U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

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TO: Holders of United States Attorneys' Manual Title 9

FROM: Jo Ann Harris
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United States Attorneys' Manual Staff
Executive Office for United States Attorneys

RE: Procedures regarding the use and unsealing of Title III affidavits

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to holders of Title 9.
3. Insert as new section.

CREATES: USAM 9-7.520

PURPOSE: To protect the privacy interests and reputation of persons not charged with any crime but who nonetheless may be identified in Title III materials and to protect the integrity and security of ongoing criminal investigations, care must be exercised not to disclose publicly or allow the disclosure of Title III materials following the termination of any Title III surveillance.

9-7.520 Caution against the unsealing and public use of Title III applications and intercept information:

When the government terminates a Title III[1] electronic surveillance investigation, it must maintain under seal all of the Title III applications (including affidavits and accompanying material) that were filed in support of the electronic surveillance. See 18 U.S.C. § 2518(8)(b).[2] The purpose of this

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[1] The Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2521 (hereinafter, "Title III").

[2] Although 18 U.S.C. 2518(8)(b) refers only to "applications" and "orders," the Department interprets "applications" to include the affidavits and any other related documents filed in a Title III investigation. See In re Grand

sealing requirement is to ensure the integrity of the Title III materials and to protect the privacy rights of those individuals implicated in the Title III investigation. See Sen. Report No. 1097, 90th Cong., 2d Sess., reprinted in, 1968 U.S. Code Cong. & Admin. News 2112, 2193-2194 (hereinafter, "Sen. Report"). The applications may be unsealed only pursuant to order of court and only upon a showing of good cause under 18 U.S.C. § 2518(8)(b) or in the interest of justice under 18 U.S.C. § 2518(8)(d).

Thus, the government attorney should not attach Title III affidavits or other application material as exhibits to any search warrant affidavit, complaint, indictment, or trial brief. The government attorney may, nevertheless, use information from these materials or the Title III interceptions in documents such as search warrant affidavits, complaints, indictments, and trial briefs. See 18 U.S.C. § 2518(8)(a); 18 U.S.C. §§ 2517(1) and (2); Sen. Report at 2188. In using this information, however, the government attorney must use care not to disclose publicly information from the Title III affidavits or interceptions that would either abridge the privacy interests of persons not charged with any crime or jeopardize ongoing investigations.

When Title III materials are sought by defense counsel or other persons and the privacy interests of uncharged persons are implicated by the contents of those materials, the government attorney should seek a protective order pursuant to Rule 16(d)(1), Fed. R. Crim. P., that will forbid public disclosure of the contents of the materials. Likewise, a protective order pursuant to Rule 16(d)(1) should be sought to deny or defer discovery of those portions of the affidavits and applications that reveal ongoing investigations where disclosure would jeopardize the success of any investigation.

Jury Proceedings, 841 F.2d 1048, 1053 n.9 (11th Cir. 1988). Consequently, it is our policy that supporting affidavits and related documents be filed and maintained under seal.

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9-7.000 ELECTRONIC SURVEILLANCE

9-7.010 Purpose and Scope

9-7.011 Introduction

The purpose of this chapter is to provide references to existing and anticipated material describing the availability and use of electronic surveillance in two major areas: (1) as an invaluable investigative tool which is available for use in many federal criminal investigations, and (2) as highly inculpatory evidence which may be used in any resulting federal prosecution. Most importantly, this chapter will also set forth those review/approval processes which must be followed prior to the utilization of certain types of electronic surveillance.

9-7.012 Title III Monograph

The Criminal Division is currently drafting a monograph on the legal and policy concerns relating to the use of the federal electronic surveillance statutes. These statutes were originally enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, 82 Stat. 197 (June 19, 1968) (''Title III''), and they were substantially amended and updated as part of the Electronic Communications Privacy Act of 1986, Pub.L. 99-508, 100 Stat. 1848 (October 21, 1986) (''ECPA'').

The monograph will feature a detailed discussion of the status of electronic surveillance law, especially regarding how the ECPA has affected the availability and use of electronic surveillance (*e.g.*, wiretaps, ''bugs,'' clone pagers, pen registers). As an important background note, prosecutors should be aware that the amendments to Title III incorporated in the ECPA were enacted by Congress in recognition of recent advancements in communication and communication-interception technology, and were designed to delineate clearly the permissible bounds of law enforcement's investigative incursion into these areas. In addressing society's competing goals of security and privacy, Congress has, through the ECPA, attempted to fashion a workable compromise whereby law enforcement agencies must obtain the approval of certain high-level Justice Department officials, then a court order authorizing or approving their proposed action, before they can utilize certain of the most effective—and intrusive—electronic surveillance techniques. Newly drafted model forms incorporating these concepts are to be included in the monograph.

It is the specifics of the review process within the Department of Justice that the following paragraphs will attempt to clarify and summarize. (Further elaboration on this and related issues will be addressed, in depth, in the forthcoming monograph, *supra*.)

A partial legislative history for Title III and the ECPA may be found in S.Rep. 1097. 90th Cong., 2d Sess., *reprinted in* 1968 U.S.Code Cong. &

Ad.News 2112, at 2153 *et seq.* (Title III), and S.Rep. No. 541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.Code Cong. & Ad.News 3555 *et seq.* (ECPA). Attorneys in the Electronic Surveillance Unit of the Office of Enforcement Operations, Criminal Division, are available to provide additional assistance concerning both the interpretation of Title III and the review process necessitated thereunder.

Specifically excluded from the coverage of Title III and the ECPA, as well as the scope of this discussion of electronic surveillance, are interceptions to be conducted pursuant to the Foreign Intelligence Surveillance Act, which is codified at 50 U.S.C. § 1801 *et seq.* *See* 18 U.S.C. § 2511(2)(a)(ii), (2)(e), and (2)(f). Procedures for such interceptions are addressed elsewhere in the United States Attorneys' Manual.

9-7.100 THE AUTHORIZATION

9-7.110 Authorization of Applications for Interception Orders

As noted *supra*, Title III includes several review and approval provisions to govern use of the electronic surveillance statutes which were enacted by Congress as an integral part of the myriad of intended barriers to law enforcement's full use of electronic surveillance. Title III specifically assigns such review powers to the Attorney General, but allows for the Attorney General to delegate this authority to a list of high-level Justice Department officials. The provisions thereby mandate Department of Justice scrutiny of proposed applications for many types of electronic surveillance, such as ''wiretaps'' (to intercept wire communications), ''bugs'' (use of microphones surreptitiously installed to intercept oral communications), and the ''roving interception'' of oral and/or wire communications. Many of these terms are defined in the ''definitions'' provisions of Title III: 18 U.S.C. § 2510.

Because of the harsh penalties which are attached to the improper and unlawful use of electronic surveillance, including criminal, civil, and administrative penalties, as well as exclusion of the evidence obtained thereby, it is essential that federal prosecutors understand clearly when Departmental review is required, and what such a review entails.

Where required, the Department's review process must occur prior to the submission to the court of an application for interception. Such review and approval must, in almost all instances, precede the actual interception. However, in certain ''emergency'' situations (addressed *infra*), interception may temporarily precede application to the court. In those instances, the Department's authorization must still be obtained prior to interception, and the application to the court must be submitted within 48 hours of the interception.

Central to an understanding of the core concepts of the legislative scheme of Title III is an appreciation of the history of this legislation

and Congress's goals in enacting it. While essentially banning the use of certain electronic surveillance techniques by private citizens in 1968, Congress excepted law enforcement from this prohibition, but required compliance with certain explicit preconditions regarding the circumstances under which law enforcement's use of electronic surveillance would be permitted. While many of the limitations on law enforcement power in this area were enacted in recognition of the strictures as to unlawful searches and seizures contained in the Fourth Amendment to the U.S. Constitution, *see, e.g., Katz v. United States,* 389 U.S. 347 (1967), several of Title III's provisions are broader and more restrictive, than would otherwise be required by the U.S. Constitution. *See generally* 18 U.S.C. § 2518(9) and (10) (Title III's statutory exclusionary rule).

One of the most restrictive of the above provisions, but one mandated by the Supreme Court's decision in *Katz, supra,* is the requirement that the government obtain an order from a court of competent jurisdiction prior to the utilization of many types of electronic surveillance. For example, the requirement that a court order be obtained prior to the interception of wire and oral communications, required by *Katz* and set forth at 18 U.S.C. § 2516, was originally enacted as part of Title III in 1968. This provision was broadened as part of the ECPA to include the interception of electronic communications (*e.g.*, messages transmitted to digital display paging devices and to and from ''fax'' machines). Also as part of the ECPA, Congress included ''pen registers'' as a form of electronic surveillance that requires a court order prior to utilization, but such action was clearly not mandated by the Supreme Court's interpretation of ''search'' as used in the Fourth Amendment. *Compare Smith v. Maryland,* 442 U.S. 735 (1979), *with* 18 U.S.C. § 3121 *et seq.*

The application must provide sufficient facts for the court to conclude the following:

> (1) that probable cause exists that certain listed persons have committed, are committing, or will commit offenses which are proper predicates for the specific type of electronic surveillance. Where the interception of wire or oral communications is requested, the predicate offenses are listed in 18 U.S.C. § 2516(1); where the interception of electronic communications is requested, any federal felony offense may properly serve as a predicate offense, as provided in 18 U.S.C. § 2516(3));
>
> (2) that probable cause exists that all or some of the above persons have used, are using, or will use a targeted facility or targeted premises in connection with the commission of the above offenses; and
>
> (3) that probable cause exists that the targeted facility (for wire or electronic interception) or targeted premises (for

oral interception) has been used, is being used, or will be used in connection with the above offenses.

In addition, the application must contain: a complete statement as to other investigative procedures that have been tried and failed, or reasonably appear unlikely to succeed if tried, or which would be too dangerous to employ, and a complete statement of all other applications for electronic surveillance involving the persons, facilities, or premises which are the subject of the current application.

In drafting the affidavit in support of the government's application—which normally provides the factual basis for the statements contained in the application, *supra*—care should be taken to avoid unsupported statements of opinions and conclusions. In addition, it is important that the affidavit set forth underlying circumstances and the factors which give intrinsic reliability to the facts established by the affidavit, and, especially, to the reliability and accuracy of any information provided by informants.

Congress has also mandated, prior to the application to a court for an order authorizing the interception of wire and/or oral communications, that the Attorney General, Deputy Attorney General, or Associate Attorney General review—and approve where sufficient—such applications to the federal judiciary. 18 U.S.C. § 2516(1). Title III (as modified by the ECPA) permits the Attorney General to delegate this review function to any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General of the Criminal Division. *See* 18 U.S.C. § 2516(1). As of Attorney General Order No. 1162-86 of December 12, 1986, the Attorney General had specifically designated the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Criminal Division and any Deputy Assistant Attorney General of the Criminal Division to act in his stead in these matters. Although the ECPA has instituted a requirement that a court order be obtained prior to the installation of a ''pen register'' or ''trap and trace device,'' *see* 18 U.S.C. § 3121 *et seq.*, the requirement for prior Department authorization has not been mandated by the statute and is, therefore, not applicable to applications for such orders.

Important note: Although Title III (as amended by the ECPA) provides that any ''attorney for the Government'' (as defined in Federal Rule of Criminal Procedure 54(c)) may authorize an application for the interception of electronic communications as to any federal felony, and no Department review is explicitly mandated, the Department of Justice, in its efforts to ensure enactment of this provision, agreed with Congress to also review applications for the interception of electronic communications for the three-year period beginning with the enactment of the ECPA on October 21, 1986. *See* S.Rep. No. 541, 99th Cong., 2d Sess. 28, *reprinted in* 1986 U.S.Code Cong. & Ad.News 3582.

9-7.111 ''Roving Interception''

In another major revision to Title III enacted as part of the ECPA, Congress has authorized applications for the ''roving interception'' of wire and/or oral communications. As to the interception of oral communications, such applications may be made without specifying the location(s) of the interception when it can be shown that it is not practical to specify such location. An application for the interception of wire communications without specifying the facility or facilities to be targeted may be made in those instances where it can be shown that the subject or subjects of the interception have demonstrated a purpose to thwart interception by changing facilities. In instances where roving interception is to be requested, the Department's review must be conducted by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an Acting Assistant Attorney General. *See* 18 U.S.C. § 2518(11). *See also* S.Rep. No. 541, *supra*, at 32, 1986 U.S.Code Cong. & Ad.News, at 3586. These latter categories have been further restricted by the Attorney General's order, *supra*, and thus applications for roving interception may only be authorized by the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Criminal Division.

9-7.112 Emergency Interception/Authorization

Since its enactment in 1968, Title III has contained a provision which authorizes the emergency interception of wire or oral communications. 18 U.S.C. § 2518(7). As amended by the ECPA, this provision allows an investigative or law enforcement officer to intercept wire, oral, or electronic communications before a court order authorizing such interception can be obtained where such officer is specially designated, *prior to the interception*, by the Attorney General, Deputy Attorney General, or Associate Attorney General and where an emergency situation exists that involves (1) immediate danger of death or serious bodily injury to any person, (2) conspiratorial activities threatening the national security interest, or (3) conspiratorial activities characteristic of organized crime. The statute requires that grounds must exist under which an order could be entered to authorize the interception and that an application be made within 48 hours after the interception has occurred or begins to occur. If a court order is obtained within that time frame, the interception may continue as ordered. If the application is denied, or in any other case where the interception is terminated without an order having been issued (*e.g.*, when the communication sought is first obtained pursuant to such emergency interception), ''the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of [Title III], and an inventory shall be served as provided for in [18 U.S.C. § 2518(8)(d)] on the person named in the application.'' 18 U.S.C. § 2517.

9-7.113 Format for Authorization Request

In all of the above instances where Justice Department review of a proposed application for electronic surveillance is mandated, the Electronic Surveillance Unit of the Criminal Division's Office of Enforcement Operations will conduct the initial review of the attendant pleadings, which are composed of: (1) the affidavit of an ''investigative or law enforcement officer'' of the United States who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in 18 U.S.C. § 2516 (which, for any application involving the interception of electronic communications, includes any federal felony offense), with such affidavit setting forth the facts of the investigation that establish the basis for those probable cause (and other) statements required by Title III to be included in the application, as described in more detail *supra*; (2) the application by any United States Attorney or his/her Assistant, or any other attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in 18 U.S.C. § 2516, providing the basis for the court's signing of an order authorizing, or approving, the requested interception of wire, oral, and/or electronic communications; and (3) a set of orders to be signed by the court authorizing the government to intercept, or approving the interception of, the wire, oral, and/or electronic communications which are the subject of the application, including appropriate redacted orders to be served on any relevant providers of ''electronic communication service'' (defined in 18 U.S.C. § 2510(15)).

The above pleadings should be transmitted by the most expeditious means possible to the Office of Enforcement Operations. When the U.S. Mails are to be utilized, the package should be addressed to Post Office Box 7600, Ben Franklin Station, Washington, D.C. 20044-7600. If one of the overnight/express services is to be utilized, please address the package to OEO at room 2229 of the Department of Justice, 10th Street and Constitution Avenue, Washington, D.C. 20530. Prior to mailing, OEO should be contacted at FTS (commercial area code 202) 633-2869 (Electronic Surveillance Unit) or 633-3684 (main OEO office) to notify the Department that the material should be expected.

In emergency situations, or otherwise where time is of the essence, the above material should be sent to OEO via ''fax'' machine. OEO's ''fax'' number is FTS (commercial area code 202) 786-3733. Please contact OEO prior to transmitting via ''fax.'' It is important that the *affidavit* be transmitted first, because that document is necessary for OEO to begin the preparation of the documents necessary for Department authorization.

It should be noted that OEO cannot forward a request for authorization to an appropriate Department official for review and approval unless and until a formal, written request for authorization is received from the head of the investigative agency conducting the investigation. Because of the time normally necessary for the federal investigative agencies to complete

their internal review and recommendation process, at least one week should be allowed for such process. The involved prosecutor(s) should make sure that the involved group supervisor, case agent, or other agent is in contact with that person's agency headquarters in Washington, D.C., as far in advance as possible so that any problems with the pleadings or the underlying investigation can be resolved as expeditiously as possible.

9-7.114 Authorization to Intercept Electronic Communications

The Electronic Communications Act of 1986 added ''electronic communications'' to the type of communications, in addition to oral and wire, whose interception is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The types of electronic communications that are most commonly the subject of Title III applications are those occurring over digital display paging devices. Interception over these devices is usually accomplished through the use of duplicate or ''clone'' pagers, and applications for this type of interception must comply with the requirements set forth in 18 U.S.C. § 2510, *et seq*. Unlike applications to intercept oral or wire communications, Section 2516(3) provides that any attorney for the government may authorize an application to be made to intercept electronic communications. By agreement with Congress, however, prior Department approval has heretofore been required for all applications to conduct interceptions of electronic communications. As of February 1, 1991, an exception will be made for electronic communications intercepted over digital display pagers. After that date, applications involving digital display pagers may be authorized by a United States Attorney. This exception will apply only to interceptions involving digital display pagers, the most commonly targeted type of electronic communications. Department approval will continue to be required as a prerequisite to filing an application for an interception order targeting any other form of electronic communications (e.g., a facsimile transmission, teletype communications, electronic mail or computer transmission). Questions or requests for assistance may be directed to the Criminal Division's Electronic Surveillance Unit at (202) 514-2869 or FTS 368-2869.

9-7.200 VIDEO SURVEILLANCE

9-7.201 Introduction

Video surveillance—the use of closed circuit television (CCTV) to conduct a visual surveillance of a person or place—is not covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 or by the Electronic Communications Privacy Act of 1986, both of which are discussed in detail *supra*. Moreover, video surveillance, as it is being used more and more to supplement physical surveillance in federal investigations, is an area of the law where there is minimal caselaw to provide guidance. In order to ensure compliance with the provisions of the Fourth Amendment—to

the extent that video surveillance is considered a ''search''—the Department has promulgated guidelines governing the use of such surveillance. These guidelines incorporate those constitutional restrictions which have been recognized as relating to video surveillance, particularly as decided by the courts of appeals in *United States v. Torres*, 751 F.2d 875 (7th Cir.1986), *United States v. Biasucci*, 786 F.2d 504 (2d Cir.1986), and *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir.1987). Although these decisions have been taken into account in the drafting of the guidelines, prosecutors are advised to review these decisions in conjunction with the Department guidelines prior to use of this surveillance technique.

Prosecutors are also advised that any video (or other visual) surveillance providing ''enhanced'' viewing (including magnification and infrared/nightscope capabilities) must be utilized in a manner consistent with applicable caselaw in addition to complying with the requirements set forth herein.

9-7.210 Authorization for Use of Video Surveillance Where There is No Apparent Reasonable Expectation of Privacy

Pursuant to Department of Justice Order No. 985-82, dated August 6, 1982, certain officials of the Criminal Division have been delegated authority to review and evaluate requests by any component of the Department of Justice for the requesting component to engage in video surveillance (CCTV) for law enforcement purposes. This authority, which was delegated to: the Assistant Attorney General, any Deputy Assistant Attorney General, and the Director and Associate Director of the Office of Enforcement Operations, encompasses every use of television surveillance for law enforcement purposes except the use of such surveillance in a non-search context, *i.e.*, to record events in public places or places to which the public has unrestricted access and where camera equipment can be installed in such places or in areas to which investigators have lawful access, thereby comporting with the ''plain view'' exception to the Fourth Amendment. The heads of investigative agencies are directed to ensure that any such video surveillance of ''public places'' is conducted in a proper manner. ''Public places'' include such areas as open fields, public streets, and public parking lots. Places in which the public has unrestricted access include such places as public hallways in buildings.

Pursuant to the Department's guidelines, the Director or Associate Director of the Office of Enforcement Operations may review and approve video surveillance requests in those instances where no intrusion on a person's legitimate privacy rights appears to be involved. The most common such situation exists when a person provides his consent to the presence of the camera, and such person will be present at all times. Without such a consenting party, and where justifiable expectations of privacy seem to exist, such as in a private office or residence, the Criminal Division

takes the position that use of video surveillance may be considered as equivalent to a ''search'' and, as set forth in the introduction and in the following section, requires judicial authorization.

The guidelines also provide that in an emergency situation, such as where a video surveillance request cannot be delivered to the Director of the Office of Enforcement Operations at least 48 hours before the proposed use of such surveillance, authorization may be given by the head of the responsible Department of Justice investigative agency or his designee. In such case, the investigative agency shall give written notification to OEO no later than five working days after the authorization by the agency head, and such notification shall describe the circumstances which gave rise to such use, including the nature of the emergency, the need for expeditious action, and a description of the investigation being conducted particularly describing the subject(s) of the investigation and the method of utilization of the video surveillance.

9-7.220 Video Surveillance Where There is a Reasonable Expectation of Privacy

As set forth in the Department's guidelines, the Criminal Division takes the position that the use of video surveillance in a situation where an individual has a constitutionally protected expectation of privacy constitutes a ''search'' and requires judicial authorization. Because there is no federal statute that relates directly to video surveillance, the legal requirement for a court order authorizing such surveillance, as well as the court's authority to order such surveillance, were somewhat speculative prior to the opinions of the Seventh Circuit (*Torres*), Second Circuit (*Biasucci*), and Fifth Circuit (*Cuevas-Sanchez*), cited *supra*. These decisions are the leading cases in this area and should be consulted whenever video surveillance is considered in situations where the Fourth Amendment is implicated.

Although the provisions of Title III and the ECPA were not specifically made applicable to video surveillance, the above decisions indicate that the minimum constitutional standards for electronic surveillance—implementing the Fourth Amendment's requirements of particularity and minimization—as set forth in *Katz v. United States,* 389 U.S. 347 (1967), must be satisfied. Under the above courts of appeals decisions, the four provisions that *must* be satisfied before an order authorizing video surveillance may issue are the following: (1) the application must contain a showing that normal investigative procedures have been tried and have failed, reasonably appear unlikely to succeed if tried, or are too dangerous to employ; (2) the application must provide a particularized description of the type(s) of visual communications and/or activities sought to be intercepted, and a statement of the particular offense(s) to which the visual communications/activities relate; (3) the interception period applied for (or authorized) may not be longer than that necessary to achieve

the objective(s) of the authorization, nor in any event longer than 30 days; and (4) the interception must be conducted in such a way as to minimize the interception of visual communications, *i.e.*, video images, which are not relevant and, therefore, should not be the subject of law enforcement interception.

9-7.230 Court Authorization

When court authorization for video surveillance is deemed necessary, it should be obtained by way of an application and order premised on Rules 41(b) and 57 of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. § 1651). The application and order should be based on an affidavit that establishes probable cause to believe that evidence of a federal crime will be obtained by the surveillance. In addition to complying with the four provisions set forth in USAM 9-7.220, the application/order should include a particularized description of the premises to be surveilled and the names of the persons to be surveilled, if known, as well as a statement indicating the steps to be taken to ensure that the surveillance will be minimized in order to effectuate only the purposes for which the order is to be issued.

The video surveillance order *should* not be incorporated into an order for electronic surveillance pursuant to 18 U.S.C. § 2518. In the event that the video surveillance order is being filed in conjunction with an electronic surveillance order, the affidavit used in support of the latter may, where appropriate, be used in support of the separate video surveillance order. However, Department policy requires that the video surveillance order be separate from the Title III order.

9-7.300 CONSENSUAL MONITORING

9-7.301 General Use

Section 2511(2)(c) of Title 18 provides that ''It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception . . .'' *See United States v. White,* 401 U.S. 745 (1971). As such consensual interceptions need not be made under Title III procedures, interception orders under Section 2518 are not available and should not be sought in cases falling within Section 2511(c).

The Fourth Amendment to the U.S. Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510, *et seq.*), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, *et seq.*) permit government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communica-

tions, as well as oral and electronic communications. *United States v. White, supra; United States v. Caceres*, 440 U.S. 741 (1979). Similarly, Title III, by its definition of oral communications, permits federal agents to engage in warrantless interceptions of oral communications when the communicating parties have no justifiable expectation of privacy.[1] Since such interception techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting the safety of informants and undercover law enforcement agents, or fulfilling other compelling needs. While these techniques are lawful and helpful, their use in investigations is frequently sensitive, so they must remain the subject of careful self-regulation by the agencies employing them.

The Department has developed guidelines for the investigative use of consensual monitoring. The guidelines do not apply to consensual monitoring of telephone conversations or radio transmissions. It was left to the enforcement agencies to develop adequate internal guidelines for the use of those aspects of this investigative tool. The following guidelines cover the investigative use of devices which intercept and record certain consensual verbal conversations where a body transmitter or recorder or a fixed location transmitter or recorder is used during a face-to-face conversation. In certain specified sensitive circuations, under the regulations, the agencies must obtain advance written authorization from the Department of Justice. The guidelines on consensual monitoring set forth in the Attorney General's Memorandum of November 7, 1983, on that subject are as follows:

9-7.302 Procedures for Lawful, Warrantless Interceptions of Verbal Communications

I. DEFINITIONS

As used in this Memorandum, the term ''agency'' means all of the Executive Branch departments and agencies and specifically includes United States Attorneys' offices which utilize their own investigators and the Offices of the Inspectors General.

As used in this Memorandum, the term ''interception'' means the aural acquisition of verbal communications by use of an electronic, mechanical, or other device. *Cf.* 18 U.S.C. § 2510(4).

As used in this Memorandum, the term ''public official'' means an official of any public entity of government, including special districts as well as all federal, state, county and municipal governmental units.

1 Section 2510(2) of Title 18. No similar exception is contained in the definition of wire communications and, therefore, the nonconsensual interception of wire communications violates 18 U.S.C. § 2511, regardless of the communicating parties' expectation of privacy, unless the interceptor complies with the court authorization procedures of Title III or with the provisions of the Foreign Intelligence Surveillance Act of 1978.

II. NEED FOR WRITTEN AUTHORIZATION

A. Investigations Where Written Department of Justice Approval is Required

A request for authorization to intercept a verbal communication without the consent of all parties to the communication must be sent for approval to the Director of the Office of Enforcement Operations, Criminal Division, Department of Justice, when it is known that:

(1) The interception relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV, or above, or a person who has served in such capacity within the previous two years;

(2) The interception relates to an investigation of any public official and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;

(3) The interception relates to an investigation of a federal law enforcement official;

(4) The consenting or nonconsenting person is a member of the diplomatic corps of a foreign country;

(5) The consenting or nonconsenting person is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;

(6) The consenting or nonconsenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or

(7) The Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for the Criminal Division, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent for making a consensual interception in a specific investigation.

B. Investigations Where Written Department of Justice Approval is Not Required

In all other cases approval of consensual surveillances will be in accordance with the procedures set forth in Part V below.

C. Interceptions Not Within Scope of Memorandum

Even if the interception falls within one of the seven categories above, the procedures and rules do not apply to:

(1) Extraterritorial interceptions;

(2) Foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, *et seq.*) [Refer to FISA procedures];

(3) Interceptions pursuant to the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended by the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510, *et seq.*) [Refer to Title III authorization procedures];

(4) Routine Bureau of Prisons interceptions of verbal communications which are not attended by a justifiable expectation of privacy;

(5) [Consensual] interceptions of radio communications; and

(6) [Consensual] interceptions of telephone communications.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information

Where a request to DOJ is required, as set forth in the above paragraphs, the following information must be set forth on any request to intercept a verbal communication without the consent of all parties to the communication:

(1) *Reasons for the Interception.* The request must contain a reasonably detailed statement of the background and need for the interception.

(2) *Offense[s].* If an interception is for investigative purposes, the request must include a citation to the principal criminal statute[s] involved.

(3) *Danger.* If an interception is for protection purposes, the request must explain the danger to the consenting party or other persons.

(4) *Location of Devices.* The request must state where the interception device will be hidden, *i.e.*, on the person, in personal effects, or in a fixed location.

(5) *Location of Interception.* The request must specify the location and primary judicial district where the interception will take place. An interception authorization is not restricted to the original district. However, if the location of an interception changes, notice should be promptly given to the approving official. The record maintained on the request should reflect the location change.

(6) *Time.* The request must state the length of time needed for the interception. Initially, an authorization may be granted for up to thirty days from the day the interception is scheduled to begin. If there is need for continued interception, extensions for periods of up to thirty days may be granted. In special cases (*e.g.*, ''fencing'' operations run by law enforcement agents), authorization for up to sixty days may be granted with similar extensions.

(7) *Names.* The request must give the names of persons, if known, whose communications the department or agency expects to intercept and the relation of such persons to the matter under investigation or to the need for the interception.

(8) *Trial Attorney Approval.* The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, an Organized Crime Strike Force Attorney for the district in which the surveillance will occur, or any previously designated Department of Justice attorney for a particular investigation, and that such attorney has stated that the surveillance is appropriate under this Order. Such statement may be made orally.

(9) *Renewals.* A request for renewal authority to intercept verbal communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed.

B. Verbal Requests

Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency (for example, telephonic) requests in cases in which written Department of Justice approval is required may be made to the Director or Associate Director of the Office of Enforcement Operations and should then be reduced to writing

and submitted to the appropriate headquarters official as soon as possible after authorization has been obtained. An appropriate headquarters filing system is to be maintained for surveillance requests which have been received and approved in this manner. These verbal requests must include all the information required for any regular written requests as set forth above.

C. Authorization

Authority to engage in a consensual interception in situations set forth in Part II, A above may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or Associate Director of the Criminal Division's Office of Enforcement Operations.

D. Emergency Interceptions

If an emergency situation requires a consensual interception during non-working hours at the Department of Justice, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations not later than five working days after the emergency authorization. The notification shall explain the emergency and shall contain all other items required for a non-emergency request for authorization as set forth in Part III, A above.

IV. SPECIAL LIMITATIONS

A. Consensual Interceptions

When a communicating party consents to the interception of his or her verbal communications, the device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual interceptions must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. *See United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975).

B. Non-Consensual, Non-Private Interceptions

The interceptions of verbal, non-wire communications when no party to the communication has consented and when no party has a justifiable expectation of privacy[2] must be conducted under tightly controlled circumstances. Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted.

V. CONSENSUAL INTERCEPTIONS WHERE NO WRITTEN APPROVAL REQUIRED

Each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual interceptions of verbal communications. Approval for a consensual interception must come from the head of the agency or his/her designee. Any designee should be a high-ranking supervisory official at headquarters level. Prior to receiving approval for a consensual interception from the head of the agency or his/her designee, a representative of the agency must contact the United States Attorney, an Assistant United States Attorney, an Organized Crime Strike Force attorney in the district where the interception is to occur, or any previously designated Department of Justice attorney for a particular investigation. Final authorization may be obtained verbally from the attorney so contacted. The attorney, in giving final authorization, will determine both the legality and propriety of the interception in question.

Each department or agency shall establish procedures for emergency authorizations consistent with the requirements of Part III, D above, with a follow-up verbal Department of Justice attorney authorization.

Records are to be maintained for each interception. These records are to include the information set forth in items 1 through 8 of Part III, A above.

VI. REPORTS

The head of each department or agency, or his or her designee, shall make quarterly reports summarizing the results of interceptions authorized pursuant to this Memorandum. The report shall contain the following information broken down by offense or reason for interception: the number of requests for authorization, the number of emergency authorizations, the number of times that the interceptions provided information which corroborated or assisted in corroborating the allegation or suspicion, and the number of authorizations not used. The

2 For example, burglars, while committing a burglary, have no justifiable expectation of privacy. *Cf. United States v. Pui Kan Lam*, 483 F.2d 1202 (2d Cir.1973), *cert. denied*, 415 U.S. 984 (1974).

quarterly reports shall be submitted in January, April, July and October of each year to the Office of Enforcement Operations in the Criminal Division.

In October of each year, each department or agency shall submit to the Attorney General an inventory of all devices which are intended for the surreptitious interception of telephone or verbal, non-wire communications, including devices used to intercept communications pursuant to the warrant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended by the Electronic Communications Privacy Act of 1986.

VII. GENERAL LIMITATIONS

This Memorandum relates solely to the subject of consensual interception of verbal communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual interception.

9-7.400 DEFENDANT OVERHEARINGS AND ATTORNEY OVERHEARINGS WIRETAP MOTIONS

In response to a defendant's motion or discovery request, the government should ask the court to require the defendant to provide descriptive biographical data and *a specific time period for the survey in order* to assist government agencies in making an accurate and expeditious check. It is important to keep in mind that it is the province of either the court or the defendant to set a time period to be searched; not the government's. Unless the government makes no attempt to limit the time of the search or is unsuccessful in persuading the court or the defendant to do so, the search conducted will encompass the present date to as far back as records exist. This is a very costly and time consuming process which we should attempt to avoid by procuring a narrow time limit for the search.

9-7.410 Defendant Overhearings

Generally, when a defendant alleges he/she had been overheard, the government has an obligation to conduct a search of the appropriate agencies and to affirm or deny the claim pursuant to the provisions of 18 U.S.C. § 3504. This search is initiated at the request of the U.S. Attorney to the Office of Enforcement Operations of the Criminal Division and the results of the check are reported to that office. The agencies which should be canvassed in most instances are:

1. The United States Secret Service;

2. The Bureau of Alcohol, Tobacco and Firearms;

3. The United States Customs Service;

4. The United States Postal Service;

5. The Internal Revenue Service;

6. The Drug Enforcement Administration; and

7. The Federal Bureau of Investigation.

Other appropriate agencies will be canvassed depending on whether the court has ordered additional agencies searched or whether the nature of the charges would make it appropriate to conduct a search.

Pursuant to 26 U.S.C. § 6103(c), the Internal Revenue Service requires the written consent of the taxpayer before any information concerning that taxpayer is released in a non-tax case. Therefore, if a search of the Internal Revenue Service is to be undertaken, the request must be accompanied by a motion signed by either the taxpayer or his/her counsel. If a waiver indicating the taxpayer's consent is submitted, the taxpayer himself/herself must sign that document. In multi-party cases an indication of consent from each party is required.

Although ''mere assertion'' has generally been sufficient to raise a claim under 18 U.S.C. § 3504, *see In re Evans*, 452 F.2d 1239, 1247 (D.C.Cir. 1971), *cert. denied*, 408 U.S. 930, there is some indication that courts are beginning to raise the threshold.

The Fifth Circuit held in *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir.1976), *cert. denied*, 429 U.S. 935, that a claim surveillance ''may have taken place'' was not sufficient; a positive statement that unlawful surveillance had taken place was required. *See also*, *In re Millow*, 529 F.2d 770, 774-775 (2d Cir.1976) (lacks any colorable basis, objection should be raised to the search on that ground).

Further, many courts have adopted the view that the government's response must be measured against the specificity of the allegations of unlawful electronic surveillance and the strength of the support of these allegations. *See United States v. Gardner*, 611 F.2d 770 (9th Cir.1980); *In re Brummitt*, 613 F.2d 62 (5th Cir.1980), *cert. denied*, 447 U.S. 907; and, *United States v. Alvillar*, 575 F.2d 1316 (10th Cir.1978).

The identifying information which should be included with an Electronic Surveillance (Elsur) request consists of the *full* name of the subject to be checked, all known aliases used by that individual, date and place of birth, race, sex, social security number, and an FBI number if one is available. The time period for which the check is to be performed and all addresses and phone numbers, both residential and commercial, in which the subject had a proprietary interest during that period, should also be included.

Elsur requests should be made at the earliest opportunity in order to give the agencies involved sufficient time to conduct a thorough and accurate search. The average time needed to conduct the search is 6-8 weeks. In your written request to conduct an 18 U.S.C. § 3504 search, please include all necessary identifying information, a list of agencies to be surveyed other than the normal seven listed above, the time period of the search, the citations of the statutes involved in the investigation or charged in the indictment, your deadlines, and a copy of the subject's signed motion or waiver. A specific exception to the government's obligation to search has been recognized where there is an inherent impossibility that the evidence to be offered could be the fruits of an illegal surveillance. For example, in *In re Dellinger*, 357 F.Supp. 949, 958-61 (N.D.Ill.1973), the charge was contempt of court and the evidence to be offered was a trial transcript. Since there was no possibility that the trial transcript could have resulted in any way from an illegal surveillance, the court held that 18 U.S.C. § 3504 did not apply. Should any of your cases involve evidence that could not possibly be obtained as the result of electronic surveillance, you should object, preliminarily, to conducting the search for defendant overhearings on that ground.

Even if the answers of the appropriate agencies are negative, the response to the 18 U.S.C. § 3504 motion should not be made in the absolute to the effect that defendant has never been overheard. The records or indices maintained by the agencies would not necessarily disclose all overhearings but only those which have been identified and catalogued. Accordingly, if the result of the search is negative, the response should state that the search of the appropriate records or indices fails to reveal any overhearing of the defendant.

If the search reveals that the defendant has been overheard, the following procedure shall be employed by the agency conducting the search in determining who should be notified of the electronic surveillance. All non-classified overhearings or oral acquisitions initiated and conducted in connection with an investigation of criminal activity are reported to the Office of Enforcement Operations. That office will in turn apprise the U.S. Attorney of the results of the electronic surveillance search as reported by each agency. If the agency conducting the search determines that the electronic surveillance is classified, it will report that overhearing to the General Litigation and Legal Advice Section of the Criminal Division which will prepare the necessary response, supporting memorandum and affidavits so that the court can make an *in camera* determination of the legality of the overhearing.

9-7.420 Attorney Overhearings

Overhearings of attorneys and defense counsel staff involve Sixth, rather than Fourth Amendment rights, and should be handled somewhat differently.

Although there is always an obligation to complete voluntary disclosure to the court when an overhearing of the defense staff concerning a trial is discovered, the Department is under no obligation to conduct a search for such overhearings, absent a showing that conversations relating to the conduct of the defense may have been overheard. In *Black v. United States*, 385 U.S. 26 (1966), and *O'Brien v. United States*, 386 U.S. 345 (1967), the United States recognized its *affirmative* obligation to bring to a court's attention any overhearings of which it was aware which relate to the defendant's case *whether or not a demand is made for such overhearings*. *See Dellinger*, *supra*, at 957. You must inform the court of all overhearings of defendant's attorneys of which you are aware in each case you prosecute. In short, a ''mere assertion'' is insufficient to trigger an obligation to conduct a search for Sixth Amendment overhearings. Instead, some minimum showing is required before a search must be undertaken.

The reason for this difference is that a defendant's Sixth Amendment rights are not implicated when his/her attorney is overheard unless the conversations overheard are relevant to the representation of the particular client in the matter at hand. *See United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 394 (1st Cir.1978); *United States v. Vielguth*, 502 F.2d 1257, 1260 (9th Cir.1974).

An example of the minimum showing required before the government must respond to a claim that counsel had been overheard is found in *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir.1973), which held that the claimant at least show by affidavit:

> (1) The specific facts which reasonably lead the affiant to believe that named counsel for the named (defendant) has been subjected to electronic surveillance;
>
> (2) The dates of such suspected surveillance;
>
> (3) The outside dates of representation of (defendant) by the lawyer during the period of surveillance;
>
> (4) The identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
>
> (5) Facts showing some connection between possible electronic surveillance and the (defendant) who asserts the claim . . . .
>
> When these elements appear by affidavit or other evidence the government must affirm or deny illegal surveillance . . .

See United States v. Alter, *supra* at 1026.

For your guidance, then, searches for attorney overhearings should be resisted unless the defendant makes at least the minimal showing required by *Alter*, and should be strictly limited to the time period during which the attorney legally represented the defendant. A standard similar to that in *Alter* is set forth in *Beverly v. United States*, 468 F.2d 732, 752 (5th Cir.1972).

Once the defendant has established in accordance with *Alter* a *prima facie* case that electronic surveillance of counsel has occurred, the government has an obligation to conduct a search of the appropriate agencies. Any intercepted communications of defense counsel or the defense staff, except for those involving a foreign intelligence surveillance, will be reported by the agency conducting the search to the Office of Enforcement Operations. Intercepted communications of defense counsel or the defense staff involving foreign intelligence surveillances will be reported by the agency conducting the search to the General Litigation and Legal Advice Section of the Criminal Division, which has the responsibility in this area.

Should you have any questions, please contact the Office of Enforcement Operations (786-4995).

9-7.500 USE OF INTERCEPTED COMMUNICATIONS IN CIVIL LITIGATION

9-7.510 Criminal Division Authorization

In order to use communications intercepted under the provisions of Title III (*see* USAM 9-7.000 *et seq.*) in civil litigation, the approval of the Assistant Attorney General of the Criminal Division must be obtained. This approval requirement is necessary to avoid compromising pending or prospective criminal investigations or other actions. The approval should be sought by memorandum to the Assistant Attorney General of the Criminal Division, sent to the Director of the Office of Enforcement Operations. (The means of transmitting requests of this nature to OEO is set forth at USAM 9-7.113.)

The transmittal should include:

A. The name of the intercepting agency and the agent who will testify and produce the tapes;

B. Whether the intercepting agency has any objection(s) to such testimony;

C. The status of any other indicted criminal cases arising out of the evidence derived from the interception;

D. The names of any attorneys engaged in criminal prosecution of the cases arising out of such evidence and the attorneys' opinions as to

whether disclosure will delay, damage, or impair the progress of these criminal cases;

E. The court before which application for disclosure will be made (if appropriate);

F. The court before which the evidence will be used;

G. The name of the opposing party in the suit in which the evidence will be used;

H. The type of proceeding in which the evidence will be used; and

I. The benefit to the government in use of the interception evidence.

DETAILED
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FOR CHAPTER 8

9-8.000 JUVENILES

9-8.001 Supervision of Juvenile Prosecutions

Juvenile prosecutions are supervised by the General Litigation and Legal Advice Section of the Criminal Division, and its staff attorneys are available for consultation on issues which arise in this area. In addition, authority to prosecute juveniles as adults must be obtained from the Chief of that Section before a Motion to Transfer to Adult Prosecution can be filed with the court. *See* USAM 9-8.170.

9-8.002 ''Juvenile'' Defined

A ''juvenile'' is a person who has not attained his eighteenth birthday, and ''juvenile delinquency'' is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult. A person over eighteen but under twenty-one years of age is also accorded juvenile treatment if the act of juvenile delinquency occurred prior to his eighteenth birthday. *See* 18 U.S.C. § 5031.

9-8.110 Preliminary Issues

9-8.111 Arrest of a Juvenile

A juvenile may be arrested on a warrant issued on either a complaint or a juvenile information. Where arrest is unnecessary, the court may be asked to issue a summons on the complaint or information. In either case, it is advisable to have the complaint and/or information placed under seal to avoid public disclosure of the juvenile's identity.

By statute, the officer arresting a juvenile is required to advise a juvenile of his rights, and must immediately notify the Attorney General (notice to the United States Attorney is sufficient) and the juvenile's parent, guardian, or custodian of the arrest. The arresting officer is also required to notify the parent, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense. The juvenile must be taken before a magistrate as soon as possible and, in any case, within a reasonable period of time. Section 5033 of Title 18. The duties of the magistrate at that time are set forth in 18 U.S.C. § 5034.

The federal juvenile statutes provide for fingerprinting and photographing of juveniles only *after* a finding of guilt of certain types of drug and violent offenses. *See* 18 U.S.C. § 5038(d). Routine booking photographs and fingerprints should therefore not be taken upon arrest of a juvenile. In addition, unless a juvenile is prosecuted as an adult, neither his name nor picture may be made public in connection with the proceeding. This restriction should be kept in mind in making decisions concerning press releases.

9-8.112 Questioning a Juvenile in Custody

The questioning of juvenile suspects raises at least two legal issues which could have a bearing on the admissibility of any confession made by a juvenile in custody. The first of these concerns the voluntariness of the confession. The second concerns the implications of the prompt presentment provisions of 18 U.S.C. § 5033.

A. Voluntariness of Confession

A juvenile has both a right to counsel and a privilege against self-incrimination in juvenile delinquency proceedings. *In re Gault,* 387 U.S. 1, 32-55 (1979). A juvenile may waive his Fifth Amendment right and consent to interrogation. *Fare v. Michael C.,* 442 U.S. 707 (1979).

The question of whether a waiver is voluntary and knowing is one to be resolved on the totality of the circumstances surrounding the interrogation. The court must determine not only that the statements were not coerced or suggested, but also that they were not the products of ''ignorance of rights or of adolescent fantasy, fright, or despair.'' *In re Gault,* 387 U.S. at 55. Among the factors to be considered are the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving them. *Fare v. Michael C.,* 442 U.S. at 725. For applications of the totality of the circumstances approach involving juveniles, see *United States v. White Bear,* 668 F.2d 409 (8th Cir.1982); *United States v. Palmer,* 604 F.2d 64 (10th Cir.1979); *West v. United States,* 399 F.2d 467 (5th Cir.1968).

Since confessions by juveniles are given even closer scrutiny than those by adults, *Miranda* warnings are probably an essential threshold requirement for voluntariness. The presence of a parent or guardian is not required for a voluntary waiver, although it is a factor to be considered.

B. Prompt Presentment

In addition to voluntariness, the courts have also considered the statutory requirement of prompt presentment in connection with the admissibility of confessions. Title 18 U.S.C. § 5033 provides:

> The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

Apparently by analogy to the *McNabb/Mallory* rule for adults, some courts have held inadmissible confessions obtained during a delay in presentment in violation of this provision. In deciding when this provision has been violated, some courts have focused on the ''forthwith'' language and others on the ''reasonable period of time'' language. *See United States v.*

Nash, 620 F.Supp. 1439, 1443 (S.D.N.Y.1985); *United States v. Smith*, 574 F.2d 707, 710 (2d Cir.1978); *United States v. Indian Boy*, 565 F.2d 585, 591 (9th Cir.1978). Because of the varying approaches to this issue, it is essential to consult the law of the circuit.

9-8.113 Detention Pending Trial

The juvenile statutes provide for release of a juvenile pending trial to his parents, guardian, custodian, or other responsible individual unless the magistrate determines, after a hearing at which the juvenile is represented by counsel, that detention is required to secure his timely appearance before the appropriate court or to insure his safety or that of others. Section 5034 of Title 18.

A juvenile held in custody pending trial must be segregated from adult offenders and detainees. Section 5039 of Title 18. For juveniles in federal custody, the United States Marshals Service will arrange for a place to hold the juvenile which is consistent with the statutory requirements.

The juvenile statutes have their own speedy trial provision. Juveniles who are held in custody pending trial must ordinarily have their proceedings commence within 30 days. Section 5036 of Title 18.

9-8.114 Protection of Identity of Child Witnesses and Victims

Recent legislation has created new provisions intended to increase protections for child victims and witnesses; these provisions are codified at 18 U.S.C. § 3509. Under these provisions, the term ''child'' means a person who is under the age of eighteen who is or is alleged to be—

> (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
>
> (B) a witness to a crime committed against another person.

Subsection (d) of Section 3509 requires that all government employees connected with ''a criminal proceeding,'' all court personnel, the defendant and all employees of the defendant, and all members of the jury:

> (i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and
>
> (ii) disclose documents described [in the statute] or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

Pursuant to 18 U.S.C. § 403, a knowing or intentional violation of the privacy protection accorded by Section 3509 is a criminal contempt punishable by a fine and up to one year's imprisonment.

9-8.115 Prior Juvenile Records

Proceedings against a juvenile are not to commence until any prior juvenile court records have been received by the court, or the clerk of the court certifies that the juvenile has no prior record or that the records are unavailable and explains why. The legislative history makes clear that these requirements are to be understood in the context of a standard of reasonableness, *see* S. Rept. No. 98-225 at 391, but several circuits have refused to examine the legislative history, saying that the statute is clear on its face and that the juvenile records are a jurisdictional prerequisite. *United States v. M.I.M.*, 932 F.2d 1026 (1st Cir.1991); *United States v. Brian N.*, 900 F.2d 218 (10th Cir.1990); *United States v. Juvenile Male*, 923 F.2d 614 (8th Cir.1991).

9-8.120 The Nature of Federal Juvenile Proceedings

When a juvenile is brought into federal court, the proceeding is ordinarily a juvenile delinquency proceeding rather than a criminal prosecution. In such a proceeding, if the juvenile has been found to have committed the offense charged, the result is a status adjudication of him as a juvenile delinquent rather than a criminal conviction. The intent of the proceeding is rehabilitative rather than punitive. The juvenile statutes contain significant limitations discussed at USAM 9-8.114 and 9-8.160, on the disclosure of information concerning a juvenile proceeding.

9-8.130 When to Proceed in Federal Court

The federal juvenile statutes embody a presumption of state jurisdiction over juvenile offenses. However, assuming that federal jurisdiction over the offense is proper, federal jurisdiction over the juvenile offender may be invoked in any of the following circumstances: (1) where the appropriate state court does not have jurisdiction or refuses to assume jurisdiction; (2) where the state does not have programs and services adequate for the needs of the juvenile; or (3) where the offense charged is a felony that is a crime of violence or one of certain drug offenses enumerated in the first paragraph of 18 U.S.C. § 5032 *and* there is a substantial federal interest in the case.

The federal statute requires that, in order to proceed against a juvenile in federal court, either as a juvenile or an adult, the Attorney General must certify, after investigation, that one of these three enumerated statutory bases for federal jurisdiction exists. The Attorney General's authority to make this certification has been delegated to the United States Attorneys. See 28 C.F.R. 0.57 and the Memorandum dated March 12,

1985, to all United States Attorneys from Stephen S. Trott, Assistant Attorney General for the Criminal Division.

Consultation with state officials is important in determining the appropriate method of proceeding. In this regard, it is useful to note that a number of states consider persons to be adults for purposes of criminal prosecution at an age younger than eighteen years of age.

9-8.140 The Certification Requirement

As noted above, one or more of the enumerated statutory bases for federal jurisdiction must be invoked in a certification before a juvenile can be prosecuted federally. One of the following bases must be clear from the certification:

(A) The state does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency.

(I) In cases of exclusive federal jurisdiction, the United States Attorney may wish to contact the local prosecutor and obtain his or her concurrence in the exclusivity of federal jurisdiction.

(II) In cases of concurrent jurisdiction, the local prosecutor should be contacted and the facts of the case discussed with him or her. If the local prosecutor declines to assume jurisdiction over the juvenile, it is very helpful to append a letter from him or her to this effect to the certification filed with the court.

It should be noted that local prosecution may be available and preferable even if the offense took place on a federal enclave. Aside from cases where the offense charged is (1) a crime of violence that is a felony or (2) a drug offense described in the first paragraph of section 5032 in which the United States Attorney has determined that there is a substantial federal interest, the release to state authorities of juveniles who are alleged to have committed an act of juvenile delinquency on a United States military base or other federal enclave is not precluded by the fact of the enclave's ''exclusive jurisdiction'' status. As long as the state is willing to accept jurisdiction over the juvenile and has available programs and services adequate for the needs of juveniles, a juvenile may properly be turned over to the state for non-criminal juvenile treatment. When a juvenile is charged with committing a violation of federal law on an exclusive jurisdiction enclave, the United States Attorney should determine whether the state is willing to assume jurisdiction over the juvenile and has adequate juvenile programs available. Such a determination may be made on a case-by-case basis after consultation with the local prosecutor, or it may be based on a general understanding reached with the local prosecutor regarding the state's willingness to assume jurisdiction over juveniles who commit offenses on federal enclaves. This policy does not

apply to Indian juveniles, as to whom jurisdictional questions should be directed to Senior Legal Advisor Ezra Friedman of the General Litigation and Legal Advice Section.

(B) The state does not have adequate juvenile programs and services.

This seldom-invoked basis should be preceded by an investigation by the Chief Probation Officer of the federal district into the available programs and services in the state's juvenile correction system. A statement from the Chief Probation Officer about the state facilities should be appended to the certification when this is the grounds relied upon for proceeding federally.

(C) The crime meets the statutory requirements and there is a substantial federal interest in the case.

If the crime charged is a felony crime of violence or a drug offense as described in the first paragraph of section 5032 *and* there is a ''substantial federal interest in the case or offense to warrant the exercise of federal jurisdiction,'' the case may be certified for federal prosecution. This provision is limited to violent felonies and certain drug offenses so that the federal government will continue to defer to state authorities for less serious juvenile offenses. Examples of offenses with substantial federal interest would include assassination of a federal official, aircraft hijacking, interstate kidnaping, major espionage or sabotage activity, large-scale drug trafficking, and significant destruction of United States property.

If any one of the above factors is found to exist, the United States Attorney should proceed with the certification. The certification should specifically set out which of the factors justifying federal jurisdiction over the juvenile was found to exist. See the forms at the end of this chapter.

9-8.141 Exception to Certification Requirement

The certification requirement does not apply to violations of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of incarceration does not exceed six months. Most of these cases involve petty offenses committed on government land where summary disposition is appropriate.

9-8.150 The Filing of the Complaint and its Relationship to the Certification Process

The first paragraph of 18 U.S.C. § 5032 states: ''A juvenile alleged to have committed an act of juvenile delinquency . . . shall not be proceeded against in any court unless . . . [the certification procedure is followed.]'' The ''proceedings'' referred to are properly interpreted as

either the filing of the information which initiates juvenile adjudication action or in those cases where it is warranted, the commencement of criminal prosecution which is begun by motion to transfer. It is only at the point where the United States has decided that it will not surrender the juvenile to the state, but will instead proceed against him in federal court, that the certification requirement comes into play. The Department does not interpret the statute as requiring certification prior to the filing of a complaint and issuance of an arrest warrant. Frequently, however, it is most convenient to file the information and the certification at the same time.

Certification should also not be required where a juvenile is brought before a magistrate for a removal hearing under Rule 40 of the Federal Rules of Criminal Procedure. In this case, it should be argued that the United States Attorney in the district where the crime was committed is the only prosecutor who can make the proper determination concerning the appropriate forum for the handling of the case; i.e., only he or she can determine whether one of the factors necessary for certification exists or whether the juvenile should be turned over to state authorities.

9-8.160 Juvenile Delinquency Proceedings

The juvenile delinquency proceeding itself is essentially a bench trial. Where detention may follow the proceeding, juveniles have been held to have constitutional rights under the due process clause which include adequate notice, the assistance of counsel, the privilege against self-incrimination, and the privilege of confronting and cross-examining the witnesses. *In re Gault,* 387 U.S. 1 (1967). Where a juvenile is charged with an act which would constitute a crime if committed by an adult, the due process clause also requires proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). The Federal Rules of Evidence appear to apply to juvenile proceedings. See Federal Rule of Evidence 1101. Juveniles do not have a constitutional right to a jury trial in juvenile court. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971).

