury to the officer or others and deadly force is necessary to prevent their escape.

The Court in *Garner* also considered whether officers should be required to give a warning before using force on a suspect. On this issue, the Supreme Court concluded that an officer must provide a warning *when feasible*.

### 23.2.2 Scott v. Harris

The Supreme Court revisited the issue of deadly force in Scott v. Harris, 550 U.S. 372 (2007). In this case, officers attempted to conduct a traffic stop when they observed Victor Harris driving at 73 miles per hour in a 55-mile-per-hour zone. Harris fled, leading police on a ten-mile, high-speed chase exceeding 85 miles per hour on a dark, two-lane road. During the chase, Harris pulled into the parking lot of a shopping center and was nearly boxed in by various police vehicles. Harris evaded the trap by making a sharp turn, colliding with Officer Timothy Scott’s police car, exiting the parking lot, and speeding again down a two-lane roadway. A short while later, Officer Scott received permission from his supervisor to perform a precision intervention technique (PIT) maneuver. Scott then pushed his bumper into the rear of Harris’ vehicle. Harris then lost control of his car, left the roadway, ran down an embankment, overturned, and crashed. Harris was severely injured and rendered a quadriplegic.

Harris sued, claiming excessive force. The Supreme Court stated that the first step in assessing the constitutionality of Officer Scott's actions was to determine the relevant facts. Dash camera videos of the chase revealed that Harris' vehicle raced down narrow, two-lane roads in the dead of night at speeds that were 'shockingly fast. Harris swerved around more than a dozen other cars, crossed the double-yellow line, and forced cars traveling in both directions to their respective shoulders to avoid being hit. Harris ran multiple red lights and traveled for considerable periods in the occasional center left turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers to keep up. The Court observed that the incident resembled "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." Id., at 379-380.

Harris sued Officer Scott and others, claiming that the deadly force used against him was unreasonable as he was a 'mere speeder'. Harris argued that the Tennessee v. Garner decision prescribed certain preconditions that must be met before an officer may use deadly force. Specifically, (1) the suspect must pose an immediate threat of serious physical harm to the officer or others, (2) deadly force must be necessary to prevent escape, and (3) where feasible, the officer must give the suspect some warning. Since these 'preconditions' for deadly force were not met in this case, Harris argued that Scott's actions were unreasonable and in violation of the Fourth Amendment.

The Supreme Court rejected Harris' argument. The Court emphasized that Garner did not establish a magical on/off switch that triggers rigid preconditions for an officer's use of 'deadly force.' The facts in Garner were not at all like the facts in Scott v. Harris. Garner dealt with an officer shooting a gun, whereas Scott v. Harris involved one car striking another. Nor was the threat posed by the flight on foot of an unarmed suspect in Tennessee v. Garner even remotely comparable to



the extreme danger to human life posed by Harris. The Court stressed that although Tennessee v. Garner gave examples of situations where deadly force might be reasonable, the question of reasonableness depends entirely upon the facts of a particular situation. As noted by the Court, "In the end, we must slog our way through the fact-bound morass of reasonableness." Each case requires an application of the facts to Graham and relevant factors for using force. Even assuming that the severity of the crime was speeding at the beginning of the encounter, Harris fled. But this was no foot chase, like Garner. This was a flight using a two-ton vehicle. Harris raced down narrow, two-lane roads in the dead of the night and at speeds over 85 miles per hour. Harris swerved around more than a dozen other cars, crossed the double yellow line, and forced other vehicles off the road to avoid being hit. He ran multiple red lights and traveled for considerable periods of time in the occasional center left-turn lane. Harris did all that while being chased by numerous police cars. Harris even rammed one of the police cruisers. Pushing him off the road was not unreasonable, even if the force was highly likely to have deadly effects.

So, how do Graham, Garner, and Scott relate to one another on the critical topic of the use of force? Scott tells us that Graham is the test for judging all use of force claims. Graham tells us that the test for evaluating force is objective reasonableness. Garner provides examples of when deadly force (force highly likely to have deadly effects) is reasonable. Ultimately, however, every case goes back to Graham. There are no per se rules. Each case requires an application of the facts to Graham factors and other factors to the facts reasonably known to the officer at the moment force is used.

