DETAILED
TABLE OF CONTENTS
FOR CHAPTER 7

9-7.000 ELECTRONIC SURVEILLANCE

9-7.010 Purpose and Scope

9-7.011 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (see 18 U.S.C. §2510 et seq.), and closed circuit television surveillance.

9-7.012 Scope of Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (see 18 U.S.C. §§2510-2520) is a comprehensive scheme for controlling the interception of an unauthorized disclosure and use of oral, wire, and radio communications. The legislative history relating to Title III states that the purpose of Title III is to prohibit:

> [A]ll wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order, with exceptions provided for interceptions by employees of communications facilities whose normal course of employment would make necessary such interception, personnel of the Federal Communications Commission in the normal course of employment, and Government agents to secure information under the powers of the President to protect the Nation against actual or potential attack, or to otherwise protect the national security.

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) at 27 reported in 7 Cong. News, 1968, 1635.

Except as otherwise specifically provided in other sections of Title III, 18 U.S.C. §2511 makes it a criminal offense to acquire aurally by means of an electronic or other device and a separate offense to disclose or use information obtained through such acquisition by means of an electronic or other device:

> (a) any communication transmitted, in whole or through wire or cable facilities; and

(b) any oral communication uttered by one who exhibits a reasonable expectation that such communication is not subject to interception.

"Intercept" is defined in 18 U.S.C. §2510(4) as the aural acquisition of the contents of a communication ". . . through the use of any electronic, mechanical or other device." This definition clearly excludes simple eavesdropping by the unaided human ear from the coverage of the statute even if the conversation involved occurs in what otherwise would be considered a private place, but it is not equally clear what is intended to be included in the terms "aural acquisition" and "contents of the communication." The Senate Committee on the Judiciary, Report on the Omnibus Crime Control and Safe Streets Act of 1967, 90th Cong., 2d Sess. (S. Rep. 1097, April 29, 1968) (hereinafter, Senate Report) states at page 90 that, "[t]he proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, is not governed by the procedures prescribed by Title III, because that device does not result in aural acquisition of the contents of the communication. See United States v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir. 1976).

18 U.S.C. §2510(1) defines "wire communication" as covering all communications carried, in whole or in part, by wire or cable, and 18 U.S.C. §2511(1) therefore constitutes an absolute prohibition against wiretapping. On the other hand, 18 U.S.C. §2510(2) limits the meaning of "oral communication" to one uttered ". . . by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation" and, therefore, creates a prohibition which will vary in scope with changing factual situations. The Senate Report (at 89-90) indicates that the definition is intended to "reflect existing law" as set forth in Katz v. United States, 389 U.S. 347 (1967), but its description of the factors to be considered in determining whether the speaker's expectation of privacy is reasonable makes very little sense in a practical context.

The report's assertion that the speaker's subjective intent is not to be the controlling factor seems to be a statement of the obvious if it means only that reasonableness is an objective test, but it is clear that the efforts a subject makes to secure privacy for his/her conversation are extremely relevant even if, unbeknownst to him/her, he/she is in a place which is subject to eavesdropping by passersby. If the subject goes into a room and engages in a whispered discussion which an agent stationed outside the room's open window cannot hear clearly, the recording of that discussion by the agent through a sensitive microphone would be a violation of the statute even if the room were public and filled with

strangers. Similarly, if it were known that the subject met with his/her co-conspirators every noon at a particular table in a restaurant where they discussed plans for a murder, despite the public nature of the place where the conspiracy was carried on, a microphone could be placed under their table only pursuant to an interception order.

It may be that, as the Senate Report states, any conversation in a jail cell may be recorded and that a prisoner can have no reasonable expectation of privacy there, but there will be very few places in which the subject of the interception may be said to have anything approaching a proprietary interest where such liberties will be permissible. The further example of the subject who loses the protection of the statute in his/her home by speaking loudly enough for those outside to hear has little practical relevance; it is difficult to imagine any great number of cases in which agents would be interested in recording criminal discussions being conducted for public consumption.

In sum, little in the way of substantive guidelines can be offered for resolution of the question of the speaker's expectation of privacy, but the decision of the Supreme Court in Mancusi v. DeForte, 392 U.S. 364 (1968), indicates that a liberal approach will be taken in extending the ambit of the Fourth Amendment's protection. When the issue is in doubt, the best practice is to proceed by way of an interception order.

18 U.S.C. §2510(5) excludes from the otherwise broad definition of "electrical, mechanical or other" devices any telephone equipment ". . . furnished to the subscriber or used by a communications common carrier in the ordinary course of its business [or] . . . being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." The Senate Report does not amplify this exception, but the language seems clearly to be intended to exempt from the statutory prohibition an interception by extension telephone; whether any other result is intended is problematical. But see United States v. Harpel, 493 F.2d 346 (10th Cir. 1974), holding that an extension telephone used to accomplish an interception is not within the exception.

It is the view of the Department that radio communications which are transmitted independently of the facilities of a wire communications common carrier are not within the scope of the provisions of Title III regarding wire and oral communications. But see United States v. Hall, 488 F.2d 193 (9th Cir. 1973), holding that such transmissions are "oral communications" if attended by a reasonable expectation of privacy. At least as to so-called Citizen Band radio traffic, the view of the Department is that no such reasonable expectation of privacy can exist.

Interception of radio transmissions is, of course, within the scope of 47 U.S.C. §605. However, that section has no application to law enforcement officers acting in the regular course of their employment. See United States v. Hall, supra. For a more detailed discussion of the prohibitions against interception of wire, oral and radio communications, see USAM 9-60.200 et seq.

9-7.013 Consensual Monitoring

18 U.S.C. §2511(2)(c) provides that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is as 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 18 U.S.C. §2518 are not available and should not be sought in cases falling within 18 U.S.C. §2511(2)(c). In this connection, the Attorney General has issued policy guidance concerning the monitoring of a private conversation with the consent of a party. The following constitutes the Attorney General's Memorandum of November 7, 1983, on consensual monitoring:

NOVEMBER 7, 1983 MEMORANDUM OF THE ATTORNEY GENERAL ON CONSENSUAL MONITORING

By Memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication. This directive was clarified and continued in force by the Attorney General's subsequent Memorandum of September 22, 1980, to Heads and Inspectors General of Executive Departments and Agencies.

This Memorandum supersedes the aforementioned directives. It establishes new authorization procedures with relevant rules and guidelines while it continues existing reporting procedures. It limits the requirement for prior written approval by the Department of Justice to specific types of investigations, but it continues to require verbal authorization from Department of Justice attorneys in all other types of investigations. This change in policy, eliminating prior written Department of Justice approval in most cases of consensual surveillance, is a result of the exercise of the Department's review function for some ten years. This experience reflects the fact that the departments and agencies have been uniformly applying the required procedures with great

care, consistency, and good judgment, and that the number of inappropriate requests for consensual interceptions has been negligible.

The Fourth Amendment to the Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (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 communications and verbal, non-wire communications. See United States v. White, 401 U.S. 745 (1971); United States v. Caceres, 440 U.S. 741 (1979). Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless interceptions of verbal, non-wire 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 informants or undercover law enforcement agents, or fulfilling some other similarly compelling need. 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 sources of authority for this Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"); Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Priorities") of September 11, 1979; Presidential Memorandum (untitled) of June 30, 1965, on, inter alia, the utilization of mechanical or electronic devices to overhear non-telephone conversations; and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

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.

1/ As a general rule, nonconsensual interceptions of verbal wire communications violate 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. of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510, et seq.) or with the provisions of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.).

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.

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 or 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 in this Memorandum 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.);

3. Interceptions pursuant to the court-authorization procedures of Title III. of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (18 U.S.C. §2510, et seq.);

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

5. Interceptions of radio communications; and

6. Interceptions of telephone communications.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information

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. If an interception is for investigative purposes, the request must include a citation to the principal criminal statute involved.

3. Danger. If an interception is for protection purposes, the request must explain the danger to the consenting party.

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. of this Memorandum 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 of 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.

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).

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 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.

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 electronic surveillance or any other form of nonconsensual interception.

9-7.014 Use of Pen Registers

One commonly used electronic surveillance device is the pen register. A pen register is a mechanical device that records the numbers dialed on a telephone. Unlike other devices used in electronic surveillance, a pen register does not actually overhear oral communications. For this reason a pen register has been regarded as a less intrusive form of electronic surveillance.

The United States Supreme Court has held that no warrant is required under either the Fourth Amendment or Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq., when installing a pen register. See Smith v. Maryland, 442 U.S. 735 (1979) (Fourth Amendment); United States v. New York Telephone Co., 434 U.S. 157 (1977) (Title III).

However, it is the policy of the Department of Justice that no pen register shall be installed by any federal law enforcement agency except pursuant to an order issued by a federal district court. Such an order may be obtained under Rule 57(b) of the Federal Rules of Criminal Procedure and, as an adjunct thereto, an order pursuant to the All Writs Act may be obtained directing the cooperation of the concerned telephone company. Procedures for obtaining such orders are described in USAM 9-7.231, infra. A model application and order are included in USAM 9-7.925 and 9-7.926.

While it is strictly Department policy that requires a court order prior to the use of a pen register in a domestic investigation, under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §1801 et seq., a court order is legally required before a pen register can be employed in a FISA investigation. FISA defines electronic surveillance broadly and, as the legislative history indicates, includes pen registers within its definition of "electronic surveillance." See H.R. Rep. No. 1283, 95th Cong., 2d Sess. 51 (1980); S. Rep. No. 701, 95th Cong., 2d Sess. 35 (1980), reprinted in 1978 U.S. Code Cong. & Ad. News 3904, 4004-05. FISA contains very specific requirements for obtaining a court order approving electronic surveillance. Accordingly, it is necessary that any order approving the use of a pen register in a FISA case comply with the explicit statutory requirements enumerated in 50 U.S.C. §1804. Failure to satisfy the statutory requirements could expose law enforcement officers to liability under the Act. See 50 U.S.C. §§1809, 1810.

9-7.100 THE AUTHORIZATION

9-7.110 Authorization of Applications for Interception Orders

No application for an order under 18 U.S.C. §2518 permitting the interception of an oral or wire communication may be made without the written authorization of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General specially designated by the Attorney General. (See 18 U.S.C. §2516(1)).

18 U.S.C. §2516 provides that "[t]he Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application" for an interception order, and the Senate Report at p. 97 clearly states that the purpose of this provision is to insure strict, centralized control of the administration of Title III. It centralizes in a publicly responsible official the formulation of law enforcement policy, and, should abuses occur, draws lines of responsibility leading to an identifiable person. Failure to comply with this requirement constitutes a ground for suppression of any ensuing intercepted communication. See United States v. Giordano, 416 U.S. 505 (1974).

The Attorney General has specially designated the Assistant Attorney General in charge of the Criminal Division, the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Office of Legal Counsel, and the Assistant Attorney General in charge of the Antitrust Division to authorize interception applications (Order No. 931-81). See also Order No. 934-81, which modified (to some extent) and reaffirms Order No. 931-81. Both of these Orders are included at USAM

9-7.910, infra. Just as one of these officials of the Department must personally be involved in the Title III authorization process, so it is incumbent upon any U.S. Attorney in whose district an application for a Title III interception order is to be filed to evaluate personally the merits of the proposed application prior to its submission to the Department of Justice for filing authorization. A U.S. Attorney should not authorize the submission of any applications unless, in his/her judgment, the interception would foster the interests of justice. He/she should not approve an authorization request solely because an investigative agency strongly urges it.

9-7.120 Types of Cases in Which Authorization May be Granted

The statutory limitations on the types of cases in which interception orders may be issued are contained in 18 U.S.C. §2516(1). The list of offenses in that section is intended to cover those which are particularly characteristic of organized criminal activity in addition to a limited number of intrinsically serious crimes. Please note that Section 2516(1) has been amended pursuant to Chapter XII, Part B, of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2152 (1984). The list of offenses in this section now includes 18 U.S.C. §1343 (fraud by wire, radio, or television); 18 U.S.C. §§2252 and 2253 (sexual exploitation of children); 31 U.S.C. §5322 (dealing with the reporting of currency transactions); 18 U.S.C. §1512 (tampering with a witness, victim, or informant); and 18 U.S.C. §1513 (retaliating against a witness, victim, or an informant). No offenses were removed from the list. As a matter of policy, authorizations for interception orders will be limited to a relatively small number of cases exhibiting characteristics best suited to optimum compliance with the requirements of Title III and the Fourth Amendment.

Experience with the use of the immunity provisions of 18 U.S.C. §2514 has pointed up a potential problem in connection with this list--that is, the extent to which the descriptive language in the parentheses is intended to limit the scope of the statute which precedes it. For example, the description in parentheses following "section 186 or section 501(c) of Title 29" does not fully describe the content of the former statute and does not refer at all to the content of the latter; however, the Senate Report at 97 states that Title III ". . . also strikes at labor racketeering by the inclusion of 29 U.S.C. §186 and §501(c)," and it seems clear that the parenthetical descriptions were intended merely to be general aids and were not intended to restrict the range of 18 U.S.C. §2516.

Two matters which are neither of pure policy nor patent on the face of the statute must be noted:

A. No authorization will be granted for an interception order directed at or likely to encompass a subject who has already been arrested if the object of the interception is information concerning the offense for which the arrest occurred. If the object of the interception is the investigation of possible obstruction of justice arising out of the prosecution for that offense, this restriction does not apply. See Massiah v. United States, 377 U.S. 201 (1964); Beatty v. United States, 389 U.S. 45, reversing per curiam, 377 F.2d 181 (5th Cir. 1967).

B. Except in extraordinary circumstances, no authorization will be granted to secure an order for the installation of an interception device in a location where it may be expected to intercept any substantial number of privileged communications. This means, for example, that unless the objective of the interception is evidence of a crime to which an attorney is a party, the placing of devices in attorneys' offices will be avoided; however, this does not mean, obviously, that devices cannot be placed in subjects' homes simply because communications to which the marital privilege may apply will be intercepted. For a further discussion of the problems arising out of the interception of privileged communications see USAM 9-7.312 (2) and USAM 9-7.317, infra.

9-7.130 Manner in Which Authorization is Given

A memorandum over the signature of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or of a specially designated Assistant Attorney General will authorize the application for the interception order. A copy of this memorandum will be transmitted to the appropriate attorney in the field.

9-7.140 Requesting Authorization to Apply for an Interception Order

The formal request for authorization under 18 U.S.C. §2516(1) to apply for an interception order must be submitted in writing by the director or head of the investigating agency conducting the investigation. The request should be addressed to the Attorney General. The other required documents, including the proposed affidavit, draft application, and draft order, should be transmitted by the most expeditious means to the Office of Enforcement Operations. When they are to be delivered by mail, they should be addressed to:

Office of Enforcement Operations
Criminal Division
Department of Justice
Post Office Box 7600
Benjamin Franklin Station
Washington, D.C. 20044

Prior to mailing, the Office of Enforcement Operations should be telephonically contacted for additional instructions and to notify the Department that the material is being placed in postal channels.

In this connection, it should be noted that Express Mail provides overnight delivery between specified post offices. The Office of Enforcement Operations will telephonically provide information in this regard. Another method of expedited delivery is by pilot pouch service provided by certain airlines. In conjunction with this service, investigative agents may desire to cooperate by assisting with airport pickup and delivery.

Requests for authorization will be reviewed by the Office of Enforcement Operations, which is charged with the supervision of the interception procedures of Title III and a recommendation will be made to the Assistant Attorney General. The investigative agency is expected to consult with the supervising attorney in connection with the preparation of its request.

9-7.150 Information to be Contained in Requests for Authorization

Each request for authorization should contain all of the following, either as an integral part of the request or as documents separately submitted by the supervising attorney:

A. Draft copies of the application and order; and

B. The proposed affidavit containing the following information:

1. The specific factual information establishing probable cause for the issuance of the interception order;

2. A detailed analysis of all investigative procedures utilized and considered and a full and complete statement as to the reasons for their inadequacy;

3. The names and backgrounds of each prospective subject of the investigation;

4. A description of the location in which the interception device is to be placed or the phone to which such a device is to be attached;

5. A description of the communication expected to be intercepted together with an analysis of the relevance of that communication to the investigation;

6. The names of all persons whose communications may be expected to be intercepted together with their backgrounds and places in the investigation;

7. The length of time it is requested that the device be activated; and

8. Any information not specified which may be relevant to the request or which may shed light on problems to be anticipated in the securing or execution of the order.

9-7.160 The Affidavit

The affidavit is a document of particular importance, and its preparation must be attentively supervised by the attorney who will oversee the interception. 18 U.S.C. §2518(1) and (4) specify the information to be contained in the application (including the supporting affidavit of probable cause) and order, respectively.

The probable cause standard for a Title III affidavit is the same as in other search and seizure situations. It is not the purpose or intent of this chapter to review the law of probable cause, and the chapter on search and seizure should be referred to for that purpose. Many courts have expressed views as to the sufficiency of the probable cause in support of applications for Title III interceptions, and these should be consulted for additional guidance. These cases include United States v. Cantor, 328 F. Supp. 561 (E.D. Pa. 1971); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971); United States v. Becker, 334 F. Supp. 546 (S.D.N.Y. 1971); United States v. Focarile, 340 F. Supp. 1034 (D. Md. 1972); United States v. Escander, 319 F. Supp. 295 (S.D. Fla. 1970); United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971).

As a general matter, the highest degree of specificity consistent with the information available at the time of application and with the safeguarding of intelligence sources should characterize the affidavit. There should be no tendency to allege only the minimum necessary to establish probable cause, and the applying agent should be as candid and cooperative as is possible under the circumstances.

In Illinois v. Gates, 103 S. Ct. 2317 (1983), the Supreme Court abandoned strict application of the "two pronged test" set forth in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), for determining the sufficiency of an affidavit based on information from an informant. The Court concluded that the wiser approach was the totality of the circumstances analysis that traditionally applies to probable cause determinations. The issuing judge is now charged with making "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit. . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that . . .evidence of a crime will be found in a particular place." Id. at 2332. Thus, the principles announced in Aguilar, supra, and Spinelli, supra, should still be observed and in drafting the affidavit, particular care should be accorded to establishing the reliability of informants and the accuracy of the information which they provide. There is a tendency to assert conclusions rather than facts in Title III affidavits, and care must be used to avoid unsupported statements of opinion and conclusions, particularly where they relate to key facts. The source of each item of information in the affidavit should be specified. It is important to set forth underlying circumstances and the factors which give intrinsic reliability to the basic facts established by the affidavit.

The statute requires that the affidavit contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. See 18 U.S.C. §2518(1)(d). In this connection, the use of stereotype statements and "boiler plate" should be avoided, and effort should be devoted to tailoring the statement to the "factual situation" presented. In United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975), the court said, "... the boiler plate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order." However, the court affirmed the conviction, noting that the government had demonstrated a factual basis for the conclusion that other investigative means would not suffice. See also United States v. Pezzino, 535 F.2d 483 (9th Cir. 1976), and United States v. Smith, 519 F.2d 516 (9th Cir. 1975). This statement should, as part of its exposition, include consideration of every ordinary technique set out in the Senate Report. (Failure to list them in the application is not grounds for suppression, however, so long as they are factually eliminated by the allegations of the affidavit. See United States v. Curreri, 363 F. Supp. 430 (D. Md. 1973). The following excerpt from the Senate Report at 101, supra, deals with the showing planned by the drafters:

> Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely . . . What the provision envisions is that the showing be tested in a practical and commonsense fashion . . . .

In most situations where use of electronic surveillance will be contemplated, ordinary visual surveillance will have been attempted and resulted in agent testimony which, while helpful to probable cause, falls far short of the quantum of proof necessary for conviction. Visual surveillance might also be impracticable in ethnic or close, established neighborhoods where the residents are well known to each other or are aware of and hostile to the presence of law enforcement officers.

Questioning under a grant of immunity might be unfeasible on the practical grounds that such questioning would alert the subjects of the investigation to enforcement interest and cause a change in their methods of operation, if no reasonable number of persons could give testimony embracing the entire spectrum of the operation under investigation, or if the identity of the persons to subpoena and immunize is unknown.

Use of search warrants might be forclosed because the particular offense involved seldom or never generates physical evidence, the organization under investigation keeps its records in easily disposable form, e.g., chalk boards, rice or flash paper or has in the past destroyed evidence in a search, the records sought are kept in code or mean little unless examined in the light of the transactions by telephone which gave rise to them (see United States v. Bobo, 477 F. 2d 974 (4th Cir. 1973)), or by the fact that such records were kept and retained for only 14 days while proof of a federal offense requires illegal activity for 30 days or longer.

Undercover operations are not a "standard" investigative technique. They are dangerous, expensive, and highly speculative ventures. The fact that the organization has existed for years with no additions to its membership, that such additions as were made to membership were made from an identifiable class of persons in existence for a long period of time, or that no one operative could hope to uncover the scope of the operations

(see United States v. Bobo, supra) might constitute reasons why no operative can be inserted.

The above listing is not to be used as a litany of excuses for use of electronic surveillance in working a case. It is intended solely as examples of reasons which might force consideration of electronic surveillance. Wire and oral interceptions have been and should remain almost the last resort of law enforcement.

In United States v. Donovan, 429 U.S. 413 (1977), the Supreme Court held that 18 U.S.C. §2518(1)(b)(iv) requires "that a wiretap application must name an individual if the Government has probable cause to believe that he is engaged in the criminal activity under investigation and expects to intercept his conversations over the target telephone" (45 U.S.L.W. at 4119). Thus, the application (and the proposed order, see United States v. Kahn, 415 U.S. 143, 152 (1967)) should include a list of those persons whom there is probable cause to believe are committing the offense and a list of those persons whom there is probable cause to believe will be overheard in conversations relating to the offense. See Appendices I and II at USAM 9-7.170, 9-7.180, 9-7.910, and 9-7.921, infra.

Where the sufficiency of the probable cause to warrant identification of a person is borderline, that person should be named in the application and order. In other words, the naming requirements of the statute should be liberally construed in the interest of caution. Accordingly, applications for extension interceptions should also name any person who was intercepted during a previous period of interception unless the evidence shows that the person either was not committing the offense or will not be overheard during the extension.

When transcribed conversations contain jargon or uncommon terminology, the terms should be explained. The explanation may be included in a short paragraph following the paragraph in which the communications are set out.