The entire proceeding is subject to the limitations set forth in 18 U.S.C. § 5038 on disclosure of the identity of the juvenile defendant and information about the juvenile proceedings. The usual methods of complying with these limitations include filing documents in the case under seal, using the juvenile's initials or ''John Doe'' to describe the juvenile in pleadings and conducting proceedings in a closed courtroom or in chambers.

9-8.161 Disposition Upon Adjudication

Upon an adjudication of delinquency, the judge has discretion to impose any of the conditions listed in 18 U.S.C. § 5037. These include restitution, probation (and conditions of probation), and official detention, but

not fines. There are currently no sentencing guidelines which are applicable to juvenile proceedings.

Official detention may not extend beyond the defendant's twenty-first birthday for defendants under eighteen at the time of disposition, or five years for defendants between the ages of eighteen and twenty-one at the time of disposition. In addition, the period of detention may not exceed the maximum period of imprisonment statutorily authorized for adult defendants.

Juveniles sentenced to official detention are committed to the custody of the Attorney General. The federal Bureau of Prisons designates a place of confinement. Juveniles may not be placed in an institution in which they have ''regular contact'' with adults convicted of crimes or awaiting trial on criminal charges. There are at present no federal facilities for juveniles; the Bureau of Prisons ordinarily places them in state juvenile or other suitable facilities under contract. Where possible, they are to be placed in foster homes or community-based facilities located in or near their home communities. Section 5039 of Title 18.

9-8.170 Adult Prosecution of Juveniles

The fourth paragraph of 18 U.S.C. § 5032 provides several avenues for adult prosecution of a juvenile:

(A) By Consent

In the first, the juvenile requests in writing, upon advice of counsel, to be proceeded against as an adult.

(B) On the Government's Motion to Transfer

The second involves the filing of a ''motion to transfer'' against juveniles fifteen years or older who have committed offenses which fall within certain classes. In the latter case, after the United States Attorney files a motion to transfer, the district court must conduct a hearing to determine whether prosecuting the juvenile as an adult would be in the interest of justice. In making this determination, the court must consider the criteria set out in the fifth paragraph of section 5032, taking evidence on each of the criteria and making findings on the record with regard to each of them.

To maintain uniformity in those cases where adult prosecution is pursued, *United States Attorneys must forward a request for authority to proceed to the Criminal Division.* Such requests should be forwarded only in cases in which the facts will satisfy the requirements of the statute; telephone consultations with the Department's staff prior to formal request may help resolve close cases. The request must set out the facts of the case in detail, demonstrate that the criteria of the statute can be met, and identify any other factors which give rise to the United States Attor-

ney's desire to prosecute the juvenile as an adult. The request should be addressed to the Chief of the General Litigation and Legal Advice Section of the Criminal Division.

It should be noted that the fourth paragraph of section 5032 sets out the offenses which can be transferred to adult prosecution. As of this writing, conspiracy to violate the narcotics laws and attempts to violate the narcotics laws are *not* transferrable offenses.

(C) For Repeat Offenders

The increased participation by persons under eighteen years of age in serious criminal activity, particularly in drug violations, has increased the numbers of juveniles who may be eligible for harsher adult treatment.

Section 5032 provides that juveniles who are sixteen years of age or older and charged with a serious crime involving violence against persons or a particularly dangerous crime involving destruction of property *must* be transferred to adult prosecution if they are repeat offenders. Since adult treatment is mandatory in these cases, a formal motion to transfer—approved in advance by the General Litigation and Legal Advice Section as described in USAM 9.8-170—is unnecessary.

In many cases, the fact that a juvenile is a repeat offender is clear on the face of the record. However, other cases are not so clear, as where the factual details of a state felony conviction must be considered. The following policies therefore govern the handling of repeat offenders:

(1) If the prior offense is one of the federal offenses listed in paragraph four of section 5032, the approval of the General Litigation and Legal Advice Section need not be sought, and the pleading filed in the district court may be styled as a Notice of Prior Conviction for Purposes of Mandatory Transfer to Adult Prosecution to emphasize that the court has no discretion in ruling on the transfer.

(2) If the prior offense is not one of the federal offenses listed in paragraph four of section 5032, the approval of the General Litigation and Legal Advice Section must be sought. This may be done in writing or by telephone. If the review discloses that the prior offense properly qualifies the case for automatic transfer, permission to file the Motion to Transfer may be granted by telephone. If the propriety of automatic transfer is in doubt, the request must be reduced to writing, and reviewed in accordance with USAM 9-8.170.

9-8.171 Conviction on Lesser Charges

If a juvenile is transferred to adult prosecution and is convicted of a lesser charge which would not have supported the transfer, the disposition

of the juvenile is to be done in accordance with the restrictions which apply to juvenile delinquency proceedings.

9-8.180 Alternatives to Prosecution

Regulations of the Armed Services as well as sound public policy prohibit the enlistment of an individual against whom criminal or juvenile charges are pending or against whom charges have been dismissed to facilitate the individual's enlistment. There may be exceptional cases in which imminent military service may be considered in deciding to decline prosecution if the offense is trivial, the offender is generally of good character and has no record or habits of anti-social behavior, the offender does not require rehabilitation, and failure to prosecute will not seriously impair observance of the law in question or respect for law generally. In no case, however, should the United States Attorney be a party to or encourage an agreement affecting criminal prosecution in exchange for enlistment.

Similarly, the use of any pretrial diversion program for juveniles is inappropriate unless the certification requirements of the law have been met and the pretrial diversion guidelines set out by the Department have been met. *See* USAM 9.22-000.

JUVENILE INFORMATION

(18 U.S.C. 5032)

On or about the _____ day of _____, 19__, in the _____ District of _____, the defendant, F.M.L. [the juvenile's first initial, middle initial, last initial], a male [or female] juvenile who had at the time not yet reached his [or her] eighteenth birthday, committed an act of juvenile delinquency, to wit: *[describe substantive acts just as in adult indictment]*, which would have been a crime in violation of Title ___, United States Code, Section _____, if he [or she] had been an adult, all in violation of Title 18, United States Code, Section 5032.

CERTIFICATION

(18 U.S.C. 5032(3)*)

The undersigned United States Attorney for the _____ District of _____, *[John Doe]*, hereby certifies to the Court pursuant to the first paragraph of Title 18, United States Code, Section 5032, that the offense charged against F.M.L. [the juvenile's first initial, middle initial, last initial], a male [or female] juvenile, is an offense described in *[section of the statute]*, and that there is a substantial federal interest in the case and the offense which warrants the exercise of federal jurisdiction.

This certificate is made pursuant to the requirements of the first paragraph of Title 18, United States Code, Section 5032, and is made by the United States Attorney for the _____, District of _____ on the basis of the authority delegated to him [or her] by the Attorney General of the United States.

(Attorney General Order No. 579-74, 28 C.F.R. 0.57).

*Certification under 18 U.S.C. 5032(1) and (2) would be similar but would follow the wording of those clauses.

DETAILED TABLE OF CONTENTS FOR CHAPTER 9

9-9.000 MENTAL COMPETENCY OF AN ACCUSED

The conviction of a defendant while mentally incompetent violates due process. *See Pate v. Robinson*, 383 U.S. 375, 379 (1966). The procedures prescribed for determinations of mental competency to stand trial are set out in 18 U.S.C. §§ 4241 and 4247. *See* C. Wright, *Federal Practice and Procedure, Criminal 2d*, § 196.

The separate question of insanity or incompetence at the time of the offense as a defense to criminal charges is discussed at USAM 9-18.200 *et seq., infra*.

9-9.100 STATUTORY PROVISION

Section 4241 of Title 18, enacted as a part of the Insanity Defense Reform Act of 1984, governs procedures for determination of competency to stand trial and related commitments of the defendant. The previously existing standard for determining competency, founded on *Dusky v. United States*, 362 U.S. 402 (1960), is retained in the new statute, and the previously existing procedures in this area are also generally retained. Briefly, under Section 4241, if competency is perceived to be an issue by the prosecutor, by defense counsel, or by the court itself, a psychiatric examination may be ordered and a hearing is to be held on the defendant's competency to stand trial. If found incompetent, the defendant will be committed for treatment for a limited period to determine whether the defendant will attain the capacity to permit trial to proceed. If the defendant's condition does not improve in the prescribed time, his/her continued commitment must be based on state civil commitment procedures or on the commitment provisions for dangerous persons under new 18 U.S.C. § 4246. These procedures comport with the Supreme Court's views on incompetency expressed in *Jackson v. Indiana*, 406 U.S. 715 (1972).

9-9.110 Procedures For Examination

The initial competency examination of defendants free on bail should normally be made locally by private psychiatrists or on an outpatient basis at a hospital or clinic. *See In re Newchurch*, 807 F.2d 404 (5th Cir.1986); *Featherston v. Mitchell*, 418 F.2d 582 (5th Cir.1969), *cert. denied*, 397 U.S. 937 (1970); *Marcey v. Harris*, 400 F.2d 772 (D.C.Cir.1972). The use of local examiners whenever possible is important to obviate extensive travel by Bureau of Prison psychiatrists. It is the responsibility of the U.S. Attorney to determine the availability of board-certified psychiatrists and to maintain a panel from which selections may be made. If it should be necessary, the court may order the accused committed to the custody of the Attorney General for purposes of an examination under § 4241. *See* 18 U.S.C. § 4247(b). Pursuant to the statute, after a court makes the determination whether commitment for examination is necessary, it is the responsibility of the Attorney General, through the Bureau of Prisons, to select the

specific facility at which the examination will be conducted. *See* 18 U.S.C. § 4247(b).

Whenever the accused is referred for examination, the Assistant U.S. Attorney should forward to the examining doctor a summary letter setting forth a full exposition concerning the alleged crime together with all background information on the accused, including any history of criminal convictions and any prior history of mental illness.

Office of the Attorney General
Washington, D. C. 20530

January 27, 1995

TO: Holders of United States Attorneys' Manual, Title 9

FROM: Janet Reno
Attorney General

RE: Federal Prosecutions in Which the Death Penalty May Be Sought

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to all Holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-10.000

PURPOSE: This bluesheet sets forth policy and procedures to be followed in all federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty.

The following section replaces 9-10.000 in your United States Attorneys' Manual:

9-10.000 Federal Prosecutions in Which the Death Penalty May Be Sought

A. AUTHORIZATION TO SEEK THE DEATH PENALTY

The death penalty shall not be sought without the prior written authorization of the Attorney General.

B. NOTICE OF INTENTION TO SEEK THE DEATH PENALTY

At the time an indictment charging a defendant with an offense subject to the death penalty is filed or unsealed, or before the United States Attorney's Office decides to request approval to seek the death penalty, whichever comes first, the United States Attorney should give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration. If the United States Attorney decides to request

approval to seek the death penalty, the United States Attorney's Office should inform counsel for the defendant.

C. SUBMISSIONS TO THE DEPARTMENT OF JUSTICE

In all cases in which the United States Attorney intends to charge a defendant with an offense subject to the death penalty, whether or not the United States Attorney recommends the filing of a notice to seek the death penalty, the United States Attorney shall prepare a "Death Penalty Evaluation" form and a prosecution memorandum. Following (i) an introduction, the prosecution memorandum should include a comprehensive discussion of (ii) the theory of liability, (iii) the facts and evidence, including evidence relating to any aggravating or mitigating factors, (iv) the defendant's background and criminal history, (v) the basis for federal prosecution (see Section F, infra), and (vi) any other relevant information. A copy of the Death Penalty Evaluation form is included as Appendix A.

The United States Attorney shall send the above-described documents, a copy of the indictment,[1] and any written material submitted by counsel for the defendant in opposition to the death penalty being imposed on the defendant to the Assistant Attorney General for the Criminal Division. Whenever possible these materials should be submitted prior to the return of an indictment containing a charge for which the death penalty could be sought. In no event should these documents be received by the Criminal Division later than 30 days prior to the date on which the Government is required, by an order of the court or otherwise, to file notice that it intends to seek the death penalty.

D. DEPARTMENT OF JUSTICE REVIEW

Each of the documents described above shall be reviewed by a Committee appointed by the Attorney General, including the Deputy Attorney General or designee and the Assistant Attorney General of the Criminal Division or designee. Counsel for the defendant shall be provided an opportunity to present to the Committee, orally or in writing, the reasons why the death penalty should not be sought. The Committee will consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the federal death penalty. The Committee should give the Attorney General its recommendation in writing

[1] The request should include copies of all existing, proposed, and superseding indictments.

within fifteen days of receiving all documents required by Section C, supra. The Attorney General will conduct a review and make the final decision whether the Government should file a "Notice of Intention to Seek the Death Penalty."

Subsequent to the initial Department of Justice review, the United States Attorney and the Attorney General's Committee shall review any submission defense counsel chooses to make. After considering the information submitted, the Committee will make a recommendation to the Attorney General concerning the application of the death penalty to the case.

E. NOTICE TO FAMILY OF VICTIM

The United States Attorney shall notify the family of the victim of all final decisions regarding the death penalty.

F. SUBSTANTIAL FEDERAL INTEREST

Where concurrent jurisdiction exists with a state or local government, it is anticipated that a federal indictment for an offense subject to the death penalty will be obtained only when the federal interest in the prosecution is more substantial than the interests of the state or local authorities. See Principles of Federal Prosecution, USAM 9-27.000, et seq. In states where the imposition of the death penalty is not authorized by law, the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution.

The following factors, which are not intended to be an exhaustive list, may be considered in deciding whether there is a more substantial interest in federal as opposed to state prosecution of the offense:

(1) The relative strength of the state's interest in prosecution. The federal and state characteristics of the criminal conduct should be considered. One of the jurisdictions may have a particularly strong interest because of the nature of the offense; the identity of the offender or victim; the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators; or the possibility that prosecution will lead to disclosure of violations which are peculiarly within the jurisdiction of either the federal or state authorities or which will assist an ongoing investigation being conducted by one of them.

(2) The extent to which the criminal activity reached beyond the local jurisdiction. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction should be considered. The nature, extent, and impact of the criminal activity upon the

jurisdiction, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other states or foreign countries, are all relevant to this analysis.

(3) The relative ability and willingness of the state to prosecute effectively. The relative likelihood of effective prosecution in the state and federal jurisdictions should be considered, including the ability and willingness of the authorities in each jurisdiction; the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively; legal or evidentiary problems that might attend prosecution; conditions, attitudes, relationships or other circumstances that enhance the ability to prosecute effectively, or alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

G. STANDARDS FOR DETERMINATION

In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General shall consider any legitimate law enforcement or prosecutorial reason which weighs for or against seeking the death penalty.

In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be found to exist beyond a reasonable doubt. Recognizing that there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be considered in the light most favorable to the defendant. The analysis employed in weighing the aggravating and mitigating factors that are found to exist should be qualitative, not quantitative. Finally, there must be sufficient admissible evidence of the aggravating factors to obtain a death sentence and to sustain it on appeal.

The authorization process is designed to promote consistency and fairness. As is the case in all other actions taken in the course of federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty.

H. WITHDRAWAL OF NOTICE OF INTENTION TO SEEK THE DEATH PENALTY

Once the Attorney General has authorized the United States Attorney to seek the death penalty, a notice of intention to seek the death penalty filed with the court shall not be withdrawn unless authorized by the Attorney General or as a condition of a plea agreement approved by the United States Attorney. If the United States Attorney wishes to withdraw the notice and proceed to trial, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request, including any changes in facts or circumstances.

Any request to withdraw a notice shall be reviewed by the Committee appointed by the Attorney General, which will make a recommendation to the Attorney General. The Attorney General shall make the final decision.

I. PLEA AGREEMENTS

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, for the purpose of obtaining a more desirable negotiating position. No plea agreement shall be negotiated until an evaluation in accordance with this Bluesheet has been conducted by the United States Attorney. After an evaluation has been completed by the United States Attorney regarding whether or not to recommend the seeking of the death penalty, the United States Attorney can approve any plea agreement. There is no need for the United States Attorney to obtain prior authority from the Attorney General to approve a plea agreement.

Should a plea be entered in any death penalty case, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division in writing of the plea agreement and the reasons for it.

Appendix A

EVALUATION OF FACTORS IN POSSIBLE DEATH PENALTY PROSECUTIONS

This form is to be prepared by the lead AUSA in any case in which the Government intends to charge a defendant with an offense which is subject to the penalty of death. If your district is making a request for the death penalty, attach a copy of a prosecution memorandum which clearly sets forth the facts of the case or pending investigation in the format described in section 9-10.000 of the United States Attorneys' Manual.

DISTRICT: _____

USAO NO.: _____

GRAND JURY NO.: _____

COURT DOCKET NO.: _____

DEFENDANT NAME: _____

CHARGES: _____

AUSA(s): _____

(LEAD) AGENCY: _____

AGENCY CASE NO: _____

JUDGE: _____

I. THEORY OF PROSECUTION

Specify the Title(s), Section(s), and subsection(s) of the U.S. Code and state the theory or theories applicable to the proposed death penalty prosecution.

A. _____ Title _____, Section _____, subsection _____.

_____ Theory or theories of prosecution:

B. _____ Title _____, Section _____, subsection _____.

_____ Theory or theories of prosecution:

II. STATUTORY AGGRAVATING FACTORS

A. AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON

For offenses described in 18 U.S.C. § 794 (espionage) and § 2381 (treason) place a checkmark (✓) next to each applicable factor which you believe you will be able to prove at a sentencing proceeding beyond a reasonable doubt and describe the relevant supporting facts.

Factors listed under 18 U.S.C. § 3592(b). At least one of the following statutory aggravating factors must be found to exist before the death penalty may be considered. 18 U.S.C. § 3591(a) and (e)(1).

_____ (1) **PRIOR ESPIONAGE OR TREASON OFFENSE** -- The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

_____ (2) **GRAVE RISK TO NATIONAL SECURITY** -- In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

_____ (3) **GRAVE RISK OF DEATH** -- In the commission of the offense the defendant knowingly created a grave risk of death to another person.

B. AGGRAVATING FACTORS FOR HOMICIDE

For all homicide offenses, place a checkmark (✓) next to each applicable factor which you believe you will be able to prove at a sentencing proceeding beyond a reasonable doubt and describe the relevant supporting facts.

Factors listed under 18 U.S.C. § 3591(a)(2). At least one of the following statutory aggravating factors must be found to exist before the death penalty may be considered. 18 U.S.C. § 3591(a)(2).

_____ (A) The defendant intentionally killed the victim;

_____ (B) The defendant intentionally inflicted serious bodily injury that resulted in the death of the victim;

_____ (C) The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

_____ (D) The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

Factors listed under 18 U.S.C. § 3592(c). At least one of the following statutory aggravating factors must be found to exist before the death penalty may be considered. 18 U.S.C. § 3593(d) and (e)(2).

_____ (1) **DEATH DURING COMMISSION OF ANOTHER CRIME** -- The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of an offense under one of the following Sections under Title 18:

____ 32 (destruction of aircraft or aircraft facilities),
____ 33 (destruction of motor vehicles or motor vehicle facilities),
____ 36 (violence at international airports),
____ 351 (violence against Members of Congress, Cabinet Officers, or Supreme Court Justices),
____ 751 (prisoners in custody of institution or officer),
____ 794 (gathering or delivering defense information to aid foreign government),
____ 844 (d) (transportation of explosives in interstate commerce for certain purposes),
____ 844 (f) (destruction of Government property by explosives),
____ 1118 (prisoners serving life term),
____ 1201 (kidnapping),
____ 844 (i) (destruction of property affecting interstate commerce by explosives),
____ 1116 (killing or attempted killing of diplomats),
____ 1203 (hostage taking),
____ 1992 (wrecking trains),
____ 2280 (maritime violence),
____ 2281 (maritime platform violence),
____ 2332 (terrorist acts abroad against U.S. Nationals),
____ 2339 (use of weapons of mass destruction),
____ 2381 (treason),

under Title 49:

____ 1472 (i) (aircraft piracy within special aircraft jurisdiction), and/or
____ 1472 (n) (aircraft piracy outside special aircraft jurisdiction).

_____ (2) **PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM** -- For any offense, other than an offense for which a sentence of death is sought on the basis of 18 U.S.C. § 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than one year, involving the use or attempted or threatened use of a firearm (as defined in 18 U.S.C. § 921) against another person.

_____ (3) **PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED** -- The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

_____ (4) **PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES** -- The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

_____ (5) **GRAVE RISK OF DEATH TO ADDITIONAL PERSONS** -- The defendant, in the commission of the offense, or in escaping apprehension for the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense.

_____ (6) **HEINOUS, CRUEL, OR DEPRAVED MANNER OF COMMITTING THE OFFENSE** -- The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

_____ (7) **PROCUREMENT OF THE OFFENSE BY PAYMENT** -- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

_____ (8) **COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN** -- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

_____ (9) **SUBSTANTIAL PLANNING AND PREMEDITATION** -- The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

_____ (10) **PREVIOUS CONVICTION OF TWO FELONY DRUG OFFENSES** -- The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

_____ (11) **VULNERABILITY OF THE VICTIM** -- The victim was particularly vulnerable due to old age, youth, or infirmity.

_____ (12) **PREVIOUS CONVICTION OF SERIOUS FEDERAL DRUG OFFENSE** -- The defendant has previously been convicted of violating Title II or Title III of the Controlled Substances Act (21 U.S.C. § 801 et seq.) for which a sentence of five or more years imprisonment may be imposed or has previously been convicted of engaging in a continuing criminal enterprise (21 U.S.C. § 848(c)).

_____ (13) **CONTINUING CRIMINAL ENTERPRISE INVOLVING DISTRIBUTION TO MINORS** -- The defendant committed the offense in the course of engaging a continuing criminal enterprise in violation of [21 U.S.C. § 848(c)] and that violation involved the distribution of drugs to persons under the age of 21 in violation of [21 U.S.C. § 859].

_____ (14) **HIGH PUBLIC OFFICIALS** -- The defendant committed the offense against:

_____ (A) the President, President-elect, Vice President, Vice President-elect, Vice President-designate, officer next in the order of succession to the Presidency (if there is no Vice President), or any person acting as President under the Constitution and laws;

_____ (B) a Chief of State, head of government, or the political equivalent, of a foreign nation;

_____ (C) a foreign official listed in 18 U.S.C. § 1116(b)(3)(A), if the official is in the United States on official business;

_____ (D) a federal public servant who is a judge, a law enforcement officer[1], or an employee of a United States penal or correctional institution --

___ (i) while engaged in the performance of official duties,

___ (ii) because of the performance of official duties, or

___ (iii) because of status as a public servant.

_____ (15) **PREVIOUS CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION** -- In the case of an offense under chapter 109A (sexual abuse) [18 U.S.C. § 2241, et seq.] or chapter 110 (sexual exploitation and other abuse of children) [18 U.S.C. § 2251, et seq.], the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

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[1] For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution, or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions. 18 U.S.C. § 3592(c)(14).

C. AGGRAVATING FACTORS FOR DRUG OFFENSE DEATH PENALTY

For offenses described in 18 U.S. C. § 3591(b)(1) and (2), place a checkmark (✓) next to each applicable factor which you believe you will be able to prove at a sentencing proceeding beyond a reasonable doubt and describe the relevant supporting facts.

Factors listed under 18 U.S.C. § 3592(d). At least one of the following statutory aggravating factors must be found to exist before the death penalty may be considered. 18 U.S.C. § 3593(d) and (e)(3).

_____ (1) **PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED** -- The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

_____ (2) **PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES** -- The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in 21 U.S.C. § 802) or infliction of, or attempted infliction of, serious bodily injury or death upon another person.

_____ (3) **PREVIOUS SERIOUS FELONY DRUG CONVICTION** -- The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in 21 U.S.C. § 802) for which a sentence of five or more years of imprisonment was authorized by statute.

_____ (4) **USE OF A FIREARM** -- In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm (as defined in 18 U.S.C. § 921) or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

_____ (5) **DISTRIBUTION TO PERSONS UNDER TWENTY-ONE** -- The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by [21 U.S.C. § 859 (distribution of a controlled substance to a person under 21)] which was committed directly by the defendant.

_____ (6) **DISTRIBUTION NEAR SCHOOLS** -- The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by [21 U.S.C. § 860 (distribution or manufacture of a controlled substance within 1,000 feet of a school)] which was committed directly by the defendant.

_____ (7) **USING MINORS IN DRUG TRAFFICKING** -- The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by [21 U.S.C. § 861 (employment of a person under age 21 in a controlled substance violation)] which was committed directly by the defendant.

_____ (8) **LETHAL ADULTERANT** -- The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in 21 U.S.C. § 802) mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

III. NON-STATUTORY AGGRAVATING FACTORS, 18 U.S.C § 3593(a)

List and explain in relevant detail any non-statutory aggravating factors which you believe you can establish at a sentencing proceeding beyond a reasonable doubt.

Examples:

_____ (1) Participation in additional, uncharged murders, attempted murders, or other serious acts of violence.[2]

_____ (2) A victim was killed in an effort by the defendant to obstruct justice, tamper with a witness or juror, or in retaliation for cooperating with authorities.[3]

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[2] See, e.g., United States v. Pitera, 795 F. Supp. 546, 564 (E.D.N.Y.) (holding that the evidence of defendant's participation in other murders was "relevant to his character and his propensity to commit violent crimes"), aff'd, 986 F.2d 499 (2d Cir. 1992).

[3] See 18 U.S.C. §§ 1510, 1512, and 1513.

_____ (3) Contemporaneous convictions for more than one killing.[4]

_____ (4) Future dangerousness to the lives and safety of other persons,[5] as evidenced by one or more of the following:[6]

____ a. specific threats of violence,
____ b. continuing pattern of violence,
____ c. low rehabilitative potential,
____ d. lack of remorse,
____ e. mental evaluation, and/or
____ f. custody classification.

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[4] In United States v. Pitera, 795 F.Supp. at 573-77, the district court ruled that multiple murder convictions in the same trial do not satisfy the requirements of the statutory aggravating factor under 21 U.S.C. § 848(n)(2). This is no impediment, however, to the use of multiple murder convictions as a non-statutory aggravating factor.

[5] See Jurek v. Texas, 428 U.S. 262, 272-73 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). The Supreme Court has approved consideration of a defendant's future dangerousness in capital sentencing, as both statutory and non-statutory aggravation. See Simmons v. South Carolina, 114 S.Ct. 2187, 2193 (1994) (and cases cited therein).

[6] See, e.g., Johnson v. Texas, 113 S.Ct. 2658, 2662-63 (1993) (affirming a death sentence where a finding of future dangerousness was based in part upon lay witness testimony about unadjudicated acts of violence committed by the defendant prior and subsequent to the instant capital murder); Barefoot v. Estelle, 463 U.S. 880, 898 (1983) ("relevant, unprivileged evidence [expert testimony concerning future dangerousness] should be admitted and its weight left to the factfinder").

_____ (5) Victim impact evidence concerning the effect of the offense on the victim and the victim's family as evidenced by oral testimony or a victim impact statement. See 18 U.S.C. § 3593(a).[7]

IV. MITIGATING FACTORS

1. **Statutory Mitigating Factors.** The statutory mitigating factors under 18 U.S.C. § 3592(a) are listed below. Place a checkmark (✓) next to each factor which you expect the defendant will be able to prove at a sentencing proceeding by a preponderance of the evidence or which is reasonably raised by the evidence, and describe the relevant supporting facts.

_____ (1) **IMPAIRED CAPACITY** -- The defendant's capacity to appreciate the wrongfulness of conduct or to conform conduct to the requirements of the law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

_____ (2) **DURESS** -- The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

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[7] See also Payne v. Tennessee, 111 S.Ct. 2597, 2609 (1991) (holding that the victim's personal characteristics and the impact of the murder on the victim's family may be considered in capital sentencing; the Eighth Amendment is not per se a bar "if the State chooses to permit the admission of victim impact evidence").

_____ (3) **MINOR PARTICIPATION** -- The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

_____ (4) **EQUALLY CULPABLE DEFENDANTS** -- Another defendant or defendants, equally culpable in the crime, will not be punished by death.

_____ (5) **NO PRIOR CRIMINAL RECORD** -- The defendant does not have a significant prior history of other criminal conduct.

_____ (6) **DISTURBANCE** -- The defendant committed the offense under severe mental or emotional disturbance.

_____ (7) **VICTIM'S CONSENT** -- The victim consented to the criminal conduct that resulted in the victim's death.

2. **Non-Statutory Mitigating Factors.** Subsection (a)(8) provides wide latitude to the defendant to present evidence of any "other factors in the defendant's background, record, or character or any other circumstance of the offense . . . mitigat[ing] against imposition of the death sentence." List and explain in relevant detail all non-statutory mitigating factors. Note again whether you expect that a defendant could establish the factor at a sentencing hearing by a preponderance of the evidence or the factor is reasonably raised by the evidence.

V. WEIGHING OF AGGRAVATION AND MITIGATION

The applicable statutory aggravating factors under Section 3591(a)(2) and Section 3592(b), (c), and (d) and any non-statutory aggravating factors under Section 3593(a) must sufficiently outweigh any mitigating factors under 18 U.S.C. § 3592(a) to justify a sentence of death, or, in the absence of any mitigating factors, the aggravating factors themselves must be sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be found to exist beyond a reasonable doubt. Recognizing that there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor(s) reasonably raised by the evidence should be considered in the light most favorable to the defendant. The analysis employed in weighing the aggravating and mitigating factors that are so found to exist should be qualitative, not quantitative.

VI. DEFENSE ATTORNEY(S)

DEFENSE ATTORNEY(S) **NAME:**_____
ADDRESS:_____
_____
TELEPHONE NO.:_____

NAME:_____
ADDRESS:_____
_____
TELEPHONE NO.:_____

If defense attorney(s) submitted any written materials in opposition to the death penalty, attach copies of documents.

VII. RECOMMENDATION OF THE UNITED STATES ATTORNEY

In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General may consider any legitimate law enforcement or prosecutorial reason which weighs against seeking the death penalty. There must be sufficient admissible evidence of the aggravating factors to obtain a death sentence at trial and to sustain it on appeal.

_____ Recommends that "Notice of Intention to Seek the Death Penalty" be filed for the following reasons:

_____ Recommends that "Notice of Intention to Seek the Death Penalty" not be filed for the following reasons:

_____ _____

Date United States Attorney

_____

[District]

NON-DECISIONAL CASE IDENTIFYING INFORMATION[1]

[Fill out a separate page for each indicted defendant. This page will not be included in the materials presented to the Attorney General's Review Committee but will be routed to and retained by OPMA, Criminal Division.]

DISTRICT:______________________ USAO NO.:______________________

CASE NAME:____

DEFENDANT NAME:____

DEFENDANT ALIASES:______________________________________

DEFENDANT DOB:______________ DEFENDANT SSN:______________

CORONER'S OFFICE CASE NO(S).:____________________________

DEFENDANT

RACE (Check one)
- ☐ White
- ☐ Black
- ☐ Asian
- ☐ Pacific Islander
- ☐ Native American
- ☐ Alaska Native
- ☐ Aleut
- ☐ Other (explain)______________________

IS DEFENDANT HISPANIC? ☐ YES ☐ NO

VICTIM NAME____

RACE (Check one)
- ☐ White
- ☐ Black
- ☐ Asian
- ☐ Pacific Islander
- ☐ Native American
- ☐ Alaska Native
- ☐ Aleut
- ☐ Other (explain)______________________

WAS VICTIM HISPANIC? ☐ YES ☐ NO

VICTIM NAME____

RACE (Check one)
- ☐ White
- ☐ Black
- ☐ Asian
- ☐ Pacific Islander
- ☐ Native American
- ☐ Alaska Native
- ☐ Aleut
- ☐ Other (explain)______________________

WAS VICTIM HISPANIC? ☐ YES ☐ NO

VICTIM NAME____

RACE (Check one)
- ☐ White
- ☐ Black
- ☐ Asian
- ☐ Pacific Islander
- ☐ Native American
- ☐ Alaska Native
- ☐ Aleut
- ☐ Other (explain)______________________

WAS VICTIM HISPANIC? ☐ YES ☐ NO

DOES U. S. ATTORNEY RECOMMEND DEATH PENALTY? ☐ YES ☐ NO

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1 As is true for all federal decisions regarding prosecution, bias for or against an individual based upon characteristics such as race, color, religious beliefs, national origin, or sex of a defendant or a victim may not play any role in the decision whether to seek or authorize the death penalty, and any influence of passion, prejudice, or other arbitrary factors must be avoided. See 18 U.S.C. § 3593(e) and (f) and § 3595(c)(1).

DETAILED TABLE OF CONTENTS FOR CHAPTER 10

9-10.000 CAPITAL CRIMES

9-10.010 Federal Death Penalty Provisions

Some of the existing federal death penalty provisions are unenforceable in view of a series of Supreme Court decisions including *Furman v. Georgia*, 408 U.S. 238 (1972) and *United States v. Jackson*, 390 U.S. 570 (1968). Previously, the Department had taken the position that, with the exception of the Aircraft Piracy Statute (49 U.S.C. §§ 1472-1473), all federal death penalty provisions were void because they set forth no legislated guidelines to control the fact-finder's discretion in determining whether the penalty of death is to be imposed. The Aircraft Piracy Statute was amended after the *Furman* decision and provides for the death penalty but places substantial constraints on the discretion of the fact-finder. Essentially, this statute provides that a separate, post-verdict, sentencing hearing must be held to determine the existence or non-existence of specified mitigating and aggravating factors before the defendant is sentenced to death. The requirements for the hearing are set out in the statute. It is the Department's view that this procedure is constitutionally permissible because it provides specific guidelines that preclude the arbitrary and capricious imposition of the death penalty.

The Office of Legal Counsel has reviewed other federal capital punishment provisions and has concluded that the death penalty may be permissible for certain crimes in addition to aircraft hijacking. There are arguments, never considered by the Supreme Court, that imposition of the death penalty for narrowly drawn offenses against the United States and its officials remain viable under the rationale of *Jurek v. Texas*, 428 U.S. 262 (1976). In *Jurek*, the Court held that Texas' action in narrowing capital offenses to five categories in essence requires the jury to find the existence of a statutory aggravating circumstance before the death penalty may be imposed, thus requiring the sentencing authority to focus on the particularized nature of the crime. Moreover, while the Texas statute did not specifically speak of mitigating circumstances, it had been construed to include the jury's consideration of such circumstances.

Thus, under *Jurek*, certain narrow federal statutes that carry a death penalty sanction, such as assassination of the President (18 U.S.C. § 1751) might survive an Eighth Amendment challenge. The provisions of 18 U.S.C. § 1751 apply to such a narrow group of statutorily delimited persons—the President, Vice President or person next in line to the Presidency, and highest echelon Presidential and Vice Presidential aides—that a reasonable argument could be made that Congress had so carefully shaped the offense as to essentially require the finding of an aggravating circumstance before the death penalty could be imposed. Of course, in cases such as these the court would itself have to establish a procedure to permit the consideration of mitigating factors.

On the other hand, there are some death penalty provisions which are so broad that no reasonable argument could be made that they would survive an Eighth Amendment challenge. For example, aircraft destruction resulting in death, punishable under 18 U.S.C. § 34, specifically leaves unfettered discretion in the hands of the jury as to whether or not to impose the death penalty as do provisions in 18 U.S.C. § 844 providing for the death penalty if death results from any one of three explosives offenses. Similarly, the general federal murder provision, 18 U.S.C. § 1111, gives the jury unguided discretion as to which murders will be punished by the death penalty.

9-10.020 Recommendation of the Death Penalty

The death penalty shall not be recommended without the approval of the Attorney General. *See* USAM 9-2.148, *supra*.

9-10.100 PROCEDURAL REQUIREMENTS IN CASES UNDER STATUTES AUTHORIZING DEATH PENALTY—AFTER *FURMAN*

Federal law contains various provisions applicable to the prosecution of capital cases. These provisions include: 18 U.S.C. § 3005 (appointment of two attorneys for defense in capital cases), 18 U.S.C. § 3235 (venue in capital cases), 18 U.S.C. § 3281 (no time limitation on instituting proceedings in capital cases), 18 U.S.C. § 3432 (requiring disclosure of government witnesses and list of veniremen at least three days before trial), Rule 7(a), Federal Rules of Criminal Procedure (prohibiting waiver of indictment in capital cases), Rule 24(b), Federal Rule of Criminal Procedure (increased peremptory challenges in capital cases).

In prosecutions under statutes with unenforceable death penalties, not all provisions tied to the concept of a ''capital case'' become invalid. The general rule is that where the provision is tied to the nature of the offense and not to the severity of the punishment, it survives. *See United States v. Steel*, 759 F.2d 706 (9th Cir.1985).

The unlimited statute of limitations, 18 U.S.C. § 3281, is not intended to provide additional safeguards to a defendant faced with the death penalty. Rather, it is tied to the extremely serious nature of the offense charged. Accordingly, there is no time limitation on instituting a prosecution under a statute with an invalid death penalty so long as Congress has not downgraded the offense to non-capital status. *See United States v. Helmich* 521 F.Supp. 1246 (M.D.Fla.1981); *United States v. Provenzano*, 423 F.Supp. 662 (S.D.N.Y.1976) *aff'd without opinion*, 556 F.2d 562 (2nd Cir. 1977).

However, those procedural safeguards intended to reduce the chance an innocent defendant would be put to death are inapplicable in a prosecution for an offense with an invalid death penalty. A defendant in such a prosecution would not be entitled to two court appointed attorneys, addi-

tional peremptory challenges, nor to the government's witness list and the list of veniremen three days before trial. *See United States v. Dufer*, 648 F.2d 512 (9th Cir.1980), *cert. denied*, 450 U.S. 925 (1981); *United States v. Goseyun*, 789 F.2d 1386 (9th Cir.1986); *United States v. Steel*, 759 F.2d 706 (9th Cir.1985) and cases cited therein. An apparently contrary view on this issue was expressed by a divided panel of the Fourth Circuit in *United States v. Watson*, 496 F.2d 1125 (4th Cir.1973). The panel majority held that notwithstanding *Furman*, *supra*, a defendant charged with first degree murder under 18 U.S.C. § 1111, had an absolute right to two attorneys under 18 U.S.C. § 3005. The dissenting judge in *Watson* agreed with the weight of authority that procedural safeguards accorded to defendants are applicable only where death was a possible penalty.

We note that the majority view is given further support by a line of cases which antedate *Furman*, *supra*, and hold that where the government expressly or implicitly agrees not to seek the death penalty, there is no error in denying the defendant the benefit of the procedural protections. *See e.g. Loux v. United States*, 389 F.2d 911 (9th Cir.1968), *Hall v. United States*, 410 F.2d 653 (4th Cir.1969).

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FOR CHAPTER 11

9-11.000 GRAND JURY

9-11.001 Additional Materials

Additional materials that may be helpful include treatises, especially Beale and Bryson, *Grand Jury Law and Practice*. In addition, the Narcotic and Dangerous Drug Section has prepared a monograph entitled ''Federal Grand Jury Practice (Volumes I and II). Copies may be obtained from that Section.

9-11.010 Grand Jury Indictment Required by the Fifth Amendment

The Fifth Amendment to the Constitution of the United States provides, in part, 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, 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.''

While it is a very effective instrument of law enforcement, the grand jury is regarded primarily as a protection for the individual. It has been said that the grand jury stands between the accuser and the accused as ''a primary security to the innocent against hasty, malicious, and oppressive persecution.'' *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). The grand jury functions to determine whether there is probable cause to believe that a certain person committed a certain offense and, thus, to protect individuals against the lodging of unfounded criminal charges. *See United States v. Calandra*, 414 U.S. 338 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 391 U.S. 935 (1965).

9-11.020 The Role of the Prosecutor

In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

9-11.100 POWERS AND LIMITATIONS OF GRAND JURIES

9-11.101 The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, it is particularly useful to say that a grand

jury's function is to determine whether or not there is probable cause to believe that a certain person committed a certain federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a ''no-bill,'' *see* Wright, *Federal Practice and Procedure*, Criminal § 110. It is useful to look upon the functions of a grand jury in this way because, in general, a grand jury may not perform any different function. The investigative grand jury works toward such an end, although some investigations are never brought to fruition.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed fully at USAM 9-11.330, *infra*. It would seem that a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure also has a power to issue reports on non-criminal matters. *See Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). Whether and in what form a grand jury report should be issued is in all events a difficult and complex question. Consultation should be had with the Criminal Division before any grand jury report is initiated, whether by a regular or special grand jury. *See* USAM 9-11.331, *infra*.

9-11.110 The Investigative Powers of a Grand Jury

The grand jury has always been accorded the broadest latitude in conducting its investigations. The proceedings are conducted *ex parte*, in secret, and without any judicial officer in attendance to monitor them, and there is no exclusionary rule or standard of relevancy or materiality to inhibit grand jury inquiry. A grand juror's own information, newspaper reports, rumors, or whatever, may properly be used to trigger an investigation. The grand jury may act upon mere suspicion that the law has been violated, or with the objective of seeking assurance that it has not. The grand jury may investigate a field of fact with no defendant or criminal charge specifically in mind and with no duty to measure its steps according to predictions about the outcome. Thus the grand jury may conduct the broadest kind of investigation before stopping to determine whether an indictment should be found. *See Calandra, supra; Branzburg, supra; United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Blair v. United States*, 250 U.S. 273 (1919); *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Smyth*, 104 F.Supp. 283 (N.D.Cal.1952).

9-11.120 Power of a Grand Jury Limited by Its Function

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350

U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir.1976), *cert. denied sub nom., Hurt v. United States*, 429 U.S. 1062 (1977); nor can it be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir.1972). After indictment, the grand jury may be used *if* its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir.1978).

A. Approval Required Prior to Resubmission of Same Matter to Grand Jury

Once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (*i.e.*, the same transaction or event and the same putative defendant) should not be presented to another grand jury or presented again to the same grand jury without first securing the approval of the responsible Assistant Attorney General.

B. Use of Grand Jury to Locate Fugitives

It is improper to utilize the grand jury *solely* as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest. *In re Pedro Archuleta*, 432 F.Supp. 583 (S.D.N.Y.1977); *In re Wood*, 430 F.Supp. 41 (S.D.N.Y.1977), *aff'd, In re Cueto*, 554 F.2d 14 (2d Cir.1977).

If, however, the grand jury has a legitimate interest in the testimony of a fugitive, it may subpoena other witnesses and records in an effort to locate the fugitive. *Wood, supra*, citing *Hoffman v. United States*, 341 U.S. 479 (1951). Similarly, it is the Criminal Division's view that if the present whereabouts of a fugitive is related to a legitimate grand jury investigation of offenses such as harboring, 18 U.S.C. §§ 1071, 1072, 1381, misprision of felony, 18 U.S.C. § 4, accessory after the fact, 18 U.S.C. § 3, escape from custody, 18 U.S.C. §§ 751, 752, or failure to appear, 18 U.S.C. § 3146, the grand jury properly may inquire as to the fugitive's whereabouts. *See In re Grusse*, 402 F.Supp. 1232 (D.Conn.1975). Unless such collateral interests are present, the grand jury should generally not be employed in locating fugitives in bail-jumping and escape cases since, as a rule, the gist of those offenses is the circumstances of defendant's disappearance rather than his or her current whereabouts.

Generally, grand jury subpoenas should not be used to locate fugitives in investigations of unlawful flight to avoid prosecution, 18 U.S.C. § 1073. Normally an unlawful flight complaint will be dismissed when a fugitive is apprehended and turned over to state authorities to await extradition. Prosecutions for unlawful flight are rare and the statute requires prior written approval of the Attorney General or Assistant Attorney General. Since indictments for unlawful flight are rarely sought,

it would be improper to routinely use the grand jury in an effort to locate unlawful flight fugitives.

C. Obtaining Records to Aid in Location of Federal Fugitives—Alternatives to Use of Grand Jury Subpoenas

The Criminal Division recognizes the importance of providing to federal investigative agencies a means of obtaining records which would aid in the search of federal fugitives. Usually the records sought are telephone toll records of relatives and close associates of the fugitive, although other kinds of records might also be valuable in ascertaining the fugitive's whereabouts.

With the enactment of the Electronic Communications Privacy Act of 1986, Public Law No. 99-508, law enforcement access to telephone toll records will now be covered by federal statute.

Pursuant to 18 U.S.C. §§ 2703(c)(1)(B) and 2703(c)(2) the government may obtain a ''record or other information pertaining to a subscriber'' (telephone toll records) without notice to the subscriber by obtaining: (1) an administrative or grand jury subpoena; (2) a search warrant pursuant to state or federal law; or (3) a court order pursuant to 18 U.S.C. § 2703(d) based on a finding that the information is relevant to a legitimate law enforcement inquiry.

For an analysis of the Electronic Communications Privacy Act of 1986 *see* USAM 9-7.2000.

Occasionally, there may be records, other than telephone toll records, which might be useful in a fugitive investigation but which cannot be obtained by grand jury subpoena, administrative subpoena, or search warrant. In such situations, it may be appropriate to seek a court order for production of the records pursuant to the All Writs Act, 28 U.S.C. § 1651. The All Writs Act provides:

> The Supreme Court and all courts established by the Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Supreme Court has recognized the power of a federal court to issue orders under the All Writs Act ''as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of its jurisdiction.'' *See United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

Because the purpose of the All Writs Act is to aid the court in the exercise of its jurisdiction, an application for an order under the act must be sought only from the United States District Court in which the complaint or indictment is pending.

The use of the All Writs Act to obtain records in a fugitive investigation is not a procedure to be used in every fugitive case. The willingness of courts to issue such orders will depend in the selectivity with which such applications are made, and the courts will not condone a wholesale use of the act for this purpose. Thus, the procedure should be used only in important cases where a strong showing can be made that the records are likely to lead to the whereabouts of the fugitive.

9-11.121 Venue Limitations

A case should not be presented to a grand jury in a district unless venue for the offense lies in that district. Nevertheless, it is common for a grand jury to investigate matters occurring at least partly outside its own district, because federal offenses are often prosecutable in more than one district, and a grand jury is under no obligation to determine venue early in its investigation. A witness should not be heard to challenge the right of a grand jury to inquire into events that happened in other districts. As a general matter, a witness has a duty to testify if the grand jury has a *de facto* existence and cannot resist questions on the grounds of relevancy or materiality.

9-11.122 Limitations Set by the District Court

It is often said that the grand jury is an arm or appendage of the court. This has a certain significance but is also misleading. The grand jury is dependent on the court in certain respects and independent in other respects.

Lacking powers of its own, the grand jury must rely upon the district court's subpoena and contempt powers if witnesses are to be compelled to attend and to testify in grand jury sessions. *See Brown v. United States*, 359 U.S. 41 (1959). This presents no problems in the ordinary course. But a court may properly deny a grand jury the use of subpoenas to engage in ''the indiscriminate summoning of witnesses with no definite object in mind and in a spirit of meddlesome inquiry.'' The court may curb a grand jury when it clearly exceeds ''its historic authority.'' *See Hale v. Henkel*, *supra*. In any event, the district court has broad authority to discharge a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure, and rather than monitor the issuance of grand jury subpoenas in situations involving a flagrant abuse, the court might more likely put an end to the grand jury by discharging it. *See* Fed.R.Crim.P. 6(g).

There is a counterbalancing principle. Since the grand jury enjoys Constitutional status, the district court must neither control nor interfere with the grand jury in ''the exercise of its essential functions.'' *See United States v. United States District Court for the Southern District of West Virginia*, 238 F.2d 713 (4th Cir.1956), *cert. denied, sub nom.*,

Valley Bell Dairy Co. v. United States, 352 U.S. 981 (1957). In that case, the district court was held to have interfered improperly with the grand jury by denying government counsel the use of the grand jury transcript and by instructing the jurors to vote without the benefit of government counsel's summarization of the evidence.

The government attorney also enjoys a constitutionally-based independence. Court, prosecutor, and grand jury—each has its own authority; and a court may not exercise its supervisory power over the grand jury in such a way as to encroach upon the jurors' or the prosecutor's prerogatives, unless there is a clear basis in law and fact for doing so. *See United States v. Chanen*, 549 F.2d 1306 (9th Cir.1977).

9-11.123 Limitations Arising From the Role of the Government Attorney

No federal grand jury can indict without the concurrence of the attorney for the government. He/she must sign the indictment under Rule 7(c) of the Fed.R.Cr.P. for the indictment to be valid, and the judiciary cannot compel the attorney for the government to sign any indictment. In signing an indictment, the attorney for the government is not just complying with Rule 7; the attorney is exercising a power belonging to the executive branch of the government. *See Cox, supra; Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 391 U.S. 841 (1967).

9-11.124 Testimonial Privilege as Limiting Power of Grand Jury

A witness before a grand jury enjoys the same testimonial privilege he/she would have at any stage of a criminal proceeding. The single rule in the Fed.R.Evid. that is made applicable to grand jury proceedings is Rule 501 on testimonial privileges, *see* Fed.R.Evid. 101 and 1101(c) and (d). Fed.R.Evid. 501 provides that, except as otherwise required by the Constitution, statute, or rules, the testimonial privileges of witnesses "shall be governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The subject is thus left for case law development. But Rule 501 is clear: federal law (not state law) is controlling on the matter of testimonial privilege before grand juries. *See United States v. Woodall*, 438 F.2d 1317 (5th Cir.1970), *cert. denied*, 403 U.S. 933 (1971). It is emphasized, however, that Rule 501 is only a rule for the witness and does not set a standard for what may be heard and used as a basis for indictment. *See* the Advisory Committee's Note to Rule 1101 of the Fed.R.Evid. In short, a grand jury may consider and indict on the basis of testimony that will not necessarily be admissible at trial; and the indictment will not be vitiated because evidence was obtained in violation of a testimonial privilege. *See, e.g., United States v. Fultz*, 602 F.2d 830 (8th Cir.1979); *United States v. Colasurdo*, 453 F.2d 585 (2d Cir.1971), *cert. denied*, 406 U.S. 917

(1972); *cf. United States v. Franklin*, 598 F.2d 954 (5th Cir.), *cert. denied* 444 U.S. 870 (1970.)

When a grand jury witness invokes a testimonial privilege, the attorney for the government will want to examine the claim very carefully to ascertain whether the privilege, although perhaps available in that state, is properly invoked in a federal proceeding. Each witness is under a broad duty to answer questions; the witness has no privilege to protect others. *See United States v. Mandujano*, 425 U.S. 564 (1976). To compel a witness to give testimony, resort may be had to the civil contempt remedy under 18 U.S.C. § 401, and Rule 42 of the Federal Rules of Criminal Procedure is utilized for punitive purposes. If the privilege against self-incrimination is invoked in appropriate circumstances, it may be necessary to consider whether to seek authority for obtaining an order to compel testimony under 18 U.S.C. § 6003, which may be enforced by use of the civil testimony under 18 U.S.C. § 6003, which may be enforced by use of the civil contempt remedy.

One exceptional situation is to be noted. A grand jury witness is entitled, by reason of 18 U.S.C. § 2515, to refuse to respond to questions based on illegal interception of oral or wire communications. *Gelbard v. United States*, 408 U.S. 41 (1972). The decision is based on the statute and not any broader principle.

9-11.130 Limitation on Naming Persons Unindicted Co-Conspirators

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in *United States v. Briggs*, 514 F.2d 794 (5th Cir.1974), and other cases.

As the court in *Briggs* pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

Accordingly, in the absence of some sound reason (*e.g.*, where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for U.S. Attorneys to identify unindicted co-conspirators in conspiracy indictments.

9-11.140 Limitation on Grand Jury Subpoenas

Subpoenas in federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Fed.R.Cr.P.

Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him/her may be deemed a contempt of the court.

Grand jury subpoenas may be issued, to be served abroad, to compel the appearance before the grand jury of a national or resident of the United States and the production of ''a specified document or other thing by him.'' The decision to the contrary in *United States v. Thompson*, 319 F. 2d 665 (2d Cir.1963), was overcome by an amendment of 28 U.S.C. § 1783. *See* Wright, *Federal Practice and Procedure*, Criminal § 277. However, before issuing a subpoena to a witness abroad, the district court is required under 28 U.S.C. § 1783(a) to make certain findings regarding the necessity for subpoenaing the witness. The issuance of a grand jury subpoena to an American citizen in a foreign country may at times be obviated by presenting the person's statement to the grand jury in the form of hearsay.

There can be enormous difficulties involved in investigating any matter abroad and in seeking to obtain the testimony of persons located in other countries, even if they are citizens of the United States. *See Jones, International Judicial Assistance: Procedural Chaos And A Program For Reform*. 62 Yale L.J. 515. Subpoenas cannot be issued and served abroad upon foreign nationals; even to request a foreign national to appear in this country may involve sensitive problems. Accordingly, before making any effort or initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required. Inquiries should be directed to the Office of International Affairs.

All grand jury witnesses should be accorded reasonable advance notice of their appearance before the grand jury. ''Forthwith'' or ''*eo instanter*'' subpoenas should be used only when swift action is important and then only with the prior approval of the U.S. Attorney. Considerations, among others, which bear upon the desirability of using such subpoenas include the following: (1) the risk of flight; (2) the risk of destruction or fabrication of evidence; (3) the need for the orderly presentation of evidence; and (4) the degree of inconvenience of the witness.

Policies regarding the issuance of subpoenas to members of the news media and subpoenas for telephone toll records of members of the news media are discussed elsewhere in the USAM.

9-11.141 Fair Credit Reporting Act and Grand Jury Subpoenas—Special Handling Necessary

The Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*) prohibits credit reporting agencies from furnishing consumer reports except, *inter alia*, ''in response to the order of a court'' of competent jurisdiction. Authorities are divided on the question whether grand jury subpoenas are court

orders within the meaning of the quoted language (at 15 U.S.C. § 1681(b)(1). The cases are collected in *Matter of Application to Quash Grand Jury Subpoena*, 526 F.Supp. 1253 (D.Md.1981). The only circuit court to rule on the issue held that a subpoena is not a court order within the meaning of the act. *See In re Gren*, 633 F.2d 825 (9th Cir.1980); *accord, Doe v. DiGenova*, 779 F.2d 74 (D.C.Cir.1985).