### 23.3 Intermediate Weapons

Batons, electronic control devices (ECDs), and oleoresin capsicum (OC) spray are often called intermediate or less-



than-lethal weapons. The use of such weapons must be objectively reasonable. To make this calculation, courts weigh the nature of the intrusion (the force used) against the countervailing governmental interest at stake (the facts confronting the officer).

a. The Nature of the Intrusion

There is no precise definition or mechanical formula for determining when or how an intermediate weapon can be used. For example, it may be reasonable to hold a baton at port arms to push a protestor back to the sidewalk gently, or it may be used to crush someone's skull. Generally speaking, however, batons and other intermediate weapons are used in a less-than-lethal manner. While not like shooting someone, they are usually believed to be a significant intrusion on someone's liberty and require a commensurately strong governmental interest.

Not all intermediate weapons are the same. Some of them, depending upon the manner in which they are used, are much more intrusive to an individual's freedom than others. Oleoresin Capsicum (OC) spray from the oily extract of the cayenne pepper plant creates a deep burning sensation and makes breathing difficult. Electronic control devices (ECDs) come in dart and drive-stun modes. Experts have testified that ECDs may cause abnormal heartbeat, leading to stoppage and death. On the other hand, a National Institute of Justice panel determined that there is no conclusive evidence that indicates a high risk of serious injury to humans from short-term ECD exposure in healthy, non-stressed, non-intoxicated persons. Statistically, ECDs carry a significantly lower risk of injury than physical force. John H. Laub, Director, National Institute of Justice, Study of Deaths Following Electro Muscular Disruption 31 (2011).

With respect to ECDs, the Ninth Circuit Court of Appeals has held that “the physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 taser and similar devices are a greater intrusion than other non-lethal methods of force we have confronted”. Bryan v. MacPherson, 630 F. 3d 805 (9th Cir. 2010). When an officer tased a clearly unarmed McPherson during a traffic stop for a seat belt violation from a distance of 15-20 feet away when no pedestrians were in harm's way, it was objectively unreasonable despite the fact that MacPherson was shouting expletives and pounding the steering wheel of his vehicle when initially stopped. The lack of evidence that he had physically or verbally threatened the officer made the force unreasonable.

In the dart mode, the ECD propels a pair of "probes," or aluminum darts, into the suspect. When the darts strike, the ECD delivers an electrical charge through the wires into the suspect's muscles. The charge momentarily overrides the central nervous system and incapacitates the suspect. In the drive-stun mode, the officer pushes two electric contacts on the front of the ECD directly against the suspect. The drive-stun delivers an electronic shock. It does not override the central nervous system like the dart mode but is painful and may cause a struggling suspect to release his grip on something. (The Physical Techniques Division at the FLETC provides electronic control device training to students. The students are issued the manufacturer's warnings.) Attention to these warnings can help the officer stay within the range of reasonableness.

With regard to OC spray, the Ninth Circuit has held that it is unreasonable to use pepper spray, projectile bean bags, and pepper ball projectiles against individuals “who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harm to others.” Nelson v. City of Davis, 685 F.3d 867, 885 (9th Cir. 2012).

Intermediate weapons are viewed as a significant intrusion into an individual's liberty. Officers must, therefore, identify a compelling governmental interest to make their use reasonable. Reference to the Graham factors (the severity of the crime, the immediacy of the threat, active resistance, and attempts to evade arrest by flight) along with the 'other factors' identified above may guide an officer in this calculation.

Intermediate weapons generally fall within the range of reasonableness when the suspect poses an immediate threat. The severity of the crime at issue may also support the use of an intermediate weapon. Consider an armed robbery suspect who refuses the officer's order to lie on the ground. But if we change the facts, we reach a different outcome. Assume the offense at issue was drunk driving. The same threat and urgency to get the suspect on the ground may not exist.