While the drawing of the affidavit is the business, in the first instance, of the supervising agent, the supervising attorney should work closely with him/her to insure that the affidavit fully complies with all technical requirements. In this connection, it should be noted that those who review proposed affidavits in the Department of Justice apply high standards, and they are not satisfied with minimal or arguable probable cause levels. Unsatisfactory affidavits will result in delay while the supervising attorney is contacted to provide required correction.

Finally, immediately prior to submission to the Department for review, the proposed affidavit should be reviewed to determine whether the probable cause in it is current. Generally, the Department expects the basic probable cause to be no more than 15 days old at the time the file containing the proposed affidavit, application, and order are received by the Office of Enforcement Operations in the Department which will process the request.

9-7.170 The Application

A. 18 U.S.C. §2518 lists in detail the information required to be contained in an application for an interception order as follows:

> (a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> (b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committd, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) A full and complete statement of the facts concerning all prevous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

B. The requirements of 18 U.S.C. §2518 are designed to respond directly to the Supreme Court's analysis of the New York statute in Berger v. New York, 388 U.S. 41 (1967), the major elements of which are listed in the Senate Report, at 74, as

(1) Particularity in describing the place to be searched and the person or thing to be seized;

(2) Particularity in describing the crime that has been, is being, or is about to be committed;

(3) Particularity in describing the type of conversation sought;

(4) Limitations on the officer executing the eavesdrop order which would (a) prevent his searching unauthorized areas, and (b) prevent further searching once the property sought is found;

(5) Probable cause in seeking to renew the eavesdrop order;

(6) Dispatch in executing the eavesdrop order;

(7) Requirement that the executing officer make a return on the eavesdrop order showing what was seized;

(8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice.

C. In light of this congressional purpose, some discussion of the requirements of 18 U.S.C. §2518 is in order.

1. As a general matter, the highest degree of specificity consistent with the information available at the time of application and with the safeguarding of intelligence sources should characterize the application;

2. A form of application appears in USAM 9-7.900, infra. The form provides for the separate listing of those: (a) who are committing the offenses; and (b) whose communications are to be intercepted. See United States v. Kahn, 415 U.S. 143 (1974). Care should be taken to list under each category only those persons for whom the affidavit establishes probable cause. Complete instructions are included on the form;

3. If a probable interceptee is under indictment or being tried, this fact should be noted in the application. Likewise, if a telephone to be tapped is a public pay phone, it should be set out. In both instances the court will be provided an opportunity to draw or modify the order so as to make allowances for the given situation;

4. Lastly, if effectuation of the proposed electronic surveillance will require surreptitious or covert entry, the application should so advise the court. See Dalia v. United States, 441 U.S. 238, 259 n.22 (1979). See also suggested application form appearing at USAM 9-7.910, infra.

9-7.180 The Order

18 U.S.C. §2518(4) requires that an interception order contain the following information:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

> (d) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> (e) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

18 U.S.C. §2518(5) also requires that every order and extension thereof contain the following statement to the effect that:

> The authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event . . . [insert time specified in order]. Section 2518(5) expressly provides that the interception . . . must terminate upon attainment of the authorized objective, or in any event in thirty days.

The form and content of the interception order raise few problems not already raised in the preceding discussion, but again it must be borne in mind that each of the requirements listed above should be met in as great detail as possible. As with a normal warrant, the scope of the permissible search will be construed against the government, and it is likely that where the order omits some seemingly obvious point the court hearing a motion to suppress will be little inclined to give the agent the benefit of the doubt.

A form of order appears in USAM 9-7.921, infra. Where a public telephone is to be tapped, the order whould be drafted to limit, insofar as practicable, monitoring activity to instances when the facility is being used by those whose interception has been authorized. See United States v. George, 465 F. 2d 772 (6th Cir. 1972). Physical surveillance of the telephone is usually necessary in this type of situation. In this way, interception is limited to calls placed by or to the subjects. See United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971). A sample form for this purpose is included in USAM 9-7.922, infra. In situations where physical surveillance is impossible, provision for voice identification should be made.

Where the application sets forth the fact that a subject of the electronic surveillance is under indictment, the order should contain restrictive language requiring particular care to avoid the monitoring of conversations pertinent to trial or other disposition of that case. A sample form for such actions appears in USAM 9-7.923, infra.

Neither Title III nor the Fourth Amendment ". . . require that a Title III electronic surveillance order include a specific authorization to enter covertly the premises described in the order." Dalia v. United States, supra at 255 n.17, 258-259. Nevertheless, it is the policy of the Department that orders authorizing microphone surveillance should expressly authorize the installing agents to enter the premises surreptitiously to install the interception device, to maintain the device, to place the device more effectively, and to remove it at the expiration of the order. See suggested interception order form appearing at USAM 9-7.921, infra. Once the initial entry has been accomplished pursuant to the court's approval it is not necessary to secure either additional Department or court approval for subsequent entries in order to accomplish repositioning, maintenance, or removal. Contra United States v. Ford, 553, F. 2d 146 (D.C. Cir. 1977). See also J. Carr, The Law of Electronic Surveillance §4.07[2][b] (1977 & Supp. 1980); C. Fishman, Wiretapping and Eavesdropping §§104, 117, and 124 (1978 & Supp. 1980).

The order should contain a provision requiring periodic reports by the supervising attorney. The judge who authorizes an interception may, in his/her discretion, order that the court be furnished with periodic reports ". . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." See 18 U.S.C. §2518(6). The statute does not make mandatory the filing of these reports unless the judge so directs in the authorization order. The frequency of these reports is similarly left to the discretion of the court. It is, however, clearly in the interest of the government to file these reports in order to: (1) demonstrate continuing judicial interception; and (2) to build the strongest possible record on appeal. Accordingly, the supervisory attorney should, as a matter of course, recommend to the district judge that the reporting requirement be included in any orders authorizing interception of oral communications. This may be accomplished by including such a requirement in the draft order submitted to the court. The appropriate interval between reports depends upon what is reasonable under the facts of the case. The usual interval is about five days.

Based on recent allegations of possible breaches in some Title III investigations, it has been concluded that there is no legal need for a communication common carrier, landlord, custodian or other person to be

acquainted with the full details of the court order such as, the names of the subjects to be intercepted, the violations of law being investigated, etc., in order for them to furnish the necessary assistance. Therefore, in the interest of security, a separate abbreviated order should be prepared and presented to the court in the applicable circumstances. A copy of this order may be left in the possession of the communication carrier. A sample form for this purpose is included in USAM 9-7.924, infra.

9-7.200 APPLICATION PROCEDURE

9-7.210 Who May Apply for Interception Orders

Although the statute authorizes applications for interception orders to be made by investigative or law enforcement officers, it is the policy of the Department that all such applications be filed by supervising attorneys.

9-7.220 Judges to Whom Application Should be Presented

Judges of the United States district courts or of the United States courts of appeals are competent to issue interception orders within the area over which they have physical jurisdiction.

18 U.S.C. §2516(1) and §2518(1) refer to "judges of competent jurisdiction," and that term is defined in 18 U.S.C. §2510(9)(a) to include judges of both the district courts and courts of appeals. Except in extraordinary circumstances, all applications should be presented to district court judges.

9-7.230 Documents to be Presented

The documents to be presented to the judge include the application, with copies of the authorization and transmitted letter attached, the affidavit, and the original and one copy each of the proposed orders for interception and for pen register or tone decoder to be used.

It is the policy of the Criminal Division that no pen register shall be installed by any federal law enforcement agency except pursuant to an order issued by a federal district court.

Such an order may be obtained pursuant to Rule 57(b), Federal Rules of Criminal Procedures and as an adjunct thereto an order pursuant to the All Writs Act may be obtained directing the cooperation of the concerned telephone company. Sample forms which may be utilized in applying for an order are inlcuded at USAM 9-7.925 and 9-7.926, infra.

Attorneys applying for such orders are to satisfy themselves that the agency requesting the order is engaged in an investigation of possible criminal activity within the jurisdiction of the agency and that the requested pen register is reasonably calculated to further the investigation.

In no case should the duration of any order exceed thirty days, but applications for extension of an order may be made when, in the view of the U.S. Attorney or Strike Force Chief, it is necessary to accomplish the objective of the investigation.

9-7.231 Trap and Trace Guidelines

In United States v. New York Telephone, 434 U.S. 159 (1977), the Supreme Court held that a district court had the power to compel a telephone company to provide facilities and other assistance to agents of the government in order to attach a pen register to a given line. The Court further held, however, that a telephone company may not be compelled to provide such assistance in cases where such an order would be overly burdensome on the company. The courts have used the same rationale in cases concerning the placement of trap and trace devices to discover the originating numbers of incoming calls. See, e.g., United States v. Mountain States Telephone & Telegraph Company, 616 F.2d 1122 (9th Cir. 1980), In the Matter of the Application of the United States, 610 F.2d 1148 (3d Cir. 1979).

Providing the minimal assistance necessary to place a pen register on a line is generally a simple matter for the phone company, but providing assistance to trap and trace a call entails far greater expenditures of phone company time, manpower and operational capacity. Thus, a telephone company is more likely to feel that an order compelling its cooperation in tracing a phone call is too burdensome, and a court is more likely to scrutinize a request for such an order to determine its effect on the company. Therefore, to minimize the burden on a telephone company that might defeat an order, and further to minimize possible litigation that could delay an important trace, the Criminal Division, after some discussion with appropriate officials of the Bell System, believes that the following guidelines will be beneficial to all concerned with this investigative technique.

A. Before considering an application for a trap and trace order, the supervising attorney will make certain that the investigating agency is conducting a bona fide criminal investigation of matters within its recognized jurisdiction.

B. Before an agent seeks an order to trace incoming calls to a particular line, he/she should, whenever possible, review the proposed trace with the local telephone company's security department. The security department should be able to advise the agent of foreseeable problems in the execution of the proposed order.

C. Except in very rare instances, orders should be limited to Electronic Switching System (ESS) or No. 5 cross-bar facilities. The likelihood of successfully tracing a telephone call through a system using less sophisticated equipment is extremely low and requires an inordinate amount of time, manpower and equipment.

D. Where possible, all orders should also be limited with respect to:

1. Scope--an order should avoid having a trap and trace device on more than one line at a given switching facility.

2. Geography--it is preferable that the order limit traces to "all calls originating in X city" or "all calls originating within a Y-mile radius of Z town." If the target phone is located in a large city, the order should limit the trace to a specific section or sections of the city whenever possible (i.e. "the east side of X city" or "the Borough of _____ in Y city").

3. Duration--orders should limit the trace to twenty (20) days, subject to an extension if the supervising attorney determines it to be necessary.

4. Hours--if it is possible to anticipate when calls will come into a target phone, tracing should be limited to these hours.

E. Except in unusual circumstances, the agent should seek the tracing information from the local telephone company only during regular business hours. The time intervals at which the agent may seek the information will vary, based upon the particular circumstances of each case. Appropriate arrangements can be made during the preliminary discussions with the local telephone company security department.

F. Each order should contain a clause forbidding the phone company to disclose that a trace is or has been in progress.

G. A telephone company should be given the opportunity for a hearing in camera to seek limitations of any proposed order if it feels the order is too burdensome.

H. AT&T has indicated that it will accept orders under Rule 57(b), Federal Rules of Criminal Procedure, as well as under Rule 41, Federal Rules of Criminal Procedure.

I. As with pen registers, no central Justice Department authorization or separate affidavit will be required.

Please bear in mind that these guidelines are meant to be somewhat flexible depending on the circumstances of each investigation. As noted above, the actual scope, duration, etc., of any trace should be negotiated with the security department of the local company. Also, it should be noted that these guidelines may prove too restrictive for emergency situations (e.g., kidnappings), requiring even more flexibility. In general, however, compliance with these guidelines will result in a minimum of delay in obtaining an order and will assure close cooperation with AT&T, its Bell System subsidiaries, and other telephone companies. While we cannot consult with every private telephone company, these guidelines should also provide a useful framework for cooperation with other companies.

A model order incorporating the above guidelines is included at USAM 9-7.928, infra. A sample application for such an order is included at USAM 9-7.927, infra.

9-7.240 Presentation of Application

The application should be presented as expeditiously as possible following the receipt of authorization under 18 U.S.C. §2516(1). 18 U.S.C. §2518(3) provedes that interception orders are to be issued in an ex parte proceeding if the issuing judge determines that:

> (a) There is probable cause for belief that . . . a particular offense . . . [listed] in section 2516 . . . [has been, is being, or is about to be committed];

> (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) Normal investigative procedures have been tried and have failed or [if not tried] reasonably appear to be unlikely to succeed . . . or to be too dangerous;
>
> (d) There is probable cause for belief that the facilities [or place] from which . . . [the interception will be made] are being used, or are about to be used, in connection with the . . . [offense involved] or are leased to, listed in the name of, or commonly used by . . . [the subject of the order].

Although 18 U.S.C. §2518(3)(b) requires a finding that ". . . particular communications . . ." will be intercepted, the Senate Report at 102 states that the judge is required ". . . to determine that there is probable cause for belief that facts concerning . . . the offense may be obtained . . . ."

The Senate Report at 102 states that these findings "together . . . are intended to meet the test of the Constitution that electric surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity . . . ."

18 U.S.C. §2518, paragraphs (2) and (3), indicate that the issuing judge is expected to play an active role in the application and issuance procedure. 18 U.S.C. §2518(2) provides that he/she may require the applicant ". . . to furnish additional testimony or documentary evidence . . ." if that contained in the original application is insufficient to justify the granting of an order, and 18 U.S.C. §2518(3) provides that the order may be issued as requested or as modified.

The Senate Report at 102 states that additional testimony given in connection with an application should be under oath, and a record should be made through the use of a court reporter. Since these ex parte proceedings are intended to be confidential, the judge should be requested to instruct the court reporter concerning this requirement of confidentiality and order that all the copies of the transcript and stenographic notes or tapes be placed under seal and treated in the same fashion as are recordings. See USAM 9-7.340, infra.

9-7.250 Sealing of Documents

As soon as the order has been signed, the supervisory attorney should make certain that the judge has sealed the documents and has caused them to be properly safeguarded or to seal them himself/herself in the court's presence. See United States v. Cantor, 470 F.2d 890 (3d Cir. 1971). The usual practice is either to file the sealed package with the district court clerk for safekeeping in the clerk's vault or for the supervising attorney to take and retain custody of the sealed documents until the interception has been completed, at which time they will be filed with the court. If this latter procedure is followed, it must be ordered by the court and the identifying number of the action placed on the sealing envelope. (It is good practice to secure either a duplicate original or to make a duplicate copy for the supervising attorney's work file. Such a document is frequently needed prior to the normal time for unsealing. A copy of the signed order is usually provided to the communications common carrier in conjunction with any request for information, facilities, or technical assistance.)

9-7.260 Procedure if the Application for an Interception Order is Denied

In the event that a judge refuses to issue an interception order, notice must be given to the Department of Justice, Office of Enforcement Operations. Upon receipt of notification that an application has been denied, the Department will determine whether a new application can be or should be made on the facts available or whether additional investigation is needed.

9-7.270 Emergency Interceptions

18 U.S.C. §2518(7) provides for the interception of communications for up to 48 hours without a prior court order under certain emergency conditions. However, that section also provides that an application for a court order approving the interception must be made within 48 hours after interception has begun to occur.

The Attorney General, the Deputy Attorney General, or the Associate Attorney General will excercise his/her power to authorize such emergency interceptions in appropriate cases. As this provision does not dispense with any of the application procedures prescribed under 18 U.S.C. §2518(1)-(6) but merely delays the application process for 48 hours, the investigative agency requesting such authorization should, insofar as practicable, submit its request in the form indicated below:

A. A written request to the Attorney General signed by the director or head of the investigating agency. In addition to identifying the persons to be intercepted, the facilities from which, or the place where, the wire or oral communications are to be intercepted, and the offenses to which the communications are expected to relate, the request must expressly state that the requester has determined that:

1. An emergency situation exists that involves an immediate danger of death or serious physical injury to any person, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained; and

2. There are grounds upon which such an order could be entered under Title III.

The request should be accompanied by documentation setting forth probable cause for belief that:

a. An individual is committing, has committed, or is about to commit a particular offense enumerated in 18 U.S.C. §2516;

b. That particular communications concerning that offense will be obtained through such interception; and

c. That the facilities from which or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offenses.

When it appears that an emergency authorization may be needed, the Office of Enforcement Operations should be immediately contacted for further information and advice.

9-7.300 CONDUCT OF INTERCEPTION

9-7.301 Preliminary Action

The statute requires that the interception devices be installed as soon after entry of the order as practicable. The supervising attorney should encourage the investigative agency to take whatever preliminary

steps are appropriate to insure that the devices are installed at the earliest possible moment. Such action may include making preliminary arrangements with the telephone company or finding a means for surreptitious entry, where that will be necessary, in advance of approval by the court. The technical agent for a wiretap should obtain pertinent cable and pair and junction box information (appearances of leads) from the communications common carrier whenever possible. Also, the supervising agent and technical agent should select a listening post and obtain the necessary technical equipment to conduct the interception. The supervising agent should determine what personnel will be needed to conduct the interception and any visual surveillance and he/she should make arrangements for obtaining them. He/she should also set up the shifts and posts for all personnel.

9-7.302 Preliminary Meeting Held by Supervising Attorney

Prior to any monitoring, action should be taken to insure that the interception will be in conformity with the court order and the statute. The supervising attorney should hold a meeting of the supervising agent, case agent, technical agent, and as many prospective monitoring agents as possible. During this meeting, he/she should inform the agents of the contents of the anticipated order. Stress should be placed on those provisions of the order describing:

A. The type of communication sought to be intercepted;

B. The particular offense to which it relates;

C. Minimization; and

D. Termination when the objective of the interception has been obtained.

He/she should instruct them what to do when confronted with the interception of communications involving crimes not named in the order, privileged communications, how to minimize interception of non-pertinent matters and when to terminate the interception. The supervising attorney should emphasize that any limitations in the order relating to, for example, limited hours of operation or visual surveillance or voice identification should be followed strictly.

9-7.303 Posting the Order

As the interception must be confined to the terms of the court order, a copy of the order should be posted at the situs of the listening post. Each monitoring agent should be required to read, initial, and date the order prior to beginning his/her first monitoring shift.

9-7.310 Duties of Agents In General

9-7.311 Duties of the Supervising Agent

A. The supervising agent normally is the liaison between the supervising attorney and the monitoring agents. This insures that instructions from the attorney are properly communicated to the agents and that the attorney receives a clear picture of what the interception is producing. The supervising agent is also charged with the responsibility of conducting the interception in compliance with all instructions of the court and the supervising attorney and insuring that the interception device is installed as soon as practicable after the court order is obtained.

B. The supervising agent should prepare and deliver to the supervising attorney daily written reports. There is no prescribed form for such reports, but they should show the nature and scope of the interception for that day. For instance, they should indicate the number of relevant conversations intercepted, the number of non-pertinent conversations terminated, whether any of the individuals named in the order was intercepted, whether any new participants were identified, and whether any problems have arisen, e.g., equipment malfunction, privileged communications, or evidence of other crimes. These daily reports should be made even throughout a weekend or holiday period and may originally be accomplished via telephone with the documentation being prepared the next working day. A copy of the corresponding day's log should accompany each report.

C. The supervising agent's duties include providing for the integrity and admissibility of the recordings by following the principles set forth herein and insuring proper termination of the interception either on the day specified in the court order or when the objective of the interception has been accomplished, whichever comes first. If during the course of the interception the supervisory agent determines that the communications expected to be overheard are intercepted and recorded, the supervisory agent must immediately terminate the interception and inform the supervising attorney.

9-7.312 Duties of Monitoring Agents

The monitoring agents have initial responsibility in the following circumstances:

A. In the event conversations between individuals in the relationship of husband-wife, clergyman-penitent, and physician-patient are intercepted, the agent must notify the supervising agent as soon as practicable;

B. In the event conversations between individuals in the relationship of attorney-client are intercepted:

1. If the conversation concerns a pending criminal case (the client under indictment), the agent must immediately shut off the recording device, remove the earphones, note such in the logs (identifying the parties intercepted), and notify the supervising agent; or

2. If the conversation relates to matters other than a pending criminal case, proceed as in A. above.

C. In the event conversations relating to crimes other than those specified in the court order are intercepted, the agent must notify the supervising agent as soon as practicable;

D. If the court order authorizes the interception of specific individuals' telephone calls from a public booth, the agent may intercept and record only those pertinent conversations of the specified subjects. When other persons are using the phone the recording device must be shut off and the earphones must be removed; and

E. In the event the communications expected to be overheard are intercepted and recorded, the agent must immediately request instructions from the supervising agent as to whether to terminate the interception.

9-7.313 The Log

The monitoring agents should maintain a contemporaneous log, by shifts, of all communications intercepted, indicating the reel and footage location of each communication; the time and duration of the interception; whether outgoing or incoming in the case of telphone conversations; the number called if the call was outgoing; the participants, if known; the

subject and, to an abbreviated extent, the content of all pertinent conversations. Any peculiarities, such as codes, foreign language use, or background sounds, should also be noted. When the interception of a communication is terminated for purposes of minimization, that fact should be noted. This log should record the names of the personnel in each shift and the function performed by each, malfunctions of the equipment or interruptions in the surveillance for any other reason and the time spans thereof, and interceptions of possibly privileged conversations or conversations relative to crimes not specified in the original interception order. Each entry in the log should be initialed by the person making it.

9-7.314 Duties of the Technical Agent

As previously noted, the technical agent should:

A. Prior to the order:

1. If a wiretap, secure the necessary technical information regarding the connections to be made to accomplish the interception. (This information should be preserved with the records of the case for later court use.) If the interception is to be of oral communications, he/she should similarly make necessary plans and preparations to facilitate the installation of the interception device;

2. Secure and establish the listening post in conjunction with the supervising agent;

3. Obtain and set up the interception equipment at the listening post. This equipment may include tape recorders in sequence, a cassette recorder, and a pen register or tone decoder.

B. Subsequent to the order:

If a wire interception, test the wire pairs with a hand set and make a test call to insure that the equipment is connected to the proper telephone line. See United States v. Lawson, 334 F. Supp. 612 (E.D. Pa. 1971).

Every technical act performed should be carefully recorded for future court use.