Because of the division of opinion on the legal issue and the resulting differences in practices in the various districts, credit reporting agencies are often constrained to resist grand jury subpoenas which they would promptly obey if the subpoenas were specially issued by the district courts. The trouble, expense and delay involved for the agencies and the government seem particularly unwarranted when no definitive resolution of the legal issue is foreseeable at an early date. Heretofore, in order to try to minimize these problems, and the need for litigation, U.S. Attorneys were given discretion to seek court approval of a grand jury subpoena. This policy, however, has not been completely successful in resolving the issue. Accordingly, to provide consistency and uniformity in the various districts, the Department of Justice has determined that henceforth attorneys for the government in seeking to obtain credit reporting agency records, should seek court orders or the endorsement or other special handling of subpoenas by the district court so as to obviate the legal difficulties. *See, e.g., In re Gren, supra*, at n. 3.

It should be sufficient simply to make an *in camera, ex parte* showing that the information sought from the credit reporting agency is or may be relevant to an ongoing investigation, that it is properly within the grand jury's jurisdiction and that it is not sought primarily for any other purpose. *Cf. In re Grand Jury Proceedings* (Larry Smith), 579 F.2d 836 (3d Cir.1978).

9-11.150 Advice of ''Rights'' of Grand Jury Witnesses

It is the Department's policy to advise a grand jury witness of the rights described below only if such witness is a ''target'' or ''subject'' (as hereinafter defined) of a grand jury investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his/her Fifth Amendment privilege against compulsory self-incrimination before his/her grand jury testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 186 and 190-191 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *Mandujano, supra*, at 582 n. 7. It is important to note, however, that in *Mandujano* the Court took cognizance of the fact that federal prosecutors customarily warn ''targets'' of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington* the Court pointed to the fact that Fifth Amendment warnings were administered as negating ''any possible compul-

sion to self-incrimination which might otherwise exist'' in the grand jury setting. *See Washington, supra*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department that an ''Advice of Rights'' form, as set forth below, be appended to all grand jury subpoenas to be served on any ''target'' or ''subject'' (as hereinafter defined) of an investigation:

Advice of Rights

A. The grand jury is conducting an investigation of possible violations of federal criminal laws involving: (State here the general subject matter of inquiry, *e.g.*, the conducting of an illegal gambling business in violation of 18 U.S.C. § 1955).

B. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.

C. Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.

D. If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you do so desire.

In addition, these ''warnings'' should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

A ''target'' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target. Although the Court in *Washington, supra*, held that ''targets'' of the grand jury's investigation are entitled to no special warnings relative to their status as ''potential defendant[s]'', the Department continues its longstanding internal practice to advise witnesses who are known ''targets'' of the investigation that their conduct is being investigated for possible violation of federal criminal law. This supplemental ''warning'' will be administered on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

A ''subject'' of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

Where a local district court insists that the notice of rights may not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

9-11.151 Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question him/her about his/her involvement in the crime under investigation. *See Wong, supra*, at 179 n. 8; *Washington, supra*, at 190 n. 6; *Mandujano, supra*, at 573-75 and 584 n. 9; *United States v. Dionisio*, 410 U.S. 1, 10 n. 8 (1973). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known ''target'' (as defined in USAM 9-11.150, *supra*) is subpoenaed to testify before the grand jury about his/her involvement in the crime under investigation, an effort should be made to secure his/her voluntary appearance. If a voluntary appearance cannot be obtained, he/she should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a ''target,'' careful attention will be paid to the following considerations:

A. The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;

B. Whether the substance of the testimony or other information sought could be provided by other witnesses; and

C. Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.152 Requests by Subjects and Targets to Testify Before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir.1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir.1975), *cert. denied*, 423 U.S. 861 (1976)) a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a ''subject'' or ''target'' of an investigation (as defined in USAM 9-11.150, *supra*) personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his/her privilege against

self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Some such witnesses undoubtedly will wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests, reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses is a matter which is left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g., Calandra, supra*, at 343.

9-11.153 Notification of Targets

Where a target is not called to testify pursuant to USAM 9-11.151, *supra*, and does not request to testify on his/her own motion (*see* USAM 9-11.152, *supra*), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him/her an opportunity to testify (subject to the conditions set forth in USAM 9-11.152, *supra*) before the grand jury. Of course, notification would not be appropriate in routine clear cases nor where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154 Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he/she will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself/herself. However, if a ''target'' of the investigation (as defined in USAM 9-11.150, *supra*) and his/her attorney state in a writing, signed by both, that the ''target'' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, *i.e.*, the importance of the testimony or other information sought, its unavailability from other sources, and the

applicability of the Fifth Amendment privilege to the likely areas of inquiry.

9-11.155 Notification to Targets when Target Status Ends

The United States Attorney shall have discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

It is suggested that the discontinuation of target status notification will most generally be obtainable when:

a. The target previously has been notified by the government that he or she was a target of the investigation; and,

b. The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide the detargeting notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the detargeting notification is appropriate, the language of the notification may be tailored to the particular case. In any particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a ''clean bill of health'' or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution.

The foregoing provisions are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-11.160 Limitation on Resubpoenaing Contumacious Witnesses Before Successive Grand Juries

While the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, 371 n. 8 (1965), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the general policy of the Department not to subpoena and seek contempt citations in a successor grand jury against a witness who refused to testify before the prior grand jury and was consequently incarcerated for such refusal. The resubpoenaing of a contumacious witness may, however, be justified in certain limited situations such as when the questions to be asked the witness relate to matters not covered in the previous proceedings or when there is an indication from the witness or his/her legal counsel that the witness will in fact testify if called before the new grand jury. If the witness is believed to possess information essential to the investigation, resubpoenaing may also be justified when the witness himself/herself is involved to a significant degree in the criminality about which he/she can testify. In such cases, prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to subpoena the witness before the successive grand jury as well as to seek civil contempt sanctions if the witness continues to persist in his/her refusal to testify.

Since the coercive effect of a civil contempt adjudication is substantially diluted when the grand jury's term is about to expire, it is recommended that a subpoena ordinarily not be issued to a witness who it is anticipated will refuse to testify before such grand jury. This, of course, is a matter of judgment for the U.S. Attorney and there may well be situations when it is necessary to subpoena a witness and institute contempt proceedings for recalcitrance in such circumstances. In most situations, however, it would seem preferable to subpoena the witness before a new grand jury.

9-11.200 THE PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 6

9-11.210 Summoning Grand Juries (Fed.R.Crim.P. 6(a))

Rule 6(a) of the Federal Rules of Criminal Procedure authorizes courts to impanel as many grand juries ''as the public interest requires.'' Each grand jury must consist of not less than 16 nor more than 23 members. The jury selection process is discussed at USAM 9-11.223, *infra*. Either the clerk of the court or a jury commission (depending upon the type of plan adopted for the random selection of jurors) manages the jury selection process under the Jury Selection and Service Act.

Rule 6 of the Federal Rules of Criminal Procedure does not state explicitly what constitutes a quorum to enable a grand jury to operate. However, since a grand jury cannot be impaneled with less than sixteen members, it is

considered that 16 jurors constitute a quorum. A grand jury should not function with less than 16 members in attendance.

9-11.220 Objection to Grand Jury and to Grand Jurors (Fed.R.Crim.P. 6(b))

The U.S. Attorney's primary concern with the grand jury selection process arises under Rule 6(b) of the Fed.R.Cr.P. That rule allows for the making of two basic types of objections. The first are objections to the array (that the jurors were not selected, drawn, or summoned in accordance with law). The second are objections to individual jurors (that they are not legally qualified to serve). The rule provides two methods for making these objections.

9-11.221 Challenges

Rule 6(b)(1) of the Fed.R.Cr.P. permits the attorney for the government or a defendant held to answer in the district court to make challenges before the administration of the oath to the grand jurors. The rule was recognized, when framed, as being of limited practical value and was not meant to prevent objections being made instead by means of motions to dismiss. *See* the original note to subdivision (b) of Fed.R.Cr.P. 6.

9-11.222 Motions to Dismiss, in General

If not previously determined upon challenge, objections to the array or to individual jurors may be made under Rule 6(b)(2) of the Fed.R.Cr.P. by means of motions to dismiss the indictment. Objections will usually be raised by this method. It is expressly provided in the rule that such motions to dismiss should be made and granted as provided in 28 U.S.C. § 1867(e).

9-11.223 Motions to Dismiss Based on Objections to the Array

It is declared federal policy under the Jury Selection and Service Act (specifically 28 U.S.C. §§ 1861 and 1862) that grand and petit jurors shall be ''selected at random from a fair cross section of the community in the district or division wherein the court convenes,'' and no citizen shall be excluded from serving on account of race, color, religion, sex, national origin, or economic status. Pursuant to 28 U.S.C. § 1863, each U.S. District Court has placed into operation a written plan for random selection of jurors. This jury selection plan generates, in accordance with 28 U.S.C. §§ 1864 to 1866, first a ''master jury wheel'' of names selected at random from particular sources (generally voter registration lists and certain supplemental sources); and then (on the basis of juror qualification forms executed by the persons on the master jury wheel, and ''other competent evidence'') a ''qualified jury wheel'' of names of legally qualified and nonexempt persons. From time to time, random (and usually public) drawings are conducted and subpoenas issued to a certain number of

persons on the qualified jury wheel. These prospective jurors are examined further in court and, as needed, grand and petit juries are impaneled. (18 U.S.C. § 3321 of Title 18 allows for the summoning of additional jurors to complete a grand jury when less than sixteen of the persons summoned attend or remain after the court allows challenges.) It is a practice in certain districts to designate alternate grand jurors, but they do not sit like their counterparts on petit juries; they sit only to replace a grand juror who is permanently excused.

While U.S. Attorneys have no responsibility for administering the Jury Selection and Service Act, they have an obvious stake in the act's being properly administered. The requirement in 28 U.S.C. § 1863(b)(4) that the master jury wheel be emptied and refilled periodically (at least every four years) affords an opportunity for reflecting upon the jury selection system and the possible effect of changed circumstances in the community. *See, e.g., United States v. Gooding*, 473 F.2d 425 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Guzman*, 468 F.2d 1245 (2d Cir.1972), *cert. denied*, 410 U.S. 937 (1973). While it is contemplated that voter lists will be the primary sources of jurors, it is also contemplated that supplemental sources will be used at times as a corrective in the system. *See United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Lewis*, 472 F.2d 252 (3d Cir. 1973); 1968 U.S.Code Congressional and Administrative News, 1974.

9-11.224 Giving the Court Information Pertinent to Jury Selection

It is important for a U.S. Attorney to inform the district court of all facts that may be pertinent to the matter of excluding jurors under 28 U.S.C. § 1866(c), especially when a grand jury is to be selected to conduct a highly sensitive investigation. Particular care should be taken to prevent the impaneling of a juror who might "be unable to render impartial jury service." If provided for in the jury selection plan, in accordance with 28 U.S.C. § 1863(b)(8), the court may vary from its customary practice and keep the names drawn from the qualified jury wheel confidential "in any case where the interests of justice so require."

9-11.230 Objections to Grand Jury Proceedings

There are few principles of more importance in the administration of criminal justice than the principle announced in *Costello v. United States*, 350 U.S. 359, 363 (1956); an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to call for trial of the charges on the merits.

9-11.231 Motions to Dismiss Due to Illegally Obtained Evidence Before a Grand Jury

The fact that illegally obtained, privileged, or otherwise incompetent evidence was presented to the grand jury is no cause for abating the

prosecution under the indictment, or for inquiring into the sufficiency of the competent evidence before the grand jury, even if the defendant may be expected to have the illegally obtained evidence suppressed or incompetent evidence excluded at trial. *See Dionisio, supra*. Despite some argument that the *Costello* rule has been eroded by cases calling for a more limited use of hearsay in grand jury proceedings, it appears that the rule is entitled to its full force today in light of the broad bases for decision in *Calandra, supra*.

In *Calandra*, the Supreme Court held that a grand jury witness cannot properly refuse to answer questions based upon evidence obtained from an unlawful search and seizure. The court reasoned that a contrary rule would deter police misconduct in only a speculative and minimal way while it would exact a prohibitive price by impeding the grand jury's investigation.

The Court cited *Dionisio, supra*, as reaffirming "our disinclination to allow litigious interference with grand jury proceedings." The Court also recognized the existence of an internal control in that prosecutors will hardly seek indictments where convictions cannot be obtained. *Calandra, supra*, at 349-351.

It is in recognition of this principle that the Department has formulated the following internal policy of self-restraint regarding presentation to the grand jury of unconstitutionally obtained evidence: A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.

9-11.232 Use of Hearsay in a Grand Jury Proceeding

There has been considerable criticism voiced that hearsay evidence is relied upon too much in grand jury proceedings. From the perspective, however, that a grand jury is a layman's inquiry, conducted *ex parte* to determine probable cause rather than guilt or innocence, and that in certain forms hearsay is highly creditable evidence, there is a justification for using hearsay in grand jury proceedings. Each U.S. Attorney should be accountable to himself/herself in this regard and to the grand jurors. Worthy of consideration are guidelines on the use of hearsay in grand jury proceedings set out in *A.B.A. Standards For Criminal Justice, Standards Relating To The Prosecution Function* 3.6(a) (Approved Draft, 1971). Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. *See United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969); *but see United States v. Trass*, 644 F.2d 791 (9th Cir.1981). The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional

obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment. Government attorneys are charged with a high duty in presenting matters to grand juries but are also entitled to a constitutionally based independence. *See United States v. Chanen*, 549 F.2d 1306 (9th Cir.1977).

9-11.233 Presentation of Exculpatory Evidence

Although neither statutory nor case law imposes upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury (*Levine Mortgage Funding System, Inc., supra; United States v. Y. Hata Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976); *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968), it is the Department's internal policy to do so under many circumstances. For example, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

9-11.240 Who May be Present at Grand Jury Sessions (Fed.R.Crim.P. 6(d))

Under Rule 6(d) of the Federal Rules of Criminal Procedure, no person may be present while a grand jury is in session other than attorneys for the government, the witness under examination, interpreters when needed, and stenographers or operators of recording devices who are making a record of the evidence. No one at all other than the jurors may be present while the grand jury is deliberating or voting. *See United States v. Mechanik*, 475 U.S. 66 (1986). Eavesdropping upon the deliberations or voting of a grand jury is punishable as an obstruction of justice under 18 U.S.C. § 1508.

9-11.241 DOJ Attorneys Authorized to Conduct Grand Jury Proceedings

Federal Rule of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of that rule, ''attorney for the government'' is defined in Fed.R.Cr.P. 54(c) as the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, an authorized assistant of a U.S. Attorney, and certain other persons in cases arising under the laws of Guam.

The authority for a U.S. Attorney to conduct grand jury proceedings is set forth in the statute establishing U.S. Attorney duties, 28 U.S.C. § 547. U.S. Attorneys are directed in that statute to ''prosecute for all offenses against the United States.'' Assistant U.S. Attorneys similarly derive their authority to conduct grand jury proceedings in the district of their appointment from their appointment statute, 28 U.S.C. § 542.

When a U.S. Attorney or Assistant U.S. Attorney needs to appear before a grand jury in a district other than the district in which he/she is appointed, the U.S. Attorney for either the district of appointment or the district of the grand jury should submit a request to the Executive Office for U.S. Attorneys for an appointment as a Special Assistant U.S. Attorney. The request should identify the attorney, and the reasons therefor. The Executive Office will send the notice of appointment to the U.S. Attorney in the district in which the grand jury is sitting.

Departmental attorneys, other than U.S. Attorneys and Assistant U.S. Attorneys, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegee pursuant to 28 U.S.C. § 515(a). The Attorney General has delegated this authority to direct Department of Justice Attorneys to conduct grand jury proceedings to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters supervised by them. (Order No. 725-77.)

9-11.242 Non-Department of Justice Government Attorneys

Federal Rule of Criminal Procedure 6(d) provides that the only prosecutional personnel who may be present while the grand jury is in session are ''attorneys for the government.'' Rule 54(c) defines attorney for the government for Federal Rules of Criminal Procedure purposes as ''the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, (and) an authorized assistant of a United States Attorney.''

An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. § 515, or a Special Assistant to a U.S. Attorney, pursuant to 28 U.S.C. § 543, in order to appear before a grand jury in the district of appointment. Normally the Special Assistant to a U.S. Attorney appointment is employed. Where the less common Special Assistant or Special Assistant to the Attorney General appointment is to be used in cases or matters within the jurisdiction of the Criminal Division, the Office of Enforcement Operations should be contacted for information.

Appointments as Special Assistants to U.S. Attorneys are made by the Associate Attorney General. A letter of appointment is executed and the oath of office as a Special Assistant to a U.S. Attorney must be taken (*see* 28 U.S.C. §§ 543, 544). Requests for such appointments must be made in writing through the Director of the Executive Office for U.S. Attorneys and must include the following information:

A. The facts and circumstances of the case;

B. The reasons supporting the appointment;

C. The duration and any special conditions of the appointment;

D. Whether the appointee may be called as a witness before the grand jury. If such a possibility exists, it ordinarily would be unwise to make the appointment;

E. How the attorney has been informed of the grand jury secrecy requirements in Federal Rule of Criminal Procedure 6(e).

F. If the appointee is an agency attorney, whether the agency from which the attorney comes is conducting or may conduct contemporaneous administrative or other civil proceedings. If so, a full description of the substance and status of such proceedings should be included; and

G. If the appointee is an agency attorney, a full description of the arrangements that have been made to prevent the attorney's agency from obtaining access through the attorney to grand jury materials in the case.

The request must also state that the agency attorney will be accompanied at all times while before the grand jury by an experienced Department of Justice attorney, the U.S. Attorney, or an Assistant U.S. Attorney. Finally, the request must contain the following statement, signed by the agency attorney:

> I understand the restrictions on the grand jury secrecy obligations of this appointment as a Special Assistant to the United States Attorney and do hereby certify that I will adhere to the requirements contained in this letter.

The use of agency attorneys as Special Assistants before the grand jury has been upheld by the courts. *See United States v. Wencke*, 604 F.2d 607 (9th Cir.1979); *United States v. Birdman*, 602 F.2d 547 (3rd Cir.1979); *In re Perlin*, 589 F.2d 260 (7th Cir.1978). The U.S. Attorney or Departmental attorney with responsibility for the case retains such full responsibility. *Cf.* D.C.Cir.1979 Judicial Conference Proceedings, 85 F.R.D. 180-181.

9-11.243 Presence of Stenographer—Recording Required

Federal Rule of Criminal Procedure 6(e)(1) requires that all grand jury proceedings be recorded except when the grand jury is deliberating or voting. Government attorneys should not have any conversations, even of a casual nature, with grand jurors unless they are being recorded. The recording, however, is not required to be transcribed and transcripts should not be prepared unless there is a specific need for them. Reporters and stenographers are bound by the secrecy requirements of Rule 6(e)(2). It is important that they be made aware of that rule.

9-11.244 Presence of an Interpreter

Federal Rule of Criminal Procedure 6(d) permits the presence of an interpreter when needed in grand jury proceedings. Interpreters should be

obtained in accordance with 28 U.S.C. § 1827 and Rule 28. An interpreter is bound not to disclose matters occurring before the grand jury without judicial authority. Attorneys for the government should make sure that any interpreter used in a grand jury proceeding is aware of his/her secrecy obligation.

9-11.245 No Exceptions

Federal Rule of Criminal Procedure 6(d) does not admit any exception under which persons not usually authorized to be present are allowed to attend a grand jury session under extraordinary circumstances. Indeed, the presence of any unauthorized person during a grand jury session may be grounds for dismissal of the indictment. Thus, a parent may not accompany a child who is to testify, nor may a marshal be present to control a potentially unruly witness. *United States v. Borys*, 169 F.Supp. 366 (D.Alaska 1959); *see United States v. Carper*, 116 F.Supp. 817 (D.D.C.1953).

9-11.250 Disclosure Under Fed.R.Crim.P. 6(e). To Attorneys for the Government, Including for Civil Use

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made ''to an attorney for the government for use in the performance of such attorney's duty.'' *See* Fed.R.Cr.P. 6(e)(3)(A)(i). ''Attorney for the government'' is defined in Fed.R.Cr.P. 54(c). Disclosure to government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i). *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). *See Guide on Rule 6(e) after Sells and Baggot* 6-8, 18-32 (January 1984).

From the Federal Rule of Criminal Procedure 54(c) definition it is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies. *See United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir.1980). Nor is disclosure permitted under this section to attorneys for state or local governments. *In re Holovachka*, 317 F.2d 834 (7th Cir.1963); *Corona Construction Co. v. Ampress Brick Co., Inc.*, 376 F.Supp. 598 (N.D. Ill.1974).

When disclosure is authorized by court order under Rule 6(e)(3)(C)(i), of the Federal Rules of Criminal Procedure, for use in civil proceedings, there is a danger of misuse, or the appearance thereof, when such disclosure is made during the pendency of the grand jury investigation. There is no rule of law that would require a civil disclosure within the Department to be deferred until the relevant criminal investigation has been completed; but unless there is a genuine need for disclosure during the pendency of the grand jury investigation, it is the better practice to forestall the disclosure until the criminal investigation is completed.

9-11.251 Disclosure Under Fed.R.Crim.P. 6(e): To Other Government Personnel

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made to ''government personnel ... to assist an attorney for the government ... to enforce federal criminal law.'' ''Government personnel'' includes not only federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the prosecutor. *See* S.Rep. No. 354, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Ad.News 530. The decision to use government personnel to assist the grand jury investigation is within the discretion of the prosecutor and need not be justified. *Perlin, supra* at 268. Such personnel may use the material disclosed in conducting interviews. *Cf United States v. Stanford*, 589 F.2d 285 (7th Cir.1978), *cert. denied*, 440 U.S. 983 (1979).

Strict precautions should be taken when employing personnel from agencies which have a civil function, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service, to ensure that knowledge of the grand jury investigation or documents subpoenaed by the grand jury are not used improperly for civil purposes by the agency. Grand jury documents should be segregated and personnel assisting the grand jury investigation should not work on a civil matter involving the same subjects unless a court order has been obtained authorizing such use. It may be valuable to issue written precautionary instructions which can be used in any hearing challenging the grand jury procedures. *See Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098, 1126 (E.D.Pa.1975).

9-11.252 Disclosure Under Fed.R.Crim.P. 6(e): Preliminarily to or in Connection With a Judicial Proceeding

Under subsection (3)(C)(i) of Fed.R.Cr.P. 6(e), grand jury materials may be disclosed by order of a court preliminarily to or in connection with a judicial proceeding. A court must make two determinations before entering such an order.

The first is whether the requested disclosure is indeed preliminary to or in connection with a judicial proceeding. The leading definition of judicial proceeding is that provided by Judge Learned Hand:

> The term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime. An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be

imputed to the Rule. *Poe v. Rosenberg*, 255 F.2d 118, 120 (2d Cir.1958).

Because IRS has unique powers to assess and collect taxes without resort to litigation, its tax audits and other proceedings may not qualify for disclosure under Rule 6(e)(3)(C)(i) of the Fed.R.Cr.P. *United States v. Baggot*, 463 U.S. 476 (1983).

The second determination the courts make before authorizing disclosure of grand jury materials to private parties is to weigh the particularized need of the party seeking disclosure against the public interest in grand jury secrecy. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 216-219 (1979); *Guide on Rule 6(e) after Sells and Baggot* at 22-27 (January 1984). A failure to demonstrate sufficient need can result in the denial of a request for otherwise permissible disclosure. *See In re Grand Jury Proceedings*, 483 F.Supp. 422 (E.D.Pa 1979) (state prosecutor). The Department takes the position that the particularized need requirement is inapplicable when grand jury materials are sought for federal law enforcement purposes. *See In re Grand Jury Subpoenas April 1978*, 581 F.2d 1103, 1110 (4th Cir.1978), *cert. denied*, 440 U.S. 971 (1979); *In re Grand Jury (LTV)*, 583 F.2d 128, 130-131 (5th Cir.1978).

As with disclosure to Department of Justice attorneys for use in civil proceedings, discussed *supra*, it is preferable to await the completion of a grand jury investigation before seeking disclosure to another government agency for civil purposes. *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F.Supp. 923 (D.Mass.1975).

9-11.253 Who is Not Covered by Fed.R.Crim.P. 6(e): Only Witnesses

One of the purposes of grand jury secrecy is to foster the cooperation of witnesses. Only by making witnesses aware of the protection afforded them can the full value of grand jury secrecy be realized. It is suggested that in an appropriate situation the witness be told that the proceeding will remain secret until such time as disclosure is required in court, and, therefore, that the witness' cooperation with or appearance before the grand jury will not be known publicly unless the witness chooses to make it known.

In communicating with a witness regarding grand jury secrecy, it is important to make clear that Federal Rule of Criminal Procedure 6(e) specifically prohibits any obligation of secrecy from being imposed ''upon any person except in accordance with this rule.'' Witnesses, therefore, cannot be put under any obligation of secrecy. *See Application of Eisenberg*, 654 F.2d 1107, 1113 n. 9 (5th Cir.1981).

However, a suggestion or request that a witness not disclose matters occurring before the grand jury may be made where necessary to protect the integrity of the grand jury's investigation or the safety of witnesses and

other individuals mentioned in testimony. Letters or statements to witnesses cautioning them regarding disclosure should make it clear that no obligation of secrecy can be imposed. In addition, it should be made clear that the witness has an absolute right to consult with his or her attorney.

9-11.260 Amendment to Rule 6(e) Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials

The Supreme Court added a new subdivision, 6(e)(3)(C)(iv), in an amendment effective August 1, 1985. Its purpose, as stated in the Advisory Committee (on Criminal Rules of the Judicial Conference) notes, was to eliminate ''an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws ... [by allowing] a court to permit disclosure to a state or local official for the purpose of enforcing state law when an attorney for the government so requests and makes the requisite showing.''

The new subdivision reads as follows: ''(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made ...

> (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.''

It is both the intent of the amended rule, and the policy of the Department of Justice, to share such grand jury information wherever it is appropriate to do so. Thus, the phrase ''appropriate official of a state or subdivision of a state'' shall be interpreted to mean any official whose official duties include enforcement of the state criminal law whose violation is indicated in the matters for which permission to disclose is to be sought. This policy is, however, subject to the caution in the Advisory Committee notes that ''[t]here is no intention ... to have Federal grand juries act as an arm of the state.''

It is thus clear that the decision to release or withhold such information may have significant effects upon relations between federal prosecutors and their state and local counterparts, and that disclosure may raise issues which go to the heart of the federal grand jury process. In this respect, the Assistant Attorney General in charge of the Criminal Division (who is a member of the Advisory Committee) promised the Advisory Committee that prior to any request to a court for permission to disclose such grand jury information, authorization would be required from the Assistant At-

torney General in charge of the Division having jurisdiction over the matters that were presented to the grand jury. In the case of a multiple-jurisdiction investigation (*e.g.*, tax, non-tax) requests should be made to the Assistant Attorney General of the Division having supervisory responsibility for the principal offense(s) being investigated. It is the policy of the Department that such prior authorization be requested in writing in all cases. A copy of such requests shall be sent to all investigating agencies involved in the grand jury investigation.

To insure that grand jury secrecy requirements are not violated in the submitting of such requests, place the following legend at the top and bottom of each page of the request:

GRAND JURY INFORMATION:

Disclosure restricted by

Rule 6(e), Federal Rules

of Criminal Procedure

In addition, the entire packet shall be covered with a plain white sheet having the word ''SENSITIVE'' stamped or typed at the top left and bottom right corners.

United States Attorneys seeking permission to apply for a disclosure order shall request that permission from the Assistant Attorney General of the Division having jurisdiction over the matter that was before the grand jury by submitting a written request in which they shall address expressly all elements necessary for these officials to comply with the standards set forth below in making their decision. Requests submitted to the Criminal Division shall be sent to the Head, Legal Support Unit, Office of Enforcement Operations. Ones submitted to other Divisions shall be sent to the appropriate contact person listed at the conclusion of this memorandum. There is no requirement that a ''particularized need'' be established for the disclosure, but there should be a substantial one. The need to prosecute or to investigate ongoing or completed state or local felony offenses will generally be deemed substantial.

Persons making requests for authorization should provide the following information:

1. Title of grand jury investigation and involved target(s);

2. Origin of grand jury investigation;

3. General nature of investigation;

4. Status of grand jury investigation;

5. State(s) for which authorization to disclose grand jury matters is sought;

6. Nature and summary of information sought to be disclosed;

7. General nature of potential state offenses;

8. Impact of disclosure to state(s) on ongoing federal grand jury investigative efforts or prosecutions;

9. Extent of prior state involvement, if any, in federal grand jury proceedings under Rule 6(e)(3)(A)(ii);

10. Extent, if any, of state knowledge or awareness of federal grand jury investigation;

11. Existence, if any, of ongoing state investigations or efforts regarding grand jury matters sought to be disclosed; and

12. Any additional material necessary to enable the Assistant Attorney General to evaluate fully the factors which the following paragraph requires them to consider in making a decision.

In making a determination on whether to authorize the seeking of permission to disclose each Assistant Attorney General shall consider all relevant factors including whether:

1. The state has a substantial need for the information;

2. The grand jury was convened for a legitimate federal investigative purpose;

3. Disclosure would impair an ongoing federal trial or investigation;

4. Disclosure would violate a federal statute (*e.g.*, 26 U.S.C. 6103) or regulation;

5. Disclosure would violate a specific Departmental policy;

6. Disclosure would reveal classified information to persons without an appropriate security clearance;

7. Disclosure would compromise the government's ability to protect an informant;

8. Disclosure would improperly reveal trade secrets; and

9. Reasonable alternative means exist for obtaining the information contained in the grand jury materials to be disclosed.

If the request is authorized, the government attorney who seeks permission to disclose shall include in the proposed order a provision that further disclosures by the state officials involved shall be limited to those required in the enforcement of state criminal laws.

It is requested that a copy of any order *denying* a request for permission to disclose be sent to the Assistant Attorney General who authorized the filing of the request.

The following divisions of the Department have designated the listed individuals to answer questions regarding Rule 6(e)(3)(C)(iv).

Antitrust Division	Director of Operations	Joe Widmar 514-3543
Civil Rights Division	Deputy Chief Criminal Section	Dan Bell 514-4071
	Deputy Chief Criminal Section	Barry Kowalski 514-4067
Criminal Division	Head, Legal Support Unit Office of Enforcement Operations	David Simonson 724-6672
Lands Division	Director, Environmental Crimes Unit Environmental Enforcement Section	Judson Starr 514-2490
Tax Division	Senior Assistant Chief Office of Policy and Tax Enforcement Analysis Criminal Section	Ed Velmes 514-3011

9-11.300 THE SPECIAL GRAND JURY—18 U.S.C. § 3331

It was once common for investigative grand juries and for grand juries other than the first of two or more impaneled in a district to be called ''special'' grand juries. The term is now ambiguous. Legislation enacted in 1970 created ''special'' grand juries primarily to meet the special needs of organized crime investigations. These statutory grand juries differ in several significant respects from grand juries impaneled under Federal Rule of Criminal Procedure 6. Care should be taken in using the term special grand jury to avoid any misunderstanding. The term may be used, for example, with a parenthetical reference to the statute or the rule, if the meaning is not otherwise clear from the context.

The distinctive features of special grand juries are discussed below. To the extent these distinctive features permit, the special grand juries are governed by the same statutes, rules, and case law applicable to regular grand juries. *See* 18 U.S.C. § 3334. In a very large measure, special grand juries and regular grand juries are alike.

9-11.310 Impaneling Special Grand Juries

As provided in 18 U.S.C. § 3334(a), the district court in every judicial district having more than four million inhabitants must impanel a special grand jury at least once every eighteen months (unless a special grand jury is then sitting); and the district court must also impanel a special grand jury when the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General certifies in writing to the chief judge of the district that in his/her judgment, a special grand jury is necessary ''because of criminal activity in the district.'' (*See* 28 C.F.R. § 0.59

under which the Assistant Attorney General in charge of the Criminal Division is designated to make certifications under 18 U.S.C. § 3331.)

9-11.311 Request for Certification

U.S. Attorneys who want certification made to cause the impaneling of special grand juries should direct their requests for certification to the Chief of the Organized Crime and Racketeering Section of the Criminal Division, explaining briefly the reasons for the request and the nature and scope of the criminal activities to be investigated.

9-11.312 Additional Special Grand Juries

District courts are authorized under 18 U.S.C. § 3332(b) to impanel additional special grand juries when the special grand juries already impaneled have more business than they can properly handle. When impaneling additional special grand juries, a court should make a finding as to the need; and a court should always make it clear that the special grand jury is being impaneled under 18 U.S.C. § 3331 (and is therefore not subject to the limitations of a regular grand jury). *See Wax v. Motley*, 510 F.2d 318 (2d Cir.1975).

9-11.320 Special Duties Imposed Upon Attorneys for the Government

The special grand jury has a duty under 18 U.S.C. § 3332(a) ''to inquire into offenses against the criminal laws of the United States alleged to have been committed within the district.'' Such alleged offenses may be brought to the jury's attention by the court or by any attorney appearing for the United States to present evidence to the jury. It is incumbent upon any such government attorney to whom it is reported that a federal offense was committed within the district, if the source of information so requests, to refer the information to the special grand jury, naming the source and apprising the jury of the attorney's action or recommendation regarding the information.

9-11.330 Reports of Special Grand Juries

At the conclusion of its service, a special grand jury is authorized under 18 U.S.C. § 3333, by a majority vote of its members, to submit to the district court, potentially for public release, a grand jury report, which must concern either: (1) noncriminal misconduct, malfeasance, or misfeasance in office involving organized crime activity by an appointed public officer or employee, as the basis for a recommendation for removal or disciplinary action; or (2) organized crime conditions in the district, without however being critical of any identified person. (''Public officer or employee'' is defined broadly in 18 U.S.C. § 3333(f) to include federal, state and local officials.)

Upon receiving a report from a special grand jury, the district court must examine it, together with the minutes of the special grand jury, and accept it, for eventual filing as a public record, if the report is: (1) one of the two types authorized by 18 U.S.C. § 3333(a); (2) based upon facts discovered in the course of an authorized criminal investigation; (3) supported by a preponderance of the evidence; and (4) if each public officer or employee named in the report was afforded a reasonable opportunity to testify and present witnesses on his/her own behalf before the special grand jury, prior to its filing the report. (It would seem that 18 U.S.C. § 3333(a) necessitates a recording of the proceedings before a special grand jury may issue a grand jury report.)

The wording and the legislative history of 18 U.S.C. §§ 3332(a) and 3333(b)(1) indicate that a special grand jury should not investigate for the sole purpose of writing a report; the report must emanate from the criminal investigation. At bottom, then, a special grand jury functions essentially like a regular grand jury. It is only after the ''completion'' of the criminal investigation, when the time is near for discharging the jury, that a report may be submitted to the court under 18 U.S.C. § 3333(a). The grand jury will by that time have exhausted all investigative leads and have found all appropriate indictments.

The ''misconduct,'' ''malfeasance,'' or ''misfeasance'' that may be the subject of a report (provided it is related to organized criminal activity) must, to some degree, involve willful wrongdoing as distinguished from mere inaction or lack of diligence on the part of the public official. Nonfeasance in office, however, if it is of such serious dimensions as to be equitable with misconduct, may be a basis for a special grand jury report. *See* S.Rep. No. 617, 91st Cong., 1st Sess. (1969); 1970 U.S.Code Cong. & Ad.News 4007.

Reports involving public officials must connect ''misconduct,'' ''malfeasance,'' or ''misfeasance'' with ''organized criminal activity.'' ''Organized criminal activity'' should be interpreted as being much broader than ''organized crime;'' it includes ''any criminal activity collectively undertaken.'' This statement is based upon the legislative history of 18 U.S.C. § 3503(a), not of 18 U.S.C. § 3333, but both sections were part of the Organized Crime Control Act of 1970, making it logical to construe the term the same way for both sections. *See* 116 Cong.Rec. 35293 (October 7, 1970).

Before the district court may enter as a public record a special grand jury report concerning appointed public officers or employees, a complex procedure must be followed as set down in 18 U.S.C. § 3333(c).

If a court decides that a report submitted to it by a special grand jury regarding a public officer or employee does not comply with the law, the court may seal the report and keep it secret or, for remedial purposes,

order the same grand jury to take additional testimony. For purposes of taking additional testimony, a special grand jury may be extended to serve for longer than thirty-six months (but this is the only exception to the thirty-six months limitation).

If the district court feels that the filing of a special grand jury report as public record would prejudice the fair consideration of a pending criminal matter, the court is authorized under 18 U.S.C. § 3333(d) to keep the report sealed during the pendency of that matter. Sealed for such a reason, the report would not be subject to subpoena.

When appropriate, U.S. Attorneys will deliver copies of grand jury reports, together with the appendices, to the governmental bodies having jurisdiction to discipline the appointed officers and employees whose involvement in ''organized criminal activity'' is the subject of the report. *See* 18 U.S.C. § 3333(c)(3). (The prospect of such disciplinary action does not prevent the officer's or employee's being compelled to testify under a grant of immunity; *see In re Reno*, 331 F.Supp. 507 (E.D. Mich.1971)).

9-11.331 Consultation With the Criminal Division About Reports

If a special grand jury will be considering the issuance of a report at the culmination of its service, U.S. Attorneys are requested to notify the Chief of the Organized Crime and Racketeering Section promptly of the fact and explain why an indictment cannot be found to obviate the issuance of a grand jury report. It should also be explained how the facts developed during a criminal investigation support one of the authorized types of reports. Before any draft report is furnished to the grand jury, it must be submitted to the Chief of the Organized Crime and Racketeering Section for approval.

It is not clear what remedy the government would have if a court was wrong in sealing a special grand jury report and refusing to make it public. The Chief of the Organized Crime and Racketeering Section should be notified promptly if a court finally determines for any reason that a grand jury report is deficient or not properly to be released, so that consideration may be given to the possibility of taking the matter to the court of appeals.

DETAILED
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FOR CHAPTER 12

9-12.000 INDICTMENTS AND INFORMATIONS

An indictment, as defined in Black's Law Dictionary (4th ed.), is:

> An accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense, punishable on indictment.

An information, as defined in Black's, *id.*, is:

> A formal accusation of crime, differing from an indictment only in that it is preferred by a prosecuting officer instead of by a grand jury.

Together with the pleas of guilty, not guilty, or *nolo contendere*, the indictment and information constitute the pleadings in federal criminal proceedings. *See* Rule 12(a), Fed.R.Cr.P.

9-12.010 Obtaining an Indictment

See USAM 9-11.000.

9-12.020 Obtaining an Information

An information, drawn up by a prosecutor, may be filed without leave of court. *See* Rule 7(a), Fed.R.Cr.P. *See also* ABA Standards Relating To The Administration of Criminal Justice, ''The Prosecution Function,'' 3.7 (1974). The information need not be supported by affidavit unless an arrest warrant is sought. *See* Rule 9(a), Fed.R.Cr.P.

9-12.100 USE OF AN INDICTMENT OR INFORMATION

Rule 7(a), Fed.R.Cr.P., provides in pertinent part:

> An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.

9-12.110 When an Indictment is Required

The Fifth Amendment commands that no person be held to answer for ''a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.'' As with a capital crime, whether a crime is ''infamous'' depends upon its punishment rather than upon the character of the criminal act. Any crime that may be punished by imprisonment in a

penitentiary or at hard labor is an infamous crime. *See Green v. United States*, 356 U.S. 165, 183 (1958); *Catlette v. United States*, 132 F.2d 902 (4th Cir.1943). Title 18, United States Code, classifies offenses whose penalty is death or imprisonment exceeding one year as felonies and classifies all other crimes as misdemeanors. *See* 18 U.S.C. § 1. Imprisonment in a penitentiary may be imposed upon conviction of a felony. *See* 18 U.S.C. § 4083. Although the penalty for a misdemeanor may be imprisonment for one year, a misdemeanor is not an ''infamous'' crime because the defendant cannot be placed in a penitentiary without his/her consent. *See* 18 U.S.C. § 4083. Therefore, unless an indictment is waived, *see* USAM 9-12.200, *infra*, its use is required to charge a felony.

9-12.120 When an Information May be Used

An information may be used where indictment is waived. *See* USAM 9-12.200, *infra*.

If the defendant is a corporation, it may be prosecuted by information since corporations are not amenable to imprisonment, but only to a monetary penalty. *See United States v. Yellow Freight Sys.*, 637 F.2d 1248, 1253-55 (9th Cir.), *cert. denied*, 454 U.S. 815 (1981). A fine, even one potentially of a million dollars, cannot be considered an infamous punishment. *See United States v. Armored Transport, Inc.*, 629 F.2d 1313 (9th Cir.), *cert. denied*, 450 U.S. 965 (1980).

An information may also be used where the offense charged is punishable by imprisonment for one year or less. *See Duke v. United States*, 301 U.S. 492 (1937). Where several misdemeanor offenses are charged in separate counts, the fact that the aggregate penalty upon conviction may exceed one year does not require prosecution by indictment. *See United States v. Johnson*, 585 F.2d 374, 377 (8th Cir.), *cert. denied*, 440 U.S. 921 (1978); *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir.1978).

Although an indictment is not required, a grand jury may return an indictment for a misdemeanor. *See Hammond v. Brown*, 323 F.Supp. 326, 332 (N.D.Ohio), *aff'd*, 450 F.2d 480 (6th Cir.1971). However, having chosen to proceed by indictment rather than by information in such a case, the prosecution is bound by the principles governing indictments. *See United States v. Goldstein*, 502 F.2d 526 (3d Cir.1974). *See also* USAM 9-12.420, *infra*. *But see United States v. Pandilidis*, 524 F.2d 644 (6th Cir.1975), where amendment of a misdemeanor indictment by a bill of particulars was held to be harmless error. *See* USAM 9-12.430, *infra*.

9-12.130 When Neither an Indictment Nor an Information is Required

The Fifth Amendment specifically excepts from the indictment requirement those cases ''arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.'' In fact, all

offenses arising under the Uniform Code of Military Justice in which the accused is on active duty in the military service may be prosecuted by court-martial, provided that the offense is ''service-connected.'' *See O'Callahan v. Parker*, 395 U.S. 258 (1969).

Criminal contempt represents another exception to the rule that prosecutions must be initiated by an indictment or information. Proceedings under 18 U.S.C. § 401 may be initiated summarily by the court or upon notice and hearing in accordance with Rule 42, Federal Rules of Criminal Procedure. *See Green v. United States*, 356 U.S. 165 (1958). An indictment, although not required, may be used. *See United States v. Mensik*, 440 F.2d 1232 (4th Cir.1971). However, in the case of contempt of Congress under 2 U.S.C. § 194, the use of an indictment is required by statute and must be employed. *See Russell v. United States*, 369 U.S. 749 (1962).

9-12.140 Presentments

Rule 7, Fed.R.Cr.P., does not recognize the use of a presentment, a charge preferred by a grand jury on its own initiative. While a grand jury may itself investigate, call witnesses, and make a presentment charging a crime, the presentment so returned cannot serve to initiate a prosecution. To initiate a prosecution, a presentment would first have to be submitted to the grand jury in the form of an indictment and be voted for in accordance with Rule 6(f), Fed.R.Cr.P. *See Gaither v. United States*, 413 F.2d 1061 (D.C.Cir.1969).

9-12.200 WAIVER OF INDICTMENT

Rule 7(b), Fed.R.Cr.P., provides:

> An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

Unless the offense is one which ''may be punished by death'' within the meaning of Rule 7(a), Fed.R.Cr.P., the defendant may waive his/her right to be indicted by a grand jury for any felony. *See* USAM 9-12.201, *infra*.

9-12.201 Effect of *Furman v. Georgia*

Furman v. Georgia, 408 U.S. 238 (1971), raised the issue of whether offenses which are statutorily punishable by death must be prosecuted by indictment pursuant to Rule 7(a), Fed.R.Cr.P., or whether a post-*Furman* defendant may waive indictment as in the case of other non-capital offenses. *Furman* has not been uniformly viewed as necessarily having the effect of invalidating all statutes and procedural rules that were tied to

the concept of a ''capital'' case. If the statute's purpose derived from the nature of the offense and not from the potential severity of the punishment, the statute remains in effect. *See United States v. Kennedy*, 618 F.2d 557 (9th Cir.1980). Once a case has clearly lost its ''capital'' character, one court has held that the defendant was no longer entitled to twenty preemptory challenges under Rule 24(b), Federal Rules of Criminal Procedure, *United States v. Maestas*, 523 F.2d 316 (10th Cir.1975), and another held that the government was no longer required to comply with the disclosure requirement of 18 U.S.C. § 3432, *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir.1980). But another circuit has held that even though the death penalty could not be constitutionally imposed, the defendant had an absolute right to two attorneys pursuant to 18 U.S.C. § 3005. *See United States v. Watson*, 496 F.2d 1125 (4th Cir.1973).

In view of the uncertainty as to the effect of *Furman* on Rule 7, Fed.R. Cr.P., prosecution of all offenses having a capital penalty should be prosecuted by indictment, notwithstanding a defendant's willingness to waive his/her right to be indicted by a grand jury. Post-*Furman* legislation which provides for a death penalty such as the air piracy statute, 49 U.S.C. § 1472, requires an indictment to initiate prosecution.

9-12.210 Waiver Procedure

There is no formal procedure for obtaining a waiver of indictment. Rule 7, Fed.R.Cr.P., merely requires that it be waived ''in open court.'' However, the court must be satisfied that the defendant knowingly, voluntarily, and understandingly waives his/her right to be indicted by a grand jury. *See Bartlett v. United States*, 354 F.2d 745, (8th Cir.), *cert. denied*, 384 U.S. 945 (1966); *Farr v. United States*, 314 F.Supp. 1125 (W.D.Mo.1970) *adopted*, 431 F.2d 975 (8th Cir.), *cert. denied*, 402 U.S. 947 (1971). However, a waiver of indictment, being merely a waiver of a finding of probable cause by a grand jury, does not call for all the protections associated with the entry of a guilty plea. *See United States v. Montgomery*, 628 F.2d 414 (5th Cir.1980).

Where a waiver form is used, the fact that the defendant does not actually sign the waiver in court is not objectionable where the form is filed of record before arraignment. *See Ching v. United States*, 292 F.2d 31 (10th Cir.1965).

A waiver may be executed in a district other than that in which the crime was committed. *Boyes v. United States*, 298 F.2d 828 (8th Cir.), *cert. denied*, 370 U.S. 948 (1962). *United States v. Scavo*, 593 F.2d 837 (8th Cir.1979). The fact that the defendant waives indictment before the information is actually filed does not affect the information thereafter filed. The court acquires jurisdiction upon the filing of the information at which time the waiver becomes effective. *Young v. United States*, 354 F.2d 449 (10th Cir.1965).

9-12.220 Prosecutorial Discretion to Allow

Although Rule 7, Fed.R.Cr.P., allows a defendant to waive his/her right to be indicted by a grand jury, the prosecutor retains the discretion to proceed by indictment regardless of the defendant's preference. *See Rattley v. Irelan*, 197 F.2d 585 (D.C.Cir.1952).

9-12.230 Judicial Discretion to Set Aside

The court may set aside a valid waiver of indictment, and, as in the case of a motion to set aside a plea of guilty, the court's exercise of discretion will be upheld on appeal unless it is clearly erroneous. However the courts are not as likely to set aside a waiver of indictment as a guilty plea, for the right to be indicted, though valuable, involves only the procedure for initiating a criminal prosecution. Setting aside a guilty plea, on the other hand, is fundamental to determining the defendant's guilt. *See Bartlett v. United States*, 354 F.2d 745 (8th Cir.), *cert. denied*, 384 U.S. 945 (1966); *Williams v. United States*, 410 F.2d 370 (3d Cir.1969). Note that a court's allowance of the withdrawal of a guilty plea does not compel the withdrawal of a waiver of indictment entered in conjunction with the plea. *See United States v. Scavo*, 593 F.2d 837 (8th Cir.1979).

9-12.240 Effect at New Trial

A waiver of indictment will be effective at a new trial upon the same information following reversal of the case on appeal because of an error in the admission of evidence, at least in the absence of a request to withdraw the waiver prior to the second trial. *See Brooks v. United States*, 351 F.2d 282 (10th Cir.1965), *cert. denied*, 383 U.S. 916 (1966).

9-12.300 DRAFTING INDICTMENTS AND INFORMATIONS

The Sixth Amendment commands that the accused in a criminal prosecution ''be informed of the nature and cause of the accusation.'' This is comprehended by the language of Rule 7(c), Fed.R.Cr.P., requiring an indictment to be ''a plain, concise and definite written statement of the essential facts constituting the offense charged.'' Thus, the drafter of indictments and informations must afford the defendant not only a document that contains all of the elements of the offense, whether or not such elements appear in the statute, but one that is sufficiently descriptive to give the defendant notice of the particular offense.

9-12.310 Formalities

Rule 7(c), Fed.R.Cr.P., deals with the drafting formalities discussed, *infra*.

9-12.311 Caption

Rule 7(c), Fed.R.Cr.P., specifically provides that the indictment or the information need not contain a ''formal commencement,'' or a ''formal conclusion,'' or any other matter not necessary to a plain, concise, and definite statement of the essential facts of the charge. The Appendix of Forms referred to in Rule 58, Fed.R.Cr.P., for example, is an indictment for murder in the first degree under 18 U.S.C. §§ 1111, 1114. The caption ''in the United States District Court for the ... District of ... Division'' merely identifies the court in which the indictment is returned. The caption is not a part of the body of the indictment and erroneous information contained in the caption will not affect the validity of the indictment. *See Stillman v. United States*, 177 F.2d 607 (9th Cir.1949).

9-12.312 Subscription

Rule 6(c), Fed.R.Cr.P., provides, among other things, that the foreperson of the grand jury ''shall sign all indictments.''

This requirement is satisfied by his/her signature below the endorsement, ''A True Bill,'' *Jones v. Pescor*, 167 F.2d 853 (8th Cir.1948). The fact that by inadvertence the indictment is unsigned when handed to the clerk is not fatal where the foreperson appears thereafter in open court and signs it in the presence of the grand jury. *See United States v. Long*, 118 F.Supp. 857 (D.P.R.1954).

Rule 7(c), Fed.R.Cr.P., provides that the indictment and information ''shall be signed by the attorney for the government.'' If the attorney for the government refuses to sign, which is within his/her discretion, there is no indictment. This provision of Rule 7, recognizes the power of government counsel ''to permit or not to permit the initiation of a prosecution.'' *See United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In Re Grand Jury January, 1969*, 315 F.Supp. 662 (D.Md.1970).

Rule 54(c), Fed.R.Cr.P., defines the phrase ''attorney for the government'' to include the Attorney General, an authorized assistant of the Attorney General, and an authorized assistant of a U.S. Attorney. An indictment may be signed in the name of the U.S. Attorney by an assistant who is authorized to sign the U.S. Attorney's name. *See United States v. Funkhouser*, 198 F.Supp. 708 (D.Md.1961), *opinion adopted*, 299 F.2d 940 (4th Cir.), *cert. denied* 370 U.S. 939, *reh'g denied*, 371 U.S. 854 (1962); *Wheatley v. United States*, 159 F.2d 599 (4th Cir.1946); *United States v. Keig*, 334 F.2d 823 (7th Cir.1964). In turn, there is nothing impermissible in having a high ranking Justice Department official's signature on an indictment. *See United States v. Climatemp, Inc.*, 482 F.Supp. 376 (N.D. Ill.1979).

The fact that the name of the attorney for the government is typewritten does not affect the indictment where the question is not raised before trial. *See Wiltsey v. United States*, 222 F.2d 600 (4th Cir.1955). The courts have reasoned that the signature of the U.S. Attorney, like the caption, is not a part of the indictment and serves only to evidence the authenticity of the indictment and the government's consent to prosecution. The manner in which it is signed is therefore not such a defect as would invalidate the indictment. *See United States v. Keig, supra.*

9-12.313 Incorporation by Reference

Rule 7(c)(1), Fed.R.Cr.P., provides that ''[a]llegations made in one count may be incorporated by reference in another count.'' The device of incorporating material from other counts is useful to avoid repetition such as is typical in fraud, conspiracy, and bankruptcy cases. For example, in a mail fraud case an introductory paragraph to one count was employed to charge all of the necessary elements represented by individual mailings, which may be incorporated by reference and set out in columnar form to avoid repetition. *See United States v. McGinn*, 381 F.2d 306 (2d Cir.), *cert. denied*, 389 U.S. 1053 (1967).

Form 3 of the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, illustrates incorporation of material from another count: ''The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.'' The safe course to follow in incorporating material from another county is to employ the term ''incorporate'' unless the reference is otherwise clear. If, for example, one count describes a particular election, a reference in subsequent counts to ''said election'' properly refers to the same election. *See Blitz v. United States*, 153 U.S. 308 (1894). Incorporation should not be made to the point of incorporating the allegations of a count in one indictment into a count of a different indictment as was done in *United States v. Bergdoll*, 442 F.Supp. 1308, 1318 n. 16 (D.D.C. 1981).

Each count is viewed as a separate indictment whose sufficiency must be determined without reference to any other count. *See Dunn v. United States*, 284 U.S. 390 (1932). If a count does not expressly incorporate allegations of another count, such allegations cannot be considered. For example, where count one properly described a controlled substance but count two omitted the numbers ''3, 4,'' describing the same substance, the second count did not state an offense, a defect that could not be cured by reference to the first count. *See United States v. Huff*, 512 F.2d 66 (5th Cir.1975). The same result obtained where counts two and four of an indictment incorporated allegations of counts one and three, but the latter did not incorporate the allegations of the former. Allegations neces-

sary to counts one and three could not be supplied from counts two and four. *See United States v. Gordon*, 253 F.2d 177 (7th Cir.1958).

Even though a count has been dismissed and is no longer a viable part of the indictment, allegations of such counts may be incorporated by reference in another count. *See United States v. Shavin*, 287 F.2d 647 (7th Cir.1961); *United States v. Weiner*, 578 F.2d 757, 776 (9th Cir.1978).