Consider another case where a patrolman stopped a truck driver for a minor traffic violation. The driver became immediately confrontational. "Get that flashlight out of my eyes," he stated. The officer asked for a license and registration five times. Instead, the driver ranted and raved by the highway, "Why don't you just take me to f---ing jail" and "I don't have to kiss your damn a—because you're a police officer." After the fifth request, and without warning the truck driver, the officer shot the man with an electronic control device (ECD) in dart mode. He fell and was taken to jail. Reasonable? The officer lawfully stopped the truck driver for a traffic violation. Failure to provide documentation (registration and license) was an arrestable offense. While the truck driver claimed that he would have obeyed the officer's arrest commands, the officer believed that arrest commands would only escalate an already tense and difficult situation into a more severe struggle. The facts supported the officer. Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

Each use of an intermediate weapon must be objectively reasonable. This means that for each application of force, the court will freeze that moment in time and inquire whether the facts that existed at that moment made the force reasonable. If an officer sprays a suspect with OC spray, tases a subject, or hits a subject with a baton multiple times, courts will evaluate whether each application of force was reasonable in light of the facts confronting the officer at that moment in time. An application of force that is reasonable in one moment may be unreasonable just moments later if the facts confronting the officer change. In Meyers v. Baltimore County, 713 F.3d 732 (4th Cir. 2013), officers deployed their taser a total of ten times against a suspect who advanced at the officers while holding a baseball bat. The court concluded that the first three deployments were reasonable as the suspect posed an immediate threat at the moment of their deployment. However, the subsequent seven deployments of the ECD were deemed excessive, as by this time, the suspect had been disarmed, brought to the ground, and restrained by several officers.

Combative resistance generally poses a credible threat. Factors to consider are the number of officers and the size, height, weight, and condition of the suspect compared to the officers. Consider a suspect that bites, scratches, punches, or kicks.

Mechanical resistance is when the suspect's resistance is not directed at the officer; instead, the suspect grabs ahold of something to thwart the officer's attempts to control him. Time is an essential factor in such a case. Is there time to consider other, less intrusive options than an intermediate weapon?

#### b. Control vs. Compliance and the Time Factor

Intermediate weapons have posed a challenge to the courts, the officers, and law enforcement trainers. When do they fall

within the range of reasonableness? The Supreme Court has not ruled definitively. Some circuit courts have held that an officer does not violate the Fourth Amendment by using an ECD to control the active resistance of a suspect. See Hagans v. Franklin Co. Sheriff's Office, 695 F.3d 505, 509 (6th Cir. 2012); See also Crowell v. Kirkpatrick, 400 F. App'x, 592 (2nd Cir. 2010), using a stun-drive ECD to force a protester to release herself from a heavy barrel to which she had chained herself did not violate the Fourth Amendment. She was told to leave, warned that the ECD would be used, told that it was painful, and given the opportunity to release herself before subsequent applications.

Others hold that active resistance alone is insufficient and that an ECD may only be used when a police officer is confronted with an immediate threat. See Armstrong v. Pinehurst, 810 F.3d 892, 903 (4th Cir. 2016.) It would be unreasonable to use a stun-drive ECD simply to remove an arrestee from a car in a circuit requiring an immediate threat, even after the arrestee stiffened her body and clutched the steering wheel to frustrate the officers' efforts. See Brooks v. City of Seattle, 661 F.3d 433 (9th Cir. 2011).

Federal law enforcement officers are assigned to various circuits and must be aware of current caselaw that might affect them. Officers must be reasonable anywhere they work.

Understanding the difference between control and compliance is a step in the right direction. Intermediate weapons are control tools, not compliance tools. Simple statements that "The suspect was non-compliant" or "He didn't do what I said" are never enough. Finally, "time" is an essential factor. And this may be the key to being reasonable in any circuit. If the suspect is not an immediate threat, there is generally time to consider other less intrusive options.