9-7.315 Minimizing the Interception

18 U.S.C. §2518(5) provides that every order shall contain a provision that the interception shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. This provision requires the intercept procedure to be conducted so as to reduce to the smallest possible number the interception of "innocent" communications. In this context, the word "possible" means feasible or practicable consistent with the objective of obtaining evidence of the criminal activity described in the interception order. See United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md. 1972); United States v. Ramsey, 503 F.2d 524, 532, n. 26 (7th Cir. 1974). In the usual situation, some interception must take place before it can be determined that the interception of the communication should be interrupted.

Conversations which must be minimized include privileged communications. However, it is difficult to draw any hard and fast rules in this area, for there appears to be an exception to every truism concerning minimization. As a guiding principle, it may be said that problems relating to minimization must be dealt with on an ad hoc basis and that monitoring agents must be provided with instructions by the supervising attorney as the surveillance progresses. For his/her part, the attorney should be familiar with the expanding case law in this area. See Scott v. United States, 436 U.S. 128 (1978); United States v. Terry, 702 F.2d 299 (2d Cir.), cert. denied, 103 S. Ct. 2095 (1983); United States v. Feldman, 606 F.2d 673 (6th Cir. 1979).

The supervising attorney should provide guidance to the monitoring agents at his/her preliminary meeting. In addition, he/she should provide written instructions for posting at the listening post if the nature of the interception suggests the desirability of such action. During the course of the interception, the supervising attorney should review and change his/her instructions as to minimization whenever appropriate.

9-7.316 Evidence of Other Crime

The monitoring agents should also be instructed as to how to react to interceptions which apparently relate to crimes other than those enumerated in the order. Essentially, they should continue to intercept and record calls of this nature and report this fact to the supervising attorney as soon as possible, but not later than the next monitoring day. The attorney should then make an initial determination as to whether the conversation may be evidence of a crime not listed in the order. If so, the supervising judge should be informed via the next periodic report.

9-7.317 Privileged Communications

A prime objective of authorized interceptions of private communications is to provide the government with legally admissible evidence of criminal activity which could not be obtained through normal investigative techniques. However, the confidentiality of conversations between individuals who stand in the relationship of husband-wife, clergyman-penitent, physician-patient, and attorney-client are protected by testimonial privilege. If a defendant could properly assert such a privilege against introduction of his/her conversations when the government had obtained evidence of them through normal investigative techniques, then it was not the intent of Congress to allow the government to use these converations as evidence when obtained through electronic surveillance. Accordingly, 18 U.S.C. §2517(4) states:

> No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

The practical effect on the investigative agency of this section is this: If an intercepted communication would be otherwise privileged, the government may not introduce evidence of the communication's content at trial. Whenever the agent supervising the interception becomes aware that the subject whose conversation is being intercepted is talking to his/her spouse, his/her physician, or his/her clergymen, the agent should bring this fact to the attention of the supervising attorney at the end of the recording period, or as soon thereafter as practicable. After being informed of the nature and content of these conversations, the supervisory attorney can make a determination as to whether or not the communication in question is one which qualifies for the privilege and so advise the investigative agent.

A more serious situation is presented when the conversations overheard by the government are between the subject and his/her attorney (or if the subject is an attorney, between the subject and his/her client) In this instance, the confidential communication is not only protected by a testimonial privilege but also by the Sixth Amendment's guarantee of the individual's right to the assistance of counsel. If the intercepted communications deal with legal advice given by the attorney to the client concerning a pending criminal case, then care must be taken not to violate the client's Sixth Amendment rights.

In the event that the electronic surveillance intercepts a communication between an attorney and client concerning a pending criminal case, that is, a case in which the client is under indictment, the agent supervising the interception must immediately shut off the interception equipment and make a notation in the logs that the conversation was shut off and was not overheard. The log should identify the attorney and the client who were on the line which occasioned the shut off. The agent should also bring this fact to the immediate attention of the supervising attorney. In rare instances, the government may be authorized to intercept the conversations of a subject and his/her attorney after an indictment has been returned against the subject; Cf. Osborn v. United States, 385 U.S. 323 (1966). However, great care must be exercised by the supervising attorney that actual pending cases against a subject are not needlessly jeopardized in order to further potential cases.

In the event, on the other hand, that the electronic surveillance intercepts a communication between an attorney and client relating to matters other than a pending criminal case, e.g., a conversation in relation to an illegal activity, the agent supervising the interception should, at the earliest practicable moment, bring this fact to the attention of the supervising attorney. Upon being informed of the circumstances and content of the conversation, the supervising attorney must decide if the conversation is in fact privileged. If that determination is made, the supervising attorney should instruct the investigative agency not to disclose the content of the privileged communication to other investigative or police agencies, nor to conduct further investigation based upon the contents of the privileged communication. Such privileged conversations should not be included in the copies of transcriptions of the tapes, but should be recorded on the sealed copy that will remain in the custody of the court.

9-7.318 Reports to the Court

The authorizing order normally requires that reports be filed periodically with the supervising judge. 18 U.S.C. §2518(6) provides that the reports should show ". . . what progress has been made toward achievement of the authorized objective and the need for continued interception." As a matter of policy, the supervising judge should be kept fully advised of the progress of the interception.

The forms used for this purpose vary from district to district. However, it is good practice to include as part of each periodic report to the court copies of the daily reports received by the supervising attorney

from the supervising agent. The report should clearly identify the interception by docket number or whatever other means is used in the district, the date it is made, and the period it covers. It should also explain to the court matters which, in the opinion of the supervising attorney, might not be clear to the court. It might contain a copy of the minimization instructions given to the agents at the onset of the interception and, in later reports, such changes as are made in these instructions. In this manner the court could change the instructions if appropriate. If certain expected communications have not been overheard and the reason is apparent, this information should be included in the report. For example, that an expected conversation between X and Y at X's house might not occur on a certain date because Y was ill. It is not necessary to go into great detail or cover matters which do not relate to the authorized objective. But the supervising attorney should take care that his/her summary fairly apprises the court of the progress of the surveillance.

In advising the court of ". . . the need for continued interception," the supervising attorney is essentially restating and updating the probable cause to continue the surveillance under the original authorization. While the sufficiency of the report will not be tested by the same standards as the original application, the record of the case will be strengthened if the government has demonstrated throughout the surveillance that the conditions which justified the original authorization are still operative. Therefore, the supervising attorney should not phrase the continued need in a conclusory fashion, but he/she should candidly, and, in some detail, inform the court why he/she thinks the electronic surveillance should continue. Each report should contain an order sealing it until after the conclusion of the interception and placing it in the custody of whomever has custody of the application and order.

The interval between reports will, of course, be determined by the desires of the supervising judge. Absent some firm indication by him/her, the interval suggested should depend on what is reasonable in the case; the longer the period of authorized interception, the longer the periods between reports may be. Usually, the interval is set at about five days. The reports to the court have assumed importance because of the significance which courts of appeals and reviewing district courts have attached to them, particularly in evaluating the effectiveness of judicial supervision of minimization. See United States v. Bynum, 485 F.2d 490 (2d Cir. 1973); United States v. Quintana, 508 F.2d 867, 875 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1021 (D.C. Cir. 1974); United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972).

9-7.320 Recording the Intercepted Communications

Title III directs that the contents of any intercepted communication ". . . shall, if possible, be recorded on tape or wire or other comparable device." (See 18 U.S.C. §2518(8)(a)). This requirement would seem to be mandatory in all but the most extraordinary situations. Although mechanical breakdown of recording equipment would probably be temporarily excusable under this section, the preferred practice is to provide for recorder redundancy in an effort to avoid such a situation.

9-7.321 Protection of the Recording

The statute commands "the recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations." (See 18 U.S.C. §2518(8)(a)). Accordingly, the following procedure should be followed during the period of authorized interceptions:

A. Either during or at the end of each recording period a copy of the recorded communications should be made for the use of the investigative agency and the supervising attorney;

B. The original recording should be placed in a sealed evidence envelope and kept in the custody of the investigative agency until it is made available to the court at the expiration of the period of the order;

C. A chain of custody form should accompany the original recording. On this form should be a brief statement, signed by the agent supervising the interception, which identifies:

1. The order which authorized the recorded interceptions (by number if possible);

2. The date and time period of the recorded conversations;

3. The identity (where possible) of the individuals whose conversations were recorded;

4. The place where the intercepted communications took place.

The form should indicate to whom the supervising agent has transferred the cusody of the original recording and the date and time that this occurred. Each subsequent transfer, including that to the court, should be similarly noted on the form.

The agent supervising the recording should mark a label attached to the original tape reel or wire so as to identify it as corresponding with the accompanying chain of custody form. The date of the recording should also be marked on the label and this should be initialed by the agent.

D. Each agent or other person signing the chain of custody form should be prepared to testify in court that the original tape, while in his/her custody, was kept secure from the access of third parties (unless so noted on the form) and was not altered or edited in any manner.

It is the responsibility of the investigative agency to ensure that original recordings in their custody will be maintained in such way as to ensure their admissibility in evidence at trial over objections to the integrity of the recording.

9-7.322 Procedure When No Recording Can Be Made

In those unusual instances where no recording of the intercepted communications could be made, the following procedure should be utilized:

A. If it is intended that the overheard conversation be introduced in evidence at trial the intercepting agent should make a contemporaneous log or memorandum. This log should be as near to a verbatim transcript as is possible under the circumstances of the interception;

B. The log or memorandum should close with a brief statement signed by the agent indicating the date, time, and place of the intercepted conversation. The order authorizing the interception should be identified. The agent should indicate that the log or memorandum contains the contents of the intercepted communication which he/she overheard. This should be followed by the agent's signature; and

C. This log should be treated by the investigative agency as if it were an original recording of the intercepted communication, and the procedure outlined in USAM 9-7.321, supra, should be followed.

9-7.323 Duplicate Recordings

The statute allows the investigative agency to make duplicate recordings of the original tape or wire before the original is sealed. Since the sealed original will, as a practical matter, be unavailable for replay by the investigative agency or the Department of Justice, at least

one duplicate should always be made from the original before sealing. Some agencies record a duplicate original "work copy" of the tape contemporaneous with the recording of the original. See United States v. Lanza, 349 F. Supp. 929 (M.D. Fla. 1972).

9-7.330 Termination of the Interception

Congress provided a statutory scheme allowing authorized electronic surveillance of private conversations for the limited purpose of securing evidence of crime which could not easily be obtained in other ways. Although modern techniques of electronic surveillance might be useful in providing investigative agencies with general intelligence concerning criminal activities, the use of the technique solely for general intelligence gathering would raise serious constitutional questions under the Fourth Amendment. Therefore, 18 U.S.C. §2518(5) commands interception to terminate either when the objective of the surveillance has been realized, or on a specified date within 30 days after the initial interception--whichever comes first.

9-7.331 Termination upon Achievement of Authorized Objective

The interception of private conversations must terminate as soon as the government has obtained the evidence which was the objective of the authorization. If interception is continued beyond that point, evidence derived from continued interception will not be construed as obtained pursuant to court order. "No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization . . ." (See 18 U.S.C. §2518(5)). Such an unauthorized interception would be violative of the Fourth Amendment. (See Katz v. United States, 389 U.S. 347 (1967)), and would have three serious consequences: First, evidence derived from the unauthorized interception would be rendered inadmissible. See 18 U.S.C. §2515; Weeks v. United States, 232 U.S. 383 (1914). Second, the agents conducting the unauthorized interception might be subject to criminal penalties. (See 18 U.S.C. §2511). Third, the agents conducting the unauthorized interception subject to civil suit by persons whose conversations were intercepted. (See 18 U.S.C. §2520).

It would be well to note that, while many orders cite the identification of co-conspirators as one of the primary objectives, a blind reliance upon this language as grounds for continuing the surveillance until the calendar expiration date could be frought with

serious consequences. While it is true that identifying and defining the roles of conspirators is a proper objective, it must be realized that these interceptions, especially gambling interceptions, rarely result in the identification of all participants. The central consideration is whether a continued interception can stand the test of subsequent court scrutiny.

The investigative agent supervising the interception bears initial responsibility for terminating the interception. When, during the course of the interception, the supervising agent determines that the communications expected to be overheard have been intercepted and recorded, he/she shall cause the interception to terminate immediately. He/she shall then inform the supervising attorney of his/her decision. If the supervising attorney does not concur, when interception under the original order shall be resumed. The daily report of the supervising agent to the supervising attorney will enable the supervising attorney to make an independent judgment as to whether the objective of the surveillance has been accomplished. If the supervising attorney determines that sufficient evidence has been obtained from the authorized interception, the investigative agency must immediately cease further electronic surveillance.

9-7.332 Termination Upon Expiration of Period of Interception

Regardless of whether or not an authorized interception has achieved its objective, it may only take place during the period authorized by the court order. It is the responsibility of the investigating agency to terminate the interception within the time period appearing on the order. The investigative agency should install the intercepting device as soon as authorization is obtained so that the authorized time period does not begin to run after the initial probable cause has grown stale. Whether execution of the warrant was sufficiently prompt is a question of fact which decided adversely to the government could be fatal in a motion to suppress. The investigative agent supervising the interception should promptly inform the supervising attorney that termination of the electronic surveillance has occurred.

9-7.333 Application for Extension of Interception

If the supervising attorney anticipates that the interception will terminate without achieving its authorized objective, he/she should determine if there are facts which would justify making application for an extension of the authorization. If the supervising attorney decides that

application for an extension is appropriate, he/she should obtain authorization from the Attorney General or specially designated Assistant Attorney General to apply for the extension exactly as if he were applying for an original order for an interception. An application for an extension, if filed without the express authorization of the Attorney General or a specially designated Assistant Attorney General, is unauthorized and communications intercepted pursuant to the extension order will be suppressed as the product of an illegal interception. It should be noted that the draft application which he/she submits must include ". . . a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." (See 18 U.S.C. §2518(1)(f)). If the supervising attorney intends that an existing interception continue without interruption via an extension, it is his/her responsibility to take the necessary steps to secure an extension from the authorizing court before the time when the interception must terminate pursuant to the original order.

When a gap exists between the termination of the original interception and the signing of the extension order, it is not necessary that the interception facilities be removed or dismantled. It is sufficient that they be inactivated, that is, turned off. During this period it is imperative that the intercepting agents understand that they do not have authority to intercept or record communications unless and until the court signs the extension, and even then their authority is circumscribed by the terms of the extension order and not the original. However, terms inadvertently omitted from the extension may be determined by reference back to the original. See United States v. Poeta, 455 F. 2d 117 (2d Cir. 1972). During the extension interception, the same procedure should be followed as during the original interception.

9-7.340 Sealing and Custody of the Recording Upon Termination of Interception

Immediately upon termination of the interception, the original recordings of the conversations should be submitted by the supervisory attorney to the judge authorizing the interception. See United States v. Poeta, supra. The judge will then order the original recordings sealed and order their place of custody. As most courts and their clerks are not equipped to safeguard evidence, the supervisory attorney should suggest that the court order the custody of the sealed recordings to remain with the investigative agency which undertook the surveillance. In many instances, the bulk of the tapes will preclude their being kept by the clerk of the court. The sealing should be done under the supervision of the authorizing judge.

Any delay should be carefully documented to show a good faith attempt at compliance with the statute by the government. If the failure to seal on the day of termination is forseeable, the supervisory attorney should seek an order of the supervising judge extending the time for sealing. If not, the procedure followed in most districts of submitting a form sealing order to the court could help. In addition to the matters required by 18 U.S.C. §2518(8)(a), the order could recite the reasons for any delay in sealing. It is suggested that the order likewise recite the number of tapes sealed. See USAM 9-9.730, infra, for a form sealing order.

If the court so orders, it is the responsibility of the investigative agency to maintain the recordings without breaking the seal placed upon them by court order. The statute directs that the unbroken seal of the court or an explanation for its absence is pre-requisite to admitting the recordings in evidence at trial. The investigative agency must be prepared to maintain safely the original recordings for a minimum period of 10 years. Even after this 10 year period, the recording may only be destroyed pursuant to an order of the court which issued the original authorization to intercept. At the time of signing of the sealing order, it is also appropriate to remind the court of its reporting obligation under 18 U.S.C. §2519 and to fill the report out for the court and submit it to the court, if that is the practice in the district. Failure to file this report is not a ground for suppression. See United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973).

9-7.350 Use of Original Recording before Trial

As noted, the prerequisite for admissibility into evidence of the original recording is the presence of the court's seal or a satisfactory explanation for its absence. If for any reason, however, it becomes necessary for the government to make use of the original recording before trial, the supervising attorney should apply to the authorizing judge for an order allowing him/her to break the seal and use the recording. The application should state in detail the reasons for the request and the uses to which the original recording will be put. If the supervising attorney drafts the order authorizing breaking of the seal, this order should contain the same information appearing in the application.

Some courts will handle the question of admissibility of the recording in a pre-trial conference. In those situations, the trial attorney will have an opportunity to break the seal and listen to the recording before trial. This enables the trial attorney to examine the quality and content of the recording. Storage in high heat or close to

strong magnetic forces can lower the quality of the recording. At this pre-trial stage, counsel for the defendant should be afforded an opportunity to be present at the breaking of the seal, playing of the original tape, and resealing of the original tape. It should be noted that 18 U.S.C. §2518(8)(c) makes violation of the recording, sealing, and custody provisions subject to the contempt power of the court.

9-7.400 THE INVENTORY

9-7.410 The Notice Requirement

Congress has provided that notice be served on certain persons whenever an application for an interception order has been filed (See 18 U.S.C. §2518(8)(d)). Congress intended by this provision that the government's activities under Title III would be made public. In addition, Congress intended to put the subject of the interception on notice so that he/she could seek civil redress under 18 U.S.C. §2520 if he/she believed his/her privacy was violated (See Senate Report, at 105).

9-7.420 Persons Entitled to Receive Notice

The persons named in the order or the application are entitled to receive notice. Other parties to intercepted communications may receive notice if the issuing judge determines in his/her discretion that it is in the interest of justice. (See 18 U.S.C. §2518(8)(d)). Everyone whose communications were intercepted is a potential recipient of notice under this section.

9-7.430 Contents of the Inventory

Notice is given to a party by serving upon him/her an inventory which includes:

> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
>
> (3) the fact that during the period wire or oral communications were or were not intercepted.

See 18 U.S.C. §2518(8)(d). Upon receipt of the inventory, the recipient or his/her counsel may move for inspection of the application, order, and recorded interceptions. The judge may grant this inspection in full or in part if he/she determines it to be in the interest of justice.

9-7.440 Time of Service

The court shall order service of the inventory "[w]ithin a reasonable time . . ." after (a) the date of filing of an application for an order of approval under 18 U.S.C. §2518(7)(b), which is subsequently denied or (b) the termination of the period of an order or extension thereof. The "reasonable time" must occur within 90 days of either (a) or (b).

9-7.450 Postponing of the Inventory

Congress recognized that continuing investigation of a subject could be compromised if the inventory invariably was served within the 90 day period. The filing of the inventory may, therefore, be postponed during a period when the supervising attorney can demonstrate that there is "good cause" for the postponement. See 18 U.S.C. §2518(8)(d) (1976).

Whenever the supervising attorney has reason to believe that there is "good cause" to postpone the serving of the inventory, he/she should immediately file an ex parte motion stating the good cause and requesting postponement. The motion may be made to any judge of competent jurisdiction. Normally, it would be made before the judge to whom application for the order was originally made. It is clear that the inventory may be late, See United States v. John, 508 F.2d 1134 (8th Cir. 1975); United States v. Lucido, 373 F. Supp. 1142 (E.D. Mich. 1974); United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972); United States v. Forlano, 358 F. Supp. 56 (S.D. N.Y. 1973); United States v. Cafero, 473 F. 2d 489, (3d Cir. 1973). Failure to serve any inventory at all may result in suppression where there is a further showing of specific prejudice to support suppression as to any defendant. See United States v. Principie, 531 F. 2d 1132 (2d Cir. 1976). The inventory time can, of course, be extended pursuant to appropriate order. See United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973); United States v. Schullo, 363 F. Supp. 246 (D. Minn. 1973); United States v. Cafero, supra.

9-7.460 Preparation of Inventory List

The second requirement set forth by the Supreme Court in Donovan, 513 F.2d 337 (6th Cir. 1975), involves post intercept inventory notice. The Court held that 18 U.S.C. §2518(8)(d) requires the government, when the intercept is over, to classify all persons whose conversations have been overheard and to provide that information to the issuing judge so that he/she may use it in causing mandatory notice to be served on persons named in the application or order and in excercising his/her discretionary power to have notice served on unnamed persons who were intercepted; see Donovan, supra. The following are essential classifications:

A. Persons named in the order or the application;

B. Other persons whose intercepted communications apparently incriminate them in the offense or offenses specified in the interception order;

C. Other persons whose intercepted communications apparently incriminate them in offenses not specified in the interception order; and

D. Persons whose intercepted communications are apparently non-incriminating.

See USAM 9-7.400 to 9-7.450, supra, and USAM 9-7.940 to 9-7.943, infra.

If any omission is discovered after the judge has been provided with the classifications, a supplementary report correcting the omission should be made to him/her as soon as possible.

To facilitate the preparation of the inventory listing, the supervising attorney should require the supervising agent to furnish him/her a preliminary report detailing the names of those intercepted and the category into which each falls, approximately 80 days after termination of the interception.

On preparation of inventory generally, see United States v. Chun, 503 F.2d 533 (9th Cir. 1974). See also United States v. Doolittle, 507 F.2d 1368, affirmed en banc, 518 F. 2d 500: (6th Cir. 1975), cert. denied, 430 U.S. 905 (1977), and United States v. Donavan, supra.

The inventory listing should be forwarded by the supervising attorney to the court about 5 days prior to the date inventory is due together with a proposed order in which the names of those to be mandatorily inventoried are listed by category. The proposed order should also make provisions for insertion by the court of the names of those to be discretionally

inventoried. This will permit the supervising judge to exercise his/her discretion by indicating who is to be inventoried. The supervising attorney should assist the judge in the exercise of this function by making recommendations. Ordinarily, those in the first three of the above categories are inventoried and those in the fourth one are not. It is important to insure that every indictee and prospective indictee who has been indentified subsequent to the inventory proceedings is served with an inventory as soon as practicable.