9-12.314 Citation of the Statute Violated

Rule 7(c)(1), Fed.R.Cr.P., provides:

> The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The above provision is limited by paragraph 7(c)(3), Federal Rules of Criminal Procedure:

> *Harmless Error*. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

At the time the Fed.R.Cr.P. were adopted, current law did not regard citation to statutes or regulations as part of the indictment; convictions could, therefore, be sustained on the basis of a statute or rule other than that cited, as in *Williams v. United States*, 168 U.S. 382 (1897), and *United States v. Hutcheson*, 312 U.S. 219 (1941). The Court stated in *Hutcheson, supra*, that the designation of the statute is immaterial. ''He [the prosecutor] may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute.'' *Id.* at 229. Rule 7(c)(1), Fed.R.Cr.P., is for the benefit of the defendant, but is likewise not intended to cause a dismissal; it is simply to provide a means properly to inform the defendant without endangering the prosecution. Thus the mis-citation of a statute will not warrant reversal where the language of an indictment makes the charge clear and the defendant can show no prejudice. *See United States v. Fekri*, 650 F.2d 1044 (9th Cir.1981). Moreover, the fact that the citation is in the heading rather than in the body of the indictment, unless it misleads the defendant to his/her prejudice, will not affect the indictment. *See Huizar v. United States*, 339 F.2d 173 (5th Cir.1964), *cert. denied*, 410 U.S. 926 (1965). Nor did the erroneous citation of a state statute in setting forth a predicate RICO act prove fatal where the reference to the state offense served to identify generally the kind of activity made illegal by the federal statute. *See United States v. Welch*, 656 F.2d 1039, 1058 (8th Cir.), *cert. denied*, 456 U.S. 915 (1982).

Citation of the statute charged should be distinguished from a reference to a statute that is an element of the offense. Here the reference must be sufficient to apprise the defendant of its identity. Thus, where the indictment charges that the defendant unlawfully imported diamonds ''contrary to law,'' the words ''contrary to law'' refer to legal provisions outside the offense of smuggling that is being charged, and the law must be identified to determine the basis for the prosecution. *See Keck v. United States*, 172 U.S. 434 (1899).

9-12.315 Grammar, Spelling, and Typographical Errors

The indictment will not be defective merely because the wrong tense of a verb is used or because of similar discrepancies in language. The test of an indictment remains whether it states the elements of the offense intended to be charged with sufficient particularity to enable the defendant to prepare his/her defense and to plead the judgment as a bar to any subsequent prosecution for the same offense. *See United States v. Lockwood*, 360 F.2d 905 (7th Cir.1966).

An indictment will not be dismissed due to typographical errors unless a defendant can affirmatively show that some prejudice resulted from the errors. *See United States v. Rich*, 518 F.2d 980, 986 (8th Cir.), *cert. denied*, 427 U.S. 907 (1976). There was no prejudice to the defendant where an indictment misspelled the word ''coca'' to read ''cocoa'' in a distribution of cocaine count, *Coppola v. United States*, 217 F.2d 155 (9th Cir. 1954); where it was apparent from the face of the indictment that the use of ''1972'' rather than ''1973'' was a typographical error, *United States v. Akins*, 542 F.2d 70 (9th Cir.), *cert. denied*, 430 U.S. 908 (1976); or where an indictment omitted the defendant's first name in one count, *United States v. Lerma*, 657 F.2d 780, 789 (5th Cir.1981).

One court, though, refused to allow the date of an offense to be amended from ''1981'' to ''1980'' where the government only offered the subjective conclusion that the error was attributable to typographical error without any affidavit supporting such an allegation, as required by the local rules. *See United States v. Randolph*, 542 F.Supp. 11 (E.D.Tenn.1982).

9-12.320 Sufficiency

Rule 7(c)(1), Fed.R.Cr.P., provides:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

The true test of an indictment is not whether it might possibly be made more certain but whether it contains:

> Every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in the case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Cochran and *Sayre v. United States*, 157 U.S. 286, 290 (1895).

The information must conform to the same rules regarding sufficiency as does an indictment. *See England v. United States*, 174 F.2d 466 (5th Cir.1949); *Southern Ry Co. v. United States*, 88 F.2d 31 (5th Cir.1937).

9-12.321 Elements of the Offense

The first component of the suggested test calls for all of the elements of the offense charged. This is founded upon the Fifth Amendment's requirement that prosecution for an infamous crime be instituted by a grand jury. If an essential element of the offense is omitted from the indictment, it cannot, consistent with the principle underlying the Amendment, be supplied by the prosecutor or by the courts. As stated in *Russell v. United States*, 369 U.S. 749, 770 (1962),

> To allow the prosecution, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

In *United States v. Outler*, 659 F.2d 1306 (5th Cir.1981), it was fatal to an indictment which charged a physician with prescribing drugs, in violation of 21 U.S.C. §841(a), not to allege that the prescriptions lacked legitimate medical reasons as an element of the offense. The court acknowledged that this factor was not a statutory element of the violation, that the defendant was clearly aware of the nature of the charges, and that the grand jurors had likely considered the legitimacy issue in returning the indictment. Nonetheless, the Fifth Amendment did not allow the Court to speculate whether the grand jury had considered this omitted element in determining whether there was probable cause for the indictment.

9-12.322 Requirement of Specificity

The second part of the sufficiency test, apprising the defendant of what he/she must be prepared to meet, incorporates the specificity requirement of the Sixth Amendment.

The specificity requirement serves to insure that a defendant only has to answer to charges actually brought by the grand jury and not a prosecutor's interpretation of the charges, that the defendant is apprised of the charges against him/her in order to permit preparation of his/her defense, and that the defendant is protected against double jeopardy. *See United States v. Haas*, 583 F.2d 216 (5th Cir.), *reh'g denied*, 588 F.2d 829, *cert. denied*, 440 U.S. 981 (1978).

An example of indictment which failed this test is provided by *United States v. Nance*, 533 F.2d 699 (D.C.Cir.1976). The indictment charged a false pretense violation pursuant to the D.C.Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants.

The indictment, though, need only satisfy a defendant's constitutional right to know what he/she is charged with and not his/her need to know the evidentiary details which will be used to establish her/his commission of the offense. *See United States v. Diecidue*, 603 F.2d 535, 547 (5th Cir.), *cert. denied, Gispert v. United States*, 449 U.S. 9[illegible] (1979). Therefore, an explicit discussion of a RICO enterprises' effect on interstate commerce was not required since it would contribute nothing to the defendant's understanding of the nature of the offense which was that of conducting an enterprise's affairs through racketeering activity.

9-12.323 Plea of Former Jeopardy

The third ingredient of the test of sufficiency, whether the record shows with accuracy to what extent the defendant may plead a former acquittal or conviction, is, as a practical matter, satisfied by compliance with the essential elements and specificity tests. Moreover, the record of the entire case, not just the indictment, is available when the defense of double jeopardy is raised. *See Bartell v. United States*, 227 U.S. 427 (1913). As the court pointed out in *United States v. Covington*, 411 F.2d 1087, 1089 (4th Cir.1969): ''The transcript is available . . . and, should it ever be necessary to do so, it may readily be determined from the transcript whether a newly charged offense was one 'which would have supported a conviction under the earlier indictment.' ''

9-12.324 Charging in the Language of the Statute

In *United States v. Carll*, 105 U.S. 611 (1881), the indictment followed the language of the statute but was found insufficient for failure to allege that the defendant knew that the instruments he uttered were forged or counterfeited. As the Court pointed out, ''it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or

ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'' *Id.* at 612.

The rule reiterates the Court's views in *United States v. Cruikshank*, 92 U.S., 542, 558 (1875):

> It is an elementary principle of criminal pleading, that where the definition of the offense, whether it be at common law or by statute, ''includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must descend to particulars.''

See also United States v. Simmons, 96 U.S. 360 (1877).

In *Russell v. United States*, 369 U.S. 749 (1962), the indictments charged defendants with contempt of Congress under 2 U.S.C. § 192 in that they failed and refused to answer questions ''pertinent to the question under inquiry'' before a committee of Congress. The defendants challenged the sufficiency of the inquiry. In holding the indictments insufficient, the Court stated that where ''guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.'' *See Russell, supra*, at 764.

The issue in *Russell* was raised by a motion to dismiss. The Court viewed the defect in the indictment as being one of specificity rather than omission of an essential element. In this situation the Court might have been expected to follow the rule in *Hagner v. United States*, 285 U.S. 427 (1932), and to overlook the defect as harmless error. However, the Court held that because of the omission of the subject of the inquiry, the indictments wholly failed to inform the defendants of the nature of the accusation against them and were not salvageable by a bill of particulars. ''[I]t is a settled rule that a bill of particulars cannot save an invalid indictment.'' *See Russell, supra*, at 770.

In *Hamling v. United States*, 418 U.S. 87 (1974) the Court considered the sufficiency of an indictment under 18 U.S.C. § 1461 making it a crime to mail obscene matter. Defendants challenged the sufficiency of the indictment, which charged them in the language of the statute, for failure to define obscenity. The Court distinguished *Russell, supra*, holding that the generic term ''obscene'' is not merely a generic or descriptive term but ''a legal term of art,'' raising a question not of fact, as in *Russell, supra*, but of law. *See Hamling, supra*, at 118. *See also United States v. Debrow*, 346 U.S. 374 (1953). But, reliance on the language of the statute was fatal to an indictment in a case in which the defendant was charged with involuntary manslaughter under 18 U.S.C. § 1112. Relevant case law had held that gross negligence and actual knowledge of potential harm were additional elements of the offense. The absence of such allegations in the

indictment was not cured by the government's proof at trial of these elements or their inclusion in the court's instructions to the jury. *See United States v. Opsta*, 659 F.2d 848 (8th Cir.1981).

9-12.325 Negativing Statutory Exceptions

Neither the indictment nor the information is required to negate defensive matter such as the statute of limitations or exceptions to the class of persons or objects set out in the statutes defining the offense.

> [I]t has come to be a settled rule ... that an indictment or other pleading founded on a general provision defining the elements of an offense, need not negate the matter of an exception made by a proviso or other distinct clause ... [I]t is incumbent on one who relies on such an exception to set it up and establish it.

McKelvey v. United States, 260 U.S. 353, 357 (1922); *United States v. Cook*, 84 U.S. 168 (1872).

Thus, an indictment for assault with a dangerous weapon need not, following the statute, also allege that the assault was ''without just cause.'' *See Hockenberry v. United States*, 422 F.2d 171 (9th Cir.1970); *United States v. Messina*, 481 F.2d 878 (2d Cir.1973). In *United States v. Outler*, 659 F.2d 1306 (5th Cir.1981), the court though, rejected the government's argument that a lack of legitimate medical reason was a statutory exception rather than an essential element of a court charging a physician with prescribing drugs in violation of 21 U.S.C. § 841.

9-12.326 Conjunctive and Disjunctive Elements

To avoid uncertainty in charging an offense in which the statute enumerates several different acts in the alternative, the practice is to plead the offense by substituting the conjunction ''and'' for the disjunctive ''or.''

> When a statute specifies several alternative ways in which an offense may be committed, the indictment may allege the several ways in the conjunctive, and this fact neither makes the indictment bad for duplicity nor precludes a conviction if only one of the several allegations linked in the conjunctive in the indictment is proven.

United States v. McCann, 465 F.2d 147, 162 (5th Cir.), *cert. denied*, 412 U.S. (1972); *Fields v. United States*, 408 F.2d 885 (5th Cir.1969).

Thus, when the statute punishes taking, carrying away, or concealing, the indictment properly charged taking, carrying away, *and* concealing. *See United States v. Gunter*, 546 F.2d 861 (10th Cir.), *cert. denied*, 430

U.S. 947 (1977). Likewise, where the statute reads ''prostitution or debauchery,'' the indictment should be phrased, ''prostitution and debauchery.'' *See Bayless v. United States*, 365 F.2d 694 (10th Cir.1966); *United States v. Uco Oil Co.*, 546 F.2d 833 (9th Cir.), *cert. denied*, 430 U.S. 966 (1976). The consequence of charging in the alternative may lead to rendering the indictment insufficient for uncertainty, as in *United States v. MacKenzie*, 170 F.Supp. 797, 799 (D.Me.1959).

> It is equally well settled, however that an indictment which alleges the several acts constituting the statutory offense in the disjunctive or alternative lacks the necessary certainty and is wholly insufficient.

See also United States v. Hicks, 619 F.2d 752 (8th Cir.1980).

9-12.330 Particular Allegations

9-12.331 Time and Date

Except where time is an essential element of the offense, the time allegation is not material to the sufficiency of the indictment if the error or variance in proof is within reasonable limits. Time was material to an indictment charging a willful failure to file an income tax return by the April 15 deadline. Therefore, evidence showing that the defendant had obtained a filing extension until May 1 of that year caused a fatal variance. *See United States v. Goldstein*, 502 F.2d 526 (3d Cir.1974). It is well settled that proof of any date, within reason, before the return of the indictment and within the statute of limitations is sufficient. *See Russell v. United States*, 429 F.2d 237 (5th Cir.1970).

Courts have allowed considerable leeway as to the specificity of the alleged date of an offense in an indictment. One court reasoned that the more specific the time allegation, stronger is the inference that the grand jury was only indicting a defendant for acts occurring on the specific dates charged, whereas use of the qualifying phrase, ''on or about'' indicated a grand jury unwillingness to pinpoint the date of the offense charged. *See United States v. Somers*, 496 F.2d 723, 745 (3d Cir.1974). A fatal variance occurred when an indictment charged that the subject extortionate acts occurred ''on October 7 and October 8, 1962,'' but the proof showed such acts occurred on August 10 and October 5, 1962. *See United States v. Critchley*, 353 F.2d 358 (3d Cir.1965). In contrast, the court in *United States v. Grapp*, 653 F.2d 189 (5th Cir.1981), readily rejected a variance claim where the proof at trial showed that the time of the offense was the middle of 1977 and the indictment charged it had occurred ''on or about May 27, 1977.''

Citing hornbook law that great generality is allowed as to the alleged date of an offense in an indictment, it was held that a count charging that an alien smuggling offense took place ''on or about 1977, the exact date to

the grand jury unknown'' was within reasonable limits. *See United States v. Nunez*, 668 F.2d 10 (1st Cir.1981).

9-12.332 Place of Offense

The indictment or information need not allege a place where the offense occurred. Uniformly indictments allege that the crime took place ''in the . . . District of . . .'' but omit any reference to such particulars as state, county, city, or township. Where place is an element of the offense, however, it must be set out.

For example, in an indictment under 18 U.S.C. § 2312, interstate transportation of a stolen motor vehicle, the state from which the vehicle was taken and into which it was transported should be named, these being essential to the offense.

Under early English law, when jurors were also witnesses summoned from the vicinage, the sheriff needed to know where the crime was committed in order to summon the proper jury. In this country ''most authorities assume that an allegation is sufficient after verdict which shows it [the crime] to have been done within the jurisdiction of the court.'' *See Ledbetter v. United States*, 170 U.S. 606, 613 (1898).

An allegation that the bank robbery occurred ''in the State and District of New Jersey'' met the requirements of an indictment. *See United States v. Bujese*, 371 F.2d 120 (3d Cir.1967). Likewise, it was sufficient that acts of bribery occurred in ''the Western District of Texas.'' *See United States v. Sutherland*, 656 F.2d 1181 (5th Cir.1981). ''[I]t is well established that an indictment is not legally insufficient for failure to include such an allegation (place where the crime occurred).'' *See United States v. Honneus*, 508 F.2d 566 (1st Cir.1974), *cert. denied*, 95 S.Ct. 1677 (1975). Even when an indictment alleged that a murder took place in the town of Popular instead of Brackton, and the indictment was therefore dismissed by the government after the jury had been impaneled, the indictment was sufficient to support a defense of double jeopardy against the subsequent, corrected indictment. *See United States v. LeMay*, 330 F.Supp. 628 (D.Mont.1971).

9-12.333 Means

Rule 7 c)(1), Fed.R.Cr.P., provides:

> It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means.

This provision is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways.

While it is permissible to allege several means in a single count, it is duplicitous to allege more than one offense in a single count. *See* Fed.R. Cr.P., Rule 8(a). It is therefore essential to distinguish between separate means and separate offenses. A count charging a single continuing offense does not offend the rule against duplicity because more than one means, each of which could constitute an offense standing alone, is joined in a single count. *See United States v. Berardi*, 675 F.2d 894, 897 (7th Cir.1982).

A single conspiracy having as its object the commission of numerous offenses is but a single offense. *See United States v. Crummer*, 151 F.2d 958 (10th Cir.1945), *cert. denied*, 327 U.S. 785 (1946). ''The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and this is one, however diverse its objects.' '' *See Braverman v. United States*, 317 U.S. 49, 54, (1942), (quoting in part from *Frohwerk v. United States*, 249 U.S. 204, 210 (1919)).

9-12.334 Venue

A defendant has a right to be tried in a forum where the crime was committed. *See* Article III, Section 2, Constitution of the United States; Sixth Amendment, Constitution of the United States; Rule 18, Fed.R.Cr.P. As discussed, *infra*, this ''right'' may be waived, but absent a waiver, the government's case fails for lack of proof of venue. *See United States v. Branan*, 457 F.2d 1062, 1065-66 (10th Cir.1972). The necessity of proving venue, however, does not require it to be alleged in the indictment. Rule 7(c)(1), Fed.R.Cr.P., does not require venue to be alleged in an indictment: *United States v. Vetterli*, 544 F.2d 1355 (6th Cir.1976). *See* USAM 9-12.332, *supra*. To avoid the filing of a bill of particulars to discover where the offense was committed, the better practice is to include such information in the indictment. *See Hemphill v. United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877 (1968).

Venue must be proved at trial by the government by a preponderance of the evidence, and proof may be by direct or circumstantial evidence. *See United States v. Powell*, 498 F.2d 890, 891 (9th Cir.), *cert. denied*, 419 U.S. 866 (1974); *United States v. McDonough*, 603 F.2d 19 (7th Cir.1979); *United States v. Luton*, 486 F.2d 1021, 1023 (5th Cir.1973), *cert. denied*, 417 U.S. 920 (1974). A division of a district, however, is not a unit of venue. *See United States v. Burns*, 662 F.2d 1378 (11th Cir.1981). Any defect in venue apparent from the indictment will be waived if the defendant fails to object before pleading guilty or before trial. *See United States v. Semel*, 347 F.2d 228, 229 (4th Cir.), *cert. denied*, 382 U.S. 840 (1965); *United States v. Jones*, 162 F.2d 72, 73 (2d Cir.1947); Fed.R. Crim.P. 12(b)(2). A claim of insufficient evidence to support a finding of venue will be waived if not specifically raised in a motion for acquittal. *See United States v. Menendez*, 612 F.2d 51 (2d Cir.1979); *United States v.*

Roberts, 618 F.2d 530 (9th Cir.), *appeal after remand*, 640 F.2d 225, *cert. denied*, 452 U.S. 942 (1980).

A number of statutes regulate the venue of particular criminal proceedings in the district courts. *See, e.g.*, 18 U.S.C. §§ 1073 (flight to avoid prosecution or giving testimony), 3236 (murder or manslaughter), 3237(a) (continuing offenses and offenses committed in more than one district), 3239 (threatening communications).

9-12.335 Intent

It is difficult to formulate a rule of general application that will safely avoid all of the hazards associated with charging scienter. This is because statutes very often do not provide a reliable guide. Traditionally, crime consists of an act coupled with intent. While this is typically the case with conduct that was regarded as criminal at common law, it is not necessarily true of a significant number of offenses that are regulatory in nature. In the case of statutes that do not specify intent, it becomes necessary to determine whether scienter is an element of the offense. This may be difficult. ''Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.'' *See Morissette v. United States*, 342 U.S. 246, 260 (1951).

Where intent is required, the indictment need not contain formal words such as ''knowingly,'' ''willfully,'' ''feloniously,'' or ''unlawfully.'' *See United States v. Zarra*, 293 F.Supp. 1074 (M.D.Pa.1969), *aff'd*, 423 F.2d 1227 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). Thus in an indictment for bail jumping, in which ''willfully'' is a necessary element of the offense, an express allegation that the bail jumping was willful was not required so long as other words or facts contained in the indictment necessarily or fairly imported guilty knowledge. *See United States v. McLennan*, 672 F.2d 239 (1st Cir.1982).

An indictment for bank robbery in the language of 18 U.S.C. § 2113(a) that the defendant ''by force and violence and by intimidation did take'' was not fatally defective for failure to charge intent. 18 U.S.C. § 2113(a) does not include intent and the court, on a motion to vacate sentence, held that the words used implied intent. *See Walker v. United States*, 439 F.2d 1114 (6th Cir.1971). The same issue was raised in *United States v. Purvis*, 580 F.2d 853 (5th Cir.), *reh'g denied*, 585 F.2d 520, *cert. denied*, 440 U.S. 914 (1978), concerning an indictment charging conspiracy to violate constitutional rights in violation of 18 U.S.C. § 241. While the statute does not explicitly require specific intent, such intent is nonetheless an essential element of proof to sustain a conviction. The court reviewed the indictment from a common sense viewpoint rather than one of ''petty preciosity, pettifogging technicality'' to find that the indictment clearly

set forth a charge of specific intent without recitation of the words ''knowing,'' ''willful,'' ''intentional,'' or one of their derivations.

Although the element of criminal intent is not specified in 18 U.S.C. § 1711, an indictment for conversion of postal funds must allege criminal intent because the word ''convert'' itself does not imply that criminal intent is a necessary element of the offense. *See United States v. Morrison*, 536 F.2d 286 (9th Cir.1976).

Intent is often not an element of offenses that are regulatory in nature, that is, offenses aimed not so much at punishment of crime as the achievement of some social objective.

> Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

United States v. Dotterweich, 320 U.S. 277, 281 (1943).

Such offenses flow from an exercise of the government's police power to protect public health and safety. Pure food and drug, traffic, and liquor offenses are typical of this class of legislation. But, as indicated by the Court in *Morissette, supra*, there is no certain guide classifying offenses into those which require scienter and those which do not.

This is well illustrated by cases involving impersonation of a federal officer under both parts of 18 U.S.C. § 912, that is, (1) acting as such or (2) employing such means in order to obtain money or something of value. Before its revision in 1948, 18 U.S.C. § 912 included the phrase ''with intent to defraud.'' The fraudulent intent language was deleted. Subsequently, in *Honea v. United States*, 344 F.2d 798 (5th Cir.1965), the Fifth Circuit addressed the issue of the sufficiency of an indictment under 18 U.S.C. § 912 that did not allege that the defendant acted with fraudulent intent, an issue first raised by the defendant's motion to dismiss. The Fifth Circuit held that the indictment was fatally defective for failure to allege fraudulent intent. In *United States v. Guthrie*, 387 F.2d 569 (4th Cir.1967), the Fourth Circuit, however, held that an allegation of fraudulent intent was unnecessary, distinguishing *Honea, supra*, on the ground that the latter described an offense under the second part of 18 U.S.C. § 912. But in *United States v. Randolph*, 460 F.2d 367 (5th Cir.1972), the Fifth Circuit reaffirmed its view, holding that an allegation of fraudulent intent was required to charge an offense under both parts of the statute.

The Ninth Circuit followed *Guthrie, supra, United States v. Mitman*, 459 F.2d 451 (9th Cir.), *cert. denied*, 409 U.S. 863 (1972). The Second Circuit in *United States v. Rose*, 500 F.2d 12 (2d Cir.1974), followed *Guthrie,*

supra, and found that an allegation of fraudulent intent was not required. *See United States v. Cord*, 654 F.2d 490 (7th Cir.1981); *United States v. Robbins*, 613 F.2d 688 (8th Cir.1979); *United States v. Wilkes*, 732 F.2d 1154 (3rd Cir.), *cert. denied*, 469 U.S. 965 (1984).

Where intent is not indicated in the statute, the case law and legislative history of the offense must be consulted to determine whether intent should be charged. While a safe general rule might be to charge intent if the issue is in doubt, such a practice in many cases could serve to increase the government's burden of proof. It is believed that most courts would hold allegations of intent to be surplussage where the statute did not require intent as an element of the offense.

9-12.336 Aiding and Abetting

Section 2 of Title 18 provides that whoever ''aids, abets, counsels, commands, induces or procures,'' the commission of an offense against the United States ''is punishable as a principal.'' The statute also punishes as a principal whoever causes an act to be done which if directly performed by him/her or another would be an offense. The statute on principals is not itself a specific criminal offense. The statute abolishes the distinction that formerly existed between principals and accessories before the fact.

Since 18 U.S.C. § 2 applies implicitly to all federal offenses, an indictment or information need not include the words ''aid and abet'' in order to sustain a conviction of that charge. *See United States v. Masson*, 582 F.2d 961 (5th Cir.1978). Even though the defendant is charged with commission of the substantive offense, proof that he/she only aided or abetted the commission of the crime will support the indictment. *See Latham v. United States*, 407 F.2d 1 (8th Cir.1969); *Theriault v. United States*, 401 F.2d 79 (8th Cir.1968); *United States v. Trollinger*, 415 F.2d 527 (5th Cir.1969).

9-12.340 Forfeiture

Rule 7(c)(2), of the Fed.R.Cr.P., as amended in 1979, provides:

> No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

To accomplish the criminal forfeiture of property pursuant to one of the statutes providing for such forfeiture, among which are 18 U.S.C. § 1963(c) (RICO), 21 U.S.C. § 848 (controlled substance); 17 U.S.C. § 605(b) (copyright infringement); the indictment has to include a paragraph listing the property or interest that is subject to forfeiture. Absent such an allegation, there can be no special verdict concerning the property to be forfeited as specified in Rule 31(e) of the Fed.R.Cr.P.

United States v. Grammatikos, 633 F.2d 1013 (2d Cir.1980), is instructive as to what constitutes a sufficient forfeiture allegation. The Court of Appeals did not require the indictment to identify each of the properties which would be the subject of a special verdict. Rule 7(c)(2) of the Fed.R.Cr.P. only required an allegation of the extent of the interest to be forfeited. The Rule was satisfied in this instance since the indictment advised the defendant that all of his/her interest in the illicit enterprise was to be forfeited. Each item of property subject to forfeiture did not have to be considered by the grand jury since forfeiture was not an essential element of the offense, but was merely intended to serve an additional penalty for its violation.

C Furthermore, the Fifth Circuit Court of Appeals in *United States v. Peacock*, 654 F.2d 334, 351 (5th Cir.1981), refused to limit its determination of compliance with Rule 7(c)(2) of the Fed.R.Cr.P. to just the paragraph reciting the property subject to forfeiture, but considered all the listed acts constituting the pattern of racketeering activity to see if the defendants were given adequate notice, as it so found, of the property the government sought to have forfeited.

Note that the Department of Justice no longer recommends including a forfeiture provision in an indictment even when the government does not intend to pursue the criminal forfeiture. The case which originally prompted this recommendation by the Department, *United States v. Hall*, 521 F.2d 406 (9th Cir.1975) (indictment dismissal for violation, of Rule 7(c)(2)) of the Fed.R.Cr.P. should have no further application. Rule 7(c)(2) of the Fed.R.Cr.P. has since been amended in specific response to the *Hall* decision. *See* Advisory Committee Notes to 1979 amendment. Additionally, subsequent case law has further negated *Hall*'s authority. *See United States v. Bolar*, 569 F.2d 1071 (9th Cir.1978); *United States v. Brigance*, 472 F.Supp. 1177 (S.D.Tex.1979).

9-12.400 AMENDMENT

9-12.410 Amendment of Information

Since an information is prepared by the prosecuting attorney, he/she should be able to amend it in form or substance, provided the rights of the defendant are not prejudiced. This is recognized by Rule 7(e), Fed.R. Cr.P., which provides:

> The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Leave of court is required for the prosecutor to amend. However, the court may also amend on its own motion. *See United States v. Blanchard*, 495 F.2d 1329 (1st Cir.1974).

9-12.420 Amendment of Indictments

The general rule is that indictments cannot be amended in substance. This follows from the fundamental distinction between the information and the indictment, *see* USAM 9-12.410, *infra*, which must be returned by a grand jury. If the indictment could be changed by the court or by the prosecutor, then it would no longer be the indictment returned by the grand jury. The Supreme Court, reviewing the history of the grand jury, quotes Lord Mansfield on the subject:

> [T]here is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do.

Ex parte Bain, 121 U.S. 1, 6 (1987).

In *Russell v. United States*, 369 U.S. 749, 770 (1962), the Court pointed out that a consequence of amending the indictment is that the defendant ''could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.''

In one case, *Stirone v. United States*, 361 U.S. 212 (1960), the defendant was convicted of unlawful interference with interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951. The indictment charged that the victim's contract was to supply ready-mix concrete from his Pennsylvania plant to be used in the erection of a steel mill in Allenport, Pennsylvania. Performance of the contract involved, according to the indictment, shipment of sand from various points in the United States to the victim's ready-mix concrete plant. The Court permitted the government to offer evidence of the effect upon interstate commerce not only of the sand thus brought into Pennsylvania but also the interstate shipment of steel from the steel mill to be constructed from the ready-mix concrete.

The Supreme Court reversed the defendant's conviction on the ground that he was convicted of a different crime from that charged, in violation of his Fifth Amendment right to be indicted by a grand jury:

> The grand jury which found the indictment was satisfied to charge that Stirone's conduct interfered with interstate shipment of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.... Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

Stirone, supra, at 217.

An amendment for the excising of surplussage that has the effect of narrowing a defendant's liability without changing the meaning of the charge as it was presented to the grand jury is permissible. In *United States v. Whitman*, 665 F.2d 313 (10th Cir.1981), it was proper for the government to strike the references to overevaluation of property in an 18 U.S.C. § 1014 (making false statements to a federally insured bank) count. A similar deletion was approved of in *United States v. Ramirez*, 670 F.2d 27 (5th Cir.1982), even though the defendant's theory of defense was thereby altered.

9-12.430 Amendment of Indictments for Offenses That Could Have Been Initiated by Information

An issue, as yet unresolved, is raised concerning amendment of an indictment for an offense that could have been initiated by an information. In *United States v. Goldstein*, 502 F.2d 522 (3d Cir.1974), the Third Circuit considered the issue in the case of an indictment for failure to file an income tax return by April 15, a misdemeanor. The evidence showed that the defendant had obtained an extension until May 7. The government argued that had the offense been prosecuted by information, it could have been amended and therefore similar liberality should apply to the indictment. The court relied in part upon the fact that Rule 7(e) of the Fed.R. Cr.P., permitting amendment of informations, is silent about indictments and by implication prohibits their amendment. The court also cites *United States v. Fischetti*, 450 F.2d 34, 39 (5th Cir.1971), where the Fifth Circuit indicated that having chosen to proceed by indictment, the government is bound by the principles applicable to indictments.

In *United States v. Pandilidis*, 524 F.2d 644 (6th Cir.1975), *cert. denied*, 424 U.S. 933 (1976), the Sixth Circuit, confronting the issue in virtually an identical case, upheld amendment of the indictment. The indictment alleged a failure to file by April 15 and the government corrected this with a bill of particulars setting out the extensions to file. The Sixth Circuit identified the rights involved as: (1) fair notice under the Sixth Amendment, (2) protection from double jeopardy under the Fifth Amendment, and (3) the right not to be held for an infamous crime except upon an indictment by a grand jury. The court held that the defendant's right to fair notice was not infringed because he was apprised by a bill of particulars before trial of what the government would prove. The same was true of the defendant's right to be protected from double jeopardy, since the record of the case provided full protection. As for the right of the defendant to be indicted by a grand jury, the court pointed out that the defendant had no constitutional right to be indicted except for an infamous crime, which the offense involved was not. ''[S]ince the error permitting amendment to the indictment in this case did not reach constitutional

dimensions, the appropriateness of reversal must be determined under Rule 52(a) [harmless error]. *See Pandilidis, supra*, at 649.

The correction of an error in an indictment by substitution of a superseding information, where the offense could have been initiated by information, was upheld in *United States v. Brewer*, 681 F.2d 973 (5th Cir.1982).

Office of the Attorney General
Washington, D. C. 20530

August 25, 1994

TO: Holders of United States Attorneys' Manual Title 9 and/or Title 4

FROM: Janet Reno
Attorney General

United States Attorneys' Manual Staff
Executive Office for United States Attorneys

RE: Contacts by Department of Justice Attorneys with Represented Individuals and Organizations

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9 and Title 4.
3. Insert in front of affected section.

AFFECTS: USAM 9-13.200
USAM 4-8.1300

The following new section is added to Title 9, Chapter 13.

9-13.200 COMMUNICATIONS WITH REPRESENTED PERSONS

9-13.210 Generally

28 C.F.R. Part 77 generally governs communications with represented persons in law enforcement investigations and proceedings. This section sets forth several additional departmental policies and procedures with regard to such communications. Both this section and 28 C.F.R. Part 77 should be consulted by Department attorneys before engaging in any communications with represented individuals or represented organizations.

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect bona fide attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

The rules set forth in 28 C.F.R. Part 77 are intended, among other things, to clarify the circumstances under which government attorneys may communicate with represented persons. They are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his or her discretion, based on the specific circumstances of the individual case.

Furthermore, the application of this section, like the application of 28 C.F.R. Part 77, is limited to communications between Department of Justice attorneys and persons known to be represented by counsel during criminal investigations and proceedings or civil law enforcement investigations and proceedings. These provisions do not apply to Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers. Thus, state

bar rules and not these provisions will generally apply in civil suits when the government is a defendant or a claimant.

Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain. The primary points of contact at the Department of Justice on questions regarding 28 C.F.R. Part 77 and this section are the Assistant Attorneys General of the Criminal and Civil Divisions, or their designees.

9-13.220 Communications During Investigative Stage

Section 77.7 of Title 28, Code of Federal Regulations, generally permits communications with represented persons outside the presence of counsel that are intended to obtain factual information in the course of criminal or civil law enforcement investigations before the person is a defendant or is arrested in a federal criminal case, or is a defendant in a federal civil enforcement proceeding. Such communications must, however, have a valid investigative purpose and comply with the procedures and considerations set forth below.

During the investigative stage of a case, an attorney for the government may communicate, or cause another to communicate, with any represented person, including a "target" as defined in section 9-13.240, concerning the subject matter of the representation if the communication is made in the course of an undercover investigation of possible criminal or wrongful activity. Undercover communications during the investigative

stage must be conducted in accordance with 28 C.F.R. Part 77, and relevant policies and procedures of the Department of Justice, as well as the guidelines for undercover operations of the federal law enforcement agency conducting the investigation (e.g., the Attorney General's Guidelines on FBI Undercover Operations).

Overt communications during the investigative stage are subject to the procedures and considerations set forth in sections 9-13.230 - 9-13.233, 9-13.240 - 9-13.242, and 9-13.250 below.

9-13.230 Overt Communications with Represented Persons

During the investigative stage of a criminal or civil enforcement matter, an attorney for the government as a general rule should communicate overtly with represented persons outside the presence of counsel only after careful consideration of whether the communication would be handled more appropriately by others. Attorneys for the government may not, however, cause law enforcement agents to make communications that the attorney would be prohibited from making personally.

28 C.F.R. § 77.8 prohibits an attorney for the government from initiating or engaging in negotiations of a plea agreement, immunity agreement, settlement, sentence, penalty or other disposition of actual or potential civil or criminal charges with a represented person without the consent of counsel. However, the attorney for the government is not prohibited from responding to questions regarding the general nature of such agreements, potential charges, potential penalties, or other subjects related

to such agreements. In such situations, an attorney for the government should take care not to go beyond providing information on these and similar subjects, and generally should refer the represented person to his or her counsel for further discussion of these issues, as well as make clear that the attorney for the government will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges or claims or immunity without the presence or consent of counsel.

9-13.231 Overt Communications with Represented Persons -- Presence of Witness

An attorney for the government should not meet with a represented person without at least one witness present. To the extent feasible, a contemporaneous written memorandum should be made of all communications with the represented person.

9-13.232 Overt Communications with Represented Persons -- Restrictions

When an attorney for the government communicates, or causes a law enforcement agent or other agent to communicate, with a represented person without the consent of counsel, the restrictions set forth in 28 C.F.R. §§ 77.8 and 77.9 must be observed.

9-13.233 Overt Communications - Assurances Not to Contact Client

During the investigative stage, and absent compelling law enforcement reasons, an attorney for the government should not deliberately initiate an overt communication with a represented

person outside the presence of counsel if the attorney for the government has provided explicit assurances to counsel for the represented person that no such communication will be attempted and no intervening change in circumstances justifying such communications has arisen.

9-13.240 Overt Communications with Represented Targets

Except as provided in section 9-13.241 or as otherwise authorized by law, an attorney for the government should not overtly communicate, or cause another to communicate overtly, with a represented person who the attorney for the government knows is a target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such person. A "target" is a person as to whom the attorney for the government: (a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding. An officer or employee of an organization that is a target is not to be considered a target automatically even if such officer's or employee's conduct contributed to the commission of the crime or wrongful conduct by the target organization; likewise, an organization that employs, or employed, an officer or employee who is a target is not necessarily a target itself.

9-13.241 Overt Communications with Represented Targets -- Permissible Circumstances

An attorney for the government may communicate overtly, or cause another to communicate overtly, with a represented person who is a target of a criminal or civil law enforcement investigation concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) Determination if Representation Exists. The communication is to determine if the target is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) Discovery or Judicial Administrative Process. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.

(c) Initiation of Communication by Represented Person. The represented person initiates the communication directly with the attorney for the government or through an intermediary and, prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the represented person's right to

speak through his or her attorney and/or to have the attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(d) Waivers at the Time of Arrest. The communication is made at the time of the arrest of the represented person, and he or she is advised of his or her rights under Miranda v. Arizona, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) Investigation of Additional, Different, or Ongoing Crimes or Wrongful Conduct. The communication is made in the course of an investigation of additional, different or ongoing criminal or wrongful conduct. See 28 C.F.R. § 77.6(e).

(f) Threat to Safety or Life The attorney for the government believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of harm; and the attorney for the government believes that the communication is reasonably necessary to protect against such risk.

(g) Effective Performance of Law Enforcement Functions. The Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney: (i) determines that exceptional circumstances exist such that, after giving due regard to the importance -- as reflected in 28 C.F.R. Part 77 and this section -- of avoiding any undue interference with the attorney-client relationship, the

direct communication with a represented party is necessary for effective law enforcement; and (ii) authorizes the communication. Communications with represented parties pursuant to this exception shall be limited in scope consistent with the exceptional circumstances of the case and the need for effective law enforcement.

9-13.242 Overt Communications with Represented Targets -- Organizations and Employees

Overt communication with current high-level employees of represented organizations should be made in accordance with the procedures and considerations set forth in section 9-13.241 above, in the following circumstances:

(a) the current high-level employee is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter of the communication; and

(b) the organization is a target.

Whether a person is to be considered a high-level employee "known by the government to be participating as a decision maker in the determination of the organization's legal position" is a fact-specific, case-by-case question.

9-13.250 Overt Communications During Investigative Stage -- Office Approval Procedure

Before communicating, or causing another to communicate, overtly with a target the attorney for the government knows is

represented by counsel regarding the subject matter of the communication, the attorney for the government should write a memorandum describing the facts of the case and the nature of the intended communication. The memorandum should be sent to and approved by the appropriate supervisor before the communication occurs. In United States Attorney's Offices, the memorandum should be reviewed and approved by the United States Attorney. If the circumstances of the communication are such that prior approval is not feasible, the attorney for the government should write a memorandum as soon after the communication as practicable and provide a copy of the memorandum to the appropriate supervisor. This memorandum should also set forth why it was not feasible to obtain prior approval. The provisions of this section do not apply if the communication with the represented target is made at the time of arrest pursuant to section 9-13.241(d).

9-13.260 Enforcement of the Policies

Appropriate administrative action may be initiated by Department officials against government attorneys who violate the policies regarding communication with represented persons.

* * * * *

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 23, 1993

To: Holders of United States Attorneys' Manual Title 9

From: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

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Re: Civil Forfeiture of Assets Located in Foreign Countries

Note:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to holders of Title 9.
3. Insert as new section.

Creates: USAM 9-13.525

Purpose: This bluesheet implements a new policy requiring attorneys for the federal government to notify the Criminal Division before bringing civil forfeiture actions against property located in foreign countries pursuant to 28 U.S.C. §1355 (b)(2).

I. Extraterritorial Jurisdiction under 28 U.S.C. §1355 (b)(2)

On October 28, 1992, the President signed a bill that expands the scope of 28 U.S.C. §1355, the statute vesting U.S. district courts with original jurisdiction in federal forfeiture cases, to reach assets located abroad. As amended, the statute provides that when property that is forfeitable under U.S. law is located in a foreign country or has been seized or detained pursuant to foreign law, an action for forfeiture can be brought against the property in the U.S. District Court for the District of Columbia, the district in which any of the acts or omissions giving rise to forfeiture occurred, or any district where venue is authorized under 28 U.S.C. §1395 or any other venue statute, (e.g. 18 U.S.C. §981(h) or 21 U.S.C. §881(j)).

The expanded jurisdiction now specifically granted by 28 U.S.C. §1355 provides federal prosecutors with a significant and potentially powerful mechanism for seeking to deprive criminals and criminal enterprises of the proceeds and instrumentalities of their illegal activities, wherever those assets may have been transferred. It is anticipated that the ability of attorneys for the federal government to obtain civil forfeiture orders in the United States for property abroad will result in substantial benefits to international forfeiture efforts, both by facilitating the repatriation of illicit assets to this country for disposition and sharing under U.S. law and by providing a means to assist foreign governments in the confiscation and disposition of assets pursuant to their own laws.

II. Need for Consultation and Coordination

Despite the potential benefits involved, certain issues of foreign sovereignty and domestic resource allocation and coordination are raised by the jurisdictional law relating to forfeitable property abroad. For instance, there are some countries which may perceive the mere filing of a forfeiture action here against property located within their borders as an affront to or infringement on their sovereign prerogatives. The invocation or attempted enforcement of extraterritorial forfeiture jurisdiction in such circumstances could well prove unwarrantedly prejudicial to legitimate foreign policy interests or to other law enforcement initiatives or activities involving the country in question. Moreover, when it is known or can be ascertained in advance that a particular foreign government either cannot or will not recognize, enforce, or otherwise make beneficial use of a civil forfeiture order obtained in this country, it would clearly be a waste of U.S. prosecutorial and judicial resources to pursue the forfeiture action.

The broad grant of authority in 28 U.S.C. §1355(b) also raises potential problems with conflicts between or duplicative efforts by different districts asserting jurisdiction over the same assets in other countries. It is not uncommon for major criminals to have charges pending against them and their organizations in a number of districts in the United States, each of which could have an arguable claim to the foreign assets of the defendant or his illicit enterprise. Even in the absence of pending charges, various districts might be able to argue that certain "acts or omissions giving rise to forfeiture" occurred within their territory. The filing of multiple extraterritorial forfeiture actions for the same property would clearly not be a wise use of U.S. time and effort, and the presentation of multiple forfeiture orders to the foreign government in question would likely be both confusing and counterproductive.

III. Requirement for Criminal Division Notification

A. Because of the need for both international and domestic coordination in matters relating to the exercise of extraterritorial forfeiture jurisdiction, any attorney for the federal government who plans to file a civil forfeiture action for assets located in another country pursuant to 28 U.S.C. §1355 (b)(2) is directed to notify the Office of International Affairs of the Criminal Division before taking such action. Notification to the Office of International Affairs should be in writing and set forth the following information:

1. A precise description of the assets subject to forfeiture;

2. Identification of the foreign country in which the assets are located and specific information as to their exact location (e.g., city, bank, account number and/or name):
3. A brief description of the facts supporting the proposed forfeiture, particularly the acts or omissions occurring in the district requesting concurrence;
4. Identification of any other known districts which might have a claim to seeking forfeiture of the same assets and/or which have charges pending against the defendant/owner of the assets in question; and
5. A description of any contact or communication already undertaken by the pertinent government attorney or U.S. law enforcement agents with the U.S. Embassy in the foreign country involved or with any officials or law enforcement authorities of that country concerning the assets, their potential forfeitability, or the offenses or criminal case underlying the proposed forfeiture.

Within ten days of receipt of notification, the Office of International Affairs, in coordination with the Asset Forfeiture Office, will review the request, consult with foreign and U.S. authorities, as appropriate to the facts and circumstances of the specific proposal, and communicate its findings to the attorney for the federal government making the request.

B. Attorneys for the federal government are also directed to consult with the Office of International Affairs before taking steps to present to a foreign government, for enforcement or recognition, any civil or criminal forfeiture order entered in the United States for property located within the foreign jurisdiction.

C. In cases where it appears that the property in question is likely to be removed, destroyed, or dissipated so as to defeat the possibility of the forfeiture under United States law, the attorney for the federal government may, of course, request the Office of International Affairs to seek the assistance of the authorities of the foreign government where the property is located in seizing or taking whatever action is necessary and appropriate to preserve the property for forfeiture.

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9-13.100 OUT OF COURT IDENTIFICATION PROCEDURES

9-13.110 Lineups and Showups

See generally, Cissel, *Federal Criminal Trials*, §§ 316 to 319 (1987).

9-13.111 Power to Order Lineup; Right to Counsel

It is within the power of a federal grand jury to order a person suspected of crime to participate in a lineup. The lineup in such a case will be a separate investigative procedure; it will not be physically incorporated into the grand jury proceedings. *In re Melvin*, 550 F.2d 674 (1st Cir.1977).

A lineup is a well accepted investigatory procedure carried out by law enforcement officers having a suspect in custody. It is considered preferable to an individual confrontation for identification purposes. *See United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *In re Melvin, supra*.

A person has a Sixth Amendment right to counsel at a lineup or showup undertaken ''at or after initiation of adversary criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'' *Moore v. Illinois*, 434 U.S. 220 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

When there has been a lineup or showup in which the right to counsel has been improperly denied, all testimony relating to the out-of-court identification is inadmissible. *See Gilbert v. California, supra; Moore v. Illinois, supra*. A subsequent in-court identification will also be inadmissible unless the government can establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than at the lineup identification. In determining whether there is an independent source for the in-court identification, the court will consider factors including the witness' opportunity to observe the criminal act, any discrepancy between a pre-lineup description and the defendant's actual appearance, any identification by picture of the defendant prior to the lineup, the failure to identify the defendant on a prior occasion, the lapse of time between the criminal act and the lineup and the circumstances surrounding the conduct of the lineup. *See United States v. Wade, supra*.

When a defendant challenges a lineup or showup on Sixth Amendment grounds, the court may hold a hearing in which it decides the issues of both right to counsel and independent source. *See United States v. Holiday*, 482 F.2d 729 (D.C.Cir.1973). Such a procedure will avoid the need for remand if, on appeal, the lineup or showup is found to have violated the defendant's Sixth Amendment right.

9-13.112 Self-Incrimination

Neither the lineup itself, nor requiring the accused to utter words for voice identification purposes during the lineup, violate the Fifth Amendment privilege against self-incrimination. *See United States v. Wade, supra*. The government may introduce into evidence the fact that the suspect refused to speak certain words during a lineup after being directed to do so, *see Higgins v. Wainwright*, 424 F.2d 177 (5th Cir.1970), and may comment upon the suspect intentionally changing appearance prior to a lineup as some evidence of guilt, *see United States v. Jackson*, 476 F.2d 249 (7th Cir.1973).

9-13.113 Due Process

Testimony concerning a lineup or showup identification is inadmissible if, considering the ''totality of the circumstances,'' the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967). Suggestive procedures include when the identifying witness knows all the other participants in the lineup except the suspect, when the others are grossly dissimilar in appearance from the suspect, when only the suspect is required to wear the distinctive clothing allegedly worn by the culprit, when the police tell the witness that they have caught the suspect after which the suspect is viewed alone, when the suspect is pointed out before or during the procedure, when the participants are asked to try on clothing which only fits the suspect or when an identification is made in the presence of other identifying witnesses.

Where a lineup or showup is conducted in violation of the defendant's right to due process, an in-court identification of the defendant will not be permitted unless the government can establish an independent source. The factors used to establish an independent source where a lineup or showup has been conducted in violation of the defendant's right to counsel are also applicable here.

9-13.114 Search and Seizure

The independent source doctrine is also applicable if a pretrial identification is suppressed on Fourth Amendment grounds. *United States v. Crews*, 445 U.S. 463 (1980).

9-13.115 Admissibility of Lineup and Showup Identifications

Lineup and showup identifications are admissible as non-hearsay statements under Rule 801(d)(1)(C) of the Federal Rules of Evidence as long as the identifying witness testifies at trial. The evidence of a trial witness' prior identification may be presented by a third party who was present at the identifications, *see United States v. Elemy*, 656 F.2d 507

(9th Cir.1981), but the percipient witness must testify at trial. *See United States v. Owens*, 108 S.Ct. 838 (1988) (effect of failure of memory).

9-13.120 Photographic Identification

9-13.121 No Right to Counsel

In general, the principles discussed in USAM 9-13.110 *et seq.* with respect to lineup identifications are fully applicable to photographic identifications. *See Simmons v. United States*, 390 U.S. 384 (1968). The major exception to this principle is that no right to counsel attaches at photographic identifications, whether before or after indictment. *United States v. Ash*, 413 U.S. 300 (1972).

9-13.122 Due Process

In general, the due process principles discussed in USAM 9-13.113 relating to impermissible suggestivity of lineup identifications are fully applicable to photographic identifications. *See Simmons v. United States*, 390 U.S. 384 (1968).

9-13.130 Physical Evidence

The Fourth Amendment may be implicated in obtaining physical evidence such as hair samples, fingernail scrapings, blood samples and other evidence from the person of an individual. Unlike physical appearance, writing, speaking, fingerprints, and measurements which are exposed to the public, the taking of evidence such as hair and blood samples creates greater concerns under the Fourth Amendment. Compare *United States v. Wade*, *supra*, with *Schmerber v. California*, 384 U.S. 757 (1966).

Obtaining physical evidence from a person involves a potential Fourth Amendment violation at *two* different levels—the ''seizure'' of the ''person'' necessary to bring him/her into contact with government agents, and the subsequent search for or seizure of the evidence. *See United States v. Dionisio*, 410 U.S. 1, 8 (1973); *Schmerber v. California, supra*. Even where there has been a lawful arrest, a subsequent search for physical evidence must comply with the requirements of the Fourth Amendment.

9-13.131 Hair Samples

The federal courts are undecided as to whether the involuntary removal of hair samples constitutes a search and seizure under the Fourth Amendment. *United States v. DeParias*, 805 F.2d 1447, 1457-1458 (11th Cir.1986) (collecting cases).

9-13.132 Surgical Intrusions

A surgical intrusion into a person's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be

''unreasonable'' even if probable cause exists. This determination must be made on a case-by-case basis in which the individual's interests in privacy and security are weighed against society's interests in obtaining evidence for fairly determining guilt or innocence. *See Winston v. Lee*, 105 S.Ct. 1611 (1985) (refusing surgery to remove bullet for evidence); *Schmerber v. California, supra* (routine blood test permissible for drunk driving suspects). The minor intrusion upon the person involved in taking fingernail scrapings is a ''search,'' and requires compliance with the Fourth Amendment. *Cupp v. Murphy*, 412 U.S. 291 (1973).

9-13.140 Fingerprinting

9-13.141 Right to Counsel

The taking of fingerprints is not a critical stage at which the accused has a right to the presence of counsel. *See United States v. Wade, supra; United States v. Sanders*, 447 F.2d 112 (5th Cir.1973), *cert. denied*, 414 U.S. 870 (1973).

9-13.142 Self-Incrimination

The taking of fingerprints does not fall within the category of either communication or testimony so as to be protected by the Fifth Amendment privilege. *United States v. Wade, supra; United States v. Thomann*, 609 F.2d 560 (1st Cir.1979).

9-13.143 Search and Seizure

The Fourth Amendment does not bar the fingerprinting of a properly seized person. ''Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.'' *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969). So long as the initial seizure of the person is reasonable, as in a lawful arrest, subsequent fingerprinting is permissible. It is also possible that the requirements of the Fourth Amendment could be met through ''narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause for arrest.'' *See Davis v. Mississippi, supra*, at 728; *see also Hayes v. Florida*, 105 S.Ct. 1643 (1985).

9-13.150 Handwriting Exemplars

9-13.151 Right to Counsel

The taking of handwriting exemplars is not a critical stage of a criminal proceeding requiring the assistance of counsel. *See Gilbert v. California, supra.*

9-13.152 Self-Incrimination

A handwriting exemplar, in contrast to the content of what is written, is an identifying physical characteristic which falls outside the protection of the Fifth Amendment. It is not testimonial or communicative in nature. *See Gilbert v. California, supra.* The government may introduce into evidence the fact that the suspect refused to provide an exemplar after being directed to do so by a court, *United States v. Nix,* 465 F.2d 90 (5th Cir.1972), *cert. denied,* 409 U.S. 1013 (1972), or that he/she intentionally distorted his/her handwriting when giving the exemplar, *United States v. Stembridge,* 477 F.2d 874 (5th Cir.1973).

9-13.153 Search and Seizure

Obtaining a handwriting exemplar is not a seizure within the meaning of the Fourth Amendment. A person has no expectation of privacy in handwriting because it is a physical characteristic which is constantly exposed to the public. So long as the initial seizure of the person is reasonable, compelling production of a handwriting exemplar is permissible. *See United States v. Mara,* 410 U.S. 19 (1973).

9-13.154 Compelling Specific Handwriting

An accused or subpoenaed person may be compelled to duplicate specific language. *United States v. Doe,* 405 F.2d 436, 438 (2d Cir.1968). It is within the court's power to direct a person to provide a handwriting sample of other than normal writing, as by requiring the individual to provide writing with a backhand or backward slant. *Matter of Special Federal Grand Jury,* 809 F.2d 1023 (3d Cir.1987).