### 23.3.1 Duty To Intervene

Officers have an *affirmative duty* to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence. Officers can be liable for failure to intervene if they observe or have reason to know that excessive force is being used and have a realistic opportunity to prevent harm. Anderson v. Brennan, 17 F.3d 552 (2nd Cir. 1994). The rationale underlying the bystander liability theory is that a by-standing officer, by choosing not to intervene, functionally participates in the unconstitutional act of his fellow officer. Randall v. Prince George's County, 302 F.3d 188 (4th Cir. 2002). An officer must have a realistic opportunity to intervene before he will be held liable for failing to do so. Courts will consider how fast the event transpired when determining whether an officer had a realistic opportunity to intervene. Courts have held that force lasting only seconds happened too quickly to give other officers a realistic chance to recognize the need to intervene and take action. However, an officer who observed a K9 attack on a citizen for at least two minutes had the time and ability to intervene. Priester v. City of Riviera Beach, 208 F. 3d 919 (11th Cir. 2000). Similarly, an officer "was able to do something to stop" a beating that lasted for two to three minutes. Bailey v. City of Miami Beach, 476 F. App'x 857 (11th Cir. 2008).

Does a subordinate officer have a duty to intervene when he observes a superior officer committing a constitutional violation? The answer is 'yes'. An officer cannot escape liability by relying upon his inferior or non-supervisory rank vis-a-vis other officers. If a police officer, supervisory or not, fails or refuses to intervene when a constitutional violation takes place in his presence, the officer is directly liable for the violation. Smith v. Mensinger, 293 F.3d 641 (3rd Cir. 2002).

The Department of Justice updated its Use of Force Policy in May 2022. A complete copy of this policy is outlined in the legal

resource book. On the topic of duty to intervene, the policy states, "Officers will be trained in, and must recognize and act upon, the affirmative duty to intervene to prevent or stop, as appropriate, any officer from engaging in excessive force or other use of force that violates the Constitution, other federal laws, or Department policies on the reasonable use of force."

### 23.3.2 De-escalation

Police officers are often required to make decisions under circumstances that are "...tense, uncertain, and rapidly evolving..." Many times, the severity of the crime and/or the immediacy of the threat posed by a suspect will require the officer to act quickly, without hesitation, to stop the threat posed to officers and/or others. Other times, an officer may have the opportunity to slow a situation down, gain more discretionary time, and reduce the immediacy of the threat posed by a suspect. An officer might make tactical decisions to slow the situation down, including creating distance from the subject, seeking cover, calling for backup or other appropriate resources, and communicating with the subject to gain voluntary compliance with your lawful commands. Such tactical measures, taken to slow the situation down, are often broadly characterized as 'de-escalation. DOJ's updated Use of Force Policy (dated May 20, 2022) provides that "officers will be trained in de-escalation tactics and techniques designed to gain voluntary compliance from a subject before using force, and such tactics and techniques should be employed if objectively feasible and they would not increase the danger to the officer or others. When feasible, reducing the need for force allows officers to secure their own safety as well as the safety of the public". While efforts to de-escalate a situation are encouraged, they should never take precedence over officer or bystander safety.

On a related note, some circuit courts have applied a so-called officer provocation theory when evaluating an officer's decision



to use force. Under this theory, Courts have held that the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether their conduct during the seizure unreasonably created the need to use such force. In Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019), Ceballos' wife called the police to report that her husband was in the driveway with a baseball bat "acting crazy" and that he was drunk and probably on drugs. She said she was in the home with their seventeen-month-old baby, was afraid to leave, and wanted police to remove him from the house so she could put the baby to bed. Upon arriving at the residence, officers observed Ceballos pacing in the driveway from approximately 100 yards away, swinging a baseball bat, yelling, and throwing his arms in the air. Officers didn't see anyone near Ceballos; he appeared to be alone. Officers yelled commands for Caballos to drop the bat. Instead of doing so, Ceballos walked into his garage, emerged with the bat in his hand, and began walking towards the officers, who had their guns drawn and continued shouting commands. The evidence conflicted about whether Ceballos was walking quickly or slowly towards the officers. The evidence also conflicted about whether the officers were also moving towards Ceballos as he walked towards them in the driveway. It was undisputed, however, that Ceballos failed to follow the officer's repeated commands to stop and drop the bat. All of this happened very quickly. Within a minute of their arrival on the scene, officers fatally shot Ceballos when he was 12-20 feet away from them. The 10<sup>th</sup> Circuit concluded that the officer's decision to use force violated the Fourth Amendment. Although Ceballos may have posed a threat of severe bodily injury or death at the moment force was used, the officer's conduct during the seizure unreasonably created the need to use such force.