9-7.500 DISCLOSURE OF INTERCEPTED COMMUNICATIONS

Congress did not intend to make private communications become public property through the use of authorized electronic surveillance. The statute (18 U.S.C. §2517(1), (2), and (3)) sets forth the limited categories of who may disclose information derived through electronic surveillance, to whom the information may be disclosed, and how the information may be used. In 18 U.S.C. §2517, the Congress struck a balance between the need of the community to keep private its communications and the need of the community for effective law enforcement through disclosure of the fruits of electronic surveillance. Any disclosure by government attorneys and agents or any other person of the contents of intercepted communications which is not pursuant to 18 U.S.C. §2517 may subject the offending party to a civil action for damages under 18 U.S.C. §2520.

9-7.510 Who May Disclose Intercepted Communications

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use the information in the performance of his/her official duties. (18 U.S.C. §2517(1) and (2)). This would include investigative agents and supervising attorneys who either participated in the interception of the communication to be disclosed or who have learned of its contents from someone entitled to tell them.

Not every "investigative or law enforcement officer" may disclose or use his/her knowledge of the contents of an intercepted communication, however. Only those agents and attorneys who in the course of their duties transmit such information are authorized to do so. The contents of an intercepted communication is to be disclosed by an agent or attorney only after he/she is satisfied that the person to whom disclosure is made has a need to know the information.

9-7.520 To Whom Intercepted Communications may be Disclosed

Disclosure may be made ". . . to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer . . . receiving the disclosure." (See 18 U.S.C. §2517(1)). By this section, Congress intended that there be close cooperation among the different federal investigative agencies, and between federal and state or local law enforcement agencies in the administration of criminal justice (see Senate Report, at 99). If an individual is authorized by law to investigate, make arrests, or prosecute any of the offenses enumerated in 18 U.S.C. §2516, and would be able to make use of the information in the course of his/her official duties, then disclosure to him/her of the contents of an intercepted communication is proper. See Iannelli v. United States, 477 F.2d 999 (3d Cir. 1973). This limitation is applicable to state and local jurisdiction investigative and law enforcement officers.

9-7.530 Non-Statutory Restriction on Disclosure

Although the statute permits disclosure of information pursuant to 18 U.S.C. §2517(1) and (2), situations will arise wherein the congressional policy of cooperation between federal and state investigative agencies is counterbalanced by a policy of non-disclosure of information between separate investigative agencies to protect the security and integrity of an agency's authorized interception and the subsequent prosecution of the subject. Therefore, while intra-agency disclosure will be governed by procedures established by the director of the agency conducting the authorized interception, and disclosure to the Attorney General and Department of Justice (Criminal Division) attorneys will be governed by statute and procedures established herein, all other disclosures will be governed by the following:

A. Disclosure may be made at the discretion of the investigative agency. A memorandum of disclosure should be prepared by the investigative or law enforcement officer making the disclosure. This memorandum should indicate the name and agency of the person to whom disclosure was made, the date of disclosure, a brief summary of the information disclosed, or identification (by number of the order if possible) of the authorized interception, and the purpose for making the disclosure.

B. The investigative agency must inform the recipient that the disclosed information came from an authorized interception and that subsequent authorization must be obtained before use in any proceeding.

9-7.540 Use of Intercepted Communications by an Investigative or Law Enforcement Officer

An investigative or law enforcement officer may use evidence derived from intercepted communications in the same manner as he/she would use any other items of information or evidence in the course of his/her duties. See United States v. Vento, 533 F.2d 838 (3d Cir. 1976).

9-7.550 Disclosure to a Grand Jury or in a Criminal Proceeding

If a witness before a grand jury or in a criminal proceeding in federal or state court has knowledge of the contents of an intercepted communication or evidence derived therefrom, he/she may testify under oath concerning this communication or evidence if he/she obtained the information upon which his/her testimony is based in a manner authorized by 18 U.S.C. §2517(1) or (2). However, before such a witness may disclose communications relating to offenses not specified in the interception order, an order authorizing the disclosure must be obtained from a judge of competent jurisdiction in accordance with 18 U.S.C. §2517(5). See United States v. Brodson, 528 F.2d 214 (7th Cir. 1975). An order should be obtained for any disclosure from an interception conducted by another jurisdiction, such as by a state or a foreign government. See United States v. Marion, 535 F.2d 697 (2d Cir. 1976).

Such a disclosure order may be issued even though the communication is evidence of a crime not designated in 18 U.S.C. §2516 and is one for which an original authorization could not be obtained. (See Senate Report, at 100). If the intercepted communication relates solely to a state offense, and is to be used in state proceedings, it is the responsibility of state prosecuting officials to make the "subsequent application" before a state judge of competent jurisdiction. The statute does not require that the supervisory attorney or the state prosecutor must present the subsequent application to the same judge who authorized the original interception. In the federal system, subsequent application should be made to a judge of competent jurisdiction in the district wherein venue lies for the particular offense in question. Forms for such an application and order are at USAM 9-7.950 and 9-7.960, infra.

The statute directs that once evidence relating to other crimes is derived from an authorized interception, "[s]uch [subsequent] application

shall be made as soon as practicable." See 18 U.S.C. §2517(5). Accordingly, whenever an authorized interception discloses evidence of crimes other than those specified in the authorization, the agent supervising the interception should inform the supervising attorney of the existence and contents of the communication in question by including the relevant facts in the daily report (see USAM 9-7.311, supra). Although applications for such orders should not be unduly delayed, neither should orders be sought in cases which are never brought to complaint or indictment. Also, it has been held that while failure to make timely application for an order under 18 U.S.C. §2517(5) may be grounds for refusing to issue the order, once the order has been entered lack of timeliness is not ground for suppression of the intercepted communications. See United States v. Denisio, 360 F. Supp. 715 (D. Mo. 1973); and United States v. Vento, supra.

9-7.560 Approval for Use of Intercepted Communications in Civil Litigation

The approval of the Assistant Attorney General, Criminal Division, should be obtained prior to the use of communications intercepted under Title III in civil litigation in order to avoid compromise of pending or prospective criminal investigations or other actions. The approval should be sought by memorandum addressed to the Assistant Attorney General, Criminal Division, setting out:

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 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 in 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.

9-7.570 Defendant Overhearings and Attorney Overhearings Wiretap Motions

Recently, we have received a number of questions from United States Attorneys concerning the appropriate response to be made to various wiretap motions filed in connection with federal criminal cases. The question most frequently asked concerns the government's obligation to inquire as to whether or not defendants or their attorneys have been overheard.

A. 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 Inspection 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, it is necessary that 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), 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, 425 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 (2nd 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).

In response to the 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.

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 of the Elsur check had a proprietary interest during that period, should also be included. This identifying information will both speed the search and help assure its accuracy, especially when the subject has a common surname.

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 a 18 U.S.C. §3504 search, please include all necessary identifying information, a list of agencies to be surveyed other than the normal seven (see list above), the time period of the search, the citations of the statutes involved in the investigation or changed in the indictment, your deadlines, and a copy of the subject's signed motion or waiver. (See list of agencies above.) 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 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. Electronic surveillance involving a domestic national

security matter (one having no ostensible connection with a foreign country or foreign national), see Zweibon v. Mitchell, 516 F.2d 594, 663-70 (D.C. Cir. 1975), should normally be reported directly to the Office of Enforcement Operations. If, as will be explained later, any doubt exists as to whether a particular oral acquisition was initiated for foreign intelligence purposes or for a domestic national security purpose, the matter should be referred to the General Litigation and Legal Advice Section of the Criminal Division. If the agency conducting the search determines that the electronic surveillance was authorized for foreign intelligence purposes, 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 foreign intelligence wiretap's legality.

A. 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 Divison, which has the responsibility in this area.

Should you have any questions, please contact the Office of Enforcement Operations (724-6867).

9-7.600 GRAND JURY PREPARATION

9-7.610 Preliminary Action

Normally, only selected intercepted communications will be disclosed to the grand jury in the interest of presenting the government's case in the briefest and most direct way possible. The process of selection should start with the logs of the interception, which can be utilized as an index to the transcripts. In addition, the supervising agent should be consulted as to his/her knowledge of any especially pertinent communications which might not be readily apparent from examination of the logs themselves.

Once the supervising or trial attorney decides which specific conversations are to be used, a composite tape composed of them should be prepared for grand jury use from the copies of the original tapes lodged with the investigative agency. See United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973). The trial attorney should listen to the composite and satisfy himself/herself as to its clarity, recording quality, and probative value. After such listening, additional or substitute conversations may be desired. The composite tape may be changed accordingly. If expert testimony is needed concerning the meaning or cumulative effect of the conversations, the trial attorney should satisfy himself/herself that every conversation relied upon by the expert is on the composite tape.

Such composite tapes of the conversations of potential grand jury witnesses are useful for playback to a witness as they assure that his/her testimony will be accurate and truthful. Although an agent is not authorized to be present solely for the purpose of operating a tape playback machine under Rule 6(e), Federal Rules of Criminal Procedure, an agent may present evidence consisting of intercepted communications as part of his/her testimony. In other situations in which the agent desires to play back recorded conversations, as for example, to confront a witness with his/her statement, the attorney might have to operate the tape

machine himself/herself. In such a case, he/she should be prepared with ready references to the conversations which he/she plans to use.

9-7.620 Recalcitrant Witnesses and the Gelbard Doctrine

There is considerable tactical advantage in questioning an immunized hostile witness in a grand jury setting using the tapes of his/her recorded conversations to assure that his/her testimony will be truthful.

Preliminary notice is not required for such use. Also, the suppression provisions of 18 U.S.C. §2518(10) are not applicable to a grand jury. See Gelbard v. United States, 408 U.S. 41, 54 (1972); United States v. Best, 363 F. Supp. 11 (S.D. Fla. 1973). Further, copies of the original recordings may be used, thereby permitting the seal on the original to be undisturbed.

Occasionally, a grand jury witness may invoke the prohibition against the improper use of intercepted communications of 18 U.S.C. §2515 as "just cause" for his/her refusal to answer and thereby attempt to escape contempt citation under 28 U.S.C. 1826(a), relying on the rationale of Gelbard, supra. It is important to note that Gelbard does not confer standing on a grand jury witness to suppress evidence before a grand jury. In re Marcus, 491 F.2d 901 (1st Cir. 1974). It merely extends the right not to testify in response to interrogation based on the illegal interception of his communications. See Gelbard, supra, at 47.

It is the Department's view that in instances in which electronic surveillance was conducted pursuant to court order, the in camera examination of the order, should preclude further inquiry into the legality of the surveillance. See Gelbard, supra, at 70 (concurring opinion of Mr. Justice White) combined with the dissenting opinion of Justices Rehnquist, Burger, Blackman, and Powell. However, the courts of appeals which have considered this question have not been uniform in specifying the evidence required to satisfy them of the legality of an interception for this purpose. The Seventh Circuit in In re DeMonte, 667 F.2d 590, 595-96 (1981), held that when a witness fails to make a specific showing of probable illegal electronic surveillance, the prosecutor's affidavit denying that the surveillance was illegal is an adequate response. The Second Circuit, in In re Persico, 491 F.2d 1156 (1974), held the government had met its burden of proof by producing the court order for the electronic surveillance for in camera inspection. The First Circuit, In re Lochiatto, 497 F.2d 803 (1974), held that the government must also produce for inspection the supporting documents to include the application for the interception order, the affidavits in support of the

court order, and a government order, the affidavit indicating the length of time the surveillance was conducted. This court left to the discretion of the district judge the question of whether the witness should have access to the documents over objection by the government. It should be noted that several courts of appeals have accepted the government's affidavit denying any electronic surveillance. The Fifth Circuit, Beverly v. United States, 468 F.2d 732 (1972), accepted as sufficient an affidavit stating that inquiry had been made with the appropriate federal government agencies and that there had been no electronic surveillance. Accord, In re Grumbles, 453 F.2d 119 (3d Cir. 1971); Korman v. United States, 486 F.2d 926 (7th Cir. 1975). See 18 U.S.C. §3504. The Ninth Circuit, United States v. Alter, 482 F.2d 1016 (1973), held the affidavit must meet the specifics set out in the claim, that is, it must identify the persons contacted, the substance of the inquiry, and the substance of the replies.

9-7.700 PRE-TRIAL PROCEEDINGS

9-7.710 Pre-Trial Notice of Interception Use

When the government intends to introduce the contents of intercepted communications, or evidence derived therefrom, in an federal criminal proceeding, each party to the proceeding must be furnished with a copy of the application and court order under which the interception was authorized or approved. Unless the parties have been served with these copies at least 10 days prior to the hearing, trial or proceeding, the evidence shall be inadmissible unless there is a waiver of the period. (See 18 U.S.C. §2518(9)). This section does not apply to grand jury hearings where evidence derived from electronic surveillance is offered (See Senate Report at 105).

The intent of the 10 day notice requirement of 18 U.S.C. §2518(9) is to allow parties to the hearing to file motions to suppress under 18 U.S.C. §2518(10). In those ususual cases wherein the government is unable to furnish the above information 10 days prior to the proceeding, the judge may waive the 10 day time limit. In such a situation, the trial attorney should move the presiding judge for a waiver. The motion should allege facts from which the court could find that the government could not meet the 10 day requirement and that the parties will not be prejudiced by a delay in receiving such information.

9-7.720 Grounds of Motions to Suppress

Congress has permitted "[a]ny aggrieved person ..." to "...move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom," on the ground that:

(i) the communication was unlawfully intercepted; or

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

See 18 U.S.C. §2518(10)(a). The purpose of this section is to provide a definite remedy to the right conferred upon "aggrieved persons" in 18 U.S.C. §2515 that the fruits of unlawful electronic surveillance not be admitted into evidence. To promote this remedy, the moving party or his/her counsel may inspect portions of the intercepted communications or evidence derived therefrom if the judge determines that this would be in the interest of justice. Congress clearly intended to limit a party's right of inspection to the minimum necessary under the circumstances of the case. Inspection was not intended to be a substitute for far ranging discovery into the government's electronic surveillance files. "Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." (See Senate Report, at 106).

9-7.730 "Aggrieved Person" Defined

"A person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed" is the definition of aggrieved person given by 18 U.S.C. §2510(11). The "...person against whom the interception was directed" refers to the subjects of the surveillance named in the application. In a proceeding brought against such a person, he/she would be an "aggrieved person" in regard to evidence of communications of others which was derived from an electronic surveillance directed against him/her or which occurred on a premises in which he had a proprietary interest. See United States v. King, 478 F.2d 494 (9th Cir. 1973); United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972); Alderman v. United States, 394 U.S. 165 (1969). Traditional notions of standing would seem to limit the class of aggrieved persons entitled to move for suppression under 18 U.S.C. §2518(10) to parties to the proceeding in which the motion is filed. The wording of 18

U.S.C. §2510(11) and 18 U.S.C. §2518(10) is so broad, however, that this does not necessarily follow from the language of the statute. If a motion to suppress is filed by an "aggrieved person" who is not a party to the proceeding in which the motion is filed, the motion should be resisted on the ground of no standing. The Senate Report indicates that the status of a person as a party to a proceeding is a prerequisite to the person's standing to file a motion to suppress under 18 U.S.C. §2518(10)(a). See United States v. Dorfman, 690 F.2d 1217 (7th Cir. 1982) (standing depends on the likelihood of an invasion of privacy actually occurring through the disclosure of unlawfully obtained evidence).

9-7.740 Time for Filing Suppression Motions

The statute places two limitations on when the motion to suppress may be filed. First, the motion must be filed in conjunction with "... any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States...." The motion may not be filed any time a party desires, but only when some type of proceeding is pending, see United States v. Persico, 362 F. Supp. (S.D.N.Y. 1973), although the proceeding need not be of a traditional criminal category.

Secondly, the motion must be made before the proceeding "...unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." See United States v. Sisca, 361 F. Supp. 735, 738-741 (S.D.N.Y. 1973). See also 18 U.S.C. §2518(10)(a). The statute appears to contemplate, but does not expressly require, that any hearing on the motion or a decision thereon be similarly accomplished before the trial or other proceedings. It is important that the trial attorney oppose any motions not timely filed and request a hearing and decision prior to the actual trial. Otherwise, the right of the United States to appeal from an order of suppression (see 18 U.S.C. §2518(10)(b)) might be defeated. (See, Senate Report, at 106). If a motion to suppress is granted during the course of a proceeding, the supervisory attorney should immediately prosecute an emergency appeal. See 18 U.S.C. §2518(10)(b).

9-7.750 Pre-Trial Discovery

Under Rule 16, Federal Rules of Criminal Procedure, each defendant is entitled to receive transcripts of his/her own conversations and in those districts allowing liberal discovery--transcripts of the conversations contained on the composite tape which will be used in evidence. 18 U.S.C.

§2518(10)(a) also grants the court discretion to deliver to a defendant "... such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the intersts of justice." The two provisions place little limit on discovery of the tapes and transcripts, but Congress clearly intended to limit a party's right of inspection to the minimum necessary under the circumstances of the case. Inspection under 18 U.S.C. §2518(10)(a) was not intended to be a substitute for far ranging discovery into the conversations of others. "Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." See Senate Report at 106. (Emphasis supplied).

9-7.760 Common Bases of Motions to Suppress

Pre-trial motions to suppress have in the past usually been used on deficiencies or irregularities affecting:

A. Constitutionality;

B. Authorization procedures;

C. Probable cause;

D. Minimization;

E. Attainment of authorized objective; and

F. Requisite necessity.

9-7.761 Constitutionality

The constitutionality of Title III has been affirmatively determined by several courts. See United States v. Tortorello, 480 F.2d 764, 771-75 (2d Cir. 1973), cert. denied 414 U.S. 866 (1973); United States v. Cafero, 473 F.2d 489 (3d Cir. 1973); United States v. Cox, 462 F.2d 1293, 1302-04, 1362 n. 12 (8th Cir. 1972); United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

9-7.762 Authorization Procedures

The Supreme Court of the United States has stated that the provision in 18 U.S.C. §2516(1) for approval of an interception application by the

Attorney General "was intended to play a central role in the statutory scheme and that suppression must follow when this statutory requirement has been ignored", see United States v. Giordano, 416 U.S. 505 (1974), but that suppression is not required where the application and order incorrectly state that the authorization had been given by a specially designated Assistant Attorney General, see United States v. Chavez, 416 U.S. 562 (1974).

9-7.763 Probable Cause

An attack on the affidavit sometimes takes the form of an allegation of insufficiency of probable cause. General discussion of probable cause sufficiency may be found in USAM 9-4.100 et seq. (search and seizure). The cases listed below deal with the quantum of probable cause required in electronic interception situations. See United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973); United States v. Poeta, 455 F.2d 117, 121-22 (2d Cir. 1972), cert. denied, 406 U.S. 948 (1972); United States v. LaGorga, 336 F. Supp. 190, 193 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 532-37 (S.D. Cal. 1971); United States v. Becker, 334 F. Supp. 546, 549-50 (S.D.N.Y. 1971); United States v. Leth, 332 F. Supp. 1357, 1361-62 (M.D. Pa. 1971); United States v. Scott, 331 F. Supp. 233, 242-44 (D. D.C. 1971); Dudley v. United States, 320 F. Supp. 456, 458-60 (N.D. Ga. 1970); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970). Another comment regarding probable cause appears in USAM 9-7.160, supra.

9-7.764 Minimization

As previously noted, 18 U.S.C. §2518(5) provides that every interception order must require that the interception be conducted in such a way as to minimize the interception of communications not subject to interception. The burden of making a prima facie showing of minimization rests on the government. See United States v. Rizzo, 491 F.2d 215, 217, n. 7 (2d Cir. 1974). However, the court is not required to hold a full adversary hearing on the issue of minimization. It may, for example, deny a defense motion to suppress on the basis that affidavits, supplemented by logs and tapes, make the necessary showing. See United States v. Cirillo, 499 F.2d 872, 880-881 (2d Cir. 1974).

The minimization requirement is a creature of statute, United States v. Cox, 462 F.2d 1293, 1300 (8th Cir. 1972), and the court decisions view the statute's minimization command as requiring a case-by-case analysis of the reasonableness of a particular interception. See United States v. Quintana, supra; United States v. Quintana, supra; United States v.

Armocida, 515 F.2d 49 (3d Cir. 1975); United States v. Scott, 516 F.2d 751, (D.C. Cir. 1975). The requirement only reaches those conversations which are not likely to lead to the discovery of any searched-for evidence. United States v. Bynum, 360 F. Supp. 400, 409 (S.D.N.Y. 1973), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974). Also, in United States v. Kahn, 415 U.S. 143, 903 (1974). Also in United States v. Kahn, 415 U.S. 143, 154 (1974), the Supreme Court expressed the view that the minimization requirement is a duty "to execute the warrant in such a manner as to minimize the interception of any innocent conversations." (Underscoring added).

In view of the foregoing, it is considered that the minimization provision stems from a legislative as distinguished from a constitutional source, that the provision is to be broadly construed in favor of the interception of conversations having investigative value, and that the statute is not necessarily transgressed by the interception of innocent conversations.

In determining whether the requirement of minimization has been satisfied, courts have established specific factors for evaluation. United States v. Bynum, supra, at 410. The charactor of the criminal enterprise is such a factor. For the nature of the activity, its complexity and size, its geographical reach, and similar considerations all bear on the conduct of an interception. See United States v. Quintana, supra, at 874; United States v. Armocida, 515 F.2d 29 (3d Cir. 1975); United States v. James, 494 F.2d 1007, 1019 (D.C. Cir. 1974); United States v. Scott, supra.

The purpose of the investigation may be a critical factor in determining the authorized scope of the interception. Where an objective of the interception is to define the scope of criminal activity, or to identify unknown conspirators, or to obtain information on the operation of an illegal business, the parameters of interception are much broader than when an interception is instituted for a narrow, limited purpose. See United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973); cert. denied, 417 U.S. 936 (1974); accord: United States v. Quintana, supra, at 874; United States v. James, supra, at 1021; United States v. Chavez, 533 F.2d 491 (9th Cir. 1976).

Courts have also considered whether the government could have developed screening instructions based on the expected content of communications as a factor bearing upon minimization. For example, if, at the time of the initiation of the interception, the government knows all the persons who are suspected of the criminal offense, it can tailor its minimization efforts to avoid monitoring incoming or outgoing calls involving other persons; similarly, if the government knows during what

time of the day the telephone will be used for criminal activity, it can avoid intercepting calls at other times. Such considerations affect the initial minimization tactics employed by the government, but the interception policy may be expanded or contracted to conform with investigative requirements as the interception continues. See United States v. James, supra, at 1020. On the other hand, where the government does not, at the outset, have reason to believe that any identifiable group of calls will be innocent, it may be reasonable to monitor all calls until a pattern of innocent calls develops. Such a pattern may not always be identifiable, however, because it is often impossible to determine that a particular conversation would be irrelevant and innocent until it has been concluded. See United States v. Quintana, supra at 874; accord: United States v. Armocida, supra, at 53; United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973); United States v. Manfredi, supra, at 600; United States v. Chavez, supra; United States v. Scott, supra.