9-13.160 Voice Exemplars

9-13.161 Self-Incrimination

Compelling a person to give a voice exemplar violates no privilege protected by the Fifth Amendment. The exemplar is used for identification purposes, and is not testimonial or communicative in nature. *See United States v. Dionisio, supra.* A witness subpoenaed to a grand jury, or a criminal defendant, may thus be compelled to produce voice exemplar. *United States v. Mitchell,* 556 F.2d 382 (6th Cir.1977).

9-13.162 Search and Seizure

Once there has been a lawful ''seizure'' of the ''person,'' the taking of a voice exemplar involves no Fourth Amendment consideration. No expectation of privacy exists as to a person's voice because it is a physical characteristic which is constantly exposed to the public. *See United States v. Dionisio, supra.*

9-13.163 Admissibility of Spectrograms (Voice Prints)

A spectrograph transforms the energy used in the production of speech into a visual graph of acoustical energy. The spectrogram of an unidentified speaker is compared with that of an identified speaker in order to find similar patterns. The majority of the courts which have considered the question have ruled that voiceprint evidence is admissible. *See United States v. Williams*, 583 F.2d 1194 (2d Cir.1978), *cert. denied* 439 U.S. 1117 (1979) (citing additional cases from the Fourth Circuit and the Sixth Circuit). The District of Columbia Circuit, however, has expressly held such evidence to be inadmissible. *See United States v. McDaniel*, 538 F.2d 408 (D.C.Cir.1976); *United States v. Addison*, 498 F.2d 741 (1974).

9-13.200 [RESERVED]

9-13.300 POLYGRAPHS

9-13.310 Department Policy Towards Polygraph Use

Department policy opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations which may have been conducted during the investigatory stage for the reasons which follow.

Though certain physiological reactions such as fast heart beat, muscle contraction and sweaty palms are believed to be associated with deception attempts, by themselves, they do not indicate deceit. Lie detection results from a comparison of the answers to pertinent test questions with the responses to control questions. Given the present theoretical and practical deficiencies of polygraphs, the courts have been justified in excluding polygraph evidence from the jury's consideration. In respect to its use as an investigatory tool, it is recognized that in certain situations, such as to test the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by utilizing the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. *See e.g.*, R. Furgerson, Polygraph Policy Model for Law Enforcement, *FBI Law Enforcement Bulletin*, pages 6-20 (June, 1987). When utilized it should be clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. An examination should be preceded by *Miranda* warnings to a subject in custody. Subsequent admissions or confessions will then be evaluated according to traditional voluntariness criteria. *See Field v. Wyrick*, 706 F.2d 879 (8th Cir.1983), *on remand from Supreme Court*, *Field v. Wyrick*, 459 U.S. 42 (1982), *rev'd per*

curiam, *Field v. Wyrick*, 682 F.2d 154 (8th Cir.1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir.1975).

9-13.320 In General

A polygraph or lie detector examination is a procedure used to determine whether a subject shows the physiological and psychological reactions which are believed to accompany intentional attempts to deceive. Despite the appeal of a mechanical technique to measure a person's veracity, the polygraph has met with rare judicial acceptance and limited use as a federal investigative tool. In light of present scientific evidence the Department of Justice agrees with the conclusion of the Committee on Governmental Operations of the House of Representatives which held after extensive hearings:

> There is no ''lie detector.'' The polygraph machine is not a ''lie detector,'' nor does the operator who interprets the graphs detect ''lies.'' The machine records physical responses which may or may not be connected with an emotional reaction—and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to ''beat'' the polygraph without detection by the machine or its operator.

H.R.Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study the same conclusions were reached in 1976. *The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations*, 94th Cong.2d Sess. (1976). The Department, unlike the Government Operations Committee, supports the limited use of polygraphs for investigatory purposes.

9-13.330 Technique

The basic function of a lie detection device is to record signs of internal stress which a subject is thought to undergo when falsely responding to questions. A polygraph examination begins with a present interview and study of the witness. Even the best trained and most experienced polygraphers must have a thorough understanding of the factual context of the activities under investigation in order to prepare a series of simple unambiguous questions. The pre-test interview allows the examiner to secure the confidence and cooperation of the subject, and to evaluate the subject's idiosyncracies which may affect the examination results. This procedure promotes the subject's belief in the infallibility of the machine and could augment his/her physical reactions by increasing his/her fear and anxiety over detection.

A polygraph examination can be administered either on location or at a specific site. The locale must have a minimum number of distractions.

Today's machines generally consist of: (1) a cardiograph, monitoring pulse and changes in blood pressure; (2) a pneumograph, recording respiration rate by measuring chest expansions and contractions; (3) a galvanometer, displaying the skin's resistance to an electric current (this is normally attached to the palmal surface of the subject's hand); and sometimes include a device measuring gross muscular movements. All responses are recorded in graphic form while the subject is undergoing questioning. Examiners employ different types of test questions to measure the subject's reactions. The most popular test utilizes true and false control questions so that a standard can be created with which to compare the subjects' recorded reactions to essential questions. Examinations cannot be conducted without the voluntary cooperation of the subject.

Following the examination the results are evaluated by the polygraphist who administered the examination to determine whether the illustrated responses indicated deception. The amount of expertise the examiner possesses is extremely important in assessing the results of the examination. The examiner must not only interpret the tangible results of the test, like any forensic scientist would, but must also evaluate his/her own activities and procedures to uncover any factors which may have contributed to inaccurate test results.

9-13.331 Examination Variables

The recorded differences and purported indicia of deception may be caused by numerous variables. These unassessable factors are crucial to an accurate polygraph examination. Among the proven variables are: (1) physical characteristics of the subject such as fatigue, obesity, heart disease, respiratory difficulties and abnormal blood pressure; (2) temporary or permanent mental disorders such as delusions, feeble-mindedness or insanity which result in an inability to affirmatively participate or to be unable to differentiate between right and wrong; (3) the undetected use of alcohol or drugs; (4) distractions in the examination setting; such as extraneous noises, temperature fluctuations, or unusual objects; (5) the ability of the subject to mask legitimate test question reactions by faking responses to his/her own lying; (7) a guilty party's subjective belief in his/her own innocence; (8) excessive previous interrogation; (9) prior dry run examinations leading to belief that one can beat the machine; (10) the complexity of the matters being investigated; (11) the wording of the relevant questions; (12) the extent of motivation and fear by the subject that the polygraph will detect his/her lying; and even (13) the nervousness of an innocent subject induced by fear or a guilty complex involving a different offense.

9-13.340 Introduction at Trial

Neither the United States Code nor the Federal Rules of Evidence have any specific provision concerning the admissibility of polygraph examina-

tion results. In the absence of a Supreme Court decision regarding their use, federal courts have almost uniformly prohibited the introduction of polygraph evidence. These cases, as well as numerous commentaries, present diverse rationale supporting the continued opposition to legal acceptance of lie detection devices.

In *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), the first reported federal case on polygraph admissibility, the court stated the appropriate standard for the judicial determination of whether to use newly developed scientific and experimental evidence should be whether the scientific principle or discovery is ''sufficiently established to have gained general acceptance in the particular field in which it belongs.'' The polygraph was found not to possess such standing and scientific recognition among physiological and psychological authorities. The *Frye* standard is still often applied in discussions of the polygraph and other new scientific techniques. *See, e.g., United States v. Skeens*, 494 F.2d 1050 (D.C.Cir. 1974) (polygraphs); *United States v. Franks*, 511 F.2d 25, 33 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) (spectrographic analysis); *United States v. Stifel*, 433 F.2d 431, 438 (6th Cir.), *cert. denied*, 401 U.S. 994 (1970) (neutron activation analysis); *United States v. Tranowski*, 659 F.2d 750, 755-756 (7th Cir.1981) (photograph dating analysis); *United States v. Hendershot*, 614 F.2d 648, 654 (9th Cir.1980) (shoe print lifting technique); *Lindsey v. United States*, 237 F.2d 893, 896 (9th Cir.1950) (truth serum or sodium pentothal); *United States v. Bruno*, 333 F.Supp. 570, 574 (E.D.Pa.1971) (ink identification).

In *United States v. Alexander*, 526 F.2d 161, 163 (8th Cir.1975), the court indicated that reliability is one of the most important factors in determining ''general acceptance.'' Courts such as *Alexander* which have considered admitting results from polygraph tests have noted their willingness to accept proven scientific techniques, but have rejected polygraphs following their hearing of expert testimony and review of the extensive body of articles and text on polygraphs. Though polygraph methodology and examiner training have substantially improved since the primitive systolic blood test employed in *Frye*, the polygraph has yet to attain sufficient scientific acceptance among experts in polygraphy, psychiatry, physiology, psychophysiology, neurophysiology and other related disciplines to justify admission.

The ''general acceptance'' standard is often utilized in conjunction with considerations of the relevance, prejudice and burden on judicial time of polygraph evidence. These considerations rather than a ''general acceptance'' standard concerning evidential admission have been employed in Rules 401 to 403 of the Federal Rules of Evidence. The concepts present in the Rules strengthen the arguments against admission. *See generally* Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 Am.Crim.L.Rev. 19, 54-59 (1977).

The eight Courts of Appeals which have considered the admission of unstipulated polygraph examinations have uniformly held polygraph results inadmissible. *See United States v. Bando,* 244 F.2d 833, 841 (2d Cir.), *cert. denied,* 355 U.S. 844 (1957) (dicta); *United States v. Clark,* 598 F.2d 994, 995 (5th Cir.1979); *order granting rehearing en banc vacated and panel opinion reinstated,* 622 F.2d 917 (5th Cir.1980) (en banc), *cert. denied,* 449 U.S. 1128 (1981); *Poole v. Perini,* 659 F.2d 730 (6th Cir.1981), *cert. denied,* 455 U.S. 910 (1982); *United States v. Black,* 684 F.2d 481 (7th Cir.), *cert. denied,* 459 U.S. 1043 (1982); *Field v. Wyrick,* 682 F.2d 154, 159 (8th Cir.1982), *rev'd. per curiam on other grounds,* 459 U.S. 42 (1982); *United States v. Eden,* 659 F.2d 1376, 1382 (9th Cir.1981), *cert. denied,* 455 U.S. 949 (1982); *United States v. Hunter,* 672 F.2d 815, 817 (10th Cir.1982); *United States v. Skeens,* 494 F.2d 1050, 1053 (D.C.Cir. 1974).

Some circuit courts while affirming district court denials of admission have acknowledged that there may be certain situations where admission is acceptable, and that admission is a matter within the sound discretion of the trial judge. *United States v. Webster,* 639 F.2d 174, 186 (4th Cir. 1981), *modified on other grounds and aff'd.* 662 F.2d 185 (4th Cir.), *cert. denied,* 454 U.S. 857 (1981); *United States v. Rumell,* 642 F.2d 213, 215 (7th Cir.1981); *United States v. Oliver,* 525 F.2d 731, 736 (8th Cir.1975), *cert. denied,* 424 U.S. 973 (1976); *United States v. Eden,* 659 F.2d 1376, 1382 (9th Cir.1981), *cert. denied,* 455 U.S. 949 (1982). Courts willing to permit district court discretion require that proponents of polygraph evidence have the burden of laying a proper foundation for showing the underlying scientific basis and reliability of expert testimony. *See United States v. DeBetham,* 470 F.2d 1367 (9th Cir.1972), *cert. denied,* 412 U.S. 907 (1973). With the polygraph's misleading reputation as a ''truth-teller,'' the widespread debate concerning its reliability, and the critical requirement of competent examiner, and judicial problems of self-incrimination and hearsay, a trial court will rarely abuse its discretion by refusing to admit the evidence, even for limited purposes and under limited conditions. *See United States v. Marshall,* 526 F.2d 1349, 1360 (9th Cir. 1975), *cert. denied,* 426 U.S. 923 (1976).

Some courts have allowed polygraph evidence in special situations. If a polygraph examination conducted on a key government witness indicates the witness is lying, then under the *Brady* doctrine, this may be disclosed to the jury as exculpatory evidence useful to impeach the witness' credibility. *See United States v. Hart,* 344 F.Supp. 522 (E.D.N.Y.1971). *But see Ogden v. Wolff,* 522 F.2d 816 (8th Cir.1975), *cert. denied,* 427 U.S. 911 (1976). Testimony of a government witness concerning a statement made to the defendant with respect to the results of his/her polygraph examination has been allowed where the defendant confessed after the exam and the voluntariness of the confession was at issue. *See Tyler v. United States,* 193 F.2d 24, 31 (D.C.Cir.), *cert. denied,* 343 U.S. 908 (1952). *Cf. United*

States v. Bad Cob, 560 F.2d 877 (8th Cir.1977) (failure of defense counsel to object to improper references to defendant's refusal to take lie detector test not ineffective assistance of counsel since plausible strategy was to show lack of voluntariness of confession). At least one federal court has permitted the introduction of polygraph results in a criminal case upon stipulation of the defense and prosecution. *See United States v. Oliver,* 525 F.2d 731, 736-738 (8th Cir.1975), *cert. denied,* 424 U.S. 973 (1976). More than twenty states now permit admission of polygraph evidence upon stipulation of the parties. *See Israel v. McMorris,* 455 U.S. 967, 970 (1982) (Rehnquist, J., dissenting from denial of writ of certiorari).

9-13.400 [RESERVED]

9-13.500 INTERNATIONAL LEGAL ASSISTANCE

International legal assistance is the process of obtaining aid from abroad in connection with United States investigations and prosecutions, or from the United States in connection with foreign investigations and prosecutions. Because international legal assistance inherently involves two or more countries (and a corresponding number of legal codes), the process generally is more difficult than domestic evidence gathering and may produce results that differ from the prosecutor's expectations. To help the prosecutor cope with these problems, the Criminal Division established the Office of International Affairs (OIA) in 1979. OIA also oversees the execution of foreign requests for international legal assistance in the United States and advises prosecutors about executing such requests. (*See* USAM 9-15.000 concerning OIA's responsibilities in the area of extradition.)

9-13.510 Obtaining Evidence Abroad: General Considerations

Obtaining evidence outside the United States involves considerations unfamiliar to many American prosecutors. Most problems associated with international evidence gathering revolve around the concept of sovereignty. Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. An alien (*i.e.,* American) investigator or prosecutor who attempts to encroach on that function by investigating a crime or gathering evidence within another country's borders may be considered to violate its sovereignty. A telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. Such violations can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant U.S. Attorney who plies his or her trade overseas.

The solution is usually to invoke the aid of the foreign sovereign in obtaining the evidence. OIA advises prosecutors in selecting an appropriate method for requesting assistance from abroad. *See* USAM 9-13.520, *et*

seq. The method chosen depends on the factors listed in USAM 9-13.511 to 9-13.515.

9-13.511 Location of the Evidence

The first step in selecting an appropriate method for securing assistance from abroad is to determine the jurisdiction from which assistance is needed. Once the country is identified, OIA attorneys can advise the prosecutor about the existence of relevant treaties and domestic laws. Generally, foreign cooperation depends on the existence of articulable facts indicating that evidence is located in a particular jurisdiction. The prosecutor should be prepared to provide that information.

9-13.512 Intended Use of the Evidence

The proceeding in which the evidence will be used is significant because some countries only grant assistance for certain kinds of prosecutions (*e.g.*, offenses which are also crimes in the country from which assistance is requested); others exclude assistance for specific categories of cases (*e.g.*, tax violations, military and political offenses). The stage of the proceeding for which aid is needed is significant if the request is directed to a country that generally grants assistance only after the filing of formal charges (*e.g.*, the United Kingdom).

One caveat about purpose: some countries limit assistance to the purpose stated in the request. Once such a country grants assistance for that purpose, the evidence generally may not be used for another reason without the express permission of the country that provided it. Contact OIA for guidance in securing such permission.

9-13.513 Type of Assistance Needed

The prosecutor may need to obtain documentary evidence, interview a witness, conduct depositions, serve a subpoena, freeze a bank account, seek a search warrant, or perform other investigative or prosecutive tasks. The needs of the prosecutor will dictate the method chosen: some tasks can best be accomplished by informal means; others can only be done by a formal approach. (The types of assistance mentioned above are not meant to be inclusive. Note, though, that not all of the above tasks can be performed in every case.)

9-13.514 Time Required

Getting evidence from abroad invariably takes longer than the prosecutor expects. Routine tasks like obtaining bank records or telephone tolls may require months to complete. Moreover, vacations bring some countries to a virtual halt in July and August and on other holidays, which slows the

response time during those months. It is therefore imperative to contact OIA as soon as it appears that assistance from overseas will be needed.

9-13.515 Statute of Limitations and Speedy Trial Act

Recognizing the delays inherent in securing evidence from abroad, Congress has enacted provisions for suspending the statute of limitations and the requirements of the speedy trial act during the pendency of a *formal* request for international judicial assistance. However, the suspensive effect is not automatic. *See* 18 U.S.C. §§ 3161(h)(9) (Speedy Trial Act) and 3292 (statute of limitations).

9-13.516 Cost of Obtaining Evidence

Some methods cost more than others. Depositions, for example, can be formidably expensive because they may involve travel and per diem for the prosecutor, defense counsel, defendant, court reporter, interpreter and an agent. Even the expenses of translating a request for assistance can be substantial. In some countries, local counsel must be retained to present letters rogatory to the court. All such expenses are chargeable to the office that prosecutes the case. Be sure funds are available before embarking on a costly request.

9-13.520 Methods

OIA will assist the prosecutor in choosing the proper means for obtaining evidence from abroad. In general, the methods are grouped in three broad categories: formal requests (USAM 9-13.521 to 9-13.523), informal means (USAM 9-13.524), and subpoenas (USAM 9-13.525). Formal requests include: (A) letters rogatory, (B) treaty requests, and (C) requests under executive agreements. Informal requests use *ad hoc* methods to secure assistance, often more quickly and flexibly than by formal means, but not always in conformity with the Rules of Evidence. Subpoenas are a unilateral way to obtain evidence.

9-13.521 Letters Rogatory

Letters rogatory are the customary method of obtaining assistance from abroad in the absence of a treaty or executive agreement. A letter rogatory is a request from a judge in the United States to the judiciary of a foreign country requesting the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty.

A. Content: The form of a letter rogatory varies depending on the country to which it is addressed and the assistance sought. Specific guidance should be requested from OIA before drafting a letter rogatory because some countries have statutory guidelines for granting assistance.

See USAM 9-13.531 (drafting guidelines). Letters rogatory generally include: (1) background (who is investigating whom and for what charge), (2) the facts (enough information about the case for the foreign judge to conclude that a crime has been committed and to see the relevance of the evidence which is being sought), (3) assistance requested (be specific but include an elastic clause to allow subsequent expansion of the request without filing an additional letter rogatory), (4) the text of the statutes which are alleged to have been violated, and (5) a promise of reciprocity.

Letters rogatory must be signed by a judge and must be authenticated by either an apostille or a chain certificate of authentication. The latter involves authentication by the Department of Justice, the Department of State and the embassy of the foreign country to which the letter rogatory is directed, a cumbersome, time-consuming process that can be avoided by using an apostille if the requested state has ratified the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents. Consult OIA to see which method to use because the information changes annually.

B. Procedure: Obtain a model from OIA. Prepare a draft (*see* USAM 9-13.531 (drafting guidelines)) and send it to OIA for clearance. Submit the cleared final to the district court in two copies under cover of an application for issuance of letters rogatory and a memorandum in support, examples of which can be obtained from OIA. One signed original remains with the court. Affix an apostille or authentication to the signed duplicate original and send it to OIA. Make arrangements for translation (*see* USAM 9-13.532, *infra*) and send the duplicate original, with a translation (of the letter rogatory, not the application or supporting memorandum) to the Department of State which transmits it to the American Embassy in the country concerned. Usually, the Embassy sends it to the Foreign Ministry under cover of a diplomatic note. The Foreign Ministry refers it to the Ministry of Justice, which forwards it to the proper judicial district, where it is executed. The evidence, once obtained, is returned through the same channel. In some cases, the request is sent to an attorney who is retained to present the request, obtain the evidence, and deliver it to the United States. The procedure is as complicated as it sounds; nevertheless, it works. The time involved may be shortened by transmitting a copy of the request through Interpol, but even in urgent cases the request may take over a month to execute. Otherwise, count on as much as a year or more.

9-13.522 Treaty Requests

Most treaty requests are made pursuant to a mutual legal assistance treaty (MLAT), which has the force of law and defines the obligation to provide assistance, the scope of assistance, and the contents of the request. It may also contain evidentiary provisions that vary from the Federal Rules of Evidence. MLATs are not, however, the only treaties which

provide for legal assistance: many tax treaties contain such provisions, as do some extradition treaties.

A. Content: Because every treaty is negotiated separately, each one differs from the next. Experience with one should not be considered universally applicable. OIA will provide models tailored to the treaty under which assistance is being requested. In general, a treaty request includes the same information that must be provided in a letter rogatory, except that the promise of reciprocity is omitted and certain additional information (*e.g.*, name, address and citizenship of all persons affected by the request) may be required. *See* USAM 9-13.531 for general drafting guidelines.

B. Procedure: Obtain a model from OIA. Prepare a draft and submit it to OIA for clearance. OIA will either prepare the request in final or return it to the prosecutor for typing. All treaties currently in force designate the Department of Justice as the authority competent to make the request, which is therefore signed in the Department rather than by a judge. OIA confirms arrangements for translation and sends the request directly to the foreign Central Authority, which oversees its execution. This procedure, which is only available in countries with which the United States has ratified mutual legal assistance treaties (Switzerland, The Netherlands, Turkey and Italy), is generally faster and more reliable than letters rogatory. Other treaties have been signed but are not in force as of July, 1988.

9-13.523 Executive Agreements

Interim executive agreements are currently in force with the Cayman Islands, the Turks and Caicos Islands, and Anguilla. These agreements, which apply to investigations arising from illegal narcotics trafficking, will remain in force for the foreseeable future but may be replaced at some point by mutual legal assistance treaties. The agreements contemplate the issuance of a certificate by the United States Attorney General to the attorney general of the other nation stating that specified records located in the other country are required in connection with a pending investigation involving narcotics trafficking. Contact OIA for information about the use and content of such requests.

Other executive agreements have been negotiated on an *ad hoc* basis to obtain evidence in specific cases, *e.g.*, the Lockheed investigations.

9-13.524 Informal Means

Aside from the three formal methods described above, OIA has become aware of (and, in some situations, created) a variety of other methods for successfully obtaining assistance in particular cases in certain countries. These methods include:

A. Persuading the authorities in the other country to open ''joint'' investigations whereby the needed evidence is obtained by their authorities and then shared with us. (Caution: evidence gathered pursuant to a joint investigation may be excludable if the manner in which it was obtained ''shocks the conscience'' of the American court. *See, e.g., U.S. v. Rose,* 570 F.2d 1358 (9th Cir.1978), and *U.S. v. Stonehill,* 405 F.2d 738 (9th Cir.), *cert. denied,* 395 U.S. 960 (1969)).

B. Making requests through diplomatic channels for documents (*e.g.,* hotel records) that may be considered public records in the requested country and that the foreign authorities will release to us if officially requested.

C. Taking depositions of voluntary witnesses at U.S. embassies and consulates. *See* USAM 9-13.535.

D. Making treaty type requests that, even though no treaty is in force, the authorities in the requested country have indicated they will accept and execute. In some countries, (*e.g.,* Japan, Germany) the acceptance of such requests is governed by domestic law; in others, by custom or precedent.

E. Making informal police-to-police requests (often accomplished through U.S. law enforcement agents stationed at our embassies abroad).

F. Making requests through Interpol for evidence (or more often for information) which can be obtained by foreign police without an official request (*e.g.,* current location or photo of an individual).

9-13.525 Subpoenas

A. Subpoenas Directed to U.S. Citizens and Permanent Residents of the United States: 28 U.S.C. §§ 1783 and 1784 authorize the courts of the United States to issue subpoenas to a national or resident of the United States located in a foreign country and to hold him or her in contempt if he or she fails to appear or otherwise comply with the subpoena. The subpoena may direct the witness to appear in the United States or abroad, *e.g.,* at an American Embassy or consulate. Foreign laws may, however, restrict the method of serving such subpoenas, especially when the witness is a dual national. OIA aids prosecutors in selecting the appropriate methods for serving subpoenas abroad. In most cases, the subpoena may be served by an American consular official who acts upon receiving a request from the Department of State. These requests are coordinated by the Special Authorizations Unit, Justice Management Division (Tel. FTS or (202) 272-8429).

B. Bank of Nova Scotia Subpoenas: The United States has obtained bank or business records located abroad by serving subpoenas on branches of the bank or business located in the United States. The courts have upheld the use of subpoenas to compel a bank that does business in the United States to

turn over records held by a branch of the same bank in a foreign country. *See, In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir.), *cert. denied*, 105 S.Ct. 778 (1985); *In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir.1982), *cert. denied*, 103 S.Ct. 3086 (1983); *In Re Grand Jury Subpoena Directed to Marc Rich and Company A.G.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S.Ct. 3555 (1983); *but see, In Re: Sealed Case*, 825 F.2d 496 (D.C.Cir.1987).

However, foreign governments strongly object to such subpoenas, contending that they constitute an improper exercise of United States jurisdiction. Since the use of unilateral compulsory measures can adversely affect the law enforcement relationship with the foreign country, all federal prosecutors must obtain written approval through OIA before issuing any subpoenas to persons or entities in the United States for records located abroad. The request for Office of International Affairs concurrence must be in writing and set forth:

1. The subject matter and nature of the grand jury investigation or trial;

2. A description of the records sought including their location and identifying information such as bank account numbers;

3. The purpose for which the records are sought and their importance to the investigation or prosecution;

4. The extent of the possibility that the records might be destroyed if the person or entity maintaining them becomes aware that they are being sought; and

5. Any other information relevant to the Office of International Affairs' determination.

In emergencies, the Office of International Affairs can act on the basis of an oral request containing the above information. In such instances, if the Office of International Affairs concurs in the issuance of a subpoena, the oral request must be followed by a written request.

The following considerations will be taken into account in determining whether such a subpoena should be authorized:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory;

2. The indispensability of the records to the success of the investigation or prosecution; and

3. The need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.

The Office of International Affairs should also be consulted prior to initiating enforcement proceedings relating to such subpoenas.

Finally, Office of International Affairs concurrence must be obtained prior to serving a subpoena *ad testificandum* on an officer of, or attorney for, a foreign bank or corporation who is temporarily in, or passing through, the United States when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

9-13.530 Special Considerations

9-13.531 Drafting Requests for Assistance

A. Style: A request for judicial assistance is necessarily directed to a judicial system that is different from our own. Even common law countries do not always have the same legal concepts and philosophies found in our legal system (although, confusingly, they may use some of the same terms). Civil law systems differ even more markedly. In drafting a request for assistance, it is therefore imperative to describe simply and clearly the facts of the case and the nature of the assistance requested. Many prosecutors are tempted to use the kind of language which they would include in an indictment or application for search warrant. To put it bluntly: don't.

Most applications will be translated. Because technical legal terms (*e.g.*, ITAR, ITSP, RICO or even probable cause) are virtually impossible to translate, they must be avoided. Even if they could be translated, it is important to convey the sense of what is needed in a way that will be comprehensible to people who have utterly no familiarity with our legal system. A clear, narrative style eases the job of the translator and the judicial authority that receives the request. OIA reviews draft requests to ensure conformity with these requirements.

B. Grand Jury Information: Sufficient facts should be included in the request to show that a crime has been committed and that the information sought is relevant to the investigation or prosecution. Grand jury information need not necessarily be included to meet this requirement. However, if the request will not make sense without grand jury material, the Assistant U.S. Attorney should obtain an order authorizing disclosure under Federal Rule of Criminal Procedure 6(e). (Letters rogatory are signed by the court so an order authorizing disclosure is superfluous. However, the AUSA should draw the court's attention to the grand jury material in the application).

9-13.532 Translations

Formal requests must almost always be translated if the official language of the country to which the request is being sent is not English. OIA

has no interpreters on its staff or at its disposal. Arrangements for translation must be made and paid for by the office making the request. In FBI cases, the FBI may be able to translate the request but time considerations could dictate that a commercial service be used. In some cases, translations can be made overseas, with the requesting office reimbursing the American Embassy or consulate by providing accounting information (available from your administrative officer) against which to charge the expense.

Most countries will not act upon a request for assistance until they receive the translation. In every case requiring a translation, prosecutors must reach a clear understanding with OIA about who will secure the translation and send it overseas.

9-13.533 Documentary Evidence

Prosecutors frequently require documents such as bank or hotel records. Obtaining records through formal requests is relatively easy when compared to requesting depositions (*see* USAM 9-13.535, *infra*) but prosecutors should be aware of two points.

First, foreign judicial authorities frown on fishing expeditions. If the scheme started in 1985, refrain from asking for all records from the time the account was opened. Limit the request in such a way that its relevance is evident from the recitation of the facts. If there is a valid reason for making a broader request, explain why. Bear in mind that parties affected by disclosure may have a right to object under the law of the country that is granting the request. Consequently, the more precise the request, the easier it will be to defend against such an objection.

Second, documentary materials must be authenticated to be received in evidence. The easiest method of authentication pertains to foreign business records and is set forth at 18 U.S.C. § 3505. It requires completion of an affidavit by the custodian of the records attesting to the facts surrounding their making and maintenance. A form affidavit is available from OIA. Other methods of authentication are provided in 18 U.S.C. § 3491 *et seq.* and in some of the treaties under which requests for assistance can be made. However, they tend to be more cumbersome.

9-13.534 Foreign Travel by Prosecutors

Prosecutors often travel abroad in connection with the investigation of their cases, to attend depositions (*see* USAM 9-13.535, *infra*), and for other reasons. Such foreign travel must be authorized in advance by the Executive Office for U.S. Attorneys (EOUSA). EOUSA will not authorize the travel unless the prosecutor has obtained OIA's consent as required in USAM 3-3.210.

> . . . to insure that the international ramifications of proposed foreign travel are fully considered, each travel proposal must receive the consent of either the Office of International Affairs in the Criminal Division or the Office of Foreign Litigation in the Civil Division.

Prosecutors should contact OIA and EOUSA well in advance of their intended departure date. OIA ensures that the prosecutors' plans are consistent with foreign law. EOUSA notifies the proper American diplomatic or consular post through the Department of State and verifies that the host country has consented. The Department of State requests host country clearances through its overseas missions. The process can be time-consuming (Great Britain, for example, has notified the United States that clearances require ten days), but failure to comply may cause a wasted trip, or worse, *e.g.*, refusal of permission to enter the country, expulsion from the country or even arrest.

9-13.535 Depositions

If an essential witness who is not subject to a subpoena (*see* USAM 9-13.525) is unwilling to come to the United States to testify, the prosecutor may attempt to proceed by means of a deposition. *See* Fed.R.Crim.P. 15 and 18 U.S.C. § 3503. In some countries, depositions of willing witnesses may be taken at the American Embassy or consulate without a formal request. Other countries permit the taking of such depositions only from U.S. citizens. Still others prohibit any depositions except those taken pursuant to a formal request.

Depositions pursuant to formal requests must be taken in accordance with the laws and procedures of the place where the request is executed. In some cases, those laws do not contemplate direct examination by attorneys for the parties, or even the presence of both parties. In most civil law countries, for example, the questioning of witnesses is done by the judge. Other countries limit videotaping or even verbatim transcripts. Administering an oath to a witness may be prohibited if he or she is a potential defendant. The request may ask that the deposition be conducted in accordance with U.S. procedures but such requests will be honored only if they do not violate local laws, the resources for compliance are available, and the significance of the request is understood by the executing authority.

The presence of the defendant at the deposition may give rise to problems if he or she is in custody in the United States or subject to arrest in the country where the deposition is scheduled. OIA will use its best efforts to assist the prosecutor in arranging for procedures that will result in admissible testimony.

Procedure: Consult OIA to determine whether and under what circumstances a deposition may be taken. Confirm the availability of funds from the

administrative officer of your district. Draft a formal request, if necessary, and submit it to OIA. *See* USAM 9-13.531 (drafting guidelines). Move for depositions under Fed.R.Cr.Proc. 15. Submit a timely request for official travel through the Executive Office for U.S. Attorneys. Obtain official passports and visas. Remember that a court reporter may not be available overseas, so arrange to bring one to the deposition. Interpreters, if necessary, can often be retained locally through the American consular or diplomatic post.

9-13.540 Assisting Foreign Prosecutors

Judicial assistance is a two-way street. Foreign prosecutors do not make as many requests for assistance in the United States as we send abroad. Nevertheless, given the laws of probability, it is possible that the foreign prosecutor who receives an American request for execution has sent one of his or her own to the United States in the past. If that request was ignored, the foreign prosecutor may be inclined to give the same treatment to the U.S. request. The only way to ensure that international cooperation operates smoothly is to execute promptly all requests for judicial assistance that are forwarded from OIA. (Requests for assistance in civil cases are transmitted by the Civil Division's Office of Foreign Litigation).

Some foreign prosecutors and police transmit requests in criminal matters directly to U.S. Attorneys or investigative agencies. Because execution of such requests may undercut Departmental policies (*e.g.*, where we are encountering difficulties with a particular foreign government), all such requests should be discussed with OIA before execution.

Execution of foreign requests for assistance that require compulsory process is governed by 28 U.S.C. § 1782 and by any applicable treaty or agreement. OIA provides instructions and sample forms in the letter transmitting the request to the district. In general, unless a witness is completely willing to cooperate, the procedure involves filing an application with the district court seeking appointment as a commissioner under 28 U.S.C. § 1782. The Assistant U.S. Attorney may have himself or herself appointed, together with co-commissioners, such as a foreign judge or police officer who travels to the United States pursuant to the request. Once appointed, the commissioner may apply for civil subpoenas requiring the production of records or the attendance of witnesses at depositions. Depositions are held under the Federal Rules of Civil Procedure unless the request specifies an alternative procedure, in which case the order should specify it. 28 U.S.C. § 1782. The commissioner asks the questions set forth in the request for assistance. The commissioner should also ask appropriate follow-up questions. If a foreign judge, attorney or police official wishes to attend the deposition and participate, he or she may do so. Unless such attendance is provided for by a self-executing provision of an applicable treaty, the order should specify that foreign officials

and/or attorneys (described by title, not name) may attend and participate. The witness may invoke any privilege, domestic or foreign, and may be represented by counsel. However, witnesses have no right to appointed attorneys. The witness is usually required to sign the deposition, which should be certified by the commissioner and returned to OIA, together with a copy of the request. Costs of executing requests (including court reporter's fees) are the responsibility of the country making the request, unless an applicable treaty requires the United States to pay for costs of execution; in that event, the United States Attorney's Office pays the costs. Expenses chargeable to the requesting state are generally paid by the Embassy of the country making the request after receipt of an invoice from the provider of the service.

Some requests may require investigative assistance to execute (*e.g.*, when the witness's address is not given or has changed, or when public records are sought). In such instances, the commissioner may draw on the resources of federal investigative agencies. Generally, the FBI will assist in executing foreign requests, although in cases where other law enforcement agencies have a pre-existing interest in the case, their assistance will be sought.

Not all requests will require a commissioner for execution. If a witness will cooperate voluntarily for example, there is no need for a subpoena or a commissioner. *See* 28 U.S.C. § 1782(b). However, in all cases in which foreign officials are traveling to the U.S. to participate in depositions of witnesses, a commission should be secured and a subpoena delivered even to a cooperating witness. In other cases, consult with OIA about less formal means of executing the foreign request.

9-13.600 USE OF HYPNOSIS

9-13.601 Purpose

In certain limited cases, the use of hypnosis can be an aid in the investigative process. Witnesses to crimes have been able to recall certain facets of the crime while in a hypnotic state that they could not remember in the normal state. Hypnosis, however, is subject to serious objections and should be used only on rare occasions. The information obtained from a person while in a hypnotic trance cannot be assumed to be accurate. Therefore, any information obtained by the use of hypnosis must be thoroughly checked as to its ultimate accuracy and corroborated if possible.

9-13.610 Admissibility at Trial

The question whether hypnotically refreshed evidence is admissible at trial is still an open one in many jurisdictions. In those jurisdictions in which the question is unsettled, a foundation concerning the reliability

of hypnosis is necessary. *See, e.g., Harding v. State,* 5. Md.App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969). In jurisdictions where such evidence is clearly admissible, there is no need for a foundation concerning the nature and effects of hypnosis. *See United States v. Awkard,* 597 F.2d 667 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979).

The courts that permit the use of hypnotically induced testimony by prosecution witnesses have held that the fact of the hypnosis affects only the credibility of the witness and not the witness's competence or the admissibility of his or her testimony. *See e.g., Beck v. Norris,* 801 F.2d 242 (6th Cir.1986); *United States v. Awkard, supra; United States v. Adams,* 581 F.2d 193 (9th Cir) *cert. denied,* 439 U.S. 1006 (1978), *Kline v. Ford Motor Company, Inc.,* 523 F.2d 1067 (9th Cir.1975); *Harding v. State, supra.*

In *United States v. Adams, supra,* the Ninth Circuit upheld the admissibility of hypnotically refreshed testimony but the court expressed concern ''that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the production of the subject's own recollection, rather than of recall tainted by suggestions received while under hypnosis.'' *Id.* at 198-199. The court said that, ''at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful.'' *Id.* at 199 n. 12.

The generally accepted admissibility at trial of testimony refreshed or unlocked by pre-trial hypnosis is to be contrasted with the generally accepted inadmissibility at trial of out-of-court statements made while *under* hypnosis. *See State v. Harris,* 241 Or. 244, 405 P.2d 492 (1965).

9-13.611 Hypnosis of a Prosecution Witness

Hypnosis of a witness should not be employed unless there is a clear need for additional information, and it appears that hypnosis can be useful in aiding the witness to recall such information. A witness should never be hypnotized unless the witness gives consent, preferably in writing, and the witness should always be given an explanation of the nature of hypnosis before being hypnotized.

Only a person trained in the art of hypnosis should be allowed to hypnotize a witness. *See United States v. Adams, supra.* During the interrogation, leading questions should be avoided to insure against the possibility of suggestion to the subject.

Interrogation made when the witness is subject to hypnosis should be videotaped whenever possible. In those cases where videotaping the interview is impossible, a transcript should be prepared in addition to any sound recording. Where the interview is videotaped, the tape need not be transcribed unless it is necessary in subsequent legal proceedings to provide a transcript. However, where a videotape is made but the interview is not transcribed, a copy of the videotape should be made to guard against the loss of or damage to the original tape.

9-13.612 Hypnosis of a Defendant

In *Rock v. Arkansas,* No. 86-130 (U.S. June 22, 1987), the Supreme Court found unconstitutional as violative of the Fifth, Sixth, and Fourteenth Amendments, Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony. While the Court was "not ... prepared to endorse without qualifications the use of hypnosis as an investigative tool", it did conclude that a state's legitimate interest in excluding unreliable evidence does not justify a mandatory exclusionary rule barring a defendant's hypnotically refreshed testimony because such testimony could be reliable in an individual case. *Id.* at 17. The Court went on to suggest that the states establish guidelines to help the trial courts evaluate the validity of hypnotically enhanced testimony in particular cases. *Id.* Procedures that would aid in assessing the accuracy of hypnotically refreshed testimony include the use of trained psychologists, and video taping and recording the hypnotic sessions. *Id.* at 16.

9-13.613 Disclosure of Use of Hypnosis

If a witness has been hypnotized prior to trial, this fact should be disclosed in court and the defendant should be given such information. In many cases, of course, the government will be required under 18 U.S.C. § 3500(B) to produce the witness's prior statements. *See United States v. Miller,* 411 F.2d 825 (2d Cir. 1969); *United States v. Adams, supra,* at 198.

9-13.614 Expert Witness

The prosecution should be prepared to put on the stand an expert on hypnosis who can explain to the jury the nature of hypnosis and how it works in the interrogation process in order to dispel from the jurors' minds any misconceptions and doubts they may have concerning hypnosis.

9-13.620 Authorization for Use of Hypnosis

A. *General*

Prior to using hypnosis on any witness the U.S. Attorney or Strike Force Attorney-in-Charge *must* obtain the authorization of the Director or the

Associate Director, Office of Enforcement Operations (OEO), Criminal Division.

B. *Non-Exigent Circumstances*

1. To obtain such authorization, a written request should be submitted to the Office of Enforcement Operations of the Criminal Division stating the following:

a. The names(s) of the person(s) to be hypnotized;

b. The reasons why the use of hypnosis is desired, and whether it appears that hypnosis can be useful in aiding the witness to recall such additional information;

c. The fact that the person(s) to be hypnotized are not suspects or potential defendants in this or *any* related (federal or state) criminal investigation;

d. Whether the person(s) to be hypnotized are minors;

e. The fact that the person(s) to be hypnotized have consented to undergo hypnosis, and if the person(s) are minors, the fact that the parent(s) or legal guardian(s) have also consented for the minor(s) to undergo hypnosis;

f. The name(s) of the individual(s) who will induce hypnosis; and

g. The hypnotist's qualifications to induce hypnosis (for example, indicate that the hypnotist is licensed/certified as a psychologist and is a member of the American Society of Clinical Hypnosis; attach resume; etc.).

2. Written requests may be sent to:

a. Director

Office of Enforcement Operations (OEO)
Criminal Division
United States Department of Justice
Post Office Box 7600
Ben Franklin Station
Washington, D.C. 20044-7600

b. Telecopier location within OEO: FTS 633-5143.

c. Teletype located within OEO: OEO teletype symbol is JCOEO.

C. *Exigent Circumstances*

When true exigent circumstances exist (*i.e.*, mail, telecopy, or teletype will not suffice), the OEO Director or Associate Director may verbally

approve an oral request, which request *must* include the information noted at USAM 9-13.620(B)(1), *supra*. The OEO telephone number is FTS 633-3684.

9-13.621 Additional References

The following sources, while not exhaustive, may prove helpful:

A. Ault, Richard L.; ''Hypnosis: The FBI's Team Approach''; *FBI Law Enforcement Bulletin*; Vol. 49, #1; January 1980; pp. 5 to 8.

B. Ault, Richard L.; ''FBI Guidelines For Use of Hypnosis''; *The International Journal of Clinical and Experimental Hypnosis*; Vol. 27, #4; 1979; pp. 449 to 451.

C. 92 A.L.R. 3d 442 (1979).

D. 5 U.C.L.A.—Ala.L.Rev. 226 (1976).

E. 4 Ohio North L.Rev. 1 (1977).

F. 38 Ohio State, L.J. 567 (1977).

G. Council on Scientific Affairs, ''Scientific Status of Refreshing Recollection by the Use of Hypnosis''; 253 J.A.M.A. 1918, 1918-1919 (1985).

H. Diamond, ''Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witnesss'', 68 Cal.L.Rev. 313 (1980).

9-13.700 [RESERVED]

9-13.800 ACCESS TO AND DISCLOSURE OF FINANCIAL RECORDS

Since March 10, 1979, Federal agencies' access to and disclosure of all ''financial records'' of any ''customer'' from a ''financial institution'' have been governed by the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 *et seq.* This statute sets forth a complex set of procedures which United States Attorneys (along with other federal officials) must follow in obtaining the records covered by the Act. These procedures must be followed by law enforcement officials if they are to obtain records needed in an investigation without alerting the target(s) of that investigation.

For a complete discussion of these procedures and a compendium of sample forms, see JURIS—Right to Financial Privacy Act. For additional information contact the Legal Support Unit of the Office of Enforcement Operations (FTS 786-4987).

9-13.900 ACCESS TO AND DISCLOSURE OF TAX RETURNS IN A NONTAX CRIMINAL CASE

Section 1202 of the Tax Reform Act of 1976 (Pub.L. No. 94-455), as amended by section 356(a) of the Tax Equity and Fiscal Responsibility Act

of 1982 (Pub.L. No. 97-248), was designed to protect the confidentiality of tax returns and return information and establishes criteria for the disclosure of such material by the Internal Revenue Service and its use and further disclosure by the beneficiaries of disclosure. *See* USAM 9-13.901 and 9-13.902, *infra*. Effective January 1, 1977, disclosure of returns and return information is prohibited except as specifically provided in 26 U.S.C. § 6103, as amended, or other sections of the Code. Disclosure in violation of these provisions subjects the offender to possible criminal penalties.

Among the disclosures authorized by the Act are those in 26 U.S.C. § 6103(i) concerning access to returns and return information by certain Department of Justice personnel for use in the investigation and prosecution of federal criminal statutory violations and related civil forfeitures not involving tax administration. The access procedures and use restrictions in such a case are set forth at USAM 9-13.910, *infra*.

9-13.901 Definitions

A. ''Return'' means any tax or information return, declaration of estimated tax, or claim for refund required by, provided for, or permitted under, the provisions of Title 26 which is filed with IRS by, on behalf of, or with respect to, any person, and any amendment or supplement, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return. *See* 26 U.S.C. § 6103(b)(1).

B. The term ''return information'' includes all tax information relating to a taxpayer which is contained within the files of the Internal Revenue Service. Return information is divided into two distinct classifications:

1. Taxpayer return information: that information filed with, or furnished to the Internal Revenue Service by or on behalf of a taxpayer. An example of taxpayer return information is that portion of an interview between an IRS agent and the representative of a named taxpayer functioning in that capacity, discussing the taxpayer.

2. Return information other than taxpayer return information: that return information not provided to the Internal Revenue Service by or on behalf of a taxpayer, *i.e.*, information obtained from third parties who are not representatives of the taxpayer.

Examples of return information other than taxpayer return information are:

a. The books and records of a named taxpayer supplied to IRS by a third party.

b. That portion of an interview between an IRS agent and a third party discussing a named taxpayer.

c. Information developed by IRS agents in the course of investigating a named taxpayer's return from sources other than the taxpayer's representative functioning in that capacity.

d. The fact that a named taxpayer filed or failed to file a return.

C. ''Tax administration'' means the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and the development and formulation of federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions. 26 U.S.C. § 6103(b)(4).

D. ''Person'' means an individual, a trust, estate, partnership, association, company or corporation. 26 U.S.C. § 7701(a)(1).

E. ''Secretary'' means the Secretary of the Treasury or his/her delegate. 26 U.S.C. § 7701(a)(11)(B). The delegate with regard to 26 U.S.C. § 6103 is IRS. 26 U.S.C. § 7701(a)(12)(A)(i), Treasury Order No. 150-37 (Mar. 17, 1955), Treasury Reg. § 301.7000-1 (June 15, 1967).

9-13.902 Disclosure

Disclosure is defined in 26 U.S.C. § 6103(b)(8) as ''the making known to any person in any manner whatever a return or return information.'' The breadth of this definition invalidates a number of prior access procedures. For example, upon inquiry by the appropriate Division, IRS was formerly permitted under 26 U.S.C. § 6103(f) to indicate whether a named person did or did not file a return (*i.e.*, notification of the existence of a return). Under 26 U.S.C. § 6103 as amended, such notification would be a prohibited disclosure unless the provisions of 26 U.S.C. § 6103(i)(2) were met. *See* S.Rep. No. 94-938, 94th Cong., 2d Sess., at 339, 342.

Although the definition of disclosure does not appear to admit many exceptions, the return to the supplier of information supplied to IRS appears to be one. Arguably, therefore, it is not a disclosure for IRS to return taxpayer records supplied by a U.S. Attorney to that U.S. Attorney, provided that no supplementary tax material prepared by IRS is included. Likewise, ''disclosure'' by the prosecutor of a return obtained pursuant to 26 U.S.C. § 6103(i)(1) to the taxpayer who filed the return with IRS would not appear to be prohibited since no ''making known'' of information is involved.

9-13.903 Consent to Disclosure

Seeking disclosure pursuant to 26 U.S.C. § 6103(i) is unnecessary whenever the taxpayer to whom return or return information pertains consents to disclosure. *See* 26 U.S.C. § 6103(c). Normally, IRS will make disclosure upon proper receipt of a taxpayer's waiver.

A taxpayer's consent to disclosure must be formalized by ''a written document pertaining solely to the authorized disclosure.'' 26 C.F.R. § 301.6103(c)-1(a). That document must conform to the requirements of 26 C.F.R. § 301.6103(c)-1(a).

When a taxpayer files a motion for disclosure of illegal electronic surveillance under 18 U.S.C. § 3504, he/she is deemed to have requested or consented to disclosure under 26 C.F.R. § 301.6103(c)-1(a) insofar as returns and return information are involved. *See* USAM 9-13.933, *infra*.

9-13.910 Access to Returns and Return Information

Section 6103(i) of Title 26 sets forth the conditions which govern IRS's disclosure of tax returns and return information protected under 26 U.S.C. § 6103(a), for use in proceedings pertaining to either the enforcement of a federal criminal statute, or related civil forfeiture proceedings which may be pursued in addition to or in lieu of criminal prosecutions. The methods which must be used to obtain IRS's disclosure vary according to the type of material sought and reason for its disclosure.

Disclosure of tax returns and taxpayer return information must be secured through the issuance of an *ex parte* order by a federal district judge or magistrate under 26 U.S.C. § 6103(i)(1). *See* USAM 9-13.911, *infra*. Such orders automatically include return information other than taxpayer return information (*i.e.*, information about a taxpayer from a third party). Thus, when filing an application under 26 U.S.C. § 6103(i)(1), it is *not* necessary to make a separate request under 26 U.S.C. § 6103(i)(2) (as discussed below and in USAM 9-13.912, *infra*).

If, however, only return information other than taxpayer return information is sought, it may be obtained pursuant to a written request under 26 U.S.C. § 6103(i)(2). *See* USAM 9-13.912, *infra*.

Section 6103(i)(3) of Title 26 authorizes IRS to make disclosures of return information other than taxpayer return information on its own initiative under certain conditions, and any return information under other, more restrictive conditions. *See* USAM 9-13.913, *infra*.

Section 6103(i)(4) of Title 26 governs the use of information obtained under 26 U.S.C. § 6103(i)(1), (i)(2), or (i)(3) in judicial or administrative proceedings. *See* USAM 9-13.914, *infra*. It should be noted, however, that, although 26 U.S.C. § 6103(i)(4) authorizes use in civil forfeitures

related to the enforcement of federal criminal statutes, this use alone does not authorize disclosure under 26 U.S.C. § 6103(i)(1) or (i)(2). Thus, caution should be exercised that any returns or return information needed for a civil forfeiture are obtained under the appropriate procedure *before* termination of the criminal enforcement proceeding. Criminal enforcement proceedings should not be initiated, however, solely as a means of obtaining return information which would otherwise not be available for use in a civil forfeiture.

Section 6103(i)(5) of Title 26 governs the disclosure of a return or return information for the purpose of locating a fugitive from justice. *See* USAM 9-13.915, *infra*.

Section 6103(i)(6) of Title 26 provides that the Secretary shall not disclose any return or return information under the specified paragraphs and subparagraphs of 26 U.S.C. § 6103(i) if he/she determines ''that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.''

The Internal Revenue Service has offered the services of the local District Disclosure Officer to each U.S. Attorney for the purpose of briefing the U.S. Attorney and his/her assistants on the procedures to be followed in obtaining returns and return information under the revised statute. Each U.S. Attorney is urged to respond to this offer. IRS is anxious to cooperate in successfully implementing the statute, and close coordination between individual U.S. Attorneys' offices and the local District Disclosure Officer will expedite the processing of requests.

In addition, the Criminal Division, through its Office of Enforcement Operation, will be available to lend assistance and answer questions. The local and FTS number for such assistance is 786-4987.

9-13.911 Disclosure Under 26 U.S.C. § 6103(i)(1)

Section 6103(i)(1) of Title 26 authorizes application for an *ex parte* order for the disclosure of ''any return or return information ... to officers or employees of any federal agency who are personally and directly engaged in ' the investigation, or preparation for prosecution, of violations of specifically designated federal criminal statutes other than ones involving tax administration. The application must explain the intended use

Applications for the *ex parte* order authorized by this paragraph may be authorized by: the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, and U.S. Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a Criminal Division organized crime strike force established pursuant to 28 U.S.C. § 510. It is anticipated that most applications will be authorized by U.S. Attorneys or Strike Force Chiefs.

Samples of an application and resulting order appear at the end of this section.

A. Prior to the submission of this application, however, the responsible official should notify the appropriate IRS District Director that such action is being planned. This notice should include all relevant details so that IRS can:

1. Assemble the requested information; and

2. Make any appropriate determination provided for in 26 U.S.C. § 6103(i)(6), (*see* USAM 9-13.916, *infra*).

B. Applications may be submitted to either federal magistrates or federal district court judges.

C. Applicants must demonstrate that:

1. There is reasonable cause to believe that a specific federal crime has occurred;

2. There is reasonable cause to believe that the tax information sought is relevant to the offense;

3. The information will be used exclusively in a federal criminal investigation of proceeding concerning such act (except as provided in 26 U.S.C. § 6103(i)(4), *see* USAM 9-13.914, *infra*); and

4. That the information cannot reasonably be obtained from another source.

Language in the application and order should track the statutory language as closely as possible. Since 26 U.S.C. § 6103(i)(1) refers to disclosure for the ''enforcement of a specifically designated federal criminal statute,'' applicants should list every statutory violation for which ''reasonable cause'' exists.

D. Applicants should file simultaneously with the application a motion requesting the court to seal the application and its order granting or denying the application. U.S. Attorneys should notify Internal Revenue Service whenever a motion to seal is granted, and whenever the records are subsequently unsealed. Such motions are *not* necessary when an applicant determines that disclosure of the application will not jeopardize an ongoing investigation.

E. As noted in USAM 9-13.910, *supra*, 26 U.S.C. § 6103(i)(1), applications now cover return information other than taxpayer return information (as well as all return and taxpayer return information). Therefore, when such an application has been made, it is *not* necessary to make a separate 26 U.S.C. § 6103(i)(2) request for return information other than taxpayer return information.

F. Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. § 6103(i)(6). *See* USAM 9-13.916, *infra*.

See Juris for sample application to be used when requesting either 26 U.S.C. § 6103(i)(1) information only or joint 26 U.S.C. § 6103(i)(1) and (i)(2) disclosures.

9-13.912 Disclosure Under 26 U.S.C. § 6103(i)(2)

The procedure established by this paragraph is to be utilized only when the requester's *sole* interest is return information other than taxpayer return information. *See* USAM 9-13.911, *supra*.