Other circuit courts have applied the so-called provocation theory outlined in Ceballos. For instance, in City of Tahlequah v. Bond, 981 F.3d 808 (10th Cir. 2020), rev other grounds 595



U.S. 9 (2021), the Tenth Circuit held that an officer could be liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force.

### 23.3.3 Myths v. Reality

No subject is plagued with more myths than the use of force.

- **Myth:** Don't fire unless fired upon.

The reality is that waiting for the suspect to take the first shot ... waiting for the suspect to point the gun ... or waiting to see the weapon may cause the officer to react too slowly. Objectively reasonable force requires an application of the facts to the Graham factors. When the facts support a reasonable belief that the suspect poses a significant threat, deadly force is not unreasonable.

Graham allows officers to react to the *threat* of violence rather than violence itself.

- **Myth:** Deadly force can only be used as a last resort.

Use of force policies often state that deadly force can only be used as a last resort ... or that officers must use the minimal amount of force... and even then, they should always give a warning. However, law enforcement agencies cannot make laws. The Graham standard, which is the legal standard, is objective reasonableness.

- **Myth:** Never shoot an unarmed person, and never shoot someone in the back.

Whether someone poses a significant threat of serious bodily harm requires an application of the facts to the Graham factors. Someone fleeing the scene of a traffic stop may not be

armed in the traditional sense, but his flight by means of a speeding vehicle may still pose a significant threat. Consider the facts at the time and determine whether the suspect poses a significant threat of serious bodily harm to the officer or others.

### 23.4 Myths vs. Reality

- **Myth:** ECDs have been credited with reducing injuries to suspects and officers alike; therefore, they can be used anytime the suspect disobeys the officers' orders.

Part of that statement is true. ECDs have been credited with reducing injuries. But ECDs are also a significant intrusion on someone's liberty and require a commensurately strong governmental interest.

- **Myth:** The law does not require an officer to re-assess a suspect's resistance after using an ECD because the pain is only temporary.

Each use of an ECD (or each use of any intermediate weapon, for that matter) must be objectively reasonable. Objective reasonableness always requires an application of the facts to the Graham and other factors.

- **Myth:** An officer does not have a duty to de-contaminate a suspect after using OC spray so long as the initial use was reasonable.

Custody triggers the officer's duty to render aid. Officers should decontaminate the suspect and provide other necessary aid, when reasonable.

- **Myth:** Agency policy is the law.

Agency policy is not the law. The Supreme Court established

the law in Graham v. Connor. Agency policies may establish restrictions on using force and officers may suffer administrative sanctions for violating them. If sued, however, the court will apply the objective reasonableness standard.

### 23.5 After the Fight

Taking a suspect into custody creates a duty to care for him. Jones v. City of Cincinnati, 507 F. App'x. 463 (6th Cir. 2012), citing Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2012). The Department of Justice's updated use of force policy states, "Officers will be trained in, and must recognize and act upon, the affirmative duty to request and/or render medical aid, as appropriate, where needed." Consider the following:

- As soon as the suspect is handcuffed, get him off his stomach and belt him inside the car in the seated position. In-custody deaths may result from positional asphyxia – i.e., death as a result of positioning the suspect's body in a way that interferes with his ability to breathe.
- Monitor the suspect carefully and obtain medical treatment if needed. If it's reasonable to believe that the suspect is under the influence of controlled substances, ask for the name of the drug and the amount taken. Do not assume that the suspect is "playing possum." Seek medical care on his request. (The Miranda Public Safety Exception allows police officers to ask questions that are reasonably related to the safety of the suspect, the officer, or others.)
- If the suspect is not breathing or there is other evidence that he suffers from a serious medical condition, call EMS, apply CPR, and provide first aid as necessary.
- Inform the detention facility's custodians of any medical

problems.