The use of code words, cover-up jargon, or other evasive tactics, particularly in a narcotics conspiracy, makes investigation difficult and necessitates more detailed and extensive monitoring of conversations. See United States v. James, supra, at 1019-1020, accord: United States v. Quintana, supra, at 874, n. 7; United States v. Cox, supra, at 1300-1301; United States v. Manfredi, supra at 600; United States v. Scott, supra, at 751; United States v. Chavez, supra. Accordingly, the interception of all telephone communications for such time as is appropriate where evasive tactics are used does not constitute a failure to minimize. See United States v. Manfredi, supra at 600.

Another important factor is that of judicial supervision. Where a judge has required and reviewed reports at specified intervals, courts have been inclined to find that the minimization requirement has not been violated. See United States v. Quintana, supra, at 875; United States v. Armocida, supra, at 32; United States v. Bynum, supra, at 410; United States v. James, supra, at 1021; United States v. Cox, supra, at 1301; United States v. Bynum, supra, at 501; United States v. Scott, supra, at 751; United States v. Chavez, supra.

In analyzing the overall interception, courts have said that telephone conversations of brief duration do not permit intercepting agents sufficient opportunity to identify the caller and characterize the conversation. See United States v. Scott, 504 F.2d 194, 198 (D.C. Cir. 1974). Interceptions of such conversations completed in less than 2 minutes cannot be considered unreasonable. See United States v. Bynum, supra, at 500; accord: United States v. Scott, supra, at 516 F.2d 751. Moreover, calls between known coconspirators may be monitored in their entirety, for relevant information may emerge at any point in a call.

Where one of the parties is a known conspirator, the monitoring of his/her conversations may be more extensive than if he/she were not suspected, at least during the early phases of the interception; by listening to such calls, agents can effect the screening of unknown parties. The interception of communications of suspected conspirators is similarly appropriate until their complicity can be determined. See United States v. Bynum, 360 F. Supp. 400, 416 (S.D.N.Y. 1973), aff'd., 485 F.2d 490 (2d Cir.) vacated on other grounds, 417 U.S. 903 (1974). One court has viewed the brief length of time an interception was in operation as having a substantial bearing on whether the minimization was reasonable. It considered one of the most obvious indicia of minimization to be termination of the entire interception within a relatively short time. See United States v. Chavez, supra.

9-7.765 Suppression of Communications

Only violations which are basic to the protection of Title III require suppression of intercepted communications. When a court grants a motion based on the grounds of lack of proper authorization under 18 U.S.C. §2516(1) or lack of probable cause, it will usually suppress all the fruits of the interception. See United States v. Giordano, supra.

In other situations, the suppression should be tailored to the degree required to provide an appropriate remedy. For example, the remedy for failure to minimize the interception of a communication, is suppression of that communication, not suppression of the entire interception. See United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Scott, supra, at 751, n. 19; United States v. Sisca, 361 F. Supp. 735, 746-47 (S.D.N.Y. 1973); aff'd, 503 F.2d 1337 (2d Cir. 1974); United States v. Bynum, supra, at 403-04, n. 3; United States v. Mainello, 345 F. Supp. 863, 874-77 (E.D. 1972); United States v. LaGorga, 336 F. Supp. 190, 196-97 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), rev'd. on other grounds, 478 F.2d 494 (9th Cir. 1973); See United States v. Askins, 351 F. Supp. 408, 415 (D. Md. 1972); United States v. Leta, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971); United States v. Principie, 531 F.2d 1132 (2d Cir. 1976). 18 U.S.C. §2515 must be read in the light of 18 U.S.C. §2518(10)(a). These provisions were not intended to press the scope of the suppression role beyond present search and seizure law. See Senate Report, at 96. See also Nardone v. United States, 302 U.S. 379 (1937); Nardone v. United States, 127 F.2d 521 (2d Cir.), cert. denied, 316 U.S. 698 (1942); Wong Sun v. United States, 371 U.S. 471 (1963).

9-7.766 Requisite Necessity

The statute requires a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." See 18 U.S.C. §2518(1)(c). While the circuits are uniform in condemning purely conclusory affidavits that merely track the statutory language, they vary in the amount of detail necessary in the affidavit to meet the requirement of requisite necessity. Electronic surveillance need not be a tool of last resort but the affidavit must specifically demonstrate the limitations of normal investigative techniques. See United States v. Southard, 700 F.2d 1 (1st Cir.), cert. denied, 52 U.S.L.W. 3262 (1983); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983); United States v. Lilla, 699 F.2d 99 (2d Cir. 1983); United States v. Vento 533 F.2d 833 (3d Cir. 1976); United States v. Webster, 639 F.2d 174 (4th Cir. 1981); United States v. Cifarelli, 589 F.2d 180 (5th Cir. 1979); United States v. Landmesser, 553 F.2d 17 (6th Cir.), cert. denied, 434 U.S. 855 (1977); In re Demonte, 674 F.2d 1169 (7th Cir. 1982); United States v. Jackson, 549 F.2d 517 (8th Cir. 1977); United States v. Martinez 588 F.2d 1227 (9th Cir. 1978); United States v. Johnson, 645 F.2d 865 (10th Cir.) cert. denied, 454 U.S. 866 (1981); United States v. Messersmith, 692 F.2d 1315 (11th Cir. 1982).

9-7.800 TRIAL

9-7.810 Preliminary Preparation

Composite tapes and transcripts should be prepared well in advance of trial. In addition, the trial attorney should decide what matters should be the subject of stipulation and judicial notice. One desirable stipulation relates to use of the composite tape. Such a stipulation will facilitate the trial because the agent operating the playback machine will not have to change reels or skip around within reels to play pertinent conversations. To this end, a copy of the composite tape might be delivered to the defense for examination and comparison. The interception order is an item which should be listed for judicial notice.

9-7.820 Pre-Trial Conference

In a case utilizing Title III wiretape evidence, a pre-trial conference is most desirable, particularly if the case is before a judge who has never presided over such a wiretap trial. A pre-trial conference

will make it possible for the attorneys on both sides to discuss with the judge the problems that they anticipate will arise, and it is suggested that a trial brief be prepared in support of the position to be taken with respect to the admissibility of the tape recordings and transcripts, competence of a layperson to identify a voice, and other possible legal issues. The trial brief should be presented at the pre-trial conference in order to give the judge sufficient time to review it.

At the time of the pre-trial conference, there should also be a discussion of the physical problems, if any, deriving from the use of electronic equipment in the courtroom. The type of equipment to be used will, of course, vary based upon local conditions and agency capability, but the placement of available equipment can be worked out in advance. Also, a test for acoustical problems might be advisable, particularly in older courthouses.

Another matter which can be resolved at a pre-trial conference is the inclusion of a voir dire question concerning prospective jurors' feelings on the use of court-authorized electronic surveillance. Two sample questions are included in USAM 9-7.970, infra. Finally, at the pre-trial conference, every attempt should be made to arrive at stipulations concerning facts not in dispute, such as the data reflected by telephone company records. A stipulation as to the contents of not only the subscriber records but also installation records and toll call records would eliminate the testimony of at least one and perhaps several telephone company employees. A sample stipulation as to subscriber records is contained in USAM 9-7.980, infra.

9-7.830 Presentation of Government's Case-In-Chief

The following outline suggested for presentation of the government's case lists various witnesses who may not be necessary if stipulations have been obtained. It appears that courts which have never heard a trial involving Title III material tend to require more explicit testimony concerning the technical and electronic process than courts which are familiar with the procedures.

Generally, the following order of witnesses will be the most efficient:

A. Case Agent. This witness should briefly describe the investigation leading up to the application for the Title III, including an explanation of the nature and subjects of the investigation. The case

agent is usually the affiant for the Title III affidavit and can testify as to the application process and the signing of the order. At this point, for purposes of continuity, it might be best to have the case agent step down subject to recall to continue his/her testimony later in the trial. In this preliminary testimony, it is suggested that the attorney attempt to lay the foundation as to relevancy of the tape recordings not only to the defendants but also to the violations charged.

B. Chief of Security or other Security Representatives of the Telephone Company. The testimony of this witness should cover the matters leading up to the connection of the interception wires, including the serving of process, and the technical assistance that was furnished to the investigative agency by the telephone company. He/she may also be used to define certain technical terms and procedures peculiar to the telephone company.

C. Technical Agent. This witness should testify concerning the obtaining of technical information and assistance from the telephone company and that, subsequent to the entry of the court order, he/she performed the steps necessary to conduct an electronic surveillance of the specified telephone lines. He/she should also testify that he/she tested the connection to insure monitoring of the correct telephone and concerning procurement, setting up, and testing of the interception and recording equipment. In most jurisdictions, this agent is also the person in charge of duplication of the tapes and is often the custody agent, although occasionally the custody will rest primarily with the supervising agent. When these duties are all performed by the technical man, he/she will describe the overall system of custody of the tapes, beginning with the placement of the unused tape on the machine at the beginning of the monitoring day, its removal at the conclusion of the day, the procedures utilized by him/her in the duplication of the tape, and the subsequent handling of both the original tape and the duplicate, including the court-ordered sealing of the original tapes. The technical agent generally instructs all monitoring agents in the operation of the recording machines, and therefore, testimony from the supervising agent and the technical agent as to the procedures followed in the interception and recording of conversations should be sufficient. In certain instances, courts have required testimony from monitoring agents, including their explanation of the making of the logs.

D. Supervising Agent. If the supervising agent is the witness for chain of custody, he/she should be called for testimony to show not only custody but the fact that the tapes were never edited or altered. The supervising agent may also be in a position to testify that he/she

compared the composite tape with the original and that it is an exact copy of the portions included in the composite. Additionally, he/she should be able to testify as to the procedures utilized in preparing the transcripts and to the fact that he/she compared the transcripts to the tapes and the transcripts accurately reflect the recorded conversations. If a composite tape is used, it will also be necessary to adduce evidence establishing the authenticity and accuracy of its contents.

9-7.840 Playback of Tapes for the Jury

The type of equipment utilized for the playing of the tapes will vary, depending upon agency capability and local courtroom conditions. The acoustics should be tested prior to trial if a speaker system is to be used. If headsets are to be used, care should be taken to insure that the jurors are instructed to raise their hands in case of a malfunction of equipment.

9-7.850 Voice Identification

There are several ways to conduct voice identification at trial. One is to use an agent who is familiar with the voice of one or both of the parties to the conversation. See United States v. Turner, 528 F.2d 143, 163 (1975); United States v. James, 494 F.2d 1007 (D.C. Cir. 1974); United States v. Turner, 485 F.2d 976 (D.C. Cir. 1973). Another method is to use a party to the conversation as the witness. A third method is to use as a witness a person who is familiar with the voice of the defendant as it sounds over the telephone, such as friends of the defendant who had talked with him/her on numerous occasions over the telephone. When utilizing the latter two methods, it is advisable to memorialize their expected testimony by sworn affidavit or grand jury testimony or both.

The use of spectrographs for purposes of voice identification without corroborating evidence is discouraged. There is no objection to their use in conjunction with other means of identification.

Although voice identification is used, corroborating evidence, such as telephone subscriber records showing the phone listed to the defendant, surveillances putting the defendant at the place of interception, and the like should be used to confirm the voice identification. Circumstantial evidence of voice identity is sufficient in itself to support a conviction. See United States v. Kohne, supra; United States v. Iannelli, 477 F.2d 999 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975). See also United States v. Turner, 485 F.2d 976, 979 (D.C. Cir. 1973).

It is helpful to use transcripts as an aid to the jury during the playing of the tapes. When this occurs, the voice identification agents must be prepared to testify that they compared the transcripts to the tapes and the transcript identification is identical to their identification of the voices of the respective defendants. Allowed in United States v. Kohne, supra; United States v. Vigi, 363 F. Supp. 314 (E.D. Mich. 1973).

9-7.860 Transcripts

The necessary foundation for the transcripts can generally be provided through the testimony of the supervising agent. In attempting to utilize transcripts for purposes of voice identification, it is suggested that the following procedure be employed:

A. Have the parties to each conversation identified on the transcripts;

B. Have this identification made by the person who would be the voice identification witness at trial;

C. Have each voice identification witness explain how he/she became familiar with the voice of the person he/she identified; and

D. Have the witness verify his/her identification of parties as noted on the transcript.

The above, in addition to the supervising agent's testimony as to the method of preparation of the transcripts, should provide the proper foundation for introduction of the transcripts.

9-7.870 Use of Expert Witnesses

The expert can be utilized for various purposes. Among them are the interpretation of the tapes, including definitions of terms used in the particular illegal business, and the analysis of seized records. He/she can be called either at the end of the trial, or during the playing of the tapes. The latter is not only more efficient but also more effective, as it permits analysis of terminology and opinions based on facts established by the intercepted communications. When the expert is called at the end of the trial and is asked to interpret a specific communication, he/she may refer to it by the time of interception and some distinctive words or

phrases used, or, by transcript page number. If the latter method is followed, the jury should have the transcript in its possession at the time of his/her testimony.

If he/she is to be called at the end of the trial, the expert should be exempted from the witness exclusion rule for the limited purpose of being in the courtroom while the tapes are being played to the jury. Such a procedure avoids the question of whether the expert heard the same tapes that the jury heard.

The following items should normally be covered in testimony from an expert witness in a gambling case:

A. Definitions of gambling terminology and "jargon";

B. General description of the operation;

C. The relationship of the specific operation to the general description;

D. A call-by-call analysis;

E. Relationship between tapes and records seized;

F. Gross volume or continuity of existence or both; and

G. Analysis of flash paper, or water soluble paper.

Another method of interpretation of tapes is to utilize as a witness one who was a party to a conversation. Such a witness can cogently explain the nature of the conversation and what was meant by the particular words or terms used during the conversation. However, these witnesses are generally reluctant, and it is often easier to use an expert.

Once the expert has testified as to the meaning of various terms and the significance of certain types of conversations, it is not necessary for him/her to provide the same testimony as to every conversation.

9-7.880 Instruction and Charge Conference

A request that frequently comes back from the jury after it has retired for deliberation is to have certain of the tapes replayed. Certain judges will not permit this, although the government's position

has generally been that it is legally proper to permit a replaying, just as it is proper to permit the jurors to look at documentary evidence. In any event, while at the charge conference, the judge's position on this issue should be determined. If the judge's decision is to not permit the replaying, the jury should be informed before it retires that it will not be permitted to hear the tapes again.

The only instruction peculiar to cases involving the use of Title III is one relating back to the voir dire question concerning jurors' feelings on the use of evidence derived from court-authorized electronic surveillance. A proposed instruction is included in USAM 9-7.990, infra.

9-7.900 FORMS

9-7.910 Form Interception Applications

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION)
OF THE UNITED STATES FOR AN ORDER)
AUTHORIZING THE INTERCEPTION OF)
(WIRE) (ORAL) COMMUNICATIONS)

APPLICATION

_____, an attorney of the United States Department of Justice, being duly sworn, states:

A. He/she is an "investigative or law enforcement officer--of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is--an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

B. Pursuant to Section 2516 of Title 18, United States Code, the Assistant Attorney General of the _____ Division, United States Department of Justice, having been specially designated by the Attorney General pursuant to Order Number 931-81 of January 19, 1981, has approved this application for an order authorizing the interception of (wire) (oral) communications. Attached to this application is a copy of

Order Number 931-81 of January 19, 1981, specially designating the Assistant Attorney General of the _____ Division to approve applications for court orders authorizing interception of wire or oral communications. Also attached is a copy of the Assistant Attorney General's memorandum of authorization, approving this application.

C. This application seeks authorization to intercept (wire) (oral) communications of _____ and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is--offenses involving [the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code,] [_____ _____] which have been committed and are being committed by _____ _____ and others as yet unknown.

D. He/she has discussed all the circumstances of the above offenses with Special Agent _____ of the _____ office of the [Federal Bureau of Investigation] [_____] who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent _____ (attached to this application as Exhibit C and incorporated by reference herein) which alleges the facts therein in order to show that:

1. There is probable cause to believe that _____ and others as yet unknown have committed and are committing offenses involving [the transmission, by means of (an) interstate facilit(y)(ies), of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, united States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code] [ ];

2. There is probable cause to believe that particular (oral) (wire) communications of _____ and others as yet unknown concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these (wire) (oral) communications will concern the

[interstate transmission of gambling information related to horse-race results and the dissemination of such information to persons engaged in the unlawful business of gambling, the identity of the participants, the precise nature and scope of the illegal activity, and the relationships of the enterprise with other gambling activities] [ ]. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses;

3. The attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried;

4. There is probable cause to believe that the [specified] [telephone(s) subscribed by _____ and located at _____ and carrying telephone number(s)] (has) (have) been used and (is) (are) being used by _____ and others as yet unknown in connection with the commission of the above-described offenses.

E. (No previous application to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in this application are known to the individual authorizing and making this application.) (The following is) (The attached affidavit contains) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making this application made to any judge for authorization to intercept, or for approval of interceptions, or wire or oral communications involving any of the same persons, facilities, or places specified in this application, and the action taken by the judge on each such application).

WHEREFORE, your affiant believes that probable cause exists to believe that _____ and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information of an interstate wire facilit(y) (ies) by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling) and a conspiracy to do so] [___]; that _____ and others as yet unknown have used, and are using the [premises _____] [telephone(s) subscribed to by _____, located at _____ and bearing number(s) _____] in connection with the commission of the above-described offenses; that communications of _____ and others as yet unknown concerning these offenses will

be intercepted [at _____] [to and from the above-described telephone(s)]; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent _____, attached thereto, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the [Fedral Bureau of Investigation] [_____] to intercept (wire) (oral) communications [at _____] [to and from the above described telephone(s)] until communications are intercepted which reveal the manner in which _____ and others as yet unknown participate in the [illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling)] [_____] and which reveal the identities of his/her confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of _____ days from the date of that order, whichever is earlier.

[It is further requested that the order authorize surreptitious entry of the premises for the purpose of installing, maintaining and removing any electronic oral interception devices utilized pursuant to the authority granted by its order.]

[It is further requested that this court issue an order pursuant to Section 2518(4)(e) of Title 18, United States Code, directing that the [Name of telephone company], a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such a carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the [Name of telephone company] to be compensated for by the applicant at the prevailing rates. [This order to communication common carrier is a separate abbreviated order and a sample is found in USAM 9-7.924, infra.]]

_____.

Subscribed and sworn to before me this
_____ day of _____, 19___.

SPECIAL DESIGNATION OF ASSISTANT ATTORNEYS GENERAL TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND TO APPROVE EMERGENCY INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS UNDER CHAPTER 199, TITLE 18, UNITED STATES CODE

Order No. 931-81

By virtue of the authority vested in me by 28 U.S.C. §509, 510, 5 U.S.C. §301, and 18 U.S.C. §§2516, 2518(7), I hereby specially designate the Assistant Attorney General in charge of the Criminal Division, the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Office of Legal Counsel, and the Assistant Attorney General in charge of the Antitrust Division (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available to exercise the power conferred by Section 2518(7) of Title 18, United States Code, to approve an emergency interception of wire or

oral communications in accordance with the statutory requirements. Provided, that the Assistant Attorney General in charge of the Tax Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Criminal Division is not in the District of Columbia or is otherwise not available. Provided further, that the Assistant Attorney General in charge of the Office of Legal Counsel is authorized to exercise the power conferred only when both the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Tax Division are not in the District of Columbia or are otherwise not available. Provided further, that the Assistant Attorney General in charge of the Antitrust Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Office of Legal Counsel are not in the District of Columbia or are otherwise not available.

Order No. 799-78 of August 15, 1978 is revoked.

Date: 1/19/81

/s/ Benjamin R. Civiletti
Attorney General

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

SPECIAL DESIGNATION OF ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND TO APPROVE EMERGENCY INTERCEPTIONS OF WIRE AND ORAL COMMUNICATIONS UNDER CHAPTER 119, TITLE 18, UNITED STATES CODE

Order No. 934-81

Section 1. By virtue of the authority vested in me as Attorney General by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, 2518(7) I hereby specially designate the Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available, to exercise the power conferred by Section 2518(7) of Title 18, United States Code, to approve an emergency interception of wire or oral communications in accordance with the statutory requirements.

Sec. 2. Attorney General Order No. 931-81 of January 19, 1981 is hereby corrected, effective January 19, 1981, by deleting from the sixth line on the second page thereof the number "2510(7)," a typographical error, and substituting therefor "2518(7)." Attorney General Order No. 931-81 remains in effect.

Sec. 3. The designation made in Sec. 1 of this order shall terminate at such time as an Assistant Attorney General in charge of the Criminal Division, appointed with the advice and consent of the Senate, enters upon duty.

Date Feb 27, 1981

William French Smith
Attorney General

9-7.920 Form Interception Order

9-7.921 Form Interception Order--Standard

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION :
OF THE UNITED STATES FOR AN ORDER :
AUTHORIZING THE INTERCEPTION OF :
(WIRE) (ORAL) COMMUNICATIONS :

ORDER

AUTHORIZING INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS

Application under oath having been made before me by _____, on "investigative or law enforcement officer" as defined in Section 2510 of Title 18, United States Code, for an order authorizing the interception of (wire) (oral) communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

A. There is probable cause to believe that _____ and others as yet unknown have committed and are committing offenses involving [the transmission, by means of (an) interstate wire facilit(y) (ies), of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code] [_____].

B. There is probable cause to believe that particular (wire) (oral) communications concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these (wire) (oral) communications will concern the [interstate transmission of gambling information related to horse-race results and the dissemination of such information to persons engaged in the unlawful business of gambling, the identity of the participants, the precise nature and scope of the illegal activity, and the relationships of the enterprise with other gambling activities] [_____]. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses.

C. Normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

D. There is probable cause to believe that [the telephone subscribed to by _____ and located in premises at _____ _____ and carrying telephone number(s) _____] [premises _____] (has) (have) been and (is) (are) being used by _____ and others as yet unknown in connection with the commission of the above-stated offenses.