A. Written requests for this kind of information may be addressed to the appropriate IRS District Director by the head or Inspector General of any federal agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, and any official authorized to authorize an application under 26 U.S.C. § 6103(i)(1). *See* USAM 9-13.911, *supra*. Thus, a letter from a U.S. Attorney to the appropriate District Director which meets the statutory requirements is sufficient to obtain information available under 26 U.S.C. § 6103(i)(2). An example request letter appears at the end of this section.

B. The uses authorized for such information are identical to those for information obtained under 26 U.S.C. § 6103(i)(1) and the request must explain the intended use. *See* USAM 9-13.911, *supra*.

The request must set forth:

1. The taxpayer's name and address;

2. The taxable period(s) for which information is sought;

3. The statutory authority under which the enforcement proceeding is being conducted; and

4. The specific reason or reasons why the information sought is relevant to the enforcement proceeding.

Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. § 6103(i)(6). *See* USAM 9-13.916, *infra*.

See Juris for sample letter to be used when requesting 26 U.S.C. § 6103(i)(2) information.

9-13.913 Disclosures Under 26 U.S.C. § 6103(i)(3)

This paragraph authorizes IRS initiated disclosure of return information in carefully specified circumstances.

A. IRS may disclose return information (other than taxpayer return information; *i.e.*, 26 U.S.C. § 6103(i)(2) information) which indicates that a federal criminal law (not involving tax administration) has been violated to the head of the federal agency responsible for enforcing the law. The head of the agency may then disclose the information to officers and employees of the agency to the extent necessary to enforce the law.

B. If there is return information eligible for disclosure under the above criteria, the taxpayer's identity may also be disclosed. Disclosures under this subparagraph are limited by the restrictions in 26 U.S.C. § 6103(i)(6). *See* USAM 9-13.916, *infra*.

C. In practice all 26 U.S.C. § 6103(i)(3) disclosures are made to the Office of Enforcement Operations (OEO) as the designated representative of the Attorney General. OEO then refers the material, as appropriate, within the Department of Justice (including Offices of the United States Attorneys). If, however, the information should go to another agency, (*e.g.*, the Social Security Administration), OEO must return it to IRS and request that IRS send it to the designated agency.

D. IRS is also authorized to disclose any return information to:

1. Any federal or state law enforcement agency to the extent necessary to apprise it of ''circumstances involving an imminent danger of death or physical injury to any individual;'' and

2. Any federal law enforcement agency to apprise it of ''circumstances involving the imminent flight of any individual from Federal prosecution.''

Disclosures for these two purposes are *not* limited by the restrictions in 26 U.S.C. § 6103(i)(6). *See* USAM 9-13.916, *infra*.

9-13.914 Use of Certain Disclosed Returns and Return Information in Judicial or Administrative Proceedings, 26 U.S.C. § 6103(i)(4)

This paragraph governs disclosures which agencies may make of returns or return information obtained from IRS under either 26 U.S.C. § 6103(i)(1) or (i)(2). They ''may be disclosed in any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute or related civil forfeiture to which the United States or a federal agency is a party'' upon a finding that the information is probative of a matter in issue relevant to the commission of a crime, or of the guilt or liability of a party. Disclosure may also be made pursuant to either the Jencks Act or Rule 16 of the Fed.R.Cr.P.

No finding of relevance is required for disclosure of return information other than taxpayer return information in any proceeding described above when the United States or a federal agency is a party.

No return or return information is to be admitted into evidence if IRS notifies the Attorney General of a determination that disclosure ''would identify a confidential informant or seriously impair a criminal or civil tax investigation.'' This situation is not likely to occur since IRS normally will not have disclosed the information to the agency if either of these events is likely to result from such disclosure. In any event, the burden of notification is clearly on IRS.

Admission in violation of this prohibition does not constitute reversible error.

The Criminal Division has interpreted this language to include use in any post-conviction proceeding resulting from the original conviction. The justifying theory is that enforcement continues until the defendant is no longer subject to the custody of the Attorney General. Thus, the United States Parole Commission may use tax material in a hearing to determine whether to terminate parole supervision pursuant to 18 U.S.C. § 4211(c). Moreover, such use is appropriate even though it may not, technically, amount to an introduction ''into evidence.'' For example, tax material may be provided to the court for its use in sentencing pursuant to Rule 32(c), of the Federal Rules of Criminal Procedure.

9-13.915 Disclosure to Locate Fugitives from Justice 26 U.S.C. § 6103(i)(5)

A. Any official who may authorize an application to a judge or magistrate under 26 U.S.C. § 6103(i)(1) (*see* USAM 9-13.911, *supra*) may also authorize one under subsection (i)(5) for the disclosure of returns and return information to the extent necessary to locate a fugitive. The advantage of proceeding under subsection (i)(5), when appropriate, rather than 26 U.S.C. § 6103(i)(1) is that less is required to justify granting the application. Applicants must establish only that:

1. A federal arrest warrant for commission of a federal felony has been issued for the taxpayer who is now a fugitive;

2. The return or return information is being sought solely for purposes of locating the taxpayer; and

3. There is ''reasonable cause'' to believe that the return or return information will further efforts to locate the taxpayer.

It should be noted that this paragraph authorizes disclosure only of returns and return information of the individual who is a fugitive.

Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. § 6103(i)(6). *See* USAM 9-13.916, *infra*.

See Juris for sample application to be used when requesting returns and return information to locate a fugitive from justice pursuant to 26 U.S.C. § 6103(i)(5).

9-13.916 Restrictions on Disclosures, 26 U.S.C. § 6103(i)(6)

This paragraph prohibits IRS from making all but one disclosure described in USAM 9-13.911 through 9-13.915 if a determination is made that disclosure ''would identify a confidential informant or seriously impair a civil or criminal tax investigation.'' In the case of an application for a court order under either 26 U.S.C. § 6103(i)(1) or (i)(5), IRS must certify the making of this determination to the court.

These restrictions are administered solely by IRS; they do not require any action by applicants or requesters.

The exception to their application is an IRS initiated disclosure under 26 U.S.C. § 6103(i)(3)(B) to prevent death, physical injury, or flight to avoid federal prosecution.

9-13.917 Communication with IRS Personnel

Section 6103 of Title 26 governs not only access to tangible tax material (*e.g.*, returns, IRS investigative reports) but also communications regarding such material. *See* USAM 9-13.912, *supra*. Communication between IRS personnel and the prosecutor (*e.g.*, the furnishing by IRS of investigative leads, discussion of IRS investigative results) is severely restricted. Satisfactory communication is possible, however, where disclosure has been obtained pursuant to 26 U.S.C. § 6103(i)(1) or (i)(2).

Under either 26 U.S.C. § 6103(i)(1) or (i)(2), communication between a prosecutor and IRS agent is permissible to the same extent that disclosure is authorized in the court order or request. The prosecutor and the IRS agent can discuss fully the material initially disclosed to the prosecutor. Assuming the order or request authorizes IRS disclosure of subsequently obtained material, discussion and exchange of information can continue within the boundaries of the order or request as dictated by the necessities of the investigation. Separate court orders or requests are required, however, to facilitate communication where the investigation expands to focus on taxpayers not included in the original order or request.

Absent a 26 U.S.C. § 6103(i)(1) court order or a 26 U.S.C. § 6103(i)(2) request, IRS can only provide tax material under 26 U.S.C. § 6103(i)(3) and 26 U.S.C. § 6103(k)(6), both of which inhibit ongoing communication.

Under 26 U.S.C. § 6103(i)(3)(A), 26 U.S.C. § 6103 material may be disclosed by IRS ''to the extent necessary to apprise'' the prosecutor of the possible commission of a federal crime. *See* USAM 9-13.913, *supra*. The

provision appears geared to precipitating a 26 U.S.C. § 6103(i)(1) or (i)(2) request and not to supplying a flow of investigative leads. Assuming the latter use is not improper, the material, once disclosed by IRS, could be discussed with an IRS agent where an investigation could not otherwise be properly conducted. Unlike 26 U.S.C. § 6103(i)(1) and (i)(2), 26 U.S.C. § 6103(i)(3)(A) required that all disclosures—initial and subsequent—be in writing. Communication subject to such an impediment appears overly cumbersome.

By contrast, 26 U.S.C. § 6103(i)(3)(B) does not require that disclosures be in writing, which is sensible since it pertains to emergency circumstances. The provision appears to be geared to supplying investigative leads calling for an immediate response by law enforcement authorities, and thus communications between IRS and law enforcement authorities should be uninhibited under 26 U.S.C. § 6103(i)(3)(B).

Under 26 U.S.C. § 6103(k)(6), 26 U.S.C. § 6103 material may be disclosed to a prosecutor by an IRS agent ''to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available,'' for purposes of tax administration. The provision is designed to allow an IRS investigator to make limited disclosures for purposes of completing a tax case, but does not contemplate aiding the prosecutor with the preparation of a nontax criminal case. Thus, a prosecutor may not receive all the material relevant to the nontax criminal case and, under 26 U.S.C. § 6103(k)(6), has no way of ascertaining the extent of relevant material withheld. No genuine exchange of information is possible under 26 U.S.C. § 6103(k)(6).

9-13.918 Utilization of IRS Personnel

An IRS tax investigation operates independently of a prosecutor's nontax investigation unless a tax investigation and prosecution are authorized by the Tax Division. *See* USAM 9-13.970, *infra*. Generally, absent tax case authorization, the prosecutor will not receive IRS investigative assistance, except to the extent of disclosure and communication permitted by the methods previously discussed. *See* USAM 9-13.910, *supra*. However, given a nontax criminal investigative situation which requires special expertise of the type possessed by certain IRS personnel, an IRS agent with such expertise may be utilized in that investigation without imposing the restrictions of 26 U.S.C. § 6103. This result is accomplished by ''insulating'' the agent from the Service through his/her appointment as a special agent of the grand jury, assignment as a Strike Force investigator, or designation to serve in some capacity other than as an IRS agent.

A. The prosecutor seeking such IRS participation in a nontax criminal case should keep in mind the following:

1. A request for the assistance of IRS personnel is a request for IRS expertise; a request should be made only where such expertise is essential to the investigation.

2. Reliance on IRS personnel provides no additional access route to 26 U.S.C. § 6103 tax material; an IRS agent, while so serving, may not gain access to tax material held by IRS relating to the subject of his/her service except as prescribed by 26 U.S.C. § 6103.

3. Use of IRS personnel is controlled by internal IRS considerations; and requires IRS authorization (often obtainable at the district director level).

B. Examples of situations in which the prosecutor might seek IRS participation in a nontax criminal case include the following:

1. An investigation involving political corruption centers around a corporate bookkeeping system suspected of containing camouflaged payoff entries;

2. An informant wishes to provide evidence of a nontax crime but refuses to deal with other than a trusted IRS agent.

DETAILED
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FOR CHAPTER 14

9-14.000 REMOVALS AND TRANSFERS

9-14.100 RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

9-14.101 Nature of the Rule

Rule 20, Fed.R.Cr.P., provides for the transfer of criminal cases among districts for the limited purposes of acceptance of guilty or *nolo contendere* pleas and sentencing. The rule is intended to accord a defendant an opportunity to be relieved of the hardship of being removed to the district where the prosecution is pending. Advisory Committee on Rules, Note to Rule 20; *Hutto v. United States*, 309 F.Supp. 489 (D.S.C.1970).

Under Rule 20, the transferee court acquires limited jurisdiction to take a guilty or *nolo contendere* plea and pronounce sentence only. A plea of not guilty, after transfer, ends the transferee court's jurisdiction and requires transfer of the matter back to the original jurisdiction. However, a defendant's statement that he/she wished to plead guilty or *nolo contendere* shall not be used against him/her. The refusal of a transferee court to receive a *nolo contendere* plea does not remove its jurisdiction if the defendant then enters a plea of guilty. *Singleton v. Clemmer*, 166 F.2d 963 (D.C.Cir.1948). One court held that only a plea of not guilty can oust the jurisdiction of the transferee court in a Rule 20 proceeding, and that a Rule 20 transfer cannot be revoked by the withdrawal by *both* U.S. Attorneys of consent to transfer even though a plea has not yet been entered by the defendant. *United States v. Binion*, 107 F.Supp. 680 (D.Nev.1952). Compare *Hutto v. United States, supra*, where the transferee court having jurisdiction after consent of both U.S. Attorneys but before papers transferred or plea received by the transferee court, relinquished jurisdiction by allowing its U.S. Attorney to withdraw consent; *see also In re Richard Arvedon*, 523 F.2d 914 (1st Cir.1975) holding that a transferee court may reject an involuntary or improvident plea of guilty, but a guilty plea attributed only to defendant's desire not to return to the indicting district, is, by itself, an impermissible reason to refuse the plea and to return the case.

Rule 20 has been held to be constitutional against challenges that Article 3, Section 2, Clause 3 of the Constitution and the Sixth Amendment both provide that the trial shall be held in the state where the crime has been committed. In each case, place of venue has been held to be a personal privilege which may be waived. *Hilderbrand v. United States*, 304 F.2d 716 (10th Cir.1962); *Yeloushan v. United States*, 339 F.2d 533 (5th Cir.1964).

9-14.102 Who is Covered

Rule 20 transfers are available to any defendant who is arrested, held, or present in a district other than a district in which there is an indictment, information or complaint against the person. Changes in the Rule have the effect of expanding its formerly narrow coverage, to include

persons who are not arrested or otherwise in custody, *e.g.*, persons who turn in themselves in a district other than that in which the matter is pending. (Note of Advisory Committee on Rules.) Rule 20 is available in multiple defendant prosecutions. *Yeloushan v. United States, supra; Snowden v. Smith*, 413 F.2d 914 (7th Cir.1969).

9-14.110 Procedure Under Federal Rule of Criminal Procedure 20

When an indictment is pending against a person in another district, the person may state *in writing* that he/she wishes to plead guilty, to waive trial, and consent to a disposition in the district in which he/she finds himself/herself. In this situation, counsel is not necessary to validate the defendant's consent to a transfer, as defendant may, by a not guilty plea, later nullify the proceeding; and the statement in that event may not be used against him. *Snowden v. Smith, supra; White v. United States*, 443 F.2d 26 (9th Cir.1971).

After the defendant signs a written election to proceed under Rule 20, the U.S. Attorney in the district in which the defendant is present executes a consent and forwards both documents to the U.S. Attorney in which the indictment is pending. Either U.S. Attorney may, under the Rule, refuse consent, such consent being discretionary. In such a case, the defendant may be proceeded against under Rule 40.

If both U.S. Attorneys consent, the U.S. Attorney in the district in which the indictment is pending should forward the signed consents to the clerk of his/her district court, who will transfer the court file to the clerk of the district court for the district in which the defendant is present. The case will then proceed to arraignment. Since a plea is contemplated, the provisions of Rule 11, Fed.R.Cr.P., pertaining thereto apply in the Rule 20 context.

9-14.111 Complaint Only Pending

The indictment or information need not be pending in another district at the time of arrest in order to be subject to a Rule 20 disposition. *Hornbrook v. United States*, 216 F.2d 112 (5th Cir.1954); *O'Brien v. United States*, 233 F.2d 246 (5th Cir.1956). If a complaint only is pending in another district, Rule 20 may still be used. The person arrested, held, or present must state in writing that he/she wishes to plead guilty or *nolo contendere*, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district where arrested, held, or present, subject to approval of the U.S. Attorney for each district. Upon filing the written waiver of venue in the district in which defendant is present, the prosecution may proceed as if venue were in such district, *i.e.*, charges may be filed there.

9-14.112 Juveniles

A juvenile, as defined in 18 U.S.C. § 5031, against whom a criminal matter not punishable by death or life imprisonment is pending, may invoke Rule 20. The juvenile, however, must first be advised by counsel before consenting, in writing, to a Rule 20 proceeding and the district court as well as the U.S. Attorney in each district must consent. Furthermore, unlike the case of an adult defendant, a juvenile must consent before the court, after being advised by the court of his/her rights, and of the consequences of his/her consent.

9-14.113 Partial Pleas

The transferee court, in a Rule 20 proceeding, has jurisdiction to receive a plea of guilty to less than all the counts of an indictment or information and may dismiss the remainder on motion of the U.S. Attorney *Warren v. Richardson*, 333 F.2d 781 (9th Cir.1964). Such procedure should be with the approval of the U.S. Attorney in the district in which the offense was committed.

9-14.114 Use of Fed.R.Crim.P. 20 and 7 Together

Rule 20 provides that a defendant may state in writing that he/she wishes to plead guilty or *nolo contendere*, to waive trial in the district in which an indictment or information is pending or in which a warrant was issued, and to consent to the disposition of the case in the district in which he/she is present, subject to the approval of the U.S. Attorney for each district. This statement need not be made in open court. But when the transfer is completed the defendant may at that time waive indictment in open court as provided in Federal Rule of Criminal Procedure 7(b).

9-14.200 RULE 21. TRANSFER FROM THE DISTRICT FOR TRIAL

9-14.201 Nature of the Rule

Rule 21, Fed.R.Crim.P., allows a defendant to initiate a motion, dependent upon the court's discretion, for transfer of a criminal case for trial in another district, if (a) the atmosphere is so prejudicial the defendant cannot obtain a fair and impartial trial within the district in which the action is brought or (b) for the convenience of the parties and witnesses, if in the interest of justice.

Article 3, Section 2, Clause 3, and the Sixth Amendment to the Constitution provide the right of trial in the vicinity of the offense as a safeguard against unfairness and hardship if the accused were prosecuted against his/her will in a remote place; but where venue lies in several districts, the constitutional provisions are not intended to provide a defendant an absolute right to be tried in his/her home district or any particular place. *Platt v. Minnesota Mining and Manufacturing Co.*, 376

U.S. 240 (1964); *United States v. Hinton*, 268 F.Supp. 728 (E.D.La.1967). A Rule 21 motion by the defendant automatically is a waiver of the constitutional right to be tried in the district of offense. *United States v. Angiulo*, 497 F.2d 440 (1st Cir.1974), *cert. denied*, 419 U.S. 896; *United States v. Marcello*, 280 F.Supp. 510 (E.D.La.1968); *Jones v. Gasch*, 404 F.2d 1231 (D.C.Cir.1967), *cert. denied*, 390 U.S. 1029 (1968).

The purpose of the rule is to secure a fair trial to the defendant when circumstances in the district where the action is brought would place an undue risk of unfairness upon the defendant if tried within that district. *United States v. Hinton, supra; United States v. Marcello, supra; Sheppard v. Maxwell*, 384 U.S. 333 (1965); *Jones v. Gasch, supra*.

9-14.210 Procedure Under Rule 21

9-14.211 Factors Determining Transfer

Only the defendant can initiate a motion for transfer to another district. *Jones v. Gasch, supra; United States v. Clark*, 360 F.Supp. 936 (S.D.N.Y.1973). If there has been no waiver by the defendant and venue lies elsewhere, the proper course is dismissal. *United States v. Hinton, supra; also see,* dissent, *United States v. Gaviera*, 481 F.2d 276, 285 (2d Cir. 1973).

The cases are clear that, once made, defendant's motion for transfer to another district is directed to the sound discretion of the court, *United States v. Garza*, 664 F.2d 135 (7th Cir.), *cert. denied*, 455 U.S. 993 (1982); *Jones v. Gasch, supra;* including the selection of the district to which the transfer is made, *United States v. Hinton, supra; United States v. Holder*, 399 F.Supp. 220 (S.Dak.1975) (holding also that a superseding indictment is a new case and transfer of venue is not controlled by a previous order in the original but dismissed indictment).

In a multi-defendant and multi-count criminal action, it is well established that one or more of the defendants may have all or part of the case transferred ''as to him,'' *United States v. Choate*, 276 F.2d 724 (5th Cir.1960), 86 ALR 2d 1353; nor can such transfer be denied by a codefendant's opposition to the transfer, *Yeloushan v. United States, supra*; nor can non-moving defendants be transferred, *United States v. Clark, supra*.

Rules 21(a) and 21(b) are to be considered separately, and local prejudice insufficient for transfer under Rule 21(a) is not to be weighed in determining ''in the interest of justice'' under Rule 21(b), *Jones v. Gasch, supra*; nor are factors bearing on the ability to get a fair and impartial trial to be considered in determining ''the interest of justice,'' *Platt v. Minnesota Mining & Manufacturing Co., supra*.

Initial choice of venue is up to the prosecution, *United States v. Luros*, 243 F.Supp. 160, 174 (N.D.Iowa 1965), rev'd on other grounds, 389

F.2d 200 (8th Cir.1968); and *see* dissent, *United States v. Griesa, supra* at 285; and the defendant must demonstrate substantial inconvenience to nullify the prerogative, though venue may be influenced by congressional interest shown by statute, *United States v. Luros, supra; United States v. Johnson*, 323 U.S. 273 (1944); *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948).

9-14.212 Transfer for Prejudice in the District

After a motion by defendant under Rule 21(a) is made and once the court is satisfied that a transfer is necessary to insure a fair and impartial trial, the order of transfer may not be revoked by the defendant's change of mind (though the court may have the authority to rescind the transfer in its sound discretion), *United States v. Marcello*, 423 F.2d 993 (5th Cir.), *cert. denied* 398 U.S. 959, *reh'g. denied* 399 U.S. 938 (1970); *United States v. Anguilo, supra.*

The court must be sensitive to prejudicial publicity. *Estes v. State of Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell, supra.* The court may disregard prospective jurors' assurances of impartiality if there is danger of well grounded fear of a prejudicial atmosphere preventing a fair trial; *Sheppard v. Maxwell, supra.*

While a showing of actual prejudice is not a prerequisite, *Estes v. State of Texas, supra*, there must be a showing of identifiable prejudice, *United States v. Hinton, supra.*

Many cases suggest that voir dire is the proper time for the court to determine the question of whether a fair and impartial trial can be had because of the claim of prejudice against a defendant in the district. However, there is no requirement that the determination be made at voir dire, and it can be made whenever the court ''is satisfied,'' *United States v. Marcello, supra; United States v. Mandel*, 415 F.Supp. 1033 (Md.1976). Nevertheless, voir dire helps to confirm the court's decision and buttress the showing of no abuse in the court's decision; *Bearden v. United States*, 320 F.2d 99 (5th Cir.1963); *United States v. Smaldone*, 485 F.2d 1333 (10th Cir.1973) *cert. denied* 416 U.S. 936, *reh'g. denied*, 416 U.S. 1000. Dismissal on a showing of prejudicial pretrial publicity caused by the government is not a proper remedy on motion of a transfer, and normally voir dire must be employed to test whether a fair trial can be held in the district, *United States v. Abbott Laboratories*, 505 F.2d 565 (4th Cir.1974), *cert. denied* 420 U.S. 990.

9-14.213 Transfer in Other Cases

As amended in 1966, Rule 21(b) allows the transfer to any district without being limited to transfer to a district in which venue would lie as under the original rule, *Jones v. Gasch, supra.*

The court's determination of the motion to transfer lies in the court's sound discretion, unlike transfer under Rule 21(a) which is mandatory after the court is satisfied that prejudice makes transfer necessary, *see* dissent in *United States v. Griesa, supra* at 284. The trial court's discretion will not be overturned unless clearly abused, *Jones v. Gasch, supra; United States v. Jessup*, 38 F.R.D. 42 (M.D.Tenn.1965); thus defendant carries the burden of showing substantial balance of inconvenience to warrant transfer in the interest of justice, *United States v. Jones*, 43 F.R.D. 511 (D.D.C.1967).

Further, an appellate court cannot substitute its judgment for that of the trial court by exercising de novo examination of the motion to transfer, *Platt v. Minnesota Mining & Manufacturing Co., supra*. And a mandamus action by the government to vacate a transfer order, being an extraordinary action reserved for extraordinary causes, will not prevail except upon a clear showing that the trial court has acted in excess of its authority or clearly abused its discretion, *United States v. Clark, supra*, at 278, suggesting that the 1966 amendment deemphasizing venue in Rule 21(b) transfers should eliminate any occasion for the use of mandamus. *Compare, Auerbach v. United States*, 347 F.2d 742 (5th Cir.), *cert. denied*, 382 U.S. 958 (1965), in which it was held the defendant had no relief from court's order transferring back the case on its own motion, where the defendant appealed the retransfer order and it was held the order was not final and thus not appealable; also *United States v. Garber*, 413 F.2d 285 (2nd Cir.1969); and *see, Holdsworth v. United States*, 179 F.2d 933 (1st Cir. 1950), dismissing defendant's appeal of retransfer order and holding transferee court cannot review transfer order.

DETAILED
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FOR CHAPTER 15

9-15.000 INTERNATIONAL EXTRADITION AND RELATED MATTERS

9-15.100 DEFINITION AND GENERAL PRINCIPLES

International extradition is the formal process by which a person found in one country is surrendered to another country for trial or punishment. The process is regulated by treaty and conducted between the federal government of the United States and the government of a foreign country. It differs considerably from interstate rendition, commonly referred to as interstate extradition, which is mandated by the Constitution, Art. 4 Sec. 2.

Some countries grant extradition without a treaty. However, every such country requires an offer of reciprocity when extradition is accorded in the absence of a treaty. Under United States law extradition may be granted only pursuant to a treaty; it therefore follows that the United States may request extradition only from countries with which we have extradition treaties. A list of such countries can be found following 18 U.S.C. § 3181, but consult the Criminal Division's Office of International Affairs (OIA) to verify the currency of the information.

Because the law of extradition varies from country to country and is subject to foreign policy considerations, prosecutors should consult OIA for advice on any matter relating to extradition before taking any action in such a case, especially before contacting any foreign official.

9-15.200 PROCEDURES FOR REQUESTING EXTRADITION FROM ABROAD

Extradition involves four basic steps: contacting OIA; making a preliminary determination of extraditability; deciding whether to ask for provisional arrest; and submitting the required documents in support of the formal request for extradition. These steps are described more fully in the following sections.

9-15.210 Role of the Office of International Affairs

OIA provides information and advice to federal and state prosecutors about the procedure for requesting extradition from abroad. OIA also advises and provides support to federal prosecutors handling foreign extradition requests for fugitives found in the United States.

Every formal request for international extradition based on federal criminal charges must be reviewed and approved by OIA. At the request of the Department of State, formal requests based on state charges are also reviewed by OIA before submission to the Department of State.

Acting either directly or through the Department of State, OIA initiates all requests for provisional arrest of fugitives pursuant to extradition treaties. Neither prosecutors nor agents are permitted to contact their

foreign counterparts to request the arrest of a fugitive for extradition. Unauthorized requests cause serious diplomatic difficulties and may subject the requester to financial liability or other sanctions. Every extradition treaty is negotiated separately, and each contains different provisions. Experience with one treaty is not a guide to all others. Therefore, after reviewing this section of the U.S. Attorneys' Manual, the first step in any extradition case should be to contact OIA. Attorneys in OIA will advise prosecutors about the potential for extradition in a given case and the steps to be followed.

9-15.220 Determination of Extraditability

The following factors are relevant to determining whether an individual is extraditable in a given case. Please be prepared to discuss these questions before telephoning OIA:

9-15.221 Location

The country in which the fugitive is believed to be located, and his or her address there, if known. As noted above, extradition is not available unless there is a treaty in force between the United States and the country where the fugitive is located.

9-15.222 Citizenship

The citizenship of the fugitive, including in particular whether he or she is a dual citizen. Many countries will not extradite their own citizens.

9-15.223 Offense Charged

The crime with which the fugitive has been charged or of which he or she has been convicted. Extradition treaties commonly limit extradition to offenses specified in the treaty, although some treaties provide for extradition in any case where the offense is punishable as a felony in both countries. In either event, OIA must know the offense to determine whether an individual is extraditable.

9-15.224 Docket Information

The name of the court in which the criminal proceeding is pending or was concluded, the docket number of the case, and the name of the judge or magistrate who signed the warrant or judgment of conviction.

9-15.225 Current Status of Case

The status of the case, *i.e.*, whether and when a warrant was issued, an indictment returned, a complaint filed, or the defendant was convicted.

9-15.226 Facts of Offense

The facts of the case in brief, *i.e.*, who did what to whom, when and where. The date of the offense is needed because many treaties bar extradition in cases where the foreign statute of limitations has run. The place of the offense is also essential since some treaties exclude extradition in cases where the U.S. asserts extraterritorial jurisdiction.

9-15.227 Potential for Trial or Retrial

Finally, if the fugitive has not been convicted, confirmation that the case is triable, *i.e.*, that all necessary witnesses and evidence are still available and that the substantial costs involved in completing an extradition request are justified by the nature of the case.

9-15.228 Procedure When Fugitive is Non-Extraditable

Some courts have held that the government is obliged by the Constitution's guarantee of a speedy trial to request the extradition of a fugitive as soon as his or her location becomes known, unless the effort would be useless. If extradition is not sought in a particular case, prosecutors should work with OIA to establish a record documenting why extradition was not possible for use in the event of any subsequent challenge based on the speedy trial clause.

Even if the fugitive is not extraditable, other steps may be available to return him or her to the United States, or to restrict his or her ability to live and travel overseas. *See* USAM 9-15.600 *et seq., infra*. These steps, if taken, should likewise be documented.

9-15.230 Request for Provisional Arrest

Every extradition treaty to which the United States is a party requires a formal request for extradition, supported by appropriate documents. Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases. Once the United States requests provisional arrest pursuant to the treaty, the fugitive will be detained (subject, in some countries, to bail) as soon as he or she is located. Thereafter, the United States must submit a formal request for extradition, supported by all necessary documents, duly certified, authenticated and translated into the language of the country where the fugitive was arrested, within a specified time (from 30 days to three months, depending on the treaty). *See* USAM 9-15.240. Failure to follow through on an extradition request by submitting the requisite documents after a provisional arrest has been made will result in release of the fugitive, strains on diplomatic relations, and possible liability for the prosecutor.

OIA determines whether the facts meet the requirement of urgency under the terms of the applicable treaty. If so, OIA requests provisional arrest; if not, the prosecutor assembles the documents for a formal request. The latter method is favored when the defendant is unlikely to flee because the time pressures generated by a request for provisional arrest often result in errors that can damage the case. If provisional arrest is necessary because of the risk of flight, the prosecutor should complete the form for requesting provisional arrest (*see* USAM 9-15.231, *infra*) and forward it to OIA by telecopier. State prosecutors who request provisional arrest must also certify that the necessary documents will be submitted on time and that all expenses, including the cost of transportation by U.S. Marshals, will be covered.

9-15.231 Form for Requesting Provisional Arrest

[Please read USAM 9-15.100 to 9-15.230 and discuss your request with OIA before sending this request to OIA].

A. Name of fugitive: _____

B. Case caption (if the fugitive is not the principal defendant in the case): _____

C. Date discussed with OIA and name of OIA contact: _____

D. Prosecutor responsible for this request (name and FTS or commercial number): _____

E. Case agent (name, agency and FTS or commercial number): _____

F. Name and telephone number of state extradition official who authorized payment of all expenses required to complete extradition (state requests only): _____

G. List all charges for which extradition will be sought (name and statutory citation): _____

H. Warrant information (name of court [district and division], docket number, name of judge or magistrate who signed the warrant, date of warrant): _____

I. Description of fugitive:
date of birth _____;
place of birth _____;
height _____; weight _____; hair _____; eyes _____;
other identifying features _____;
aliases _____;
citizen of _____;
passport number/date and place of issue _____;
_____;
other identity documents _____

J. Location of fugitive (full address and/or telephone number; names and addresses of associates, etc.): _____

K. Facts of case. Using a narrative style, provide sufficient information, including date and place of offense, to establish probable cause that a crime was committed and that the fugitive committed it. Choose simple, descriptive language, as for an affidavit in support of a warrant application, not for a formal charging document. Continue on a separate sheet if necessary:

9-15.240 Documents Required in Support of Request for Extradition

The request for extradition is the diplomatic note prepared by the Department of State and transmitted to the foreign government through diplomatic channels. It must be accompanied by the documents specified in the treaty. OIA will advise the prosecutor of the documentary requirements, but it is the responsibility of the prosecutor to prepare and assemble them and forward the original and four copies to OIA in time to be reviewed, authenticated, translated, and sent through the Department of State to the foreign government by the deadline.

OIA will provide samples of the documents required in support of the request for extradition. Although every treaty varies, all generally require:

A. An affidavit from the prosecutor explaining the facts of the case;

B. Copies of the statutes alleged to have been violated and the statute of limitations;

C. If the fugitive has not been convicted, certified copies of the arrest warrant and complaint or indictment; and

D. Evidence, in the form of affidavits or grand jury transcripts, establishing that the crime was committed, including sufficient evidence (*i.e.*, photograph, fingerprints, and affidavit of identifying witness) to establish the defendant's identity; or

E. If the fugitive has been convicted, a certified copy of the order of judgment and commitment establishing the conviction, an affidavit stating the sentence was not served, and evidence concerning identity.

These documents are explained further below. Prosecutors should be aware that there are few workable defenses to extradition, although appeals and delays are common. Foreign defense lawyers are therefore reduced to grasping at straws, such as minor inconsistencies resulting from clerical or typographical errors. Although these can be remedied eventually, they take time to untangle. Therefore, pay careful attention to detail in preparing the documents.

9-15.241 Prosecutor's Affidavit

The prosecutor's affidavit explains the facts of the case and its procedural history and identifies the remaining documents submitted in support

of the request, which are attached to the affidavit as exhibits. Because it is explanatory, the affidavit must be drafted in simple, straightforward language, avoiding technical legal terms that will not be familiar to the foreign court or agency that will decide on the fugitive's extraditability. Remember that the affidavit will be translated unless it is being sent to a country where English is the official language. Therefore, avoid jargon that criminal lawyers take for granted (*e.g.*, due process of law) that does not translate well. Do not repeat the language of the indictment or complaint.

The form of the affidavit depends on the country to which it is submitted and on the nature of the case, *i.e.*, whether the fugitive is wanted for trial or to serve a sentence. OIA will provide guidance on format. The affidavit should be captioned as a formal pleading with the name of the court and the style of the case.

The affidavit begins with a description of the prosecutor's background. For requests directed to common law countries, this information should suffice to qualify the affiant as an expert on federal criminal law, or the law of the state, if applicable.

Next, explain the procedural history of the case, including in particular the name of the court, the date of the complaint or indictment, the docket number of the case, the date of the warrant, and the name of the judge or magistrate. The complaint and/or indictment and the arrest warrant should be referred to as exhibits, and certified copies should be attached if the fugitive has not been convicted. *See* USAM 9-15.242, *infra*.

The statutes alleged to have been violated should be cited by name and code section, as should the applicable statute of limitations. The prosecutor should aver that neither prosecution nor punishment is barred by the statute of limitations. The text of the statutes may be incorporated in the body of the affidavit or attached as exhibits. If attached, they should be referred to in the affidavit. *See* USAM 9-15.243, *infra*.

Describe the facts of the case succinctly and plainly. If the fugitive has not been convicted, affidavits of the investigator or witnesses establishing the commission of the crime and the fugitive's identity should be mentioned and attached to the affidavit as exhibits. A photograph and/or fingerprints will be needed to prove identity. *See* USAM 9-15.245, *infra*. If the fugitive has been convicted, recite that fact in the prosecutor's affidavit and explain why the sentence has not been served and what time remains to be served. Attach the exhibits described at USAM 9-15.245, *infra*.

The prosecutor's affidavit should be executed before a judge or magistrate. Execution of the affidavit before a judicial officer is helpful because, especially in civil law countries, magistrates prepare extradition requests. Courts in civil law countries, being unfamiliar with U.S. procedures, are not used to seeing extradition requests that lack the

signature of a judge or magistrate. Moreover, the original signature of a judge or magistrate is needed to certify the documents properly.

9-15.242 Copies of Warrant and Complaint and/or Indictment

If the fugitive has not been convicted, obtain certified copies of the arrest warrant and the complaint and/or indictment, and attach them to the prosecutor's affidavit as exhibits. For some countries, a certificate of exemplification (three signatures: clerk, judge, clerk) may be required. If the fugitive has been convicted, *see* USAM 9-15.245, *infra*.

If the fugitive has jumped bond or escaped before conviction, include certified copies of the warrant for bond jumping or escape and for the underlying offense. Explain in the prosecutor's affidavit that the issuance of the bond jumping/escape warrant serves to bring the fugitive before the court on both the named charge and the underlying offense. Note that most extradition treaties do not include bond jumping or escape as extraditable offenses. In such cases, it will not be possible to try the fugitive for those offenses.

In civil law countries, the warrant is the charging document. Warrants therefore have greater procedural significance in those countries than in the United States. For example, civil law courts often grant extradition only for the crimes listed in the warrant, not those in the indictment. This creates serious problems in U.S. extradition cases because warrants are usually prepared in the clerk's office, which routinely lists only one or two of the offenses in the indictment.

A related problem involves signature of the warrant by the clerk pursuant to the court's order. Given the significance of warrants in civil law countries, they are always signed by judges or magistrates. Even though extradition treaties do not require that warrants be signed by a judge or magistrate in order to be valid, problems have arisen in the past when the U.S. has submitted warrants signed by clerks.

Consequently, if the warrant does not list all the crimes in the indictment, or if it is not signed by a judge or magistrate, the prosecutor may need to have it amended. If the clerk's office will not permit amendment, move for the issuance of a new warrant containing the requisite information and signatures. Doing so will necessitate an additional paragraph in the prosecutor's affidavit explaining any discrepancies between the dates of the complaint, indictment, first warrant, and second warrant. A similar explanation should be included whenever two or more warrants have been issued because of superseding indictments or for any other reason.

9-15.243 Statutes

The text of all statutes alleged to have been violated, including the penalty provision, and the pertinent statute of limitations should be typed out in full either in the body of the prosecutor's affidavit or as

exhibits to the prosecutor's affidavit. If attached as an exhibit, each statute should be typed on a separate page. If the text of the pertinent statute is unusually long or convoluted, contact OIA regarding the possibility of redaction.

9-15.244 Affidavits Establishing the Crime and the Fugitive's Identity

If the fugitive has not been convicted, it will be necessary to provide affidavits establishing the commission of the crime and the identity of the fugitive as the author of the crime. (If the fugitive has been convicted, *see* USAM 9-15.245, *infra*). In the United Kingdom, Canada, and other common law countries, the documents in support of extradition must establish a *prima facie* case. A *prima facie* case is established when the evidence submitted to the foreign magistrate would, if standing alone, justify a properly instructed jury in returning a verdict of guilty. Civil law countries are not as strict, but require factual support for every element of the crime which generally must meet a probable cause standard.

To satisfy this requirement, the prosecutor should prepare affidavits for signature by investigators, witnesses, co-conspirators or experts that, taken together, establish that each crime for which extradition is sought was committed and that the fugitive committed it. Affidavits should be prepared with formal captions showing the name of the court and the style of the case. Each affiant should state clearly and concisely the relevant facts, avoiding hearsay if possible. COURTS IN THE UNITED KINGDOM, CANADA, AND OTHER COMMON LAW COUNTRIES DO NOT ACCEPT HEARSAY IN AFFIDAVITS SUBMITTED IN SUPPORT OF REQUESTS FOR EXTRADITION. Hearsay is admissible in civil law countries, but is not accorded the same weight as first-hand knowledge. The witnesses' affidavits do not necessarily have to be executed in the district where extradition is requested. For some countries, the affidavits may be executed before a notary public rather than a judge or magistrate but a certificate of the notary's authority may be required.

A second, less-preferred means of establishing the crime involves attaching copies of grand jury transcripts to the prosecutor's affidavit. This method causes problems because some countries refuse to accept grand jury transcripts; they tend to be less concise than affidavits (resulting in higher translation costs); they are not accorded the same weight as affidavits in some countries; and, they require a disclosure order under Federal Rule of Criminal Procedure 6(e).

One of the few successful defenses in extradition cases is mistaken identity. Foreign defense attorneys know this tactic and use it. Prosecutors must establish that the person whose extradition is sought is the one who is accused or was convicted. Do so with an affidavit from an identifying witness, together with a photo of the fugitive. Do not attach a photospread if this can be avoided without jeopardizing the subsequent trial of the case (*i.e.*, by tainting the testimony of an identifying witness. *See Manson v. Brathwaite*, 432 U.S. 98 (1977)). Similarly, do not

have the witness recount having picked the photo of the accused from a photospread. The use of photospreads invites needless argument before the foreign court. Instead, use a single picture affixed to a plain sheet of paper with rivets or partially covered by the seal of the court. The picture, initialed and dated by the identifying witness, should be attached to the witness's affidavit as an exhibit. The affidavit should refer to the exhibit and to the fact that it was initialed and dated by the witness.

9-15.245 Evidence of Conviction

For fugitives who have been convicted and either escaped or otherwise failed to complete their sentences, extradition treaties dispense with the requirement of establishing the crime through affidavits. Instead, they require proof of conviction. In U.S. practice, conviction means a finding of guilt (*i.e.*, a jury verdict or finding of fact by the judge) *and* imposition of sentence. If the defendant fled after a finding of guilt but before sentencing, he or she has not been convicted, and the prosecutor must supply the affidavits described in USAM 9-15.244, *supra*, unless the treaty is a recent one which equates finding of guilt with conviction.

The conviction may be proved by a certified copy of the Order of Judgment and Committal or the equivalent state form. Proof that the fugitive is unlawfully at large may take the form of an affidavit from the warden of the institution from which the fugitive escaped, or from the marshal if the fugitive failed to surrender after sentencing. The time remaining to be served (not counting reductions for good behavior) must be stated.

The facts and procedural history of the case must be explained fully and clearly in the prosecutor's affidavit, particularly if the defendant was sentenced *in absentia*. Evidence of the fugitive's identity as described in USAM 9-15.244, *supra*, must be attached to the prosecutor's affidavit, together with the statutes under which the fugitive was convicted (*see* USAM 9-15.243). Most civil law countries have a statute of limitations on the time for execution of a sentence. The prosecutor's affidavit should therefore include an express statement that execution of the sentence is not barred by any statute of limitations under U.S. law.

If the fugitive has been charged with escape, check with OIA to see whether escape is an extraditable offense in the country of refuge. If not, the warrant for the charge of escape may be unnecessary because the fugitive cannot be tried for that offense. If it is an extraditable offense, the prosecutor must proceed on that charge as for an offense for which the fugitive has not been convicted. *See* USAM 9-15.241 and 242, *supra*.

9-15.250 Procedure After Assembling Documents

After assembling the documents required in support of extradition, the prosecutor must review them carefully to ensure that all dates and charges

mentioned in the affidavit and accompanying exhibits are consistent. Forward the original and four copies of the entire package to OIA. Attorneys in OIA review the package for completeness and send a copy to the Department of State for translation, which can take three weeks even for common languages. The cost of translation will be billed to the district requesting extradition. OIA secures the required certifications on the original and transmits it to the Department of State.

9-15.300 PROCEDURE IN THE FOREIGN COUNTRY

The Department of State sends the documents and the translation to the American Embassy in the foreign country, which presents them under cover of a diplomatic note formally requesting extradition to the appropriate agency of the foreign government, usually the foreign ministry. The request and supporting documents are forwarded to the court or other body responsible for determining whether the requirements of the treaty and the country's domestic law have been met.

In general, the decision is based on the request and any evidence presented by the fugitive. Because the American prosecutor will not have the opportunity to appear before the foreign court, the written submission, particularly the prosecutor's affidavit, must be as persuasive as possible. This is essential when the charges are based on statutes unique to U.S. law, such as RICO or CCE.

Factual defenses to extradition are limited, but creative defense attorneys can delay a decision with procedural challenges. The determination of extraditability is often subject to review or appeal. Prediction of the time required to return an individual to the United States is difficult and depends on the circumstances of the individual case and the practice of the foreign country involved.

9-15.400 RETURN OF THE FUGITIVE

Once the foreign authorities notify the American Embassy that the fugitive is ready to be surrendered, OIA informs the prosecutor and arranges with the U.S. Marshals Service for agents to escort the fugitive to the United States. U.S. Marshals must provide the escort even in a state case. If the fugitive is an alien, OIA will request the Immigration and Naturalization Service to issue a ''parole letter'' authorizing the alien to enter the country.

9-15.500 POST-EXTRADITION CONSIDERATIONS: LIMITATION ON FURTHER PROSECUTION

Every extradition treaty limits extradition to certain offenses. As a corollary, all extradition treaties restrict prosecution or punishment of

the fugitive to the offense for which extradition was granted unless the offense was committed after the fugitive's extradition. This limitation is referred to as the Rule of Speciality. Prosecutors who wish to proceed against an extradited person on charges other than those for which extradition was granted must contact OIA for guidance regarding the availability of a waiver of the rule.

Frequently, fugitives who have been extradited to the United States attempt to dismiss or limit the government's case against them by invoking the Rule of Speciality. As a technical matter, the right accorded under the rule may be invoked only by the country which granted extradition, but most courts will entertain arguments based on the rule from the fugitive. In all such cases, the prosecutor should contact OIA for assistance in responding to the claim.

9-15.600 ALTERNATIVES TO EXTRADITION

A fugitive may not be subject to extradition because he or she is a national of the country of refuge, the crime is not an extraditable offense, the statute of limitations has run in the foreign country, he or she cannot be located, extradition was requested and denied, or any number of other reasons. (If, after discussing the case with OIA, the prosecutor concludes that the fugitive is not extraditable, that conclusion and the reasons should be documented. *See* USAM 9-15.218, *supra*).

Depending on the circumstances, alternatives may be available that will result either in the return of the fugitive or limitations on his or her ability to live or travel overseas. OIA will advise the prosecutor concerning the availability of these methods, which are summarized below.

9-15.610 Deportation

If the fugitive is not a national or lawful resident of the country in which he or she is located, OIA, through the Department of State or other channels, may ask that country to deport the fugitive. Fugitives returned to the United States in this way often claim that they were kidnapped and returned illegally. The courts have disposed of those arguments under the *Ker-Frisbie* doctrine, holding that a defendant in a federal criminal trial may not successfully challenge the District Court's jurisdiction over his person on the grounds that his presence before the Court was unlawfully secured. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952). See, e.g., *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir.1986); *United States v. Winter*, 509 F.2d 975 (5th Cir.) *cert. denied*, 423 U.S. 825 (1975); *United States v. Postal*, 589 F.2d 862, 873 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Darby*, 744 F.2d 1508, 1530-31 (11th Cir.1984). One court found an exception to the general doctrine, declaring that a court could refuse to exercise its jurisdiction if the person's presence had been secured by conduct shocking to the

conscience of the court. *United States v. Toscanino*, 500 F.2d 267 (2nd Cir.1974). No court has followed *Toscanino*, and the Second Circuit itself in a subsequent decision limited to the exception to situations of extreme misconduct. *Lujan v. Gengler*, 510 F.2d 62 (2nd Cir.) *cert. denied*, 421 U.S. 1001 (1975).

Due to the sensitivity of this issue, prosecutors who anticipate that a defendant being returned to the United States may claim that his return was illegal should consult with OIA before such return.

9-15.620 Extradition From a Third Country

If the fugitive travels outside of the country from which he or she is not extraditable, it may be possible to request his or her extradition from another country. This method is often used for fugitives who take refuge in the country of which they are citizens.

Some countries, however, will not permit extradition if the defendant has been lured into their territory. Such ruses may also cause foreign relations problems. Any scenario involving an undercover or other operation to lure a fugitive into a country for law enforcement purposes (extradition, deportation, prosecution) should be discussed in advance with OIA.

9-15.630 Interpol Red Notices

Interpol (the International Criminal Police Organization) circulates notices to member countries listing persons who are wanted for extradition. The names of persons listed in the notices are placed on lookout lists (*e.g.*, NCIC or its foreign counterpart). When a person whose name is listed comes to the attention of the police abroad, the country that sought the listing is notified through Interpol and can request extradition. This method is useful when the fugitive's location or the third country to which he or she may travel (*see* USAM 9-15.620, *supra*), is unknown.

9-15.640 Revocation of U.S. Passports

The Department of State may revoke the passport of a person who is the subject of an outstanding federal warrant. Revocation of the passport can result in loss of the fugitive's lawful residence status, which may lead to his or her deportation. If the fugitive is wanted on state charges only, it will be necessary to obtain a warrant on a UFAP complaint because the Department of State is only authorized to revoke the passports of persons named in federal warrants.

9-15.650 Foreign Prosecution

If the fugitive has taken refuge in the country of which he or she is a national, and is thereby not extraditable, it may be possible to ask that

country to prosecute the individual for the crime that was committed in the United States. Virtually every country that prohibits the extradition of its own citizens permits their prosecution domestically for crimes committed abroad.

9-15.700 FOREIGN EXTRADITION REQUESTS

Summary: Foreign requests for extradition of fugitives from the United States are ordinarily submitted by the embassy of the country making the request to the Department of State, which reviews and forwards them to the Criminal Division's Office of International Affairs (OIA). The requests are of two types: formal requisitions supported by all documents required under the applicable treaty, or requests for provisional arrest. (Requests for provisional arrest may be received directly by the Department of Justice if the treaty permits. *See* USAM 9-15.230, *supra*, for an explanation of provisional arrest.) OIA reviews both types of requests for sufficiency and forwards appropriate ones to the district. The Assistant U.S. Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate or the district judge. The government opposes bond in extradition cases. A hearing under 18 U.S.C. § 3184 is scheduled to determine whether the fugitive is extraditable. If the court finds the fugitive to be extraditable, it enters an order of extraditability and certifies the record to the Secretary of State, who decides whether to surrender the fugitive to the requesting government. OIA notifies the foreign government and arranges for the transfer of the fugitive to the agents appointed by the requesting country to receive him or her. Although the order following the extradition hearing is not appealable (by the fugitive or the government), the fugitive may petition for a writ of habeas corpus as soon as the order is issued. The district court's decision on the writ is subject to appeal, and the extradition may be stayed if the court so orders.

9-15.710 Role of the Department of State in Foreign Extradition Requests

All extradition treaties currently in force require foreign requests for extradition to be submitted through diplomatic channels, usually from the country's embassy in Washington to the Department of State. Many treaties also require that requests for provisional arrest be submitted through diplomatic channels, although some permit provisional arrest requests to be sent directly to the Department of Justice. The Department of State reviews foreign extradition demands to identify any potential foreign policy problems and to ensure that there is a treaty in force between the United States and the country making the request, that the crime or crimes are extraditable offenses, and that the supporting documents are properly certified in accordance with 18 U.S.C. § 3190. If the request is in proper order, an attorney in the State Department's Office of the Legal

Adviser prepares a certificate attesting to the existence of the treaty, etc., and forwards it with the original request to OIA.

9-15.720 Role of OIA in Foreign Extradition Requests

OIA reviews formal extradition requests received from the Department of State to verify that the request is in good order and that the documents will establish probable cause to believe that a crime was committed and that the fugitive committed it. OIA also reviews requests for provisional arrest. Conforming requests are forwarded to the district in which the fugitive is believed to be located with instructions as to how to proceed. OIA advises prosecutors at all stages of the extradition proceeding. Prosecutors should not act on any request for extradition that comes from a source other than OIA.

9-15.730 Procedure in the District Court

Extraditions are *sui generis*. They are not criminal proceedings, but many concepts from criminal law apply. The prosecutor represents the foreign country that originated the request. However, he or she is paid by the United States and supervised by the Executive Branch. In rare cases, these dual obligations may result in a conflict or potential conflict of interest to which the attorney must be alert. It may even be necessary to retain private counsel to pursue the extradition request. OIA works closely with prosecutors in extradition cases to ensure that the specialized law in this area is applied consistently throughout the United States in a manner that satisfies American treaty commitments.

9-15.731 Procedure When Provisional Arrest is Requested

Provisional arrest is appropriate when the country making the demand for extradition believes that there is a risk the fugitive will flee. Requests for provisional arrest must be handled quickly for the U.S. to fulfill its treaty obligations.

After receiving a request for provisional arrest, OIA contacts the prosecutor in the district where the fugitive is located. OIA provides information about the name, identity and whereabouts of the fugitive, the crime with which he or she has been charged, the foreign warrant issued for the fugitive's arrest and the demand for provisional arrest. This information will be confirmed in writing, but in urgent cases, the prosecutor immediately drafts a complaint for provisional arrest (form available from OIA) and executes it before a magistrate or judge in the district where the fugitive is located. The judicial officer issues a warrant under the authority of the treaty and 18 U.S.C. § 3184.

The fugitive is arrested and brought before the magistrate, who informs him or her of the reason for the arrest. Although the Federal Rules of

Criminal Procedure expressly do not apply to extradition proceedings (*see* Fed.R.Crim.P. 54(b)(5)), this appearance is similar to a proceeding under Federal Rule of Criminal Procedure 5. The magistrate may appoint counsel for indigent fugitives, although there appears to be no basis for so doing, given the inapplicability of the rules, including Federal Rule of Criminal Procedure 44, and 18 U.S.C. § 3006A, which limits representation to criminal defendants. The magistrate may also set a hearing on bail, although the Bail Reform Act does not apply. *See* USAM 9-15.733, *infra.* The magistrate should schedule the hearing required under 18 U.S.C. § 3184. The date will depend on the time allotted in the treaty for submission of the documents in support of the formal request and should allow for transmitting the documents from the Department of State to the court and counsel.

9-15.732 Procedure When Provisional Arrest is Not Requested

If the foreign country does not request provisional arrest, it submits all the documents that are required under the treaty to establish extraditability. OIA forwards the documents to the prosecutor in the district where the fugitive is located. The prosecutor executes a complaint before a magistrate or district judge and files the supporting documents with the complaint. A warrant is issued and the fugitive is arrested. The hearing on extraditability under 18 U.S.C. § 3184 can take place promptly because the documents that form the basis for the hearing will have been filed with the complaint. Considerations of bail and appointment of counsel are the same as when the fugitive is provisionally arrested. *See* USAM 9-15.731, *supra.*

9-15.733 Bail Hearing

The conditional release provisions of 18 U.S.C. § 3141 apply only to criminal defendants, not to the subjects of extradition proceedings. The standards for the release of fugitives in extradition matters are instead found in case law, which contemplates release only in exceptionally rare situations. Prosecutors should vigorously oppose bail for fugitives on the ground that their release jeopardizes the ability of the United States to meet its obligation under international law to satisfy the requirements of the treaty under which the fugitive's extradition was requested. A memorandum in opposition to bail is available from OIA.