## 23.6 Qualified Immunity

This is an excellent place to discuss the defense of qualified immunity. Although this topic will be taken up in greater detail in the chapter on Officer Liability, a brief introduction to this concept is in order here.

When an officer is sued for monetary damages in civil Court for an alleged constitutional violation (such as an unreasonable seizure under the Fourth Amendment), the officer may have a defense of qualified immunity. If an officer qualifies for the protection of qualified immunity, the lawsuit filed against him will be dismissed before trial. Qualified immunity is only available as a defense when an officer is sued in civil Court for monetary damages following a use-of-force encounter. If the officer is charged with a crime in connection with the force, qualified immunity won't provide a defense.

The rationale behind qualified immunity is twofold. First, it permits officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages. Second, it allows a plaintiff to recover damages when the facts support a clear violation of a constitutional right.

We can describe qualified immunity as a contract that police officers have with the federal courts. The officer's part of the contract is to use constitutional force (i.e., force within the range of reasonableness). Still, the officer's conduct may fall outside that range, as it did in Tennessee v. Garner. In that case, the question is whether the courts lived up to their end of the bargain by issuing an opinion that put officers on notice that a particular use of force under very similar circumstances would be considered unconstitutional by the courts. Was the law clearly established at the time? The officer only breaks the

contract when he violates a clearly established constitutional right.

It is not enough to say what the officer should have done or even what a reasonable officer might have done under similar circumstances. The existing law must clearly put him on notice that his conduct (the force used) was unlawful in the specific context of the case (the facts confronting him). The matter must be beyond debate. If not, the case against the officer is dismissed. We can say that the officer's conduct was objectively lawful at the time under currently existing law.

In short, there are two ways to get qualified immunity. The judge may find that (1) the force was constitutional or (2) that the officer's conduct did not violate clearly established statutory or constitutional rights of which a reasonable officer would have known at the time. In addition, the judge is not required to answer these questions in any particular order. The judge may find that the law is unclear and save the more challenging constitutional question for another day.

So, when is an officer denied qualified immunity, and what happens? To defeat the officer's request, the plaintiff must show that the officer's conduct amounted to (1) a constitutional violation that (2) was the law was clearly established at the time. If denied qualified immunity, the case may proceed to trial.

Why not hold the officer liable if the judge finds he violated clearly established statutory or constitutional rights? Why is there a need for a trial? The answer is simple. Recall that qualified immunity is raised before the actual trial, and if granted, the plaintiff's case is dismissed. Dismissing the case denies the plaintiff his day in Court. Before the judge can dismiss the case, however, the judge must consider the facts in a light most favorable to the plaintiff. The judge must be able to say, "Mr. Plaintiff, I have considered your version of what

happened. No reasonable jury could find for you...based on your version of the facts." Only in that case is it fair to deny the plaintiff his day in Court.

It is not uncommon for the plaintiff and the officer to have a material dispute about the facts. If the officer has a different story, the judge may send the case to trial to resolve the dispute. But denying the officer qualified immunity does not always mean he is liable. At trial, credibility becomes a factor. The jury may believe the officer's version of what happened.

### **23.7 The Role of Agency Policy**

So far in this chapter, we have discussed the law and applicable legal standards used by courts when evaluating whether a use of force is constitutional. Every police officer should know the law governing this critical topic. In addition to the legal standards governing the use of force, officers must also understand and follow their agency's policy on this vital topic. Agencies are free to adopt policies that are more restrictive than the law requires when using force. If an officer violates agency policy, it can reasonably be said that he has violated a term of his employment and may be disciplined by his agency, perhaps even fired, for this violation. A violation of agency policy does not, however, mean that the officer's actions were unlawful or in violation of the Fourth Amendment. This question is entirely different, governed by *Graham v. Connor* and related cases.

In September 2021, the Department of Justice issued policy changes applicable to its law enforcement components regarding chokeholds. A copy of this updated policy is fully outlined in the Legal Reference Book you provided to supplement your legal studies. Students should review and familiarize themselves with this policy, as well as their own agency's policy governing the use of force.









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