WHEREFORE, it is hereby ordered that the [investigative agency] is authorized, pursuant to application authorized by the Assistant Attorney General of the _____ Division, the Honorable _____, pursuant to the power delegated to the Assistant Attorney General of the _____ Division by special designation of the Attorney General under the authority vested in him/her by Section 2516 of Title 18, United States Code: to intercept (wire) (oral) communications of _____ _____ and others as yet unknown concerning the above-described offenses [to and from the telephone(s) subscribed to by _____ and bearing telephone number(s) _____] [from the premises known as _____] located at _____. Such interception shall not automatically terminate when the type of communication described above in paragraph (B) has first been obtained but shall continue until communications are intercepted which reveal the manner in which _____ and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling)] [ ] and which reveal the identities of (his) (her) (their) confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of _____ days from the date of this order, whichever is earlier.

[It is further ordered that special agents of the (Federal Bureau of Investigation) ( ) are authorized to enter the foregoing premises surreptitiously for the purposes of installing, maintaining, and removing any electronic oral interception devices utilized pursuant to the authority granted by this order.]

PROVIDING THAT, this authorization to intercept (wire) (oral) communications shall be executed as soon as practicable after the signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon

attainment of the authorized objective or, in any event, at the end of _____ ( ) days from the date of this order.

PROVIDING ALSO, that _____ shall provide the court with a report on or about what _____ and _____ days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

_____
JUDGE

_____
Date

9-7.922 Form Proviso to Order When Interception is of Coin Operated Public Telephones

Providing that the above-described wire communications to and from the coin-operated public telephone(s) bearing number(s) _____ may be monitored only when it has been determined by surveillance that ___ _____ [is using the telephone] [is within the premise in which the telephone(s) (are) (is) located and may be intercepted only when it has been determined by voice identification that _____ is a party to the conversation.]

9-7.923 Form Proviso to Order When Prospective Interceptee is Under Indictment

PROVIDING FURTHER THAT, particular care will be exercised to avoid the interception of any conversation of a person under criminal indictment which pertains to his/her culpability in relation to his/her indictment or the strategy which he/she contemplates employing in his/her defense.

9-7.924 Form Common Carrier Order

IN RE: APPLICATION OF THE UNITED :
STATES FOR AN ORDER AUTHORIZING THE : MISC. NO.
INTERCEPTION OF WIRE COMMUNICATIONS :

ORDER

This matter having come before the Court pursuant to the application of the United States for the interception of wire communications on telephone numbers _____ and subscribed to by _____ _____ at _____.

IT APPEARING that the Court, having reviewed the application and having found that it conforms in all respects to the requirements of Title 18, United States Code, Sections 2516 and 2518, has this _____ day of ___ _____, 19___, signed an Order conforming to the provisions of Title 18, United States Code, Section 2518, authorizing special agents of the Federal Bureau of Investigation to accomplish the aforesaid interception, and

IT FURTHER APPEARING THAT (name of communication carrier) of _____ _____ is a communication common carrier within the meaning of Title 18, United States Code, Section 2510(10), and

IT FURTHER APPEARING that the applicant has requested that (name of communication carrier) or _____ be directed to furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish this interception unobtrusively and with minimum interference to the service to be intercepted, it is by the Court this _____ day of _____, 19___,

ORDERED THAT (name of communication carrier) of _____ shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance necessary to acomplish the interception unobtrusively and with a minimum of interference with the service presently accorded persons whose communications are to be intercepted, and

FURTHER ORDERED that the furnishing of any such facilities or technical assistance by (name of communication carrier) of _____ be compensated by the applicant at the prevailing rates, and

FURTHER ORDERED that the furnishing of said information, facilities, and technical assistance shall terminate _____ days from the date of this Order unless otherwise ordered by this Court, and

FURTHER ORDERED that this Order is sealed and that (name of communication carrier) of _____, its agents and employees

---

1/ A modification of this form should be used where the assistance of a landlord, custodian or other person is required.

shall not disclose to the listed subscribers for the said telephone numbers or to any other persons the existence of the Orders or this investigation until otherwise ordered by the Court.

_____
United States District Judge

_____
Date

_____
Date

9-7.925 Application for Applying for Pen Register

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

IN THE MATER OF THE APPLICATION OF)
THE UNITED STATES OF AMERICA FOR AN) No.
ORDER AUTHORIZING THE INSTALLATION)
AND USE OF A DEVICE TO REGISTER)
TELEPHONE NUMBERS)

APPLICATION

The United States of America, by its atorney(s) _____

A. Moves this Honorable court, pursuant to Federal Rules of Criminal Procedure, Rule 57(b) to grant an order authorizing the installation and use of a device to register telephone numbers dialed or pulsed ("dialed") from telephone number(s) _____, located at _____, and subscribed to by _____, and,

B. Moves this court, pursuant to the All Writs Act, 28 U.S.C. §1651(a), to direct the _____ Telephone Company of _____, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish (agents of investigative agency) with all of the information, facilities, and technical assistance neccessary to unobtrusively accomplish the installation and use of the registering device(s). In support of this application, the United States represents as follows:

1. _____ agents of the (investigative agency) have been engaged in a lengthy and extensive investigation of (subjects) for violations of federal laws, including _____.

2. It is believed that (subjects) use telephone number(s) _____ located at _____ and subscribed to by _____ to discuss (his) (her) (their) criminal activit(y) (ies), and/or to further (his) (her) (their) criminal activit(y) (ies);

3. It is believed that information concerning the aforementioned offenses, additional co-conspirators, and the victims of those offenses will be obtained upon discovery of the numbers, locations, and subscribers of the telephone(s) being dialed from _____ (telephone number(s))

WHEREFORE, it is respectfully requested that this court grant an order for a _____(__) period (1) authorizing the installation and use of a device to register numbers dialed from telephone number(s) _____, (2) directing the _____ Telephone Company of _____, a communication common carrier as defined Section 2510(10) of Title 18, United States Code, to forthwith furnish agents of the _____ with all information, facilities, and technical assistance necessary to accomplish the installation and use of the registering device(s) unobtrusively and with minimum interference to the service presently accorded persons whose communications are to be the subject of the registering device(s), and (3) sealing this application and the court's order.

Respectfully Submitted,

_____

9-7.926 Order for Applying for Pen Register

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF)
THE UNITED STATES OF AMERICA FOR AN) No.
ORDER AUTHORIZING THE INSTALLATION)
AND USE OF A DEVICE TO REGISTER)
TELEPHONE NUMBERS)

ORDER

This matter having come before the court pursuant to the application of the United States of America, which application requested that an order be issued (1) authorizing the installation and use of a device to register telephone number dialed or pulsed ("dialed") from telephone number(s) _____ located at _____ and subscribed to by _____ and (2) directing the _____ Telephone Company of _____, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish (agents of investigative agency) with all of the information, facilities, and technical assistance necessary to accomplish installation and use of the registering device(s) unobtrusively and with a minimum of interference with services that such carrier is presently according the person(s) whose communications are to be the subject of the registering device(s), and;

IT APPEARING that the application has been made in good faith in the furtherance of a pending criminal investigation, and it appearing that there is reason to believe that the aforementioned telephone(s) (are) (is) being and will continue to be used in connection with criminal activity,

IT IS ORDERED, pursuant to Federal Rules of Criminal Procedure, Rule 57(b), that _____ agents of the (investigative agency) are authorized to use and install the requested registering device(s) on the aforementioned telephone(s), and;

IT IS FURTHER ORDERED, pursuant to the All Writs Act, 28 U.S.C. §1651(a), that the _____ Telephone Company of _____ forthwith provide _____ agents of the (investigative agency) with all of the information, facilities, and

technical assistance necessary to accomplish the installation and use of the registering device(s) unobtrusively and with a minimum of interference to the service(s) that such carrier is presently according the person(s) whose communications are to be the subject of the registering device(s), and;

IT IS FURTHER ORDERED that the _____ Telephone Company of _____ be compensated by the applicant at the prevailing rates, and;

IT IS FURTHER ORDERED that the normal operations of the _____ Telephone Company of _____ shall not be disrupted and;

IT IS FURTHER ORDERED that this order and application are sealed and that the _____ Telephone Company of _____, its agents, and its employees shall not disclose to the listed subscriber(s) of the said telephone number(s), nor to any other person, the existence of this application or order, or the existence of this investigation or of the device(s) used to accomplish the aforementioned registering, unless and until otherwise ordered by the court.

THIS ORDER, unless sooner renewed, will automatically terminate _____ days from today.

_____
JUDGE

_____
Date

9-7.927 Form Trap and Trace Application

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF A DEVICE TO TRAP AND TRACE ORIGINATING TELEPHONE NUMBERS	)	No. _____

APPLICATION

The United States, by its attorney(s) , moves this court pursuant to Federal Rules of Criminal Procedure, Rule 57(b), to grant an order (1) authorizing the installation and use of an electronic or mechanical device to trace and identify the telephone numbers of parties placing calls to telephone number(s) _____ located at _____ and subscribed to by _____ and (2) directing the _____ Telepnone Company of _____, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to furnish forthwith _____(agents of investigating agency)_____ with all of the information facilities and technical assistance necessary to unobtrusively accomplish such tracing and identification, including installation and operation of the device. In support of this application, the United States represents as follows:

A. _____(Special)_____ agents of the _____(agency)_____ have been engaged in an investigation of _____(subject)_____ for violations of federal laws, including _____;

B. It is believed that _____(subject)_____ use(s) telephone number(s) located at and subscribed to by _____ to discuss (his)(her)(their) criminal activity(ies), to conduct (his)(her)(their) criminal activity(ies), and/or to further (his)(her)(their) criminal activity(ies);

C. It is believed that information concerning the afore-mentioned offenses, additional co-conspirators, and the victims of these offenses

will be obtained upon discovery of the numbers, locations and subscribers of the telephones from which _____(target wire)_____ is called.

Wherefore it is respectfully requested that this court grant an order:

1. Authorizing the installation and/or use of an electronic or mechanical device to trace and identify the telephone numbers of, and provide the name and address of the subscriber of record to, each identified incoming call to telephone number(s) _____;

2. Directing the _____ Telephone Company of _____, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish ____(Special)____ agents of the ____(agency)____ with all information, facilities, and technical assistance necessary to accomplish the tracing and identification, including installation and operation of the device, unobtrusively and with a minimum of disruption to normal telephone service;

3. Directing the _____ Telephone Company of _____ to provide ____(Special)____ agents of the _____(agency)____ at reasonable intervals during regular business hours with the results of the tracing and identification, including the telephone number of, and the name and address of the subscriber of record to, each identified incoming call to telephone number(s) _____ and, where possible, the time and duration of each such call; and

4. Further directing that the _____ Telephone Company of _____, its agents and employees shall not disclose to the listed subscriber(s) of the above-mentioned telephone number(s), nor to any other person, the existence of this order or of this investigation, unless otherwise ordered by the court.

Furthermore it is respectfully requested that the court's order be limited in the following respects:

a. The tracing operation shall be limited to Electronic Switchig System (ESS) or No. 5 cross-bar facilities;

b. The tracing operation shall be restricted to tracing and recording only those callsoriginating from _____;

c. The tracing operation shall be restricted to the hours of _____ to _____ daily;

d. The court's order shall be in effect for twenty (20) days from the time it is granted.

Respectfully Submitted,

_____

9-7.928 Form Trap and Trace Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF A DEVICE TO TRAP AND TRACE ORIGINATING TELEPHONE NUMBERS	)	NO. _____

ORDER

This matter having come before the court pursuant to the application of the United States of America, which application requested that an order be issued (1) authorizing the installation and use of a device to trace and identify the telephone numbers of certain parties placing calls to telephone number(s) of certain parties placing calls to telephone numbers(s) _____ located at _____ and subscribed to by _____ and (2) directing the _____ Telephone Company of _____, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish (agents of investing agency) with all of the information, facilities and technical assistance necessary to unobtrusively accomplish the tracing and identification, and;

It appearing that the application has been made in good faith in furtherance of a pending criminal investigation, and it appearing that there is reason to believe that the telephone(s) from which incoming telephone calls are to be traced and identified (is) (are) being and will be used in connection with criminal activity,

It is ordered, pursuant to Federal Rules of Criminal Procedure, Rule 57(b), and the All Writs Act, 28 U.S.C. §1651(a), that the _____ Telephone Company is hereby authorized and ordered to:

A. Install and/or operate an electronic or mechanical device in order to trace and identify the telephone number or, and provide the name and address of the subscriber of record to, each identified incoming call to telephone number(s)_____, and, where possibile, provide the time and duration of each such call;

B. Continue the operation of such tracing operation for a period not to exceed twenty (20) days from the date of this Order.

Provided, however, that the tracing operation be limited to telephone facilities employing ESS or No. 5 cross-bar switching facilities, and only those reasonably necessary to trace all calls originating from _____ _____; provided further that the tracing operation can be conducted unobtrusively, with a minimum of disruption to normal telephone service; and that the tracing operation be limited to the hours of _____ _____.

It is further ordered that:

1. The _____ Telephone Company will give to (Special) Agents of _____ all information gathered by reason of the Order at reasonable intervals while this Order is in effect.

2. The (agency) will compensate and/or reimburse the _____ Telephone Company for all charges and/or expenses incurred in complying with this Order.

3. _____ Telephone Company, its agents and employees shall not disclose to the listed subscribers of the above-mention telephone number(s), nor to any other person, the existence of this order or of this investigation, unless otherwise ordered by the court.

This order, unless sooner renewed, will terminate _____ days from now at (time) on (date).

_____
Judge

_____
Date

DOJ - 1980-09

9-7.930 Form Sealing Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION BY THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS	)	NO. _____

ORDER

Pursuant to the powers conferred upon this court by Section 2518 of Title 18, United States Code, on (date), this court issued its order authorizing special (agents) (investigator) of the (agency) to intercept (wire) (oral) communications to and from certain (telephone facilities (certain premises).

Such authorized interception of communications was finally terminated on (date).

The (agency) through its agents, in accordance with requirements of Section 2518(8)(a) of Title 18, United States Code, has made the (number) reels of tape recordings of such intercepted communications available to this court, now, therefore, it is

ORDERED:

A. That said recordings be sealed and the seal verified by the signature of this court;

B. That (designated official and agency) is directed to maintain custody of said recordings for a period of 10 years beginning on this date;

C. That the said recordings shall not be destroyed except upon an order of this court, and in any event, said recordings shall be protected for the 10 year period set out above;

D. That said recordings shall be protected from editing or alteration;

E. That except as provided by Section 2517 of Title 18, United States Code, the contents of the said recordings shall be disclosed only upon the order of this court;

F. The application of the United States (Attorney) (Department of Justice Attorney) (name) , the affidavit of (agency) (special agent) (investigator) (name) , supporting documents thereto, periodic reports to this court, and the order entered by this court authorizing the interception of certin (wire) (oral) communications entered on (date) , all of which have been previously placed in the custody of the clerk of the court under seal of this court, shall be disclosed only upon showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of this court, and in any event shall be kept for 10 years.

UNITED STATES DISTRICT JUDGE

Date

9-7.940 Forms Relating to Inventory

9-7.941 Form Report to Court Prior to Inventory

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS	))))))	NO. _____ LIST OF INTERCEPTEES AND PERSONS NAMED IN THE ORDER FOR INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS

In order to assist the court in making its determination of those persons to be served with inventories as provided by 18 U.S.C. §2518(8)(d) in the abover matter, the government submits this compilation of the names of those persons named in the order or application or who have been identified by agents of the ___(agency)___ as interceptees:

A. The persons named in the order or the application are: _____ _____;

B. Other persons whose intercepted communications apparently incriminate them in offense(s) which (was) (were) specified in the interception order are: _____;

C. Other persons whose intercepted communication apparently incriminate them in offense(s) which (was) (were) not specified in the interception ordered are: _____;

D. Persons whose intercepted communications are apparently nonincriminating are: _____.

DATED this ____ day of _____, 19___.

_____
(signiture of supervising attorney)

9-7.942 Form Inventory Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS	)	NO. _____
	)	ORDER FOR INVENTORY
	)	18 U.S.C. §2518(8)(d)

TO: Attorneys of the United States Department of Justice

Having examined the government's list of identified interceptees and person named either in the order of application and pursuant to 18 U.S.C. §2518(8)(d): It is hereby ordered that attorneys for the United States Department of Justice shall cause to be served upon the person named below an inventory which shall include notice of:

A. The fact of the (entry of the order) (making of the application);

B. The date of the (entry) (and the period) of (authorized) (approved) (disapproval of application for) interception; and

C. The fact that during the period wire or oral communications were not intercepted.

The persons to be served are: _____ .

_____
UNITED STATES DISTRICT JUDGE

_____
Date

9-7.943 Form Inventory Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION)
OF THE UNITED STATES FOR AN ORDER) NO. _____
AUTHORIZING THE INTERCEPTION OF)
(WIRE) (ORAL) COMMUNICATIONS) INVENTORY

TO: (Name of Interceptee)

Pursuant to 18 U.S.C. §2518(8)(d), you are advised as follows:

A. That on (date) , an application for an order authorizing interception of (wire) (oral) communications was filed in the United States District Court for the _____ District of _____ _____ , under Docket No. _____.

B. That pursuant to the above application, an order was entered that same day, (date) (authorizing) (denying) the application of (wire) (oral) interceptions for a period of _____ days;

C. That between the dates of (date) and (date) (wire) (oral) communications were (not) intercepted.

9-7.950 Form Application For 18 U.S.C. §2517(5) Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF AN APPLICATION)
FOR AN ORDER AUTHORIZING USE OF)) NO. _____
INTERCEPTED (WIRE) (ORAL))
COMMUNICATIONS)

APPLICATION

(applicant's name) , (Title) , _____
District of _____ , being duly sworn states:

This sworn application is submitted for an order pursuant to 18 U.S.C. §2517(5) authorizing the use, pursuant to the provision of 18 U.S.C. §2517(3) in any criminal proceeding held under the authority of the United States of the contents and any evidence derived therefrom of (wire) (oral) communications intercepted by an investigative or law enforcement officer in a manner authorized by Chapter 119, 18 U.S.C. which relate to offenses other than those specified in the order of authorization.

A. He/she is an "investigative or law enforcement officer of the United States" within the meaning of 18 U.S.C. §2510(7)--that is, he/she is an attorney authorized by law to prosecute or participate in the poseuction of offenses enumerated in 18 U.S.C. §2516.

B. On _____, upon application of _____ (applicant's name) (title) _____, District of _____, an order was issued by Judge _____, authorizing agents of the _____ to intercept of a period of _____ days (wire) (oral) communications of _____ and _____ and unknown others to and from telephone number(s) _____ subscribed to by _____ in the premises known as _____, located at _____, for the purpose of securing evidence that _____ and unknown others were committing offenses specified in 18 U.S.C. §2516, to wit: offenses involving violations of _____. A copy of that order along with the application and supporting affidavit is attached to this application as Exhibit B and incorporated by reference herein.

C. On _____, agents of the _____ commenced the court order interception set forth in paragraph B above. These interceptions continued until termination on _____.

D. During the authorized period of interception, (wire) (oral) communications were intercepted which indicated that _____ and unknown others were committing offenses other than those specified in the aforemention order(s), that is, offenses in violation of _____ U.S.C. _____. These communications were intercepted incidentally and in good faith.

On the bases of the allegations contained in this application, affiant requests the court to issue an order pursuant to 18 U.S.C. §2517(5) authorizing the use of the contents of the intercepted (wire) (oral) communications regarding the violations set forth in paragraph D above by those persons whose names are set out in paragraph D above, in any criminal proceeding held under the authority of the United States as provided by 18 U.S.C. §2517(3).

_____
NAME OF APPLICANT
ADDRESS OF APPLICANT

Subscribed and sworn to before me this ____ day of _____, 19___.

_____
(Notary) (_____)

9-7.960 Form 18 U.S.C. §2517(5) Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

Application under oath having been made before me for an order pursuant to 18 U.S.C. §2517(5) by the United States, through its attorney, ____(name)____, for the _____ District of _____, an "investigative or law enforcement officer _____ of the United States" as defined in 18 U.S.C. §2510(7), I find that:

A. On _____, upon application of ____(applicant's name)____, an order was issued by Judge _____, United States District Court, _____ District of _____, authorizing agents of the _____ to intercept for a period of _____ days (wire) (oral) communications of _____ and unknown others, to and from telephone number(s) _____ subscribed to by _____ in the premises known as _____, and located at _____, for the purpose of securing evidence that _____ and unknown others were committing offenses specified in 18 U.S.C. §2516, to wit: offenses involving violations of _____ U.S.C. _____.

During the period of authorized interception, which commenced on ____ _____ and terminated on _____, agents of the _____ intercepted numbers (wire) (oral) communications not specified in the interception order, that is, offenses involving violations of _____ U.S.C. _____.

C. The communications mentioned in paragraph B above, relating to violations not specified in the interception order, were intercepted

incidentally and in good faith by agents of the _____ in the course of authorized inteceptions, and accordingly, were "otherwise intercepted" in accordance with the provisions of 18 U.S.C. Chapter 119.

WHEREFORE, it is ordered pursuant to the provisions of 18 U.S.C. §2517(5) that any person who has received, by any means authoized by Chapter 119 18 U.S.C. any information concerning (wire) (oral) communications, or evidence derived therefrom, intercepted over telephone number(s) _____, pursuant to the order of Judge _____, United States District Court, _____ District of _____, dated _____, but relating to offenses other than those specified in the said order, to wit: violations of _____ U.S.C. _____ may disclose the contents of said communications and any evidence derived from such communications while giving testimony under oath or affirmation in any criminal proceeding held under the authority of the United States of America.

_____
UNITED STATES DISTRICT JUDGE

_____
DATE

9-7.970 Form Voir Dire

A. Does any juror have any strong conviction, belief, or prejudice against the federal law which permits a United States district judge to authorize federal investigative agencies, upon a proper showing of probable cause to believe that a crime is being committed, (to wiretap a designated telephone or telephones) (to listen to conversations between conspirators).

If any juror answers affirmatively, please inquire as to whether such belief would render that juror unable to serve as a fair and impartial juror in a case involving court-authorized wiretapping.