9-15.734 Extradition Hearing

The government's case at the hearing consists of moving the formal request for extradition and all supporting documents into evidence. The Federal Rules of Evidence do not apply. Fed.R.Evid. 1101(d)(3). Instead, admissibility is governed by 18 U.S.C. § 3190. The fugitive's opportunity to present evidence is severely limited under existing case law. If the judge or magistrate is unfamiliar with extradition proceedings, the prose-

cutor may wish to outline the restrictions in a pre-hearing memorandum. OIA can provide a sample. A pre-hearing memorandum is also advisable if the facts are unusual or complicated. The fugitive is remanded in custody pending the court's ruling.

9-15.735 Certification to the Secretary of State

If the court determines that the fugitive is extraditable, it certifies the fact and the record of the proceedings to the Secretary of State. A sample certification is available from OIA. The final decision to surrender the fugitive is made by the Secretary of State. Neither the court's determination of extraditability nor the Secretary's decision is appealable. However, the fugitive may petition for a writ of habeas corpus. *See* USAM 9-15.737, *infra*.

9-15.736 Surrender of the Fugitive

Once the decision is made by the Secretary of State, the foreign government is notified and dispatches agents to return with the fugitive. OIA coordinates the transfer with the U.S. Marshals Service.

9-15.737 Petition for Writ of Habeas Corpus

The fugitive may challenge the finding of extraditability by means of a petition for a writ of habeas corpus. The filing of the petition does not automatically stay further proceedings, and in certain cases, the government may go forward with the extradition if the proceedings are not stayed by the order of the court. Notify OIA immediately if a petition is filed. The district court's decision on the petition is subject to appeal.

9-15.800 PLEA AGREEMENTS AND RELATED MATTERS: PROHIBITION

Persons who are cooperating with a prosecutor may try to include a ''no extradition'' clause in their plea agreements. Such agreements, whether formal or informal, may be given effect by the courts. If a foreign country subsequently requests the person's extradition, the United States faces the unpleasant dilemma of breaching its solemn word either to the person involved or to its treaty partner. *Petition of Geisser*, 627 F.2d 745 (5th Cir.1980), describes the enormous practical problems of resolving such a dilemma. Related matters involve agreements with potential witnesses to prevent or delay their deportation.

Prosecutors may not agree either formally or informally to prevent or delay extradition or deportation unless they submit a written request for authorization, and receive an express written approval from the Assistant Attorney General, Criminal Division. Requests should be submitted to OIA after endorsement by the head of the section or office responsible for supervising the case.

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FOR CHAPTER 16

9-16.000 PLEAS—RULE 11—FED.R.CRIM.P.

A defendant may plead guilty, not guilty, or, with the consent of the court, *nolo contendere*. If the defendant refuses to plead, or if a defendant corporation fails to appear, the court must enter a plea of not guilty. Fed.R.Crim.P. 11(a). In a criminal case, the plea of *nolo contendere* has the effect of a guilty plea. *United States v. Norris*, 281 U.S. 619 (1930). Under Rule 11, a plea of *nolo contendere* shall be accepted by the court only with its consent and only after it gives due consideration to the views of the parties and the interest of the public in the effective administration of justice. The court does not have the authority to accept either a plea of guilty or a plea of *nolo contendere* until the court has first determined that the defendant has a requisite understanding and that the plea is voluntary, in accordance with Federal Rules of Criminal Procedure 11(c) and (d). *See Boykin v. Alabama*, 395 U.S. 238 (1969).

9-16.010 Approval Required for Consent to Plea of Nolo Contendere

U.S. Attorneys are instructed not to consent to a plea of *nolo contendere* except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible or by the Associate Attorney General, Deputy Attorney General, or the Attorney General.

9-16.015 Approval Required for Consent to Alford Plea

U.S. Attorneys are instructed not to consent to a so-called ''Alford plea,'' where the defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty, except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General. In any case where the defendant tenders a plea of guilty but denies that he or she has in fact committed the offense, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty. *See* 9-27.440, *infra* (Principles of Federal Prosecution); 6-4.330, *supra* (approval of Alford pleas in tax cases).

9-16.020 Approval Required for Plea Agreements Involving Members of Congress, Federal Judges, Extradition, Deportation, and Air Piracy Cases

U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or

if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

The Department continues to advocate severe penalties for aircraft hijackers as a deterrent to future acts of piracy. Consequently, authorization from the Criminal Division must be obtained by the U.S. Attorney before he/she enters into any agreement to forego an air piracy prosecution in return for a guilty plea to a lesser offense, or decides otherwise not to fully prosecute an act of air piracy.

For approval required for plea agreements involving defendants who are Members of Congress, candidates for Congress, or federal judges, *see* 9-16.110, *infra*.

9-16.030 Investigative Agency to be Consulted

Although U.S. Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power should be exercised only after appropriate consultation with the federal investigative agency involved.

9-16.040 Plea Bargains in Fraud Cases

When possible, U.S. Attorneys should require an explicit stipulation of all the facts of a defendant's fraud against the United States government when agreeing to a plea bargain, including acknowledgement of the financial consequences or damages to the government. A good example of this approach and its usefulness in ensuing civil litigation may be found in *United States v. Podell*, 436 F.Supp. 1039, 1042-1044 (S.D.N.Y.1977), *aff'd*. 572 F.2d 31, 36 (2d Cir.1978). Concerning such pleas, U.S. Attorneys should also be aware of USAM 9-2.159, 4-1.218, 9-42.451, and 9-16.030.

9-16.100 CASE ON PLEAS

Particularly noteworthy on the subject of pleas are the three cases of *North Carolina v. Alford*, 400 U.S. 25 (1970); *United States v. Gray*, 438 F.2d 1160 (9th Cir.1971); and *United States v. McCarthy*, 445 F.2d 587 (7th Cir.1971). In *Alford*, the Supreme Court held that the defendant's protestations of innocence did not bar acceptance of a second degree murder guilty plea made with the advise of counsel, supported by substantial evidence of guilt, and motivated by a desire to avoid the death penalty. The Court, in *Gray*, held that a plea to a lesser included offense is not proper unless the offense charged has been reduced with the consent of the government. In *McCarthy*, the Court held that where two counts of a three-count indictment had been dismissed after the defendant pleaded guilty to one count, from which he successfully appealed, the government, which did not move to reinstate the dismissed counts until after the statute of limitations had run, was not entitled to reinstate those counts.

9-16.110 Plea Negotiations with Public Officials

In *United States v. Richmond*, 550 F.Supp. 144 (E.D.N.Y.1982), the Chief Judge for the Eastern District of New York questioned the propriety of using the plea bargaining process to negotiate the resignation from office of a Congressman. The Criminal Division believes that this decision is incorrect on the merits. U.S. Attorney personnel are therefore encouraged to continue to consider voluntary offers of resignation from office as a desirable feature in plea agreements with elected and appointed public officials at all levels of government, in accordance with the considerations and procedures described below.

The *Richmond* case involved a former Congressman from New York who, during 1982, became the subject of a federal criminal investigation. In an effort to dispose of his criminal liability, Congressman Richmond voluntarily agreed to resign his seat in the Congress and to plead guilty to federal tax, narcotics, and conflict of interest offenses. Thereafter, Richmond resigned his seat, took appropriate measures to withdraw his candidacy in the 1982 Congressional election, and entered guilty pleas to the aforementioned charges. At his sentencing a month later, the judge announced that, in his judgment, the resignation and withdrawal conditions of the plea agreement violated the separation of powers doctrine, and infringed upon the constitutional right of the public to select Congressmen of their choosing as articulated in *Powell v. McCormack*, 395 U.S. 486 (1969).

Although the Criminal Division considers the *Richmond* decision to have been incorrectly decided on its merits, the unusual procedural and factual setting of the case foreclosed judicial review in the Second Circuit. In this regard, the District Judge's comments concerning the plea bargaining issue were made after the plea agreement terms dealing with resignation and withdrawal from candidacy had been fully performed by Congressman Richmond, and without the issue having been otherwise raised by the defendant. Since the plea agreement was in all other respects enforced, and since the Court's refusal to ''accept'' the resignation and non-candidacy terms did not demonstrably impact on the sentence imposed, the issue was moot and not easily amenable to appellate review.

The *Richmond* case is particularly troublesome from the standpoint of the orderly and efficient discharge of the Justice Department's responsibilities to protect the public from criminal abuse of the public trust by high federal officials. It purports to limit, without adequate legal justification, the latitude of federal prosecutors to reach voluntary settlements with defendants in significant corruption cases which equitably address and protect the important public interests that such prosecutions normally entail.

Accordingly, the following principles shall govern the negotiation of resignation and non-candidacy conditions in plea agreements with defendant in federal public corruption cases:

A. As a general proposition, resignation from office and/or withdrawal from elective candidacy remain appropriate and desirable objectives in plea negotiations with public officials who are charged with federal offenses that focus on abuse of the office(s) involved.

B. Resignation and non-candidacy with respect to public positions other than those of Members of Congress or federal judges may be enforced involuntarily against the will of the defendant by a sentencing judge pursuant to the Federal Probation Act. *United States v. Tonry*, 605 F.2d 144 (5th Cir.1979).

C. Resignation and non-candidacy with respect to Congressional or federal judicial office may be properly made the subject of plea negotiations, and offers of resignation and/or withdrawal for such offices may be incorporated into plea agreements, with incumbent Members of Congress and judges.

D. Resignation and/or withdrawal from candidacy with respect to Congressional or federal judicial office shall not be imposed *involuntarily* against the will of the judge or Member of Congress involved. *Powell v. McCormack, supra.*

E. To assure uniformity and fairness, all proposed plea agreements involving defendants who are Members of Congress, candidates for Congress, or federal judges shall be subject to prior approval by the Public Integrity Section of the Criminal Division.

Questions concerning matters discussed herein should be directed to the Public Integrity Section at FTS 786-5066.

9-16.200 ACCEPTING THE PLEA

9-16.210 Rule 11(c)

Rule 11(c) requires that, before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and inform him/her of, and determine that he/she understands, the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; (2) if the defendant is not represented by an attorney, that he/she has the right to be represented by an attorney at every stage of the proceeding against him/her and, if necessary, one will be appointed to represent him/her; (3) that he/she has the right to plead not guilty or to persist in that plea if it has already been made, and that he/she has the right to be

tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him/her, and the right not to be compelled to incriminate himself/herself; (4) that if his/her plea of guilty or *nolo contendere* is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or *nolo contendere* he/she waives the right to a trial; and (5) that if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he/she has pleaded, that his/her answers may later be used against him/her in a prosecution for perjury or false statement.

9-16.220 Rule 11(d)

Rule 11(d) requires that the court not accept a plea of guilty or *nolo contendere* without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The Court shall also inquire as to whether the defendant's willingness to plead guilty or *nolo contendere* results from prior discussions between the attorney for the government and the defendant or his/her attorney.

9-16.300 PLEA AGREEMENTS

9-16.310 Rule 11(e)

Rule 11(e) recognizes and codifies the concept of plea bargaining. The plea agreement procedure, however, is not mandatory; a court is free to disallow the presentation of the parties' plea agreements. H.R.Rep. No. 94-247, 94th Cong., 1st Sess., 6 (1975). To the extent that a court permits plea agreements, Rule 11(e) shall regulate such agreements. Rule 11(e) recognizes the possibility that the attorney for the government and either the attorney for the defendant or the defendant pro se may enter into an agreement whereby the attorney for the government would do any of three listed options upon the defendant's entering of a plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense. Those three listed options of the attorney for the government, included in Rule 11(e)(1)(A) to (C), are as follows: he/she may move for dismissal of other charges; he/she may make a recommendation or an agreement not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or he/she may agree that a specific sentence is the appropriate disposition of the case. These options are not the only subjects that may be addressed in a plea agreement. For example, the prosecutor may agree not to bring a particular charge against the defendant or against a third party. Moreover, Rule 11(e), though not explicitly stating so, does contemplate that the plea agreement may bind the defendant to do more than just plead guilty or *nolo contendere*. The plea agreement, for example, may also require that

the defendant further cooperate with the prosecution in another case or in another investigation. H.R.Rep. No. 94-247, 94th Cong., 1st Sess., 6 (1975). The courts are forbidden under the Rule from participating in discussions looking toward plea agreements.

If the parties reach a plea agreement, the court, under the mandate of Rule 11(e)(2), shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time that the plea is offered. Although there must be a showing of good cause before the court conducts a disclosure proceeding in camera, Rule 11(e)(2) does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is probably left for the courts to solve on a case-by-case basis. H.R.Rep. No. 94-247, 94th Cong., 1st Sess., 6 (1975).

After the plea agreement has been disclosed, the court may either accept or reject it. If the court accepts the plea agreement, the court must inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

As amended in 1982, Rule 11(c)(1) requires that the court, in appropriate cases, explain to the defendant the effect of any special parole term. It is expected the Rule will be amended to require an explanation of a term of supervised release under the sentencing guidelines. In this regard, the Advisory Committee Note cites with approval the following procedure as recommended in *Moore v. United States*, 598 F.2d 753 (4th Cir.1979):

> [The defendant must be informed]
>
> (1) that a special parole term will be added to any prison sentence he receives;
>
> (2) of the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;
>
> (3) that special parole is entirely different from—and in addition to—ordinary parole; and
>
> (4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

This advice must be given on the record by the court prior to accepting the plea. The Assistant U.S. Attorney should make sure that the sentencing judge advises the defendant of the special parole provision in the terms cited above and that the defendant acknowledges a full understanding of the concepts so conveyed. A court's failure to comply will not, however, necessarily entitle a defendant to relief. *See United States v. Timmreck*, 441 U.S. 780 (1979). It is not necessary that every conceivable conse-

quence of sentencing be communicated to the defendant. *See Bunker v. Wise,* 550 F.2d 1155 (8th Cir.1977).

Although parole has been eliminated for offenses committed on or after November 1, 1987 when the Sentencing Reform Act of 1984 took effect, parole remains in effect for persons who committed their offenses before that date, and this procedure will help to assure the continued viability of pleas entered pursuant to Rule 11. Additionally, it is the better practice for a defendant and his/her counsel to be advised of the special parole provisions in the course of plea negotiations.

It should be noted that Federal Rule of Criminal Procedure 11 may be contended by defendants to apply to statements of intention by prosecutors not in the course of plea agreements. For example, a merely informative statement to defense counsel by the prosecutor (after learning of the defendant's intention to plead guilty to the charges) that the prosecutor does not intend to make any recommendation as to sentence may be alleged to be an agreement ''not to oppose the defendant's request'' within the meaning of Rule 11(e)(1)(B), even though the general practice in the district is one of non-allocution by the government. Attorneys, therefore, should not indiscriminately convey such information to defendants or their counsel outside the plea bargaining context and should be alert to the need to make an adequate record both to preserve traditional judicial discretion with respect to sentencing (unless the agreement is otherwise) and to prevent successful attacks upon judgments based upon guilty pleas.

If the court rejects the plea agreement, the court is mandated by Rule 11(e)(4) to inform the parties of its rejection, on the record, and to advise the defendant either personally in open court or, on a showing of good cause, in camera that the court is not bound by the plea agreement. The court must then afford the defendant the opportunity to withdraw his/her plea, and also must advise the defendant that if he/she persists in his/her guilty plea or plea of *nolo contendere,* the court may dispose of the case less favorably than what was contemplated by the plea agreement. Again, as in the somewhat similar situation of Rule 11(e)(2), Rule 11(e)(4) does not address itself to whether the showing of good cause is to be made in open court or in camera. As in the situation of Rule 11(e)(2), the issue is better left for the courts to solve on a case-by-case basis. H.R.Rep. No. 94-247, 94th Cong., 1st Sess., 6 (1975).

The court must be notified, except when good cause has been shown, of a plea agreement's existence either at the arraignment or some other time, prior to trial, as may be fixed by the court. Fed.R.Cr.P. 11(e)(5). Even though the court accepts a guilty plea, it is prohibited under Federal Rule of Criminal Procedure 11(f) from entering a judgment upon that plea unless it first makes a satisfactory inquiry that the plea has a factual basis. *See United States v. Navedo,* 516 F.2d 293 (2nd Cir.1975); *United States v. Bethany,* 489 F.2d 91 (5th Cir.1974). Rule 11(g) requires that a verbatim

record be made of the proceedings at which the defendant enters a plea. In addition, if the plea is one of guilty or *nolo contendere,* the record must include, without any limitations, the following: the court's advice to the defendant; the inquiry into the voluntariness of the plea including any plea agreement; and the inquiry into the accuracy of a guilty plea.

9-16.400 INADMISSIBILITY OF PLEAS—RULE 11(e)(6)

Rule 11(e) bars the use in evidence of the following (with exceptions) in any civil or criminal proceeding against the person who made them. (1) a plea of guilty which was later withdrawn; (2) a plea of *nolo contendere;* (3) any statement made in the course of any proceeding under Rule 11 regarding a plea of guilty or *nolo contendere;* and (4) any statement made in the course of plea discussions with an attorney for the government which discussions do not result in a plea of guilty or result in a plea of guilty later withdrawn. Such evidence is admissible, however, (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it; or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. This is modeled after Rule 410 of the Fed.R.Evid.

9-16.600 PLEA AGREEMENTS AFFECTING FORFEITABILITY OF FOREIGN ASSETS

The Department of Justice has placed a high priority on seizing and forfeiting the proceeds of criminal activity, particularly those assets derived from, or which have facilitated, drug trafficking and money laundering. Until recently, federal prosecutors vigorously pursued forfeitable property only within the United States, implicitly conceding that once such assets leave this country they go beyond the confiscatory reach of our laws.

To be truly effective, however, forfeiture increasingly requires an international law enforcement effort. With the cooperation of our foreign counterparts, the Department has sought and obtained the forfeiture of tainted wealth generated in the United States, but which its owners placed abroad. Accordingly, prosecutors should not agree to plea agreements which render assets located abroad, but which are otherwise forfeitable, safe from confiscation under either United States or foreign law.

The United States has entered into a number of international agreements, requiring the parties to provide each other with forfeiture assistance, including identifying, restraining, and forfeiting criminally-derived assets found within their borders. Plea agreements which insulate such property from forfeiture may, in effect, be contrary to the international obligations of the United States.

In drafting plea agreements, prosecutors should ensure that defendants agree to cooperate fully in identifying, repatriating, and forfeiting their tainted assets, regardless of where they may have been transferred or hidden. To achieve this end, the plea agreement may provide for polygraph examinations of the defendant regarding his or her domestic and foreign holdings.

A defendant's ability to assist in the repatriation and forfeiture of assets located abroad may be limited by the laws of the foreign government where the assets are located. For example, the United States frequently requests foreign governments to restrain or freeze forfeitable assets such as bank accounts. Once in place, such a restraint cannot be lifted except by the foreign authority which issued it. Even in such cases, however, a plea agreement should still require the defendant to cooperate to the extent possible in any forfeiture efforts.

Any questions regarding international seizures and forfeitures should be directed to the Asset Forfeiture Office, Criminal Division, (202) 524-1267; FTS 368-1267.

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

AUG 22 1990

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Laurence S. McWhorter
Director

RE: Multi-District (Global) Agreement Requests

NOTE: 1. This is issued pursuant to USAM 1-1.510.
2. Distribute to Holders of Volume III, USAM.
3. Insert in front of affected section.

AFFECTS: USAM 9-16.500

PURPOSE: This bluesheet sets forth a guideline for multi-district (global) agreement requests in criminal prosecution.

The following is a new section:

Multi-District (Global) Agreement Requests

No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the U.S. Attorney(s) in each affected district(s) and/or the Assistant Attorney General in the Criminal Division.

(REQUESTING DISTRICT/DIVISION SHALL MAKE KNOWN TO ANY OTHER AFFECTED DISTRICT(S)/DIVISION):

(1) The specific crimes allegedly committed in affected district(s) as disclosed by the defendant. (No prosecution agreement should be made to any crime not disclosed by the defendant.)

(2) Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.

(3) The proposed agreement to be made to the defendant and the applicable sentencing guideline range.

DETAILED TABLE OF CONTENTS FOR CHAPTER 17

9-17.000 SPEEDY TRIAL ACT OF 1974, AS AMENDED

Title I of the Speedy Trial Act of 1974, 88 Stat. 2080, as amended on August 2, 1979, 93 Stat. 328, entitled ''Speedy Trial'', is set forth in 18 U.S.C. §§ 3161 to 3174. The act provides for a 70-day limitation, not counting periods of delay excludable under the act, for the commencement of a criminal trial. The act also has a sanction of dismissal for violation of its time limits that may be with or without prejudice to any reprosecution. The act is applicable to all criminal proceedings except prosecutions of petty and military offenses. 18 U.S.C. § 3172(b). It is inapplicable to juvenile delinquency proceedings, which have their own speedy trial provision. 18 U.S.C. § 5036.

The case law may be found in West's Federal Practice Digest 3d, Criminal Law, at Key Numbers 577.1-577.16. The legislative history is found in S.Rep. No. 1021, 93d Cong., 2d Sess. (1974); H.R.Rep. No. 1508, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong. and Ad.News 7401; S.Rep. No. 212, 96th Cong., 1st Sess. (1979); H.R.Rep. No. 390, 96th Cong., 1st Sess., *reprinted in* [1979] U.S.Code Cong. and Ad.News 1781. These reports are contained in a one volume legislative history of the act prepared by the Federal Judicial Center which was previously distributed to all U.S. Attorneys' offices. Useful and persuasive, but not binding, authority may be found in the Guidelines to the Administration of the Speedy Trial Act of 1974 as Amended (revised December 1979), prepared by the Committee on the Administration of Criminal Law of the Judicial Conference of the United States and distributed to all U.S. Attorneys' offices (Judicial Conference Guidelines), and in the guidelines adopted by the Court of Appeals of the Second Circuit (Second Circuit Guidelines).

The Supreme Court has interpreted the act on two occasions. *Henderson v. United States*, 476 U.S. 321 (1986) (pretrial motion exclusion); *United States v. Rojas-Contreras*, 474 U.S. 231 (1985) (30-day defense preparation period). The Supreme Court presently has under submission, in *United States v. Taylor*, No. 87-573, the question whether a minor violation of the time limitations of the act justifies the dismissal with prejudice of an indictment charging a serious crime.

An analysis of the act prepared in 1984 is presently set forth in JURIS in the U.S. Attorney's Manual. The Appellate Section of the Criminal Division is available for assistance to solve any problems in the interpretation of the act.

Note that other speedy trial issues may arise under the Speedy Trial Clause of the Sixth Amendment. *See Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Loud Hawk*, 106 S.Ct. 648 (1986). The Due Process Clause of the Fifth Amendment is also applicable to pre-trial delay. *See United States v. MacDonald*, 456 U.S. 1 (1982); *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

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FOR CHAPTER 18

9-18.000 DEFENSES

9-18.100 ALIBI DEFENSE

9-18.110 Discovery of Alibi Witnesses (Fed.R.Crim.P. 12.1)

Rule 12.1 of the Federal Rules of Criminal Procedure permits pre-trial discovery by the United States of the alibi and alibi witnesses of a criminal defendant. However, where the United States avails itself of such discovery, it must reciprocate by disclosing the names and addresses of its witnesses placing the defendant at the scene of the offense and rebutting the defendant's alibi witnesses. Because the rule provides for mutuality of discovery, it should satisfy the constitutional requirements of the Fifth Amendment. *See Williams v. Florida*, 399 U.S. 78 (1970); *Wardius v. Oregon*, 412 U.S. 470 (1973). The rule provides that the court may exclude the testimony of alibi witnesses or rebuttal witnesses upon a failure to comply with the requirements of the rule. *United States v. Fitts*, 576 F.2d 837 (10th Cir.1978). It has been held that the sanction of defense witness preclusion is a permissible remedy for discovery abuse in some circumstances. *Taylor v. Illinois*, --- U.S. ---, 108 S.Ct. 646 (decided January 25, 1988); *Escalera v. Coombe*, 826 F.2d 185 (2d Cir.1987).

9-18.120 Practice Under Fed.R.Crim.P. 12.1

In a case in which it is desired to discover the potential alibi defense of a defendant, the prosecutor must make a written demand on the defense for such disclosure. The demand must state the time, date and place at which the crime was committed. The defendant has 10 days to reply unless the court directs a different time. The reply must include the specific place or places at which the defendant claims to have been, and the names and addresses of the witnesses, other than the defendant, who are to be relied upon to establish the alibi. Great care should be exercised in preparing the demand since the specifications contained therein may be treated as a bill of particulars, thereby restricting the government in its proof. *See* USAM 9-18.122, *infra*.

After receipt of the reply, the prosecutor has 10 days to serve on the defendant written notice of the names and addresses of the witnesses on whom the government will rely to establish the defendant's presence at the scene of the crime, and those on whom the government will rely to rebut the testimony of the defense alibi witnesses. Such notice must be served on the defendant at least ten days before trial.

Should additional witnesses be discovered after the service of the notices required by the rule, who, if known, would have been included in the initial disclosure, the party relying on said witnesses is required promptly to notify the other side of the identity of such witnesses.

The court is authorized, in its discretion, to exclude the testimony of a proffered witness, other than the defendant, where a party fails to observe the requirements of the rule. *But see* USAM 9-18.110, *supra*. The court may grant an exception to the rule for good cause shown.

Evidence of an intention to rely upon an alibi or on statements made in connection with such intention is inadmissible against the defendant in any civil or criminal proceeding in the event the alibi defense is withdrawn. Therefore, it is suggested that caution be exercised prior to employing the rule. If the government makes a demand and the defendant gives notice of an alibi defense, and then the government responds with a list of witnesses, the defendant may still withdraw the alibi defense, having obtained discovery of certain government witnesses.

9-18.121 Unsolicited Disclosure by the Defendant

Discovery under Rule 12.1 of the Federal Rules of Criminal Procedure is designed to be a prosecution-initiated device for the primary benefit of the government. A defendant's unsolicited disclosure of an alibi or alibi witnesses should not, without government consent, trigger the government's reciprocal discovery obligations. *See United States v. Bouye*, 688 F.2d 471 (7th Cir.1982); *United States v. Ortega-Chavez*, 682 F.2d 1086 (5th Cir.1982).

9-18.122 Specific Incident During a Continuing Offense

Federal Rule of Criminal Procedure 12.1 may also be used in cases in which the prosecution seeks notice-of-alibi only with respect to a specific period or incident during the course of a continuing offense. *See United States v. Vella*, 673 F.2d 776 (5th Cir.1982). In order to prevent limitation of the government's proof at trial, the Federal Rule of Criminal Procedure 12.1 demand should either include the entire duration of the offense or specify that the period described in the demand does not include the entire time period of the offense.

9-18.130 Suggested Form of Demand

Demand for Disclosure of Alibi Defense

To: [Defendant]

Pursuant to Rule 12.1, Fed.R.Cr.P., you are hereby informed that at ___ o'clock am/pm on ___ (day) of _____ (month), 198___, at _____ (street address or other particular description) in the _____ District of _____, there was committed the crime of _____ with which you are charged by (indictment or information). Demand is hereby made upon you to furnish the U.S. Attorney with a written notice of your intention to offer a defense of alibi within 10 days of this demand.

In the event you intend to offer a defense of alibi, demand is made upon you further to disclose the specific place or places at which you claim to have been at the time of the offense and the names and addresses of the witnesses upon whom you intend to rely to establish such an alibi.

9-18.200 INSANITY DEFENSE

9-18.201 The Insanity Defense Reform Act of 1984

The Insanity Defense Reform Act of 1984, signed into law on October 12, 1984, is the first comprehensive federal legislation governing the insanity defense and the disposition of individuals suffering from mental disease or defect who are involved in the criminal justice system. The more significant provisions (1) significantly modify the standard for insanity previously applied in the federal courts; (2) place the burden of proof on the defendant to establish the defense by clear and convincing evidence; (3) limit the scope of expert testimony on ultimate legal issues; (4) eliminate the defense of diminished capacity; (5) create a special verdict of ''not guilty only by reason of insanity'' which triggers a commitment proceeding; and (6) provide for federal commitment of persons who become insane after having been found guilty or while serving a federal prison sentence.

9-18.202 Policy Concerning Application of Insanity Defense Reform Act of 1984 to Offenses Committed Before Date of Enactment

Due to *ex post facto* considerations, the Department has determined that prosecutors should not seek to apply the new statutory standard for the insanity defense and the burden of proof set forth in 18 U.S.C. § 17 to offenses committed before the date of enactment, October 12, 1984. *United States v. Samuels*, 801 F.2d 1052, 1054 n. 1 (8th Cir.1986); *see Dobbert v. Florida*, 432 U.S. 282, 292 (1970).

The Department has also concluded that the automatic commitment procedures of new 18 U.S.C. § 4243 (and the use of the special verdict of new 18 U.S.C. § 4242) should not be applied to persons whose charged conduct occurred before October 12, 1984. *See United States v. Edwards*, 819 F.2d 262, 265 n. 3 (11th Cir.1987). This policy is based on the legislative intent and the conclusion that the quantum of evidence necessary to produce an insanity acquittal under the prior burden of proof—a reasonable doubt that the defendant was sane—is probably not sufficient under the due process clause to support involuntary commitment. *See Jones v. United States*, 463 U.S. 354 (1983).

All other provisions of the Insanity Defense Reform Act of 1984, including the amendment to Rule 704 of the Federal Rules of Evidence concerning expert opinion testimony, are immediately applicable to pending cases.

See United States v. Freeman, 804 F.2d 1574 (11th Cir.1986); *see* USAM 9-18.230, *infra*.

9-18.203 Mental Competency Distinguished

Mental competency of an accused to stand trial is discussed at USAM 9-9.000. The pertinent statutory provisions under the 1984 Insanity Defense Reform Act are 18 U.S.C. §§ 4241, 4246 and 4247. The Supreme Court decisions on competency to stand trial, *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975), have little to do with the insanity defense, since the standards are quite different. *See Dusky v. United States*, 362 U.S. 402 (1960).

9-18.210 Prior Law

Prior to the adoption of the federal statutory standard in the Insanity Defense Act of 1984, most federal courts were using some form of the proposal of the American Law Institute's Model Penal Code, which provides that:

> (1) [A] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform to the requirements of the law.
>
> (2) ... [T]he terms ''mental disease or defect'' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Model Penal Code, § 4.01 (P.O.D. 1962). *See United States v. Freeman*, 357 F.2d 606 (2d Cir.1966); *United States v. Currens*, 290 F.2d 751 (3rd Cir. 1961); *United States v. Chandler*, 393 F.2d 920 (4th Cir.1968) (*en banc*); *Blake v. United States*, 407 F.2d 908 (5th Cir.1969) (test altered to eliminate volitional prong by *United States v. Lyons*, 731 F.2d 243 (1984)); *United States v. Smith*, 404 F.2d 720 (6th Cir.1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir.1967); *Pope v. United States*, 372 F.2d 710 (8th Cir.1967); *Wade v. United States*, 426 F.2d 64 (9th Cir.1970) (*en banc*); *Wion v. United States*, 325 F.2d 420 (10th Cir.1963); *United States v. Brawner*, 471 F.2d 969 (D.C.Cir.1972) (*en banc*).

9-18.220 The Present Statutory Test: 18 U.S.C. § 17(a)

The present statutory test was signed into law as part of the Insanity Defense Reform Act of 1984 on October 12, 1984, and is applicable to offenses committed after that date. *See United States v. Samuels*, 801 F.2d 1052, 1054 n. 1 (8th Cir.1986) (Ex Post Facto Clause bars application of the new statutory test and burden of proof to prior acts). This standard, now codified at 18 U.S.C. § 17(a), formerly 18 U.S.C. § 20(a), provides as follows:

> (a) AFFIRMATIVE DEFENSE—It is an affirmative defense under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

The standard eliminates entirely the volitional prong of the cognitive volitional test of the ALI Model Penal Code, the capacity to conform conduct to the requirements of the law. It also requires that the mental disease or defect be ''severe.'' This concept was added as a committee amendment ''to emphasize that non-psychotic behavior disorders or neurosis such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense.'' *See* S.Rep. No. 225, Pub.L. No. 98-473, 98th Cong., 1st Sess., p. 229; *see United States v. White*, 766 F.2d 22 (1st Cir.1985). The explicit provision that mental disease or defect does not otherwise constitute a defense is intended to insure that the requirements of the standard are not circumvented in the guise of showing some other affirmative defense such as ''diminished capacity.'' *Id.* The standard is intended to incorporate the conclusion of existing case law that voluntary use of alcohol and drugs, even if they render the defendant unable to appreciate the nature and quality of the act, does not constitute insanity or any other legally valid affirmative defense. *Id.*

9-18.230 Burden of Proving Insanity: 18 U.S.C. § 17(b)

Under 18 U.S.C. 17(b), the burden has been shifted to the defendant to prove the defense of insanity by clear and convincing evidence. This is a change from the previous federal standard set forth in *Davis v. United States*, 160 U.S. 469 (1895), which required the government, once some evidence of insanity had been introduced by the defendant, to prove the defendant's sanity beyond a reasonable doubt.

The *Davis* standard was set forth in the exercise of the Supreme Court's supervisory powers over the federal courts and was not of constitutional magnitude. *See Leland v. Oregon*, 343 U.S. 790, 797 (1952). A defendant may constitutionally be required to prove his insanity by a standard as high as beyond a reasonable doubt. *Id.*, at 799. It therefore follows that placing the burden on the defendant to prove the defense of insanity by clear and convincing evidence is constitutional. *See United States v. Freeman*, 804 F.2d 1574 (11th Cir.1986); *United States v. Amos*, 803 F.2d 419 (8th Cir. 1986); *see Martin v. Ohio*, 107 S.Ct. 1098 (1987).

9-18.240 Scope of Expert Testimony

The Insanity Defense Reform Act amends Federal Rule of Evidence 704 to read as follows:

Rule 704. Opinion on ultimate issue

(a) Except as provided in subdivision (b), 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) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

In the past, psychiatrists and other mental health experts were permitted to state opinions as to whether the defendant met the relevant legal test for insanity. This amendment was intended ''to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact.'' *See* S.Rep. No. 225, 98th Cong., 1st Sess., p. 230. It is intended that expert testimony be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect, and the characteristics of such a disease or defect, if any. *Id.* While the psychiatrist must be permitted to testify fully, in both clinical and commonsense terms, about the defendant's diagnosis, mental state, and motivation at the time of the alleged act, the determination whether the relevant legal test for insanity has been met is a matter for the legal factfinder. *Id.* at p. 231. *See United States v. Edwards*, 819 F.2d 262 (11th Cir.1987). The restriction in Rule 704 on ultimate opinion psychiatric testimony extends to any ultimate mental state of the defendant relevant to ultimate legal conclusions to be proved, such as premeditation in a homicide case, or lack of predisposition in entrapment. *Id.*

This amendment to Rule 704 is applicable to all trials following the effective date of the Act, October 12, 1984. Application of this procedural change to crimes occurring before the effective date of the Act does not violate the Ex Post Facto Clause. *See United States v. Alexander*, 805 F.2d 1458 (11th Cir.1986); *United States v. Prickett*, 790 F.2d 35 (6th Cir. 1986); *United States v. Mest*, 789 F.2d 1069 (4th Cir.1986).

9-18.250 Special Verdict, ''Not Guilty Only By Reason of Insanity,'' and Related Commitment Procedures (18 U.S.C. § 4243)

If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, on motion of either party or the court, the trier of fact shall be instructed to find the defendant (1) guilty, (2) not guilty, or (3) not guilty only by reason of insanity. *See* 18 U.S.C. § 4242(b).

Section 4243 of Title 18 sets forth a procedure for commitment of persons found not guilty only by reason of insanity to a facility suitable to provide care and treatment given the nature of the offense and the characteristics of the defendant. Persons found not guilty only by reason of insanity are automatically committed pending hearing, which must be held within 40 days, on the person's present mental state and dangerousness. A psychiatric or psychological examination and report are required prior to the hearing. At the hearing the burden of proof is on the committed person to prove that release would not create a substantial risk of bodily injury to, or serious damage to the property of, another person due to a present mental disease or defect. If the offense for which the defendant was tried involved bodily injury, serious property damage, or a substantial risk thereof, the defendant must sustain a burden of proof by clear and convincing evidence. With respect to any other offense, the defendant has the burden of proof by the preponderance of the evidence. The Supreme Court has reviewed a similar District of Columbia statute and upheld its constitutionality. *See Jones v. United States*, 463 U.S. 354 (1983).

If the defendant does not meet his burden, the Bureau of Prisons undertakes to place the defendant with the state where the crime was committed or of which state the defendant is a resident. Regardless of whether a state voluntarily accepts the inmate or whether the state requires the federal authorities to involuntarily commit the inmate to state custody under 18 U.S.C. 4247(i)(B), the state cannot discharge the inmate until after it has obtained a discharge order under 18 U.S.C. 4243(f) from the federal committing court.

9-18.260 Other Commitment Procedures

9-18.261 Hospitalization of a Convicted Person Suffering from a Mental Disease or Defect: 18 U.S.C. § 4244

This section established a new sentencing option for convicted defendants who need care or treatment at a ''suitable facility'' for mental disease or defect. After a hearing, a convicted defendant found to be in need of treatment is to be committed to the custody of the Attorney General for treatment. This commitment constitutes a provisional sentence for the maximum term authorized for the offense. If the defendant recovers before the expiration of this term, the court is to proceed to final sentencing and may modify the provisional sentence.

9-18.262 Hospitalization of an Imprisoned Person Suffering from a Mental Disease or Defect: 18 U.S.C. § 4245

This section provides a new right to a judicial hearing for an imprisoned federal defendant who objects to transfer to a mental treatment facility. The hearing is held in the district of the federal hospital

facility to which the prisoner has been sent for evaluation, *United States v. Jones*, 811 F.2d 444 (8th Cir.1987).

9-18.263 Hospitalization of a Person Due for Release But Suffering from a Mental Disease or Defect: 18 U.S.C. § 4246

This section establishes a federal commitment procedure for mentally ill persons who are due to be released but whose release would create a substantial risk of serious bodily injury or serious property damage to others. It is applicable to any person otherwise due for release because of the expiration of a sentence, because of the expiration of the period of commitment to determine competency to stand trial, or because all criminal charges have been dropped solely for reasons related to the mental condition of the person. It is intended that this provision be used only as a last resort when there are no state authorities willing to accept the person for commitment. *See* S.Rep. No. 225, 98th Cong., 1st Sess., at 250. It also provides federal release provisions with which the state or federal custodian must comply.

9-18.270 Criminal Division Contacts

Questions concerning the Insanity Defense Reform Act of 1984 should be directed to Victor Stone (786-4827), Beneva Weintraub (786-4805), or William Brown (786-4821) of the General Litigation and Legal Advice Section. Copies of useful pleadings or decisions involving the insanity defense should be mailed to the General Litigation and Legal Advice Section, Criminal Division, United States Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.

9-18.300 THE DEFENSE OF ENTRAPMENT

9-18.310 Introduction

The defense of entrapment is frequently raised by defendants in criminal proceedings. Entrapment can basically be defined as the act of officers or agents of the government in inducing a person to commit a crime not contemplated by that person, for the purpose of instituting a criminal prosecution against that person. However, the mere act of an officer in furnishing the accused an opportunity to commit a crime, where the criminal intent was already present in the accused's mind, is not ordinarily entrapment.

9-18.320 Recent Cases

The two most recent Supreme Court cases regarding entrapment are *Hampton v. United States*, 425 U.S. 484 (1976) and *United States v. Russell*, 411 U.S. 423 (1973). In *Russell*, the Court simply reaffirmed the principle of *Sorrells v. United States*, 287 U.S. 435 (1932), and *Sherman v. United States*, 356 U.S. 369 (1958), that the entrapment defense focuses on the intent or predisposition of the defendant to commit the crime rather than

upon the conduct of the government's agents. In *Russell*, where it was conceded that a government agent supplied a necessary ingredient in the manufacture of an illicit drug, the Court stated, ''it is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.'' *See Russell*, *supra*, at 436. In *Hampton*, the defendant was charged with selling to government agents heroin supplied by a government informant who had also arranged the meeting between the agents and the defendant in which the sale occurred. In both *Hampton* and *Russell*, government agents were acting in concert with the defendant, *i.e.*, the agents played a significant role in enabling the defendant to consummate a criminal act. However, in each either the jury found or the defendant conceded that he was predisposed to commit the crime for which he was convicted. Thus, because the defense of entrapment turns on the question of predisposition and because the result of governmental activity did not implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission, entrapment did not occur in either *Hampton* or *Russell*.

As stated in *Sherman*, *supra*, ''to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.'' *See Sherman*, *supra*, at 372. Furthermore, *Sorrells* and *Sherman* both recognized ''that the fact that officers or employees of the government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution.'' *See Sorrells*, *supra*, at 441; *Sherman*, *supra*, at 372. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play. A finding of predisposition is fatal to a claim of entrapment.

9-18.330 Proof of Predisposition to Commit the Crime

Finally, as stated in *Sorrells*, *supra*, ''if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as being upon that issue.'' *See Sorrells*, *supra*, at 451. Predisposition to commit the crime charged may be proven through evidence of other crimes, (*i.e.*, the defendant's admission in *Russell*, *supra*, that he had been manufacturing an illegal drug for several months prior to meeting the agent). Evidence of subsequent crimes may also be utilized to rebut an entrapment defendant such as in *United States v. Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972), where evidence was obtained in a search conducted after the filing of the indictment tending to show acts similar to those charged.

9-18.340 Outrageous Government Conduct

It has been suggested that supervisory powers or due process could bar conviction of a defendant based on outrageous police conduct even though

the defendant may have been predisposed to commit the offense. *See Hampton v. United States*, *supra*, at 493-95 (Powell, J., concurring). The federal courts have uniformly applied the predisposition test, however, and have declined to reverse convictions where predisposition has been shown. *See, e.g., United States v. Dougherty*, 810 F.2d 763 (8th Cir.1987); *United States v. Ramirez*, 710 F.2d 535, 539-41 (9th Cir.1983); *United States v. Williams*, 705 F.2d 603, 619-21 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983). In any event, this is a question for the court, not for the jury. *Dougherty*, *supra*, at 770.

9-18.400 STATUTE OF LIMITATIONS DEFENSES

9-18.401 Introduction

A statute of limitations bars prosecution for an offense if the formal prosecution is not commenced, usually by return of an indictment or filing of an information, within a specified period after the completion of the offense. Statutes of limitations have been said to be a defendant's primary safeguard against prejudice from preaccusation delay. *See United States v. Lovasco,* 431 U.S. 783, 789 (1977).

A statute of limitations establishes an arbitrary cutoff point; no showing of prejudice is required. Thus a statute of limitations defense is fundamentally distinct from a claim that a pre-indictment delay violated due process, which involves an evaluation of the reason for the delay and the prejudice to the accused. *Lovasco*, *supra*. Statutes of limitations should also be distinguished from post-accusation rights to promptness, such as the constitutional right to a speedy trial and rights under the Speedy Trial Act.

9-18.402 Length of Limitations Period

Current federal law contains a single statute prescribing a general period of limitations and several statutes applying to specific offenses.

Section 3282 of Title 18 is the statute of general application. It states that ''[e]xcept as otherwise expressly provided by law'', a prosecution for a non-capital offense shall be instituted within five years after the offense was committed.

Section 3281 of Title 18 deals with capital offenses and provides that an indictment for an offense ''punishable by death'' may be filed at any time. Despite the invalidity of most current federal statutory death penalty provisions, it is arguable that the unlimited time period remains applicable to those statutes which formerly carried that penalty. *See United States v. Helmich*, 521 F.Supp. 1246 (M.D.Fla.1981), *aff'd on other grounds*, 704 F.2d 547 (11th Cir.1983); *see Matter of Extradition of Kraiselburd*, 786 F.2d 1395 (9th Cir.1986).

A one year statute of limitations is provided for criminal contempt under 18 U.S.C. § 402 (*see* 18 U.S.C. § 3285) and for seduction in violation of 18 U.S.C. § 2198 (*see* 18 U.S.C. § 3286).

Section 507(a) of Title 17 provides that no criminal proceeding shall be maintained under Title 17 (relating to copyrights) unless commenced within three years after the cause of action arose.

Section 6531 of Title 26 provides that prosecutions for violation of the internal revenue laws shall be commenced within three years after commission of the offense, except for eight enumerated categories of offenses as to which a six-year limitations period is made applicable. *See* USAM 9-18.411, *infra*.

Section 3291 of Title 18 provides that prosecutions for violations of nationality, citizenship, and passport laws, or a conspiracy to violate such laws, shall be commenced within ten years after the commission of the offense. Section 19 of the Internal Security Act of 1950, 64 Stat. 1005, provides a ten-year limitations period for prosecutions under the espionage statutes, 18 U.S.C. §§ 792 to 794.

Section 2278 of Title 42 provides a similar ten-year period for prosecution of restricted data offenses under the atomic energy laws, 42 U.S.C. §§ 2274 to 2276.

Section 783(e) of Title 50 provides that a prosecution for an offense under that section, part of the Subversive Activities Control Act, shall be instituted within ten years after the commission of the offense.

9-18.403 Continuing Offenses

Normally, a statute of limitations begins to run on the date when the offense is complete. *See Toussie v. United States*, 397 U.S. 112 (1970). Some offenses, by their nature, have attributes of nonfinality and are called continuing offenses. For example, possession-of-contraband offenses are continuing offenses. *Von Eichelberger v. United States*, 252 F.2d 184 (9th Cir. 1958). Escape from federal custody is a continuing offense, *see United States v. Bailey*, 444 U.S. 394 (1980), as is conspiracy, *see* USAM 9-18.404, *infra*.

The finding that an offense is a continuing offense is disfavored. It must be found that ''the explicit language of the substantive criminal statute compels such a conclusion, or that the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.'' *Toussie*, *supra*, at 115.

9-18.404 Conspiracy

Conspiracy is a continuing offense. For statutes such as 18 U.S.C. § 371 which require an overt act in furtherance of the conspiracy, the statute of

limitations begins to run on the date of the last overt act. *See Fiswick v. United States*, 329 U.S. 211 (1946); *United States v. Butler*, 792 F.2d 1528 (11th Cir.1986). For statutes which do not require proof of an overt act, such as RICO (18 U.S.C. § 1961) or 21 U.S.C. § 846, the government must allege and prove that the conspiracy continued into the limitations period. The crucial question in this regard is the scope of the conspiratorial agreement, and the conspiracy is deemed to continue until its purpose has been achieved or abandoned. *See United States v. Northern Imp. Co.*, 814 F.2d 540 (8th Cir.1987); *United States v. Coia*, 719 F.2d 1120 (11th Cir. 1983), *cert. denied*, 466 U.S. 973 (1984).

An individual's ''withdrawal'' from a conspiracy starts the statute of limitations running as to that individual. ''Withdrawal'' from a conspiracy for this purpose means that the conspirator must take affirmative action by making a clear breast to the authorities or communicating his disassociation to the other conspirators. *See United States v. Gonzalez*, 797 F.2d 915 (10th Cir.1986).

9-18.405 Assimilative Crimes Act

The Assimilative Crimes Act of 1948 (18 U.S.C. § 13) makes punishable in federal court criminal acts or omissions not made punishable by enactments of Congress if committed within the special maritime and territorial jurisdiction of the United States (18 U.S.C. § 7), if the act is a crime under the applicable state law. Only the substantive offenses of a state are assimilated into federal law. Thus, although case authority in this area is slight, a different state period of limitation will not control prosecution under the act. *See Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 n. 1 (5th Cir.1971), *cert. denied*, 405 U.S. 989 (1972).

9-18.406 RICO

The Racketeer Influenced and Corrupt Organizations (''RICO'') Statute, 18 U.S.C. § 1961 *et seq.*, requires that state crimes used as predicate offenses be ''chargeable under state law.'' The federal courts have uniformly held that regardless of the running of the state statute of limitations, a defendant is still ''chargeable'' with the state offense within the meaning of 18 U.S.C. § 1961(1)(A). *See* cases cited in *United States v. Licavoli*, 725 F.2d 1040, 1046-47 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984). The reference to state law in the statute is simply to define the conduct, and is not meant to incorporate state procedural law.

9-18.407 Defective Indictments; Superseding Indictments

If an indictment is dismissed because of legal defect or grand jury irregularity, the government may return a new indictment within six months

of the date of dismissal or within the original limitation period (whichever is later). After the original limitation period has expired, a superseding indictment may narrow, but not broaden, the charges made in the original indictment. *See* 18 U.S.C. §§ 3288, 3289; *United States v. Miller*, 471 U.S. 130 (1985); *United States v. Grady*, 544 F.2d 598 (2d Cir.1976).

9-18.408 Waiver

A knowing and intelligent waiver of the statute of limitations is valid; *see United States v. Levine*, 658 F.2d 113, 120 n. 8 (3d Cir.1981); *United States v. Wild*, 551 F.2d 418 (D.C.Cir.), *cert. denied*, 431 U.S. 916 (1977); but contra, *Benes v. United States*, 276 F.2d 99 (6th Cir.1960). A plea of guilty (without expressly reserving the statute of limitations) has been held to waive later assertion of the defense, *see United States v. Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States v. Guerro*, 694 F.2d 898 (2d Cir.1982), *cert. denied*, 459 U.S. 1222 (1983).

9-18.409 Tolling of Statutes of Limitations

The running of statutes of limitations is tolled during periods of fugitivity. 18 U.S.C. § 3290. Physical absence from the jurisdiction is not required to trigger this tolling provision. *See United States v. Singleton*, 702 F.2d 1159 (D.C.Cir.1983); *United States v. Wazney*, 529 F.2d 1287 (9th Cir.1976).

The running of a statute of limitations may also be tolled, on application of the United States, during the pendency of an official request to a foreign court or authority to obtain evidence located in a foreign country. *See* 18 U.S.C. § 3292.

9-18.411 Tax Offenses

A special statute of limitations applicable to tax offenses is found in 26 U.S.C. § 6531. It provides in part that, if a ''complaint is instituted'' within the limitations period prescribed (*i.e.*, either three years or six years, depending on the type of internal revenue offense), then ''the time shall be extended until the date which is nine months after the date of the making of the complaint.'' The courts have ruled that, in order to toll the statute of limitations, the complaint must be valid, *i.e.*, it must establish probable cause to believe the accused committed an offense. *See Jaber v. United States*, 381 U.S. 214 (1965); *United States v. Bland*, 458 F.2d 1, 3-6 (5th Cir.1972), *cert. denied*, 409 U.S. 843 (1972); *United States v. Miller*, 491 F.2d 638, 644-45 (5th Cir.), *cert. denied*, 419 U.S. 970 (1974).

Aside from continuing offenses and the application of special provisions suspending the running of the statute of limitations (*e.g.*, when a person is a fugitive), statutes of limitations normally begin to run when

the offense is complete. In the internal revenue statute, however, Congress has provided that, in the case when a tax return is filed or a tax is paid before the statutory deadline, the limitations period begins to run on the date when the return or payment was due (without regard to any extension of time obtained by the taxpayer). *See* 26 U.S.C. §§ 6531 and 6513. These statutes are based on the desirability, for purposes of administrative convenience in criminal tax investigations, of a uniform expiration date for most taxpayers despite variations in the dates of actual filing. *But see United States v. Habig*, 390 U.S. 222, 225, 226 (1968). *Habig* held that, where an extension of time is secured but the return is filed after the original statutory due date, the period of limitations starts to run when the return is filed rather than on the date (but for the extension) when it was due. Otherwise, the limitation period would begin before the offense was even committed.

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FOR CHAPTER 19

9-19.000 DOCUMENTARY MATERIAL HELD BY THIRD PARTIES

Pursuant to Section 201 of Title II of the Privacy Protection Act of 1980 (Pub.L. No. 96-440, Sec. 201), the Attorney General published ''Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties.'' (*See* 28 C.F.R. § 59). The intent of the regulations is to protect against unnecessary invasions of personal privacy and to recognize the potential for such invasions when the government seeks to obtain documentary materials from third parties not themselves under investigation. The general thrust of these guidelines is that a search warrant should *not* be used to obtain documentary materials from a non-suspect, except where the use of a subpoena or other less intrusive means would jeopardize the availability or usefulness of the materials sought. When a warrant is sought, different provisions apply depending on whether the person from whom the materials are sought is: (1) a disinterested third party; (2) a disinterested third party who is a physician, lawyer, or clergyman; or (3) a person possessing the materials sought for the purposes of public communication (*e.g.*, a newspaper, book or broadcast). This third provision is regulated directly by statute (42 U.S.C. § 2000aa). These regulations and this chapter of the United States Attorneys' Manual are directed largely at the first two provisions.

9-19.100 DEFINITIONS OF TERMS

9-19.110 Documentary Materials—Definition

The term ''documentary materials'' means any materials on which information is recorded. It includes, but is not limited to, written or printed materials, photographs, films or negatives, audio or video tapes, and materials upon which information is electronically or magnetically recorded. It does *not* include materials which constitute contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed. *See* 28 C.F.R. § 59.2(c).

9-19.120 Disinterested Third Party—Definition

The term ''disinterested third party'' means a person or organization not reasonably believed to be a suspect in the criminal offense for which the materials are sought nor related by blood or marriage to such a suspect. *See* 28 C.F.R. § 59.2(b).

9-19.200 PROCEDURES TO BE UTILIZED UNDER GUIDELINES

9-19.210 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party

Normally a search warrant should *not* be used to obtain documentary materials held by disinterested third party. However, a search warrant may be sought if the use of a subpoena or other less intrusive means would

substantially jeopardize the availability or usefulness of the materials sought. Except as provided in USAM 9-19.220, the application for such a warrant must be authorized by an attorney for the government. Attorney for the government is defined in the regulations as having the same meaning as that term does in Rule 54(c) of the Federal Rules of Criminal Procedure and includes all U.S. Attorneys and Assistant U.S. Attorneys. In addition, the Department takes the position that the phrase ''an authorized assistant of the Attorney General'' set forth in Rule 54(c) as part of the definition of the term ''attorney for the government'' is broad enough to include all Department of Justice attorneys assigned to investigate or prosecute cases and their supervisors.