B. As an alternative to the above, should it be denied, the government submits the following question: "the government intends to present evidence derived from the use of court-authorized electronic surveillance, to wit: (wiretapping). If the judge instructs you that such evidence is admissible, would the fact that it was derived from a legal (wiretap) (__) prejudice you in any way?"

9-7.980 Form Stipulation

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

UNITED STATES OF AMERICA;	)	
	)	
v.	)	NO. _____
	)	
	)	
_____.	)	STIPULATION

It is stipulated and agreed between the undersigned counsel for the United States of America and the undersigned counsel for (defendant) that in the event (name) were subpoenaed as a witness in the forthcoming jury trial between the above-stated parties in the above-captioned indictment, he/she would testify as follows:

A. That he/she is the Commercial Manager, (name) Telephone Company, (place) ;

B. That the documents attached hereto and incorporated in and made a part of this stipulation by reference, to wit: copies of records showing telephone number _____ listing to (name) , _____ (address) _____, during the month of (month) , and telephone number (etc. for all numbers needed), _____ were made in the regular course of business of the (name) Telephone Company; that the entries shown therein were made contemporaneously with or shortly after the occurrence of the events reflected therein; and that said documents are in his/her custody and are kept and maintained under his/her supervision and control;

It is not stipulated that said testimony and attached records are relevant, material, or admissible in evidence in the trial of the aforesaid case.

_____	_____
(NAME)	(NAME)
Attorney for the United States	Attorney for (Defendant's name)

9-7.990 Form Proposed Jury Instruction

Ladies and Gentlemen of the jury, when you were being questioned to determine your qualifications to sit as a juror in this case, you stated that you would not be prejudiced against evidence that had been obtained through court-authorized electronic surveillance. I now instruct you that I have ruled the tape-recorded evidence to be admissible, and you are to consider it as you would the other evidence in this case.

9-7.1000 VIDEO SURVEILLANCE

Video surveillance is not covered by Title III of the Omnibus Crime Control and Safe Streets Act because Title III relates only to the "aural acquisition of the contents of any wire or oral communication." See 18 U.S.C. §2510 (4) (emphasis added). Moreover, video surveillance is an area of the law where there is at present very little case precedent to provide guidance. The Department does, however, have guidelines governing the use of video surveillance and there are two cases, United States v. Torres, 751 F.2d 875 (7th Cir. 1984) and United States v. Biasucci, 786 F.2d 504 (2nd Cir. 1986), which discuss the use of video surveillance in detail. Special care should be taken to ensure that both the guidelines and the Torres and Biasucci decisions are followed when video surveillance is used during a federal criminal investigation.

9-7.1010 Authority--The Department of Justice Guidelines

Certain officials of the Criminal Division have been delegated authority to review and evaluate requests to conduct closed circuit television surveillance for law enforcement purposes by any component of the Department of Justice. See Department of Justice Order No. 985-82, dated August 6, 1982, at USAM 9-7.1011. The delegated authority encompasses every use of television surveillance for law enforcement purposes except the use of such surveillance 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. The heads of investigative agencies are empowered to ensure that electronic 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.

The officials responsible for monitoring video surveillance matters are the Assistant Attorney General and Deputy Assistant Attorneys General of the Criminal Division as well as the Director and Associate Directors of the Office of Enforcement Operations. Ordinarily, the Director and Senior Associate Director of the Office of Enforcement Operations review video surveillance requests. A request may be approved as a matter of course by one of these officials when no intrusion on a person's legitimate privacy rights appears to be involved. The most common such situation is when a consenting party to the presence of the camera will be present at all times. However, when justifiable expectations of privacy seem to exist, the Criminal Division takes the position that the use of video surveillance may be considered as equivalent to a search and thus requires judicial authorization. For example, there seems to be little doubt that the conducting of video surveillance in a private office or residence without a consenting party present would constitute an invasion of one's reasonable expectations of privacy and thus be a "search" within the meaning of the Fourth Amendment.

9-7.1011 Order Delegating Authority

DEPARTMENT OF JUSTICE

Order No. 985-82

DELEGATION OF AUTHORITY TO
AUTHORIZE TELEVISION SURVEILLANCE

I hereby delegate to the Assistant Attorney General of the Criminal Division, the Deputy Assistant Attorneys General of the Criminal Division, and the Director and Associate Director of the Office of Enforcement Operations, Criminal Division, authority to review and evaluate all requests to conduct television surveillance for law enforcement purposes within the Department of Justice. When, on the basis of such review and evaluation, the responsible official concludes that the proposed surveillance would not intrude on the subject's justifiable expectations of privacy, he/she may authorize the surveillance. If such official concludes that the surveillance would infringe on the subject's justifiable expectations of privacy, he/she shall initiate proceedings to obtain a judicial warrant.

In an emergency situation, i.e., where a television surveillance request cannot be delivered to the Director of the Office of Enforcement Operations at least forty-eight (48) hours before the proposed use of such

governing the former should be applied to the latter. The court went on to say that when Congress passed Title III, there was abundant evidence that it specifically intended to adopt the constitutional guidelines announced in Berger and Katz. The court indicated that the Torres court in similar fashion borrowed four provisions of Title III implementing the Fourth Amendment's requirements of particularity and minimization as a "measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime." Ibid at 885. "We," said the court, "likewise believe that these standards, borrowed from Title III together with the more general constitutional requirements, form a sufficient outline of the showing the government must make before a warrant should issue authorizing video surveillance."

The four provisions that must be satisfied before a CCTV order can be issued are the following: (1) a showing that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous; (2) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates; (3) the interception period cannot be longer than necessary to achieve the objective of the authorization, nor in any event longer than 30 days; (4) the interception must be conducted in such a way as to minimize the interception of communications (video images) not otherwise subject to interception. See Torres, 751 F.2d at 883-84. Applications, orders, and supporting affidavits should comport with the guidelines set forth in Torres and Biasucci.

9-7.1030 Court Authorization

When court authorization for video surveillance is deemed necessary, it should be obtained by way of an application and order based 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 and should include: (1) a statement indicating that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (2) a particularized description of the premises to be surveilled; (3) the names of the persons to be surveilled, if known; (4) a statement of the steps to be taken to assure that the surveillance will be minimized to effectuate only the purposes for which the order is issued; and (5) a statement of the duration of the order which shall not be longer than is necessary to achieve the objective of the authorization nor in any event longer than thirty days.

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

9-7.1031 Form Video Surveillance Application

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF VISUAL, NON-VERBAL CONDUCT AND ACTIVITIES BY MEANS OF CLOSED CIRCUIT TELEVISION OCCURRING WITHIN THE PREMISES KNOWN AS _____	APPLICATION FOR AN ORDER AUTHORIZING THE INTERCEPTION OF VISUAL, NON-VERBAL CONDUCT AND ACTIVITIES BY MEANS OF CLOSED CIRCUIT TELEVISION

A. Pursuant to Rules 41(b) and 57 of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. §1651), the United States of America by and through _____, United States Attorney for the _____ District of _____, and _____, an Assistant United States Attorney for said District, hereby makes application to this Court for an order authorizing the interception and recording of visual, non-verbal conduct by means of closed circuit television occurring within the following premises: [At this point set forth a particularized description of the premises to be surveilled.] The factual basis for the granting of this application is set forth in the attached affidavit of _____, which is incorporated by reference herein.

B. Also attached to this application is a letter from the Director, Office of Enforcement Operations, Criminal Division, United States Department of Justice, authorizing the making of this application for visual surveillance by means of closed circuit television.

C. The attached affidavit of _____ reflects that there is probable cause to believe:

1. That the premises known as _____, located at _____, are being and will continue to be used by _____, _____, _____, and others as yet unknown to discuss, plan, and commit offenses involving _____ in violation of Sections _____ and _____ of Title _____, United States Code.

2. That visual non-verbal conduct of the above-named individuals will be obtained through interception by means of closed circuit television at these premises and that such conduct will provide:

*U.S. GOVERNMENT PRINTING OFFICE:1987-181-487:60029

a. information indicating the precise nature, scope, extent, and methods of operation of the participants in the illegal activities referred to above;

b. information reflecting the identities and roles of all accomplices, aiders and abettors, co-conspirators, and participants in the illegal activities referred to above; and

c. admissible evidence of commission of the offenses described above.

D. Installation of electronic visual surveillance equipment will require surreptitious entry into the premises (by breaking and entering if necessary) and the danger to the safety of the agents inherent in such entry requires that the agents be armed.

E. Normal investigative procedures have been tried and failed or reasonably appear unlikely to succeed if tried or appear to be too dangerous to employ.

F. On the basis of the attached affidavit of _____ and allegations contained in this application:

IT IS HEREBY REQUESTED that this Court authorize Special Agents of the _____ to intercept and record by means of closed circuit television visual, non-verbal conduct of _____, _____, _____, and others as yet unknown within the premises known as _____, located at _____, concerning offenses involving _____ in violation of Sections _____ and _____ of Title _____, United States Code.

IT IS FURTHER REQUESTED that such interception not automatically terminate when the type of visual, non-verbal conduct described above has first been obtained but continue until conduct is intercepted that reveals: (1) the manner in which the above-named individuals and others as yet unknown participate in the above-described offenses; (2) the precise nature, scope, and extent of the above-described offenses, and (3) the identity and roles of all accomplices, aiders and abettors, co-conspirators, and participants, or for a period of thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER REQUESTED that Special Agents of the _____ be authorized to enter the above-described premises surreptitiously, covertly, and by breaking and entering in order to install, maintain, and

remove electronic visual surveillance equipment used by the _____ to intercept and record visual, non-verbal conduct occurring within the foregoing premises and that such agents be authorized to be armed.

IT IS FURTHER REQUESTED THAT this order require that it be executed as soon as practicable and that interception be conducted in such a manner as to minimize interception of visual, non-verbal conduct which is not criminal in nature, and that the order terminate upon attainment of the authorized objectives or at the end of thirty (30) days from the date of the order, whichever is earlier.

When it is determined that none of the named interceptees nor any person subsequently identified as an accomplice who uses the premises to commit or converse about the designated offenses is inside the premises, interception of visual, non-verbal conduct will be discontinued. Whenever this happens, IT IS REQUESTED that surveilling agents be authorized to thereafter spot monitor the premises to ascertain whether any of the aforementioned persons is present inside the premises. When such persons are found to be present, IT IS REQUESTED that the agents be allowed to continue intercepting visual, non-verbal conduct at the premises to determine whether such conduct involves the designated offenses. If the conduct relates to such offenses, it will, under the authority of the Court's order, be intercepted.

Dated:

_____, 19__ Respectfully submitted,

_____
Assistant United States Attorney

9-7.1032 Form Video Surveillance Order

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF VISUAL, NON-VERBAL CONDUCT AND ACTIVITIES BY MEANS OF CLOSED CIRCUIT TELEVISION OCCURRING WITHIN THE PREMISES KNOWN AS _____	ORDER AUTHORIZING THE INTERCEPTION OF VISUAL, NON-VERBAL CONDUCT AND ACTIVITIES BY MEANS OF CLOSED CIRCUIT TELEVISION

TO: SPECIAL AGENTS OF THE _____

A. Upon the application of _____, United States Attorney for the _____ District of _____, by Assistant United States Attorney _____, for an Order authorizing the interception and recording by means of closed circuit television of visual, non-verbal conduct occurring within [particularly describe premises to be viewed], pursuant to Rules 41(b) and 57(b) of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. §1651), and based upon the affidavit of _____, sworn to before me, full consideration having been given to the matters set forth therein, the Court finds there is probable cause to believe that:

1. The premises known as _____ have been, are being, and will continue to be used by _____, _____, _____, and others as yet unknown to discuss, plan, and commit offenses involving _____, in violation of Sections _____ and _____ of Title _____, United States Code.

2. Visual non-verbal conduct of the above-named individuals will be obtained through interception by means of closed circuit television at these premises and interception of such conduct will provide:

a. information indicating the precise nature, scope, extent, and methods of operation of the participants in the illegal activities referred to above;

b. information reflecting the identities and roles of all accomplices, aiders and abettors, co-conspirators, and participants in the illegal activities referred to above, and

c. admissible evidence of commission of the above-described offenses.

3. Installation of electronic visual surveillance equipment to effectuate this Court's order will require surreptitious entry into the premises (by breaking and entering if necessary) and that the danger to the safety of the agents inherent in such entry requires that the agents be armed.

4. Normal investigative techniques have been tried and failed or reasonably appear unlikely to succeed if tried or to be too dangerous to employ.

B. WHEREFORE, IT IS HEREBY ORDERED that the _____ is authorized to intercept and to record by means of closed circuit television visual, non-verbal conduct within the premises known as _____, of _____, _____, _____, and others as yet unknown concerning offenses involving _____, in violation of Sections _____ and _____ of Title ____, United States Code.

IT IS FURTHER ORDERED THAT such interception shall not automatically terminate when the types of visual, non-verbal conduct described above have first been obtained, but shall continue until conduct is intercepted that reveals: (1) the manner in which the above-named individuals and others as yet unknown participate in the above-described offenses; (2) the precise nature, scope, and extent of the offenses, and (3) the identity and roles of all accomplices, aiders and abettors, co-conspirators and participants, or for a period of thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER ORDERED that Special Agents of the _____ are authorized to enter the foregoing premises surreptitiously, covertly, and by breaking and entering in order to install, maintain, and remove electronic visual equipment needed to intercept and to record visual, non-verbal conduct occurring within the foregoing premises and that such agents may be armed.

IT IS FURTHER ORDERED that this Order shall be executed as soon as practicable and that interception shall be conducted in such a manner as to minimize the interception of visual, non-verbal conduct when it is determined that a named interceptee's conduct is not criminal in nature. This Order shall terminate upon attainment of the authorized objectives or at the end of thirty (30) days from the date of this Order, whichever is earlier.

IT IS FURTHER ORDERED that when it is determined that none of the named interceptees nor any person subsequently identified as an accomplice who uses the premises to commit or converse about the designated offenses is inside the premises, interception of visual, non-verbal conduct shall be discontinued, except that if such a determination is made, visual monitoring ceases, and agents are thereafter unable to ascertain whether

any of the aforementioned persons is inside the premises, agents may engage in spot monitoring to determine whether any of the persons is once again inside the premises. Whenever it is determined that any of the aforementioned persons is within the premises, interception of visual, non-verbal conduct may be initiated to determine whether such conduct involves the designated offenses. If the conduct relates to such offenses, it may be intercepted.

_____
United States District Judge

_____
Date

DETAILED TABLE OF CONTENTS FOR CHAPTER 8

9-8.000 JUVENILES: YOUTH CORRECTIONS ACT

9-8.010 Armed Forces Enlistment as an Alternative to Federal Prosecution

Present regulations of the Armed Services prohibit the enlistment or induction of an individual against whom criminal or juvenile charges are pending or against whom the charges have been dismissed to facilitate the individual's enlistment or induction. This policy is based, in part, on the premise that the individual who enlists or volunteers for induction under such conditions is not properly motivated to become an effective member of the Armed Forces.

Determination as to whether prosecution should be instituted or pending criminal charges dismissed in any case should be made on the basis of whether the public interest would thereby best be served and without reference to possible military service on the part of the subject. The Armed Forces are not to be regarded as correctional institutions and U.S. Attorneys are urged to give full cooperation to the Department of Defense in the latter's efforts to ensure a highly motivated all-volunteer Armed Forces and to bolster public confidence in military service as a thoroughly respectable and honorable profession.

There may be exceptional cases in which imminent military service, together with other factors, may be considered in deciding to decline prosecution if the offense is trivial or insubstantial, the offender is generally of good character, has no record or habits of anti-social behavior and does not require rehabilitation through existing criminal institutional methods 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 U.S. Attorney be a party to, or encourage, an agreement respecting criminal prosecution in exchange for enlistment or induction into the Armed Services.

9-8.100 JUVENILES

A "juvenile" for purposes of 18 U.S.C. Chapter 403 (18 U.S.C. §§5031 - 5042) is a person who has not attained his/her eighteenth birthday, or for the purpose of proceedings and disposition under that chapter for an alleged act of juvenile delinquency, a person who has not attained his/her twenty-first birthday. "Juvenile delinquency" is the violation of a law of the United States committed by a person prior to his/her eighteenth birthday which would have been a crime if committed by an adult.

The Juvenile Justice and Delinquency Prevention Act of 1974 was signed into law on September 7, 1974, and was amended by the Comprehensive Crime Control Act of 1984. On October 16, 1974, the Attorney General pursuant to Order No. 579.74 (28 C.F.R. §0.57) authorized the Assistant Attorney General, Criminal Division to exercise the power and authority vested in the Attorney General by 18 U.S.C. §§5032, 5036. By a criminal division memorandum dated March 12, 1985, to all U.S. Attorneys effective October 12, 1984, the authority to prosecute juveniles for acts of juvenile delinquency (including proceeding by information) and the power to certify under 18 U.S.C. §5032 were redelegated to all U.S. Attorneys. It should be noted that prior approval from the General Litigation and Legal Advice Section of the Criminal Division is requested before filing a motion to transfer. See 9-8.130, infra.

9-8.110 Certification

With one limited exception (see USAM 9-8.111, infra), under 18 U.S.C. §5032, a juvenile cannot be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate United States District Court that (1) the juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency; (2) the state does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a violent felony or an offense described in 21 U.S.C. §§841, 952(a), 955 or 959 and there is a substantial federal interest that justifies the exercise of federal jurisdiction.

The authority to proceed with this certification in those cases where it is deemed appropriate has been delegated to U.S. Attorneys. This was effected by Attorney General Order No. 579-74 (28 C.F.R. §0.57) and a memorandum to all U.S. Attorneys dated March 12, 1985.

Before the certification can be made, an investigation must take place. To satisfy this requirement the following steps should be taken:

A. Cases of Exclusive U.S. Jurisdiction - The U.S. Attorney should, at a minimum, research the appropriate law and statutory provisions which apply to that case. It may be advisable to contact the appropriate local prosecutor and obtain his/her concurrence in such finding of exclusivity of jurisdiction.

B. Cases of Concurrent Jurisdiction - The appropriate local prosecutor should be contacted and the facts of the case discussed with

him/her. A determination should be made as to whether he/she is accepting or refusing prosecutorial responsibilities in the matter. It is strongly urged that, when the local prosecutor refuses to assume jurisdiction over the juvenile, you receive a letter from him/her to this effect and append it to the certification filed with court.

C. Adequacy of State Juvenile Programs and Services - The U.S. Attorney should request the Chief Probation Officer in his/her judicial corrections system to conduct an investigation into the state juvenile corrections system in that district to determine whether there are available programs and services adequate for the needs of juveniles. Such studies should be made on a periodic basis to reflect any possible changes brought about by state juvenile authorities. We strongly urge that when you utilize this procedure you obtain a statement from the probation officer, outlining the basis for his/her findings, and append this to the certification.

D. Violent Felony and Substantial Federal Interest - The Comprehensive Crime Control Act of 1984 added this category permitting the disposition of a case involving a juvenile charged with a serious felony by means of a federal proceeding. If the crime charged is a felony crime of violence or a serious drug offense as described in 21 U.S.C. §§841, 952(a), 955 or 959, and there is a "substantial Federal interest in the case or offense to warrant the exercise of Federal jurisdiction," it may be certified for federal prosecution.

This provision is limited to serious violent felonies and drug offenses so that the federal government will continue to defer to state authorities for less serious juvenile offenses. See S. Rep. No. 225, 98th Cong., 1st Sess. 389 (1983). Congress clearly intended that the determination of a "substantial Federal interest" be based on a finding that the nature of the offense or the circumstances of the case give rise to special federal concerns. Id. Examples would include assault on, or assassination of a federal official; aircraft hijacking; interstate kidnaping; major espionage or sabotage activity; large-scale drug trafficking; or significant or willful destruction of United States property.

If, after investigation, any one of the above factors are found to exist, the U.S. Attorney shall proceed with the certification. The certification must specifically set out the kind of investigation made and, as a result of the investigation, which of the factors allowing federal jurisdiction was found to exist.

Since it is possible that a successful attack on the certification may be based on the U.S. Attorney's abuse of discretion in this area, the

criteria outlined above should be adhered to as closely as possible when utilizing the certification provisions of the Act.

9-8.111 Exception to Certification

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 imprisonment does not exceed six months. Most of these cases involve petty offenses committed on government land where summary disposition is in everyone's best interest. See S. Rep. No. 225, 98th Cong., 1st Sess. 388 (1983). In such a case, regular adult procedures may be followed.

9-8.120 Filing of the Complaint

Paragraph one of 18 U.S.C. §5032 states:

> A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States 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 it will not surrender the juvenile to the state, but will proceed against him/her in federal court, that the certification is required in cases not falling within the limited exception.

In other words, the Department does not interpret 18 U.S.C. §5032 as requiring certification prior to the filing of a complaint and issuance of an arrest warrant. That part of 18 U.S.C. §5032 which states "[i]f the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such state" (emphasis added) necessarily implies that an arrest procedure has been completed. Upon a juvenile's arrest, the U.S. Attorney should move as expeditiously as

possible to make the determination as to whether he/she is to be turned over to state authorities or whether there is a substantial basis to file a certification invoking federal jurisdiction.

Nor should certification be required in cases where a juvenile is brought before a magistrate for a Federal Rules of Criminal Procedures, Rule 40, removal hearing. The U.S. Attorney in the district where the removal hearing is being held should set out the government's position based on the Department's interpretation of 18 U.S.C. §5032 as indicated above. He/she should also urge that the U.S. Attorney in the district where the crime was committed or the complaint was filed is the only party who can make the proper determination concerning the appropriate forum for the handling of the case (i.e., only he/she can determine whether one of the factors necessary for certification exists or whether the case should be turned over to state authorities).

It must be emphasized that the major thrust of the Act is to insure greater participation by the states in the handling of juvenile criminal matters. Accordingly, the U.S. Attorney should make every effort to funnel cases to state authorities where it has been determined that there is no exclusive federal jurisdiction.

9-8.130 Motion to Transfer

18 U.S.C. §5032 provides several avenues for adult prosecution of a juvenile. The first is where he/she has requested in writing, upon advice of counsel, to be proceeded against as an adult. The other procedure involves the filing of a "motion of transfer" in cases involving juveniles who have committed a crime of violence or a serious drug offense (as defined in 18 U.S.C. §5032) after their fifteenth birthday. In the latter case, after filing of the motion to transfer (Motion to Proceed Against the Juvenile as an Adult) in the United States District Court, the court must conduct a hearing to determine whether such prosecution would be in the interest of justice. In making this determination, the court must consider the criteria set out in 18 U.S.C. §5032. In doing so it must receive evidence on each of the factors set out and make findings in the record with regard to each of those factors. In the case of repeat offenders see USAM 9-8.131, infra.