An exception to the authorization requirement may be made in emergency situations, where the immediacy of the need to seize the materials does not permit an opportunity to secure authorization from the attorney for the government. In such situations the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency. However, the U.S. Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution) must be notified of the authorization and its justifying basis within 24 hours of the authorization. 28 C.F.R. § 59.4(a).

9-19.220 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Physician, Lawyer, or Clergyman and Contain Confidential Information on Patients, Clients, or Parishioners Furnished or Developed for Purposes of Professional Counseling or Treatment

A similar but somewhat different procedure is followed when the disinterested third party is a physician, lawyer, or clergyman and the materials sought or other materials likely to be reviewed during the execution of the search warrant contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment. As with other disinterested third parties, a search warrant normally should *not* be used to obtain such confidential materials. A warrant will be used only if the use of a subpoena, or other less intrusive means of obtaining the materials, such as a request, would substantially jeopardize the availability or usefulness of the materials sought; access to the materials is of substantial importance to the investigation or prosecution for which they are sought; and the application of the warrant has been approved by the appropriate Deputy Assistant Attorney General (DAAG) upon the recommendation of the U.S. Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution). The appropriate DAAG would be a DAAG for the division which supervises the underlying offense being investigated or prosecuted.

If the documentary materials were created or compiled by a physician but, as a matter of practice, the physician's files are maintained at a hospital or clinic, the files, for purposes of these regulations, are to be deemed in the private possession of the physician; therefore, the regulations would apply if the physician is a disinterested third party. Such records would, however, not be deemed in the private possession of the physician if the hospital or clinic itself were a suspect.

Again, an exception to the authorization requirement may be made in emergency situations where there is an immediate need to seize the materials and not enough time to secure Deputy Assistant Attorney General approval. In such situations the application may be authorized by the U.S. Attorney or the supervising Department of Justice attorney. However, the appropriate Deputy Assistant Attorney General must be notified of the authorization and its justifying basis within 72 hours of the authorization. In these cases (physician, lawyer, or clergyman) there is no provision for an emergency authorization by a supervisory law enforcement officer as is the case for other disinterested third parties. 28 C.F.R. § 59.4(b)(1) and (2).

See USAM 9-19.700, *infra*, for a list of contact points in the several divisions to contact for advise and Deputy Assistant Attorney General approval.

9-19.221 Request for Authorization to the Deputy Assistant Attorney General

Where the materials sought are in the possession of a disinterested third party physician, lawyer, or clergyman, application for a warrant must be approved by the appropriate Deputy Assistant Attorney General as described in USAM 9-19.220 *supra*. The request for authorization from the Deputy Assistant Attorney General should be made in writing whenever possible and is to include a copy of the warrant application as well as a brief description of the facts and circumstances which form the basis for the recommendation of the authorization. In addition, the request must include a statement that it is authorized by the U.S. Attorney or the supervising Department of Justice attorney. If the request for authorization is made orally, or if, in an emergency situation, the application is authorized by the U.S. Attorney or the supervising Department of Justice attorney, a written record, as described above, must be sent to the Deputy Assistant Attorney General within seven days. 28 C.F.R. § 59.4(b)(3).

9-19.230 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Professional Involved in a Doctor-Like Therapeutic Relationship

There may be additional third-party professionals (*e.g.*, psychologists, psychiatric social workers, or nurses) who possess materials con-

taining private information similar to that held by doctors. The regulations are intended to cover these relationships as well. In such cases, the U.S. Attorney (or supervising Department of Justice attorney) should determine whether a search for such materials would involve review of extremely confidential information furnished or developed for purposes of professional counseling or treatment, and if it would, the provisions described in USAM 9-19.220 for obtaining materials from physicians, lawyers, or clergymen must be followed. At a minimum, the requirements for third party search warrants described in USAM 9-19.210 must be observed in all cases. 28 C.F.R. § 59.4(b)(5).

9-19.240 Procedures Where Materials Sought Are in Possession of a Person Who Holds Them in Relation to Some Form of Public Communication

Search warrants directed at seizure of any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book broadcast, or other similar form of public communication are governed by Title I of the Privacy Act of 1980 (42 U.S.C. § 2000aa *et seq.*). Such warrants can only be sought under very special circumstances, and the statute must be followed closely. Questions as to such searches should be directed to the Office of Enforcement Operations of the Criminal Division, David Simonson (786-4987).

9-19.300 CONSIDERATIONS BEARING ON CHOICE OF METHODS

The guidelines set forth certain factors which should be considered in determining whether the use of a subpoena or other means less intrusive than a search warrant would substantially jeopardize the availability or usefulness of the materials sought. These factors are set forth in 28 C.F.R. § 59.4(c).

9-19.400 NON-APPLICABILITY IN CERTAIN SITUATIONS

The guidelines do not apply to certain types of investigatory activities and searches. These include audits; examinations; regulatory, compliance, or administrative inspections; foreign intelligence or counterintelligence activities by a government authority pursuant to otherwise applicable law; border and customs searches; access to documentary materials for which valid consent has been obtained; and access to documentary materials which have been abandoned at a known location or which cannot be obtained by a subpoena because they are in the possession of a person whose identity is not known and cannot be determined with reasonable effort.

The guidelines do not supersede any other statutory, regulatory, or policy limitations on access to or the use or disclosure of particular types of documentary materials. These include, but are not limited to, the provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401

et seq.); and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, as amended (42 U.S.C. § 4541 *et seq.*). 28 C.F.R. § 59.3.

9-19.500 SANCTIONS

Any federal officer or employee who violates the guidelines set forth in 28 C.F.R. § 59 is subject to appropriate disciplinary action by the agency or department by which he/she is employed. *See* 28 C.F.R. § 59.6.

9-19.600 CRIMINAL TAX OFFENSES

Where the warrant application involves a search for evidence of a criminal tax offense under the jurisdiction of the Tax Division, the warrant must be specifically approved in advance by that Division pursuant to USAM 6-2.330. 28 C.F.R. § 59.4, footnote 1.

9-19.700 CONTACT POINTS FOR ADVICE AND APPROVAL

In all cases involving offenses supervised by the Criminal Division all questions as to these regulations and inquiries as to Deputy Attorney General authorization should be directed to the Office of Enforcement Operations at 633-3684.

For offenses under the jurisdiction of the Tax Division, contact the Chief of the Criminal Section of the Tax Division at 633-2973.

For offenses under the jurisdiction of the Civil Rights Division, contact the Chief of the Criminal Section of the Civil Rights Division at 633-3204.

For offenses under the jurisdiction of any other division, contact the office of the Assistant Attorney General or a Deputy Assistant Attorney General for the appropriate division.

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FOR CHAPTER 20

9-20.000 MARITIME, TERRITORIAL AND INDIAN JURISDICTION

9-20.001 In General

Jurisdiction over most personal and property crimes within our federal system is vested in the states. The federal government enacts criminal laws primarily for the protection of its own functions (*e.g.*, 18 U.S.C. § 1001); personnel (*e.g.*, 18 U.S.C. § 1114); and property (*e.g.*, 18 U.S.C. § 641). It intrudes into the area generally left to the states only where special circumstances warrant its providing auxiliary law enforcement assistance to the states unable to act beyond their borders (*e.g.*, 18 U.S.C. §§ 659, 2113, 2314). The underlying conduct is based upon or linked to some ''nexus,'' such as use of the mails, 18 U.S.C. § 1341, interstate commerce, 18 U.S.C. § 2314, or federal insurance, 18 U.S.C. § 2113.

There are, in addition, certain instances in which the special relationship the United States Government bears to the site of the offense provides the rationale and basis for the exercise of plenary criminal jurisdiction. It is with this latter class of offenses that this chapter is concerned.

9-20.100 SPECIAL MARITIME AND TERRITORIAL JURISDICTION

A number of Title 18 sections specifically declare certain conduct to be a federal crime if committed ''within the special maritime and territorial jurisdiction of the United States.'' *See, e.g.*, murder, 18 U.S.C. § 1111. In some instances, the Assimilative Crimes Act, 18 U.S.C. § 13, is also applicable. *See also* 15 U.S.C. § 1175; 15 U.S.C. § 1243; 16 U.S.C. § 3372.

The term ''special maritime and territorial jurisdiction of the United States'' is defined in seven subsections of 18 U.S.C. § 7. They relate to maritime jurisdiction, 18 U.S.C. §§ 7(1), 7(2); lands and buildings, 18 U.S.C. § 7(3); Guano Islands, 18 U.S.C. § 7(4); aircraft, 18 U.S.C. § 7(5); spacecraft, 18 U.S.C. § 7(6); and places outside the jurisdiction of any nation, 18 U.S.C. § 7(7).

9-20.110 Territorial Jurisdiction

Of the several categories listed in 18 U.S.C. § 7, § 7(3) is the most significant. 18 U.S.C. § 7(3) provides:

> The term ''special maritime and territorial jurisdiction of the United States,'' as used in this title, includes:
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

As is readily apparent, this subsection, and particularly its second clause, bears a striking resemblance to the 17th Clause of Article 1, § 8 of the Constitution. This clause provides:

> The Congress shall have power ... *To exercise exclusive Legislation in all Cases whatsoever*, over such District (not exceeding ten Miles square) as may, be Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority *over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.* [emphasis supplied]

The constitutional phrase ''exclusive legislation'' is the equivalent of the statutory expression ''exclusive jurisdiction.'' *See James v. Dravo Contracting Co.*, 302 U.S. 134, 141 (1937), *citing, Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930).

Until the decision in *Dravo*, it had been generally accepted that when the United States acquired property with the consent of the state for any of the enumerated purposes, it acquired exclusive jurisdiction by operation of law, and any reservation of authority by the state, other than the right to serve civil and criminal process, was inoperable. *See Surplus Trading Co. v. Cook, supra*, at 652-56. When *Dravo* held that a state might reserve legislative authority, *e.g.*, the right to levy certain taxes, so long as that did not interfere with the United States' governmental functions, amendment to 18 U.S.C. § 7(3) by addition of the words ''or concurrent,'' was required to restore criminal jurisdiction over those places previously believed to be under exclusive federal legislative jurisdiction. *See* H.Rep.No. 1623, 76th Cong.3d Sess. 1 (1940); S.Rep. No. 1788, 76th Cong.3d Sess. 1 (1940).

Dravo also settled that the phrase ''other needful building'' was not to be strictly construed to include only military and naval structures, but was to be construed as ''embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government.'' *See James v. Dravo Contracting Co., supra*, at 142-43. It therefore properly embraces courthouses, customs houses, post offices and locks and dams for navigation purposes.

The ''structures'' limitation does not, however, prevent the United States from holding or acquiring and having jurisdiction over land acquired for other valid purposes, such as parks and irrigation projects. This is because Clause 17 is not the exclusive method of obtaining jurisdiction. Jurisdiction may also be obtained by the United States reserving it when sovereign title is transferred to the state upon its entry into the Union or by cession of jurisdiction after the United States has otherwise

acquired the property. *See Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 526-27, 538, 539 (1885); *James v. Dravo Contracting Co., supra*, at 142; *Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *Surplus Trading Co. v. Cook, supra*, at 650-52.

The United States may hold or acquire property within the borders of a state without acquiring jurisdiction. It may acquire title to land necessary for the performance of its functions by purchase or eminent domain without the state's consent. *See Kohl v. United States*, 91 U.S. 367, 371, 372 (1976). But it does not thereby acquire legislative jurisdiction by virtue of its proprietorship. The acquisition of jurisdiction is dependent on the consent of or cession by the state. *See Mason Co. v. Tax Commission*, 302 U.S. 186, 197 (1937), *James v. Dravo Contracting Co., supra*, at 141-42.

Such consent may be evidenced by a specific enactment or by general constitutional or statutory provision. Cession of jurisdiction by the state also requires acceptance by the United States. *See Adams v. United States*, 319 U.S. 312 (1943); *Surplus Trading Co. v. Cook, supra*, at 651-52. Whether or not the United States has jurisdiction is a federal question. *See Mason Co. v. Tax Commission, supra*, at 197.

Prior to February 1, 1940, it was presumed that the United States accepted jurisdiction whenever the state offered it because the donation was deemed a benefit. *See Fort Leavenworth R.R. Co. v. Lowe, supra*, at 528. This presumption was reversed by enactment of the Act of February 1, 1940, codified at 40 U.S.C. § 255. This statute requires the head or authorized officer of the agency acquiring or holding property to file with the state a formal acceptance of such ''jurisdiction, exclusive or partial ... as he may deem desirable,'' and further provides that in the absence of such filing ''it shall be conclusively presumed that no such jurisdiction has been acquired.'' *See Adams v. United States, supra* (district court is without jurisdiction to prosecute soldiers for rape committed on an army base prior to filing of acceptance prescribed by statute). Enactment of 40 U.S.C. § 255 did not retroactively affect jurisdiction previously acquired. *See Markham v. United States*, 215 F.2d 56 (4th Cir.), *cert. denied*, 348 U.S. 939 (1954); *United States v. Heard*, 270 F.Supp. 198, 200 (W.D.Mo.1967).

Summary

The United States may exercise plenary criminal jurisdiction over lands within state borders:

A. Where it reserved such jurisdiction upon entry of the state into the union;

B. Where, prior to February 1, 1940, it acquired property for a purpose enumerated in the Constitution with the consent of the state;

C. Where it acquired property whether by purchase, gift or eminent domain, and thereafter, but prior to February 1, 1940, received a cession of jurisdiction from the state; and

D. Where it acquired the property, and/or received the state's consent or cession of jurisdiction after February 1, 1940, *and* has filed the requisite acceptance.

9-20.111 Determining Federal Jurisdiction

When instances are reported to the U.S. Attorney of offenses committed on land or building occupied by agencies of the federal government, unless the crime reported is a federal offense regardless of where committed, such as assault on a federal officer or possession of narcotics, the United States has jurisdiction only if the land or building is within the special territorial jurisdiction of the United States. A convenient method of determining the jurisdictional status is to contact an appropriate attorney with the agency having custody of the land. If the land is other than a military base, the regional counsel's office of the General Services Administration usually has the complete roster of all federal lands and buildings in its region and can frequently provide a definitive answer to jurisdiction. If the land in question is part of a military base, contact with the post Staff Judge Advocate may be helpful. If the military personnel in the field or the field attorneys of the agency having responsibility for the land are unable to render assistance, the General Litigation and Legal Advice Section of the Criminal Division should be called.

9-20.112 Proof of Territorial Jurisdiction

There has been a recent trend to treat certain ''jurisdictional facts'' that do not bear on guilt (*mens rea* or *actus reus*) as non-elements of the offense, and therefore as issues for the court rather than the jury, and, in any event requiring proof by only a preponderance that the offense was committed in the territorial jurisdiction of the court to establish that venue has been properly laid. *See United States v. Bowers*, 660 F.2d 527, 531 (5th Cir.1981); *Government of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir.1979); *United States v. Black Cloud*, 590 F.2d 270 (8th Cir.1979) (jury question); *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974). The court in *Government of Canal Zone v. Burjan, supra*, applied the preponderance test to determinations of whether or not the offenses took place within the Canal Zone which established not merely proper venue but subject matter jurisdiction as well. *Id.* at 694-95. Other cases, however, hold that the issue of whether the United States has jurisdiction over the site of a crime is a judicial question, *see United States v. Jones*, 480 F.2d 1135, 1138 (2d Cir.1973), but that the issue of whether the act was committed within the borders of the federal enclave is for the jury and must be established beyond a reasonable doubt. *See United States v. Jones, supra;*

United States v. Parker, 622 F.2d 298 (8th Cir.1980). The law of your circuit must be consulted. The decision in *Burjan* should be viewed with caution. The analogy between territorial jurisdiction for venue has much to recommend it. Nevertheless, it is important to recognize that the two are not of equal importance. As the *Burjan* court noted, citing Rule 12 Federal Rules of Criminal Procedure, subject matter jurisdiction is so important that it cannot be waived and may be noticed at any stage of the proceeding, *see Government of the Canal Zone v. Burjan, supra*, at 693, and the Ninth Circuit in *Powell* rested its ruling that venue need be proved by only a preponderance on the relative unimportance of venue as evidenced by its waivability. There is clear distinction between the question of which court of a sovereign may try an accused for a violation of its laws and whether the sovereign's law has been violated at all.

Proof of territorial jurisdiction may be by direct or circumstantial evidence, and at least at the trial level may be aided by judicial notice. *See United States v. Bowers, supra*, at 530-31; *Government of Canal Zone v. Burjan, supra*, at 694. *Compare Burjan, supra* with *United States v. Jones, supra*, concerning the role judicial notice may play on appeal.

9-20.113 Assimilative Crimes Act, 18 U.S.C. § 13

The Assimilative Crimes Act, 18 U.S.C. § 13, makes state law applicable to lands reserved or acquired as provided in 18 U.S.C. § 7(3), when the act or omission is not made punishable by an enactment of Congress.

Prosecutions instituted under this statute are not to enforce the laws of the state, but to enforce federal law, the details of which, instead of being recited, are adopted by reference. In addition to minor violations, the statute has been invoked to cover a number of serious criminal offenses defined by state law such as burglary and embezzlement. However, the Assimilative Crimes Act cannot be used to override other federal policies as expressed by acts of Congress or by valid administrative orders.

The prospective incorporation of state law was upheld in *United States v. Sharpnack*, 355 U.S. 286 (1957). State law is assimilated only when no ''enactment of Congress'' covers the conduct. The application of this rule is not always easy. In *Williams v. United States*, 327 U.S. 711, 717 (1946), prosecution of a sex offense under a state statute with a higher age of consent was held impermissible, but a conviction for a shooting with intent to kill as defined by state law was upheld, despite the similarity of provisions of 18 U.S.C. § 113. *Fields v. United States*, 438 F.2d 205 (2d Cir.), *cert. denied*, 403 U.S. 907 (1971); *but see Hockenberry v. United States*, 422 F.2d 171 (9th Cir.1970). *See also United States v. Smith*, 574 F.2d 988 (9th Cir.1978) (sodomy); *United States v. Bowers*, 660 F.2d 527 (5th Cir.1981) (child abuse).

The Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 801 *et seq.*, because of its unlimited applicability, is not considered an ''enactment of Congress'' within the meaning of 18 U.S.C. § 13. *See United States v. Walker*, 552 F.2d 566 (4th Cir.1977), *cert. denied*, 434 U.S. 848 (1977) (drunk driving). *See also Franklin v. United States*, 216 U.S. 559 (1910). Military personnel committing acts on an enclave subject to federal jurisdiction which are not made an offense by federal statutes other than the U.C.M.J. may therefore be prosecuted in district court for violations of state law assimilated by 18 U.S.C. § 13, even though they are also subject to court martial. Dual prosecution, it should be noted, is constitutionally precluded by the Double Jeopardy Clause. *See Grafton v. United States*, 206 U.S. 333 (1907).

Section 13 of Title 18 does not assimilate penal provisions of state regulatory schemes. *See United States v. Marcyes*, 557 F.2d 1361 (9th Cir.1977). Neither does it incorporate state administrative penalties, such as suspension of drivers licenses. *See United States v. Rowe*, 599 F.2d 1319 (4th Cir.1979); *United States v. Best*, 573 F.2d 1095 (9th Cir.1978).

Federal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law. *See United States v. Adams*, 502 F.Supp. 21 (S.D.Fla.1980) (carrying concealed weapon in federal courthouse); *United States v. Woods*, 450 F.Supp. 1335 (D.Md. 1978) (drunken driving on parkway).

In *Adams, supra*, the defendant was charged with carrying a concealed weapon in a United States Courthouse in violation of 18 U.S.C. § 13 and the pertinent Florida felony firearms statute. In dismissing the indictment, the *Adams* court concluded that a General Services Administration (GSA) petty offense weapons regulation (41 C.F.R. § 101-20.313), explicitly provided for by statute, 40 U.S.C. § 318a, amounts to an enactment of Congress within the meaning of 18 U.S.C. § 13 and, therefore, the defendant could not be prosecuted by the assimilation of state law which prohibits the same precise act as the regulation.

It is important to note, however, that a critical provision of the GSA regulations apparently was not considered in *Adams*. *See* 41 C.F.R. § 101-20.315 provides in part:

> Nothing in these rules and regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated.

This non-abrogation provision arguably would permit the assimilation of appropriate state firearms laws or other state statutes notwithstanding the existence of the GSA regulations. It appears that this language has never been considered in any reported case. Moreover, no discussion of the meaning of this language appears in the pertinent parts of the Federal

Register, 43 *Fed.Reg.* 29001, July 5, 1978; 41 *Fed.Reg.* 13378, March 30, 1976. We believe it would be reasonable to interpret this non-abrogation provision as permitting the government, in its discretion, to proceed under 18 U.S.C. § 13 and appropriate state firearms laws, rather than under the GSA weapons regulation.

9-20.114 Limited Criminal Jurisdiction Over Property Held Proprietorially

Although we have continually emphasized in the preceding material that the United States may not exercise criminal jurisdiction over property that it holds only in a proprietorial capacity, it would be more accurate to state that it is not wholly without the power to protect its property and control its use. State jurisdiction ''does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power.'' *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (finding constitutional authority in the Property Clause, Art. IV, § 3, cl. 1).

There are a number of specific statutes that are applicable independently of 18 U.S.C. § 7(3) and the acquisition of legislative jurisdiction. Among these are 18 U.S.C. § 1382 (entering military, naval or Coast Guard property). *See United States v. Holmes*, 414 F.Supp. 831, 837 n. 9 (D.Md. 1976) and text, finding constitutional authority for 18 U.S.C. § 1382 in the Property Clause and/or the military power clauses, Const., Art. I, § 8, cls. 12 and 14, aided by the Necessary and Proper Clause, Art. I, § 8, cl. 18.

On occasion, courts have upheld convictions for trespass and minor police offenses in violation of regulations made criminal by statute committed on land and facilities held proprietorially, on authority of the Property Clause and/or the specific constitutional authority for carrying on the function. *See, e.g., United States v. Seward*, 687 F.2d 1270, 1277 (10th Cir.1982), *cert. denied*, 459 U.S. 1147 (1983) (conviction for trespass on NRC facility upheld on basis of Property Clause); *United States v. Gliatta*, 580 F.2d 156 (5th Cir.1978) (conviction of traffic offenses on postal facility upheld on basis of Property Clause and/or postal power, Art. I, § 8, cl. 7, aided by the Necessary and Proper Clause).

9-20.115 Prosecution of Military Personnel

Many violations of federal criminal law are also violations of the Uniform Code of Military Justice (U.C.M.J.) for which military personnel are subject to court martial (*e.g.*, drug offenses, theft of government property, etc.). The U.C.M.J. also punished a number of acts which are not otherwise specifically declared to be federal crimes, but which may become

such when committed on a facility over which the United States exercises legislative jurisdiction as a result of assimilation of state law under the Assimilative Crimes Act. *See* USAM 9-20.113, *supra*.

To avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction. The agreement provides generally that all crimes committed on military reservations by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned, with certain exceptions. The agreement permits civil investigation and prosecution in federal district court in any case when circumstances render such action more appropriate. If questions arise concerning the operation of the agreement, the U.S. Attorney should contact the section of the Criminal Division having cognizance over the federal statute apparently violated.

Certain cases hold that military courts have no jurisdiction to punish service personnel for even serious offenses when they entered the service under void enlistment contracts. The memorandum of understanding is not to be read to preclude prosecution in district court of such cases simply because the defendant appeared to be in the military.

O'Callahan v. Parker, 395 U.S. 258 (1969), in which the Supreme Court held that a member of the armed services could not be tried by a court martial for a crime that was not ''service-connected,'' was overruled in *Solorio v. United States*, --- U.S. ---, 55 U.S. LW 5038 (No. 85-1581, June 25, 1987). The ability of the military to apprehend, confine and conduct trials abroad and without venue restrictions should be kept in mind when considering by whom a prosecution should be undertaken.

9-20.120 Maritime Jurisdiction

Section 7 of Title 18 provides that the ''special territorial and maritime jurisdiction of the United States'' includes:

> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

Until recently the term ''high seas'' was always understood as intending the open and unenclosed waters of the sea beginning at low-water mark. *In*

re Ross, 140 U.S. 453, 471 (1891); *Murray v. Hildreth*, 61 F.2d 483 (5th Cir.1932); *see also United States v. Rodgers*, 150 U.S. 249 (1893) (Great Lakes). Although it has become common of late to use the term to describe waters beyond a marginal belt or ''territorial sea'' over which a nation claims special rights, *see, e.g., United States v. Louisiana, (Louisiana Boundary Case)*, 394 U.S. 11, 22-23 (1969); *United States v. Postal*, 589 F.2d 862, 868 (5th Cir.1979), the classic definition, contemporaneous with this statute's development, is the correct one.

The words of limitation ''and out of the jurisdiction of any particular State,'' do not qualify the ''high seas'' jurisdiction, but only the ''other waters within the admiralty and maritime jurisdiction of the United States.'' *See Murray v. Hildreth, supra; Hoopengarner v. United States*, 270 F.2d 465, 470 (6th Cir.1959); *see also United States v. Rodgers, supra*, at 265-266. Accordingly, the fact that a state fixes its boundary beyond the low-water mark and claims jurisdiction over the marginal sea, while relevant to venue, is immaterial to federal jurisdiction. *See Murray v. Hildreth, supra*. Although states' rights to exercise authority over the marginal sea developed more slowly than that of the nation, *see United States v. California*, 332 U.S. 19, 32-35 (1946), it cannot be doubted that a state may exercise jurisdiction over the marginal portion of the ocean, provided there is no conflict with federal law or the rights of foreign nations. *See Skiriotes v. Florida*, 313 U.S. 69 (1941). Indeed, it may, subject to the same limitations, enforce its laws upon its citizens and registered vessels on the high seas beyond its territorial waters. *Id.* at 77. It is usually the policy of the Department to defer to a state where it is prepared to undertake prosecution of conduct violative of both state and federal law.

Despite the apparent universal application of the term ''high seas,'' it was early held that, as a general rule, federal criminal jurisdiction does not attach to offenses committed by and against foreigners on foreign vessels. *See United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1890); *United States v. Palmer*, 16 U.S. (3 Wheat.) 281, 288 (1818).

The limitation on federal jurisdiction when the offense takes place on a river or harbor ''within the admiralty or maritime jurisdiction of the United States but not ''out of the jurisdiction of a particular State,'' applies to offenses by naval personnel on naval vessels. *See United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

''State'' in the context of 18 U.S.C. § 7(1) means ''State of the United States'' Thus, there is federal jurisdiction under this provision for offenses committed on American vessels in the territorial waters, harbors and inland waterways of foreign nations. *See United States v. Flores*, 289 U.S. 137 (1933). The port nation may also have jurisdiction if the offense disturbs its peace. *Id.* at 157-59.

Vessels have the nationality of the country where they are registered and whose flag they have a right to fly. *See United States v. Arra*, 630 F.2d 836 (1st Cir.1980). *See United States v. Ross*, 439 F.2d 1355 (9th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972), for methods of proving nationality. Note that under 18 U.S.C. § 7(1) jurisdiction attached if the vessel is even partially owned by a citizen of the United States. *See United States v. Keller*, 451 F.Supp. 631, 636-37 (D.P.R.1978), *aff'd on other grounds, United States v. Arra, supra*.

Venue for maritime offenses committed ''out of the jurisdiction of a particular State'' is governed by 18 U.S.C. § 3238. *See United States v. Ross, supra*, at 1358-59. Where the offense occurred within the boundaries of a state, venue lies there. *See United States v. Peterson*, 64 F. 145 (E.D.Wis.1894).

Federal prosecution may not be undertaken following a state prosecution for the same conduct without authorization of the Assistant Attorney General as provided by USAM 9-2.142. Prosecution should not be undertaken following a foreign prosecution unless substantial federal interests were left unvindicated.

9-20.121 Great Lakes Jurisdiction

Also included within the ''special territorial and maritime jurisdiction of the United States'' by 18 U.S.C. § 7(2) are the Great Lakes and their connecting waterways. American nationality of the vessel is a prerequisite to jurisdiction under 18 U.S.C. § 7(2). *See United States v. Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). Jurisdiction may, however, attach to foreign vessels on the Great Lakes, under 18 U.S.C. § 7(1), unless they are within harbors or waterways in the body of a state. *Id.*, at 141. Federal jurisdiction under 18 U.S.C. § 7(2) over American vessels is not affected by the existence of concurrent state jurisdiction. Again, it is usually the policy of the Department to defer to the state where it will undertake prosecution. Jurisdiction follows American vessels into Canadian waters. *See* S.Rep. 2917, 51st Cong., 1st Sess. 1890; *see also United States v. Rodgers, supra*, reaching the same result under the predecessor of 18 U.S.C. § 7(1) in a case involving an offense committed before enactment of the predecessor of 18 U.S.C. § 7(2).

Venue for offenses on the open seas and connecting waters of the Great Lakes will be governed by 18 U.S.C. § 3238 unless committed within the recognized boundaries of a state. *See United States v. Peterson, supra*.

9-20.122 General Maritime Offenses

There are a number of statutes defining maritime offenses that are not dependent upon 18 U.S.C. § 7 and are not affected by the fact that the offense occurred within state jurisdiction. For example, death resulting

from criminal negligence of a ship's officer or crew can be prosecuted under 18 U.S.C. § 1115 when a manslaughter prosecution under 18 U.S.C. § 1112 would be barred because the ship was within a harbor. *See United States v. Allied Towing Corp.*, 602 F.2d 612 (4th Cir.1979). *See also United States v. Tanner, supra*, affirming a conviction under 18 U.S.C. § 2275 (firing a vessel) while reversing one for violation of 18 U.S.C. § 1363 (malicious mischief within special maritime and territorial jurisdiction). There are other such statutes to be found in Title 18 and other titles of the United States Code.

9-20.130 Aircraft Jurisdiction

The ''enclave statutes'' are made applicable by 18 U.S.C. § 7(5) to American aircraft in flight over the high seas or other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state. This section was enacted in reaction to *United States v. Cordova,* 89 F.Supp. 298 (E.D.N.Y.1950), which held that an aircraft was not a ''vessel,'' and that ''over high seas'' was not the equivalent of ''on the high seas,'' within the meaning of 18 U.S.C. § 7(1). Venue is governed by 18 U.S.C. § 3238.

It is important to note that many of the ''enclave statutes'' are made applicable to ''aircraft within the special aircraft jurisdiction of the United States,'' by 49 U.S.C. § 1472(k)(1), and that ''special aircraft jurisdiction,'' as defined in 49 U.S.C. § 1301(38), differs significantly from the jurisdiction defined in 18 U.S.C. § 7(5). Venue is governed by 49 U.S.C. § 1473(a). *See United States v. Busic,* 549 F.2d 252 (2d Cir.1977). For a discussion of ''special aircraft jurisdiction,'' *see* USAM 9-63.110.

9-20.200 INDIAN COUNTRY

Criminal jurisdiction in ''Indian country,'' 18 U.S.C. § 1151, is based on an allocation of authority among federal, state, and tribal courts. Although federal criminal law in Indian country is briefly set forth in 18 U.S.C. §§ 1151-1165, allocation of authority in particular cases depends in general upon three factors: subject matter, locus, and person. The chart at USAM 9-20.230, *infra*, is a synopsis of presently applicable law in Indian country and reflects the changes made in the Major Crimes Act, 18 U.S.C. § 1153, by Act of May 29, 1976, Pub.L. No. 94-297, § 2, 90 Stat. 585, and Act of October 12, 1984, Pub.L. No. 98-473, § 1009, 98 Stat. 2141, as well as court decisions and current Department policy.

''Indian country'' is defined in 18 U.S.C. § 1151 as including (1) federal reservations, including fee land, *see United States v. John*, 437 U.S. 634 (1978), *Seymour v. Superintendent*, 368 U.S. 351 (1962); (2) dependent Indian communities, *see United States v. Levesque*, 681 F.2d 75 (1982), *cert. denied,* 459 U.S. 1089 (1983); and (3) Indian allotments to

which title has not been extinguished, *see United States v. Ramsey*, 271 U.S. 467 (1926).

Disputes frequently arise as to whether federal reservation status still attaches to lands that were opened to settlement. The resolution is very complex, *see Solem v. Bartlett*, 465 U.S. 463 (1984). The assistance of the Field Solicitor of the Department of the Interior should be sought in the first instance.

U.S. Attorneys should attempt to familiarize themselves with the boundaries of their reservations and off-reservations allotments with the assistance of the Field Solicitor. They should also be aware of the extent to which jurisdiction over all or some of the reservations in their districts has been transferred to the state under Pub.L. No. 83-280 as amended by Pub.L. No. 90-284, codified at 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321-1326, and similar legislation, *see, e.g.*, 18 U.S.C. § 3243 and Pub.L. No. 80-846.

Under 18 U.S.C. § 1152 the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, are extended to Indian country. This section applies to offenses committed in the Indian country by a non-Indian against the person or property of a tribal Indian, and vice versa. The Assimilative Crimes Statute, 18 U.S.C. § 13, is also applicable to offenses involving Indians and non-Indians in the Indian country. *See Williams v. United States*, 327 U.S. 711 (1946).

There is a broad exception in paragraph two of 18 U.S.C. § 1152 which provides that the statute:

> shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.
>
> Section 1153 of Title 18 grants exclusive jurisdiction to federal courts over Indians who commit any of the listed offenses, regardless of whether the victim is also an Indian. *See United States v. John*, *supra*. The offenses are, for the most part, defined by separate federal statutes. Those offenses which are not defined and punished by federal law are to be defined and punished in accordance with the law of the state where the crime was committed. *See* 18 U.S.C. § 1153(b).

9-20.210 The Reach of 18 U.S.C. §§ 1152 and 1153

By the broadest possible reading, 18 U.S.C. § 1152 would seem to apply the federal law generally applicable on other federal enclaves to Indian

reservations. Thus, federal law with regard to crimes like assault, 18 U.S.C. § 113, and arson, 18 U.S.C. § 18, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13. The Assimilative Crimes Act has itself been regarded as establishing federal jurisdiction over ''victimless'' crimes occurring within a federal enclave. *See, e.g., United States v. Chapman*, 321 F.Supp. 767 (E.D.Va.1971) (possession of marijuana); *United States v. Barner*, 195 F.Supp. 103 (N.D.Cal.1961) (driving under the influence of intoxicants).

Notwithstanding its broad terms, the Supreme Court has significantly narrowed 18 U.S.C. § 1152's reach. In the 1882 case of *United States v. McBratney*, 104 U.S. 621, the Court held that where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the state absent treaty provisions to the contrary. *Accord, Draper v. United States*, 164 U.S. 240 (1896). Subsequent decisions have acknowledged the rule. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 325 n. 21 (1978); *United States v. Antelope*, 430 U.S. 641, 643 n. 2 (1977); *Williams v. United States*, 327 U.S. 711, 714 (1946).

The precursor to 18 U.S.C. § 1152 was section 25 of the Act of June 30, 1834, 4 Stat. 733, and it was not until 1885 that federal legislation was enacted granting federal courts jurisdiction over certain major crimes committed by an Indian against another Indian. Prior to 1885, such offenses were tried in tribal courts. *See Ex parte Crow Dog*, 109 U.S. 556 (1883). 18 U.S.C. § 1153 is predicated on the Act of March 3, 1885, § 8, 23 Stat. 385, and former sections 548 and 549, 18 U.S.C. (1940 ed.). Under 18 U.S.C. § 1153, federal courts have exclusive jurisdiction of offenses named in the section when committed by a tribal Indian against the person or property of another tribal Indian or other person in Indian country. Legislative history indicates that the words ''or other persons'' were incorporated in the 1885 Act to make certain the Indians were to be prosecuted in federal court. 48th Cong., 2d Sess., 16 Cong.Rec. 934 (1885).

Although the scheme of felony jurisdiction which has arisen is complex in origin, it is not irrational in light of the historical settings in which the predecessor statutes of 18 U.S.C. §§ 1152 and 1153 were passed. Major felonies involving an Indian, whether as victim or accused, are matters for federal prosecution. Because of substantial non-Indian populations on many reservations felonies wholly between non-Indians are left to state prosecution. *See* USAM 9-20.215 *infra*. It is, moreover, significant that the historical practice has been to regard *McBratney, supra,* as authority for the states' assertion of jurisdiction with regard to a variety of ''victimless'' offenses committed by non-Indians on Indian reservations. *See* USAM 9-20.214 *infra*.

In *United States v. Antelope, supra*, the Supreme Court in essence upheld the constitutionality of the plan contained in 18 U.S.C. §§ 1152 and 1153 by rejecting a challenge on equal protection grounds raised against 18 U.S.C.

§ 1153. It was held that the Constitution was not violated by federal prosecution of an Indian for the murder of a non-Indian on the reservation under a theory of felony-murder. Defendant argued that had he been prosecuted in state court under Idaho state law for the same act the felony-murder doctrine would not have applied because Idaho does not recognize it. The Court acknowledged the disparity in treatment, but nonetheless reasoned that the Major Crimes Act, like all federal regulation of Indian affairs, is not based upon an impermissible racial classification but ''is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians.''

9-20.211 Lesser Included Offenses Under 18 U.S.C. § 1153

In *Keeble v. United States*, 412 U.S. 205 (1973), the Supreme Court held that an Indian defendant charged with a major crime violation under 18 U.S.C. § 1153, was entitled to request and receive an instruction on a lesser included offense not enumerated in that section, even though the defendant could not have been charged with such an offense in the first instance. The Court felt this result was compelled by 18 U.S.C. § 3242, which provides that Indians charged with violations of 18 U.S.C. § 1153 shall be ''tried ... in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.'' The three courts of appeals that have addressed the subject have held that, if the jury returns a verdict of guilt upon it, the court has jurisdiction to impose sentence for the lesser offense. *See United States v. Bowman*, 679 F.2d 798 (9th Cir.), *cert. denied*, 459 U.S. 1210 (1983); *United States v. John*, 587 F.2d 683 (5th Cir. 1979); *United States v. Felicia*, 495 F.2d 353, 355 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974).

9-20.212 Double Jeopardy Considerations

The second paragraph of 18 U.S.C. § 1152 specifically provides that the section ''does not extend'' to an Indian ''who has been punished by the local law of the Tribe.'' 18 U.S.C. § 1153, however, does not contain such a limitation. The Supreme Court has held that the Double Jeopardy Clause, U.S. Const., Amend. V, does not bar successive prosecutions in federal and tribal courts for violations of 18 U.S.C. § 1153 and tribal law. It reasoned that the courts are arms of separate sovereigns and prosecution is not ''for the same offense.'' *See United States v. Wheeler*, 435 U.S. 313 (1978). The Court left open the question whether its ''dual sovereignty'' ruling would apply to ''Courts of Indian Offenses,'' also known as ''CFR Courts.'' *Id.* at 327 n. 26. A federal prosecution should not, however, be undertaken following a tribal prosecution unless substantial federal interests were left unvindicated.

9-20.213 Limitations on 18 U.S.C. § 1152 Exemption

It should be emphasized that the phrase ''general laws of the United States'' means federal enclave laws. Federal enclave laws are those laws which apply only within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7. *See United States v. Cowboy*, 694 F.2d 1234 (10th Cir.1982). The exception in the second paragraph of 18 U.S.C. § 1152 does not exempt Indians from the criminal laws of the United States that apply to acts that are federal crimes regardless of where committed such as bank robbery, counterfeiting, sale of drugs, and assault on a federal officer. *See United States v. Blue*, 722 F.2d 383 (8th Cir.1983); *United States v. Smith*, 562 F.2d 453 (7th Cir.1977), *cert. denied*, 434 U.S. 1072 (1978). Neither does it exempt Indians from the liquor law provisions, 18 U.S.C. §§ 1154, 1161; *United States v. Cowboy, supra*.

9-20.214 Offenses Against Community Committed by Indians or Non-Indians (Victimless Crimes)

A. Indians

Some crimes committed by Indians on reservations do not really involve offenses against the person or property of non-Indians. Such offenses typically involve crimes against public order and morals. Examples are traffic violations, prostitution, or gambling. Federal prosecutions in these cases can be based on 18 U.S.C. § 1152 and the Assimilative Crimes Act (18 U.S.C. § 13). *See, e.g., United States v. Sosseur,* 181 F.2d 873 (7th Cir.1950); *United States v. Marcyes*, 557 F.2d 1361 (9th Cir.1977). U.S. Attorneys should strongly consider prosecution in such cases where prosecution by the tribe is not forthcoming or inadequate.

B. Non-Indians

The question of jurisdiction over victimless crimes by non-Indians received considerable attention in the Department following the Supreme Court's holding in *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978), that tribal courts do not have jurisdiction over non-Indians. The Office of Legal Counsel (OLC) prepared an extensive memorandum dated March 21, 1979, concluding that in most cases, the states have jurisdiction over victimless crimes by non-Indians. The OLC memorandum was reprinted in the August 1979 issue of Indian Law Reporter (6 ILR K-15ff) and copies are available from the Department. The conclusion of OLC is that in the absence of a true victim, *McBratney, supra*, would control, leaving the states with jurisdiction. There must be a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) before federal jurisdiction can be said to attach. Thus, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling, which are not

designed for the protection of a particular vulnerable class, should be viewed as having no real ''victim'' and therefore to fall exclusively within state competence.

In certain other cases, however, a sufficiently direct threat to Indian persons or property may be stated to bring an ordinarily ''victimless'' crime within federal jurisdiction. One example would be crimes calculated to obstruct or corrupt the functioning of tribal government. This could include bribery of tribal officials in a situation where state law in broad terms prohibits bribery of public officials. Another example which would adversely affect the tribal community are consensual crimes committed by non-Indian offenders with Indian participants, where the participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. *See Smayda v. United States*, 352 F.2d 251 (9th Cir.1965), *cert. denied*, 382 U.S. 981 (1966) (prosecution under Assimilative Crimes Act for felony sex offense in violation of state law committed in National Park). Thus, there will be federal jurisdiction under 18 U.S.C. § 1152 and Chapter 109A for the statutory rape of an Indian girl, and over a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. § 1152 and § 13.

A third group of offenses which may be punishable under the law of individual states and assimilated into federal law would be cases where an Indian victim is actually indentified. Examples would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the tribe. In certain other cases, conduct, which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals, may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school, homosexual activity in the same area, an obvious attempt to scatter Indians collected at a tribal gathering, or a breach of peace that borders on an assault, may in unusual circumstances be seen as sufficiently serious to warrant federal prosecution.

9-20.215 Offenses by Non-Indians: Concurrent State-Federal Jurisdiction

As noted at USAM 9-20.210, jurisdiction over offenses committed by non-Indians against non-Indians are within the exclusive jurisdiction of the states. *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896). Non-Indians are immune from tribal court jurisdiction. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Except for those exempted by *McBratney*, the federal government has jurisdiction over non-Indian offenders. Despite some Supreme Court dicta (and state and federal district court holdings) to the contrary, it is the Department's position that this jurisdiction is not exclusive of state

jurisdiction. *See* Office of Legal Counsel Memorandum, dated March 2, 1979, reprinted at 6 ILR K-155ff (August 1979).

There are only two bases for denying a state jurisdiction over conduct committed in Indian country within its borders: one is tribal sovereignty and the other is federal preemption. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *Rice v. Rehner*, 463 U.S. 713, 718, 719 (1983). Neither ground is sufficient to bar state jurisdiction in these cases.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), Chief Justice Marshall wrote that the Cherokee Nation ''is a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force. . . but. . . in conformity with treaties, and acts of Congress.'' But this concept of impenetrable reservation borders has not withstood the tests of time. As outlined in *Rice v. Rehner*, 463 U.S. at 718-20, state law has repeatedly been allowed to penetrate reservation borders. Indeed, the absolute limits of the concept were breached in the context of criminal law in the century-old *McBratney* case. The core interest which the doctrine is meant to protect is the Indians' right to self-government. As recently stated in *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979):

> [S]tate law reaches within the exterior boundaries of an Indian reservation only if it would not infringe ''on the right of reservation Indians to make their own laws and be ruled by them.'' *Williams v. Lee*, 358 U.S. 217, 219-220 (1959).

But ''notions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in the affairs of non-Indians.'' *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973). The principle of tribal self-government is surely not offended by a state prosecuting a non-Indian, who, by virtue of *Oliphant*, is not subject to tribal criminal jurisdiction.

The second objection that may be raised to state jurisdiction over these cases is the doctrine of federal preemption. This doctrine is similar to, but differs from, federal preemption in the state-federal context. *See Rice v. Rehner*, 463 U.S. at 718, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). For the preemption test to preclude state jurisdiction, it is necessary to find that a balance of federal, Indian and state interests requires sacrifice of the latter. *See Rice v. Rehner*, 463 U.S. at 720. As noted, a tribe can hardly complain of the state's assumption of jurisdiction over one who is beyond its own power. The federal (and tribal) interests in preserving peace in Indian country are likewise not encroached upon by a state undertaking prosecution. The federal government retains concurrent jurisdiction so that it may go forward if it believes its interests or those of its tribal wards have not been

satisfactorily vindicated in the prior state proceedings. *Cf. Abbate v. United States*, 359 U.S. 187 (1959). The state's interest in maintaining law and order within its borders is obvious and compelling. While a strong case can be made for immunizing Indian defendants from state processes, *see United States v. Kagama*, 118 U.S. 375, 384 (1886), the same cannot be said for forbidding a state to act against non-Indians and protect its Indian citizens.

An analysis of the authorities containing dicta negating state jurisdiction over these kinds of cases show that they can be traced back to a misstatement of the decision in *Donnelly v. United States*, 228 U.S. 243 (1913), particularly the interpretation given it in *Williams v. United States*, 327 U.S. 711 (1945).

In *Williams*, the defendant, a non-Indian, had had sexual relations with a reservation Indian minor between the ages of 16 and 18. As the federal carnal knowledge statute (now codified at 18 U.S.C. § 2032) fixes the age of consent at 16, he could not be charged with violating it. Instead, he was charged in federal court with violating the Arizona statutory rape provision, which fixed the age of consent at 18. The theory of the prosecution was that the Arizona statute was made applicable to the reservation by the Assimilative Crimes Act, 18 U.S.C. § 13, and the General Crimes Act, (now codified at 18 U.S.C. § 1152). The Supreme Court held that use of the Assimilative Crimes Act was improper since Congress had legislated with regard to the generic offense of sex with minors and deliberately selected the lower age of consent.

Although Williams raised no challenge to the jurisdiction of the federal court to try him, the Court delivered itself of the following dictum summarizing Indian country jurisdiction:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, *the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian*. (Footnotes omitted.) (Emphasis supplied.) 327 U.S. at 714.

In support it cited *Donnelly v. United States, supra; United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926); and *United States v. Chavez*, 290 U.S. 357 (1933). *Ibid.* note 10.

Each of these cases involved offenses committed by non-Indians against Indians, but none of them were state prosecutions in which state jurisdiction was challenged. Rather, the defendants were challenging the jurisdiction of the federal court, arguing that only the state had jurisdiction. In each case the Court ruled that the situs of the crime was Indian country and that admission to statehood did not divest the federal court of juris-

diction over offenses by or against Indians. In none of them did it hold that federal jurisdiction over the non-Indian defendant was exclusive. *Donnelly* was the case principally relied on by the other three, and *Williams* itself recognized *Donnelly* as the seminal case. *See* 327 U.S. at 714 n. 10.

In *Donnelly* the Supreme Court rejected the contention that a non-Indian's offense against an Indian in Indian country fell ''within the principle of the *McBratney* and *Draper cases*.'' The ''principle'' of *McBratney* and *Draper* was that federal jurisdiction over non-Indians under the General Crimes Act for offenses against non-Indians was divested when a territory entered the Union as a state, and that state jurisdiction over such offenses was exclusive. Instead, the Court held, the case was governed by the rationale of the *Kagama case*, which had held that because of the federal trust responsibility, federal jurisdiction over offenses by Indians was not divested by a territory entering into statehood. The same trust obligation required continued federal jurisdiction over non-Indian offenders against Indians. Neither *Kagama* nor *Donnelly*, however, held or stated that such jurisdiction was exclusive. The emphasis in *Kagama* on the need to protect Indians from state prejudice would suggest that federal jurisdiction over Indian defendants should be exclusive, and, indeed the Supreme Court so held many years later in *United States v. John*, 437 U.S. 634, 654 (1978), with respect to the Major Crimes Act. The federal trust responsibility does not, however, require that its obligation to safeguard the Indian community against non-Indian depredations preempt state action.

An additional argument against state jurisdiction may be based upon disclaimers of jurisdiction over Indian country contained in the state constitution or enabling act. The argument is without merit. As a general rule such a provision is properly construed as a disclaimer of proprietary rather than governmental interest, *Kake Village v. Egan*, 369 U.S. 60, 69 (1962), and references in such provisions to retention of ''absolute' jurisdiction'' by the federal government are not synonymous with ''exclusive jurisdiction.'' *Id.*, at p. 67-68. This was explicitly held with respect to state criminal jurisdiction over crimes by non-Indians against non-Indians in *Draper v. United States, supra. Ibid. See also Rice v. Rehner*, 463 U.S. at 723.

Finally, it may be argued that, if states had jurisdiction over non-Indians who committed offenses against Indians, it would have been unnecessary to provide in Public Law 83-280, codified at 18 U.S.C. § 1162 and 25 U.S.C. § 1321, that state jurisdiction was, or could be, extended to ''offenses committed by or *against* Indians,'' since ''by'' alone would have been effective to divest the United States of exclusive jurisdiction over offenses enumerated in the Major Crimes Act. This argument overlooks the exclusive jurisdiction tribal courts have over offenses, not enumerated in the Major Crimes Act, committed by Indians *against Indians. See* 18 U.S.C.

§ 1152 ¶2; *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Public Law 83-280 was designed not only to shift federal responsibility for major crimes to the state, but also to have the state undertake responsibility for minor offenses that the tribes were unable to deal with effectively. *See Washington v. Yakima Indian Nation*, 439 U.S. at 471, 488 n. 32, 489 n. 33. It was these crimes, not those by non-Indians, that required use of the word ''against.''

In conclusion, while the United States is obligated by its trust responsibilities to maintain jurisdiction over offenses by non-Indians against Indians in Indian country, there is no statute or Supreme Court case holding that such jurisdiction is exclusive and preemptive of the states. While historically and as a ''practical matter,'' *Washington v. Yakima Indian Nation*, 439 U.S. at 470 (1979), such offenses are ''generally tried in federal courts,'' *Williams v. Lee*, 358 U.S. 217, 220 n. 5, neither Indian sovereignty nor preemption forecloses state prosecution.

United States Attorneys have a very important role to play in reacting to crimes by non-Indians against Indians. While some states may be willing and able to prosecute, this should never be assumed. The key is close liaison with state officials, either directly or through the Federal Bureau of Investigation (FBI), to make sure that all appropriate cases involving offenses by non-Indians against Indians are prosecuted vigorously. United States Attorneys shoulder a heavy responsibility in making sure that the tribal community is protected from crimes by persons over whom the tribe has no jurisdiction. In all cases where the state refuses to prosecute or does so inadequately, United States Attorneys should carefully consider federal prosecution, recognizing that a declination means that the offender will go unpunished. A declination in favor of ''state prosecution'' is not sufficient protection for the tribal community or the individual Indian victim if the state will not prosecute for some reason unrelated to the merits of the particular case.

9-20.220 Investigative Jurisdiction

The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153. Frequently by the time the FBI arrives on the reservation some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and U.S. Attorneys are free to ask for FBI investigation in all cases where it is felt that such is required. However, U.S. Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where you feel a sufficient investigation can be undertaken by BIA or tribal law enforcement officers.

9-20.230 Chart: Crimes in Indian Country

OFFENDER	VICTIM	APPLICABLE LAW
1. Non-Indian	Non-Indian	State—No federal jurisdiction.
2. Non-Indian	Indian	State law if state prosecutes. If state does not prosecute or does so inadequately United States can prosecute under 18 U.S.C. § 1152 and substantive federal offenses,[1] or 18 U.S.C. § 1152, 18 U.S.C. § 13 (Assimilative Crimes Act, and state law if no federal statute for the offense).
3. Indian	Non-Indian	If a listed major crime, prosecution by United States under 18 U.S.C. § 1153. For all crimes except burglary, involuntary sodomy, and incest, prosecution is under 18 U.S.C. § 1153 and substantive federal law (*e.g.*, 18 U.S.C. § 113). Burglary, involuntary sodomy, and incest are prosecuted under 18 U.S.C. § 1153 but the offenses are defined and punished in accordance with the laws of the state. If not a listed major crime, prosecution is by United States under 18 U.S.C. § 1152 and substantive federal offense; or 18 U.S.C. § 1152 and § 13 (Assimilative Crimes Act) and state law if no federal statute for the offense.
4. Indian	Indian	Prosecution can only be undertaken for a listed major offense as in # 3 above. An Indian cannot be prosecuted under 18 U.S.C. § 1152 for non-major crimes committed against other Indians. Such a crime can only be prosecuted in tribal court.[2]
5. Non-Indian	Victimless	State jurisdiction except in very rare situations where federal jurisdiction attaches.
6. Indian	Victimless	Tribal court jurisdiction or federal jurisdiction. Tribal courts handle the vast majority of such offenses.

1 A substantive federal offense is any of the special jurisdiction offenses such as murder, arson, or rape.

2 State courts have no jurisdiction over Indians for any crimes in Indian country.

9-20.240 Embezzlement and Theft from Tribal Organization

Section 1163 of Title 18 makes embezzlement, theft, criminal conversation and willful misapplication of funds belonging to a tribal organization a crime. It is a felony if the amount taken exceeds $100. This statute applies to both Indians and non-Indians, and need not be committed on a reservation or in Indian country. The second paragraph of 18 U.S.C. § 1152 does not shield an Indian who has committed the offense on a reservation. *See United States v. McGrady*, 508 F.2d 13 (8th Cir.), *cert. denied*, 420 U.S. 797 (1975). Neither is tribal sovereignty a shield against a grand jury

investigation and subpoena. *See United States v. Boggs*, 439 F.Supp. 1050 (D.Mont.1980). In addition, 18 U.S.C. § 666, which proscribes theft and embezzlement from federally funded governmental and nongovernmental organizations, and bribery of their officials, covers Indian tribes.