To maintain uniformity in those cases where adult prosecution is desired, U.S. Attorneys must forward a request to so proceed to the Department. Such requests should be forwarded only in those cases where, after a careful study of the facts, the U.S. Attorney feels the criteria set out in the statute can be met. The request must set out the facts on

the case in detail; state that, after study, it has been determined that the criteria can be met; and give the reasons for the U.S. Attorney's desire to proceed against the juvenile as an adult in the particular case. The request for authority to proceed by motion to transfer should be referred to the Chief of the General Litigation and Legal Advice Section of the Criminal Division. Upon the granting of such request, the U.S. Attorney shall file the motion to transfer.

9-8.131 Repeat Offenders

Where a juvenile of sixteen years of age or older is charged with a serious crime involving violence against persons or a particularly dangerous crime involving destruction of property (as defined in 18 U.S.C. §5032) and he/she has been previously found guilty of such a serious offense, this fact alone should serve as adequate justification for federal prosecution of the juvenile. Therefore, in such cases involving repeat offenders who have prior records of similar, serious offenses, transfer of the case for prosecution upon motion of the government seems to be mandatory.

Juvenile adjudications are not generally considered findings of guilt or innocence. The fact that no proceedings against a juvenile may be commenced until prior juvenile records are received by the court, however, supports the argument that juvenile records may be used in determining whether the juvenile is a repeat offender. Moreover, the wording of the statute dictates that a juvenile offender "who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this subsection or an offense in violation of a state felony statute which would have been such an offense if a circumstance giving rise to federal jurisdiction had existed, shall be transferred to the appropriate district court . . . for [federal] criminal prosecution." (Emphasis added.) This wording supports the Department's argument in favor of considering prior juvenile adjudications, for it makes federal prosecution mandatory where there is a prior record of this type. See S. Rep. No. 225, 98th Cong., 1st Sess. 391-392 (1983).

9-8.132 Conviction on Lesser Charges

If a juvenile is transferred for prosecution and is convicted of a lesser charge which could not have supported the transfer, then the disposition of the juvenile is to proceed in the same manner as if he/she had been adjudicated delinquent rather than criminally convicted. If a juvenile is convicted of a charge that could not have supported the

original transfer of his/her case, he/she should not be held to the consequences of criminal conviction but rather should be treated as though he/she had been adjudicated delinquent.

9-8.133 Prior Juvenile Records

Proceedings against a juvenile are not to commence until any prior juvenile court records of the juvenile 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. These requirements are to be understood in the context of a standard of reasonableness. See S. Rep. No. 225, 98th Cong., 1st Sess. 391 (1983).

9-8.140 Prosecutorial Discretion

The Act does not change the long-established rule that prosecutors have discretion to forego certain prosecutions in the interest of justice. Where a state treats its juveniles as adults or has poor programs and services there is still no affirmative requirement to prosecute. Courts have uniformly held that U.S. Attorneys were not stripped of their normal prosecutorial discretion even when statutes "required" prosecution. See Inmates of Attica v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

Similarly, selective prosecution is not a denial of equal prosecution unless the selection is based on an unjustifiable standard such as race or religion. See United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962). U.S. Attorneys should continue to exercise their discretion in a manner consistent with the best interests of society and the criminal justice system.

The use of any pre-trial diversion program, including the "Brooklyn Plan," for juveniles is inappropriate unless the certification requirements of the Act have been met and the pre-trial diversion guidelines set out by the Department have been complied with. (See USAM 1-12.010.)

9-8.150 Jury Trials

Some confusion about this issue has arisen as a result of a memorandum to federal judges, magistrates, etc., from the Administrative Office of the United States Courts stating that the statutory prohibition

against jury trial in juvenile proceedings has been deleted. That is true. However, it is the view of the Department that the Act does not require jury trials and the jury trials shall be opposed.

There is no constitutional requirement of a jury trial in a state juvenile proceeding. See McKiever v. Pennsylvania, 403 U.S. 528 (1971). This rule has been extended to federal juvenile proceedings. See United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976); Cotton v. United States, 446 F.2d 107 (7th Cir. 1971); United States v. Salcido-Medina, 483 F.2d 162 (9th Cir. 1973); United States v. James, 464 F.2d 1228 (9th Cir. 1972); United States v. John Doe, 385 F. Supp. 902 (D. Ariz. 1974). If this rule is to be changed, it should be by clear and explicit provisions in the Act showing that Congress intended to change the settled case law. See Callanan v. United States, 364 U.S. 587, 594-595 (1961); Toilet Goods v. Finch, 419 F.2d 21, 27 (2d Cir. 1969). This rule of statutory construction applies with special force where, as here, the statute does explicitly provide for other constitutional rights normally associated with the trial of "crimes" including the right to counsel, see 18 U.S.C. §§5032, 5034 and 5037, and the right to a speedy trial, see 18 U.S.C. §5036.

The legislative history of the Act indicates that the statutory prohibition was deleted not to change the law but to allow the courts to decide on a constitutional ground whether a jury trial is required. Every Court of Appeals that has considered this issue has held that there is not a constitutional right to a jury trial in a federal juvenile delinquency proceeding. For a summary of decisions, see United States v. Cuomo, supra.

9-8.160 Notification

U.S. Attorneys should insure that the law enforcement officers in their judicial district are made aware of the requirements of 18 U.S.C. §5033. In addition to the requirement that the juvenile be advised of his/her constitutional rights in language comprehensive to the juvenile, the arresting officers must also notify the Attorney General (notice to U.S. Attorney will suffice), and the juvenile's parents, guardian, or custodian of such custody. The arresting officer must also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

9-8.170 Detention

U.S. Attorneys must insure that the juvenile is detained in a proper facility in accordance with 18 U.S.C. §5035. Note that the juvenile

alleged to be a delinquent should not be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.

9-8.180 Information Concerning Juveniles

Subsections (a) through (c) of 18 U.S.C. §5038 guard against improper disclosure of juvenile records.

Subsection (d) provides for the fingerprinting and photographing not only of juveniles prosecuted as adults but also of juveniles adjudicated delinquent with respect to offenses that are felonies involving violence or serious drug crimes. Fingerprints and photographs of juveniles not prosecuted as adults may be made available only in accordance with the provisions of 18 U.S.C. §5038(a).

Subsection (e) prohibits the publication of the name or picture of any juvenile in connection with a juvenile delinquent proceeding. While this does not prohibit the publication of information obtained legitimately by the media, it does bar the release of such information by court or government officials.

Subsection (f) directs the transmission to the Federal Bureau of Investigation of all information concerning adjudications which relate to a juvenile who has on two separate occasions been found guilty of committing an act which, if committed by an adult, would be a felony involving violence or an offense described in 21 U.S.C. §§841, 925(a), 955 or 958.

9-8.200 YOUTH CORRECTIONS ACT

The purpose of the Act is to provide a more flexible method of sentencing convicted youth offenders in order to secure corrective treatment and release under supervision. The court may invoke the alternative sentencing provisions of the Federal Youth Correction Act (18 U.S.C. §§5005-5026) if:

A. The defendant has been convicted of a criminal offense, whether a felony or misdemeanor or petty offense, under regular adult procedure; and

B. At the time of conviction the defendant was under 22 years of age (Youth Offender), or

C. At the time of conviction he/she has attained his/her 22nd birthday but has not attained his/her 26th birthday, and the court finds, after consideration of the defendant's previous record of delinquency or crime, his/her social background, capabilities, health, and other factors, that there is reasonable ground to believe that he/she will benefit from treatment under the Act, 18 U.S.C. §4206 (Young Adult Offender).

For purposes of determining whether a defendant qualifies as a "youth offender" the time of conviction has been held to be the time the verdict is returned or a plea of guilty is taken. See United States v. Branic, 495 F.2d 1066 (D.C. Cir. 1974) rather than the time of the judgment on the verdict. See 18 U.S.C. §5006(e), (h).

If the above requirements are met and the court in its discretion decides to proceed under the provisions of the Youth Corrections Act, the court is vested with authority as set forth below.

9-8.210 Probation - Youth Offender

If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation (18 U.S.C. §5010(a)). Expungement of the conviction of a youth offender placed on probation under 18 U.S.C. §5010(a) occurs when the court has exercised its discretion to discharge the youth unconditionally prior to expiration of his/her probationary period, but does not occur merely upon his/her successful completion of probation. Tuten v. United States, 103 S. Ct 1412 (1983).

A. Indeterminate Sentence Not Exceeding 6 Years. The court may commit the youth offender to the custody of the Attorney General for treatment and supervision until discharged by the Youth Correction Division of the Board of Parole, 18 U.S.C. §5010(b). A youth offender may be given an indeterminate sentence under 18 U.S.C. §5010(b) irrespective of the maximum term of imprisonment otherwise provided by law for the offense of which he/she has been convicted. However, where the youth offender enters a plea of guilty to a crime for which the maximum penalty is less than the maximum under the indeterminate sentencing of the Youth Act, it is essential that he/she understand, at the time of his/her plea, the alternative sentencing provisions of the Youth Act. When he/she appears for sentencing, if there appears doubt that he/she was aware of such provisions at the time of his/her plea, he/she should be permitted to withdraw his/her plea, if he/she so elects.

B. Indeterminate Sentence Exceeding 6 Years. If the aggregate punishment otherwise provided by law for the offense or offenses of which

the youth offender has been convicted exceeds 6 years, and if the court finds that the youth offender may not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of 6 years from the date of conviction, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision of any further period that may be authorized by law for the offense or offenses of which he/she stands convicted or until discharged by the Youth Correction Division, 18 U.S.C. §5010(c). Such a sentence extends the permissible period of treatment and supervision for such additional time in excess of 6 years as the sentencing court has fixed.

C. Commitment for Observation and Study. If the court desires additional information as to whether a youth offender will derive benefit from treatment under 18 U.S.C. §5010(b), (c), it may order his/her commitment to the custody of the Attorney General for observation and study at an appropriate classification center or agency. See 18 U.S.C. §5010(e). The law provides that within 60 days from the date of such order, or within such additional period as the court may grant, the Youth Correction Division must report its finding to the court.

D. Split Sentences. The Ninth Circuit holds that the Youth Corrections Act permits the court to sentence youth offenders to "split sentences" consisting of periods of confinement and probation. See United States v. Roberts, 638 F.2d 1344 (9th Cir. 1981); United States v. Smith, 645 F.2d 747 (9th Cir. 1981). (It should be noted that the Department disagrees with this interpretation).

9-8.220 Commitment Without Regard to the Act

If the court finds that the youth offender will not benefit from treatment under 18 U.S.C. §5010(b), (c), the court may then sentence him/her under any other applicable penalty provision of law. See 18 U.S.C. §5010(d). However, before the court may impose an adult sentence on an individual who is eligible for sentencing under the Youth Corrections Act an explicit finding that the offender will "not benefit" from such treatment must be made on the record by the sentencing court. See Dorszynski v. United States, 418 U.S. 424 (1974). Retroactive application of the rule set out in Dorszynski should be opposed by all U.S. Attorneys. See Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975); Owens v. United States, 515 F.2d 507 (3d Cir. 1975), summarily affirming Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974). All

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 9

9-9.000 MENTAL COMPETENCY OF AN ACCUSED

The conviction of a defendant while he/she is mentally incompetent violates due process. Pate v. Robinson, 383 U.S. 375, 379 (1966). 18 U.S.C. §§4244-4248 prescribe the procedure required when the mental competency of the defendant at the time of trial (or at the time of a guilty plea) comes under suspicion before trial or after commitment under sentence, and also when mental competency is present on expiration of sentence. See generally, C. Wright, Federal Practice and Procedure, Criminal 2d §196. See also USAM 3-3.000 (Psychiatric Examinations in Criminal Cases).

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.

9-9.100 EXAMINATION BEFORE TRIAL

9-9.110 When An Examination is Necessary

18 U.S.C. §4244 requires the U.S. Attorney to file a motion for judicial determination of the mental competency of a person charged with violation of federal law if he/she has reasonable cause to believe that the mental condition of the defendant may render him/her unable to understand the charges against him/her or properly assist in his/her defense. See Dusky v. United States, 362 U.S. 402 (1960). Such motion may also be filed on behalf of the accused or the court may act on its own motion.

It has been held that the initial motion for a 18 U.S.C. §4244 examination cannot be denied unless the motion fails to set forth reasonable cause for belief that the defendant is incompetent, or unless it is determined that the motion is frivolous or not made in good faith. The degree of discretion allowed the district judge in this determination varies among the circuits. Compare United States v. Metcalf, 698 F.2d 877 (7th Cir. 1983) with Chavez v. United States, 656 F.2d 512 (9th Cir. 1981). The district court is allowed greater discretion in denying subsequent motions. Chavez v. United States, supra, at 517.

9-9.120 Procedure For Examination and Report

It is urged that examinations be made by private psychiatrists or on an outpatient basis at a hospital or clinic. See USAM 3-3.310. 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 found necessary, the court may order the accused committed to a private hospital for examination but such commitments should

be avoided where possible. Only in exceptional circumstances, such as the absence of other facilities or where long term commitment or examinations under adequate security conditions is necessary, should defendants be placed in federal custody for such examination.

Whenever the accused is referred for examination, it is imperative that the U.S. Attorney 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 his/her history of criminal convictions and any prior history of mental illness.

9-9.130 Use of Local Psychiatrists Wherever Possible

With regard to the original mental examination it is of the utmost importance that the services of local, or the nearest available, qualified psychiatrists be utilized as far as possible. If satisfactory examination cannot be secured in the area, the Bureau of Prisons will offer suggestions upon request. When commitment is ordered for the conduct of the examination, the use of the nearest hospital or other facility acceptable to the court is recommended. Commitment to the Bureau of Prisons (Springfield, Missouri; Butner, North Carolina; and Lexington, Kentucky--females) should not routinely be ordered for the initial examination and report under 18 U.S.C. §4244, because the facilities and resources of the available institutions are continually overtaxed. Bureau of Prisons' facilities should be utilized where a secure facility is indicated and when the court is willing to commit the accused to such a facility for an extended period of time (i.e., 60 to 90 days). See USAM 3-3.310. If, at the time of commitment to a Bureau of Prisons' facility, it appears that medical or psychiatric treatment may be required, the court should be asked to indicate in the commitment order its directives regarding treatment, including the use of antipsychotic medication.

9-9.140 Order for Examination

The order should specify the specific purpose of the examination, i.e., mental competency to stand trial, rather than merely citing 18 U.S.C. §4244. See USAM 3-3.301, 3-3.303. The order for examination may also specifically direct that an examiner render an opinion as to the accused's mental responsibility at the time of the alleged offense, under the framework of the responsibility tests applicable in the trial district. See Fed. R. Crim. P. 12.2; United States v. Reason, 549 F.2d 309, 312 (4th Cir. 1977); United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976); see also United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983). Local examination is highly desirable for "dual purpose" examinations because local doctors are more readily available for trial testimony on the responsibility issue. See USAM 3-3.302, 3-3.320. In the exceptional cases in which defendants are

committed to a Bureau of Prisons facility, dual purpose examinations may be ordered only if only a single doctor is asked to render an opinion both on competency and responsibility.

9-9.200 PROCEEDINGS AFTER EXAMINATION

Where the report indicates that the accused is presently mentally incompetent, the statute requires that the court hold a hearing upon due notice and make a finding on the evidence. Where the psychiatrist's report indicates that the accused is presently competent, no hearing is required unless the evidence, as a whole, raises a bona fide doubt as to the defendant's competence to stand trial. A judicial determination as to competence is required in every case after the psychiatric examination, regardless of the content of the report. See Chavez v. United States, 656 F.2d 512, 516-517 (9th Cir. 1981).

The nature of the precommitment hearing mentioned in 18 U.S.C. §4244 is not described in the statute. In many cases the hearing has been held on the basis of the medical reports without the presence of the reporting psychiatrist. This has resulted in habeas corpus suits challenging commitment to custody under 18 U.S.C. §4246 on the basis that the precommitment hearing was lacking in due process because held on the basis of reports without live testimony by the psychiatrist. Waivers of the presence of the reporting psychiatrists have been held to be ineffective since the accused is considered mentally incompetent, nor can waivers by the accused's counsel be considered appropriate. Consequently the habeas corpus courts have frequently found the hearing to have been invalid and have ordered the return of the accused to the committing court for a new hearing.

9-9.210 Subpoena of Psychiatrists

In order to insure a proper precommitment hearing under 18 U.S.C. §4244, U.S. Attorneys should as a general rule subpoena the reporting psychiatrist to testify in person. In this manner the defense attorneys and the U.S. Attorney will be enabled properly to probe the basis of the conclusion of lack of mental capacity for trial, within the definition established in decisions under the mental competency statutes. The need for personal appearance of the reporting psychiatrist points up the necessity that whenever possible local examinations or local commitments for examination be made in order to obviate extensive travel by the Bureau of Prisons.

9-9.300 COMMITMENT

If the court finds that the accused is in fact mentally incompetent it may order him/her committed, pursuant to 18 U.S.C. §4246, to the custody of the Attorney General. As a result of the Supreme Court's decision in Jackson v. Indiana, 406 U.S. 715 (1972), a person committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246 can be held only for a reasonable period of time necessary to determine whether there is a substantial probability that he/she will attain mental competency to stand trial in the foreseeable future. If it appears that the person will not be mentally competent to stand trial in the foreseeable future, the government must either institute the customary civil commitment proceedings that would be required to commit indefinitely any other citizen, or release the defendant. United States v. Wood, 469 F.2d 676 (5th Cir. 1972); United States v. Debellis, 649 F.2d 1 (1st Cir. 1982); United States v. Lancaster, 408 F. Supp. 225 (D. D.C. 1976). If the release of the person would endanger the officers, property, or other interests of the United States, a hearing should be conducted pursuant to 18 U.S.C. §4247. Upon such hearing, if the court determines that the release of the person would endanger the officers, property, or other interests of the United States, the court may commit the person to the custody of the Attorney General. United States v. Wood, supra. A person committed to the custody of the Attorney General pursuant to 18 U.S.C. §4247 shall remain in the custody of the Attorney General until the sanity or mental competency of such person shall be restored or until the mental condition of the person is so improved that if he/she be released he/she will not endanger the safety of the officers, the property, or other interests of the United States or until suitable arrangements have been made for the custody and care of the prisoner by the state of his/her residence. See 18 U.S.C. §4248. If the release of the person does not meet the standard set out in 18 U.S.C. §4247, but his/her release would pose a danger to the community, it is up to the state to institute civil commitment proceedings and the U.S. Attorney should seek to persuade the appropriate state officials to institute such proceedings.

9-9.310 Commitment Order Should Contain Statement Of Charges Against the Subject

When commitment follows a finding of mental incompetency, the U.S. Attorney should make certain that the commitment order includes a brief statement of the charges pending against the subject. The order should be accompanied by copies of any reports relating to the charges or the background of the accused, as well as copies of all available psychiatric records and reports upon which the finding of incompetency is based. The furnishing of such material enables institutional authorities to chart appropriate treatment whereas, without it, they must depend upon information furnished by the subject which may be inaccurate.

9-9.400 COMPETENCY RECOVERED--TRIAL

9-9.410 Procedure for the Return of Defendant to the District

Upon receipt of notice from the Bureau of Prisons that a defendant has recovered mentally to the point of being able to stand trial, or that after a reasonable period of examination it does not appear that the accused will regain competency in the foreseeable future, the U.S. Attorney should promptly cause issuance of a writ of habeas corpus ad prosequendum out of his/her court to be executed by the U.S. Marshal for his/her district by taking the accused into custody at the named institution. No funds are available to the institutional authorities for the return of a defendant to the district from which he/she was committed. It is important that the defendant be returned to the district as soon as possible since the time limitations of the Speedy Trial Act begin to run from the time the court receives notification that the defendant is able to stand trial. See Guidelines to the Administration of the "Speedy Trial Act of 1974" of the Committee of the Judicial Conference on the Administration of the Criminal Law, section 3161(h)(4), pp. 21-22.

9-9.420 Judicial Finding Of Mental Competency

Once a defendant has been returned to the district, a trial cannot proceed without an antecedent judicial finding, with or without hearing, that the accused has recovered mental competency. If the court, upon all the evidence in hand, is unconvinced as to mental recovery it may order the subject returned for further treatment under the original commitment. See United States v. Clark, 617 F.2d 180 (9th Cir. 1980).

9-9.430 Effect Of Psychotropic Drugs

In all cases where the defendant is returned to the trial district with maintenance of his/her competency contingent upon his/her continued usage of psychotropic drugs, the U.S. Attorney should request a full hearing on the defendant's competency. It has been held that the use of a prescribed tranquilizer which enables the defendant to understand the charge against him/her and to discuss the matter with an adequate degree of understanding does not render defendant mentally incompetent to stand trial. See United States v. Hayes, 589 F.2d 811, 123 (5th Cir. 1979), cert. denied, 444 U.S. 847 (1979); Government of Virgin Islands v. Crowe, 391 F. Supp. 987 (D. V.I. 1974), aff'd., 529 F.2d 511 (3d Cir. 1975).

9-9.500 MENTAL INCOMPETENCY UNDISCLOSED AT TRIAL

9-9.510 Procedure

When a board of examiners referred to in 18 U.S.C. §4241 has examined a sentenced prisoner and has found probable cause to believe that he/she was mentally incompetent at the time of trial, provided such issue was not raised and determined during trial, the Director of the Bureau of Prisons is required under 18 U.S.C. §4245, to certify the finding of the board, and such certificate, with a copy of the finding, must be transmitted to the clerk of the sentencing court. For the issue to be barred as having been raised and determined during trial, the trial judge must have held a hearing on the issue, followed by a finding of mental competency. Stone v. United States, 358 F.2d 503 (9th Cir. 1966). On receipt of the certificate from the Director, the court must hold a hearing. If it concludes that mental incompetency existed at the time of trial it must vacate the judgment of conviction and grant a new trial. Prior to the new trial, the defendant should be examined pursuant to 18 U.S.C. §4244 to determine his/her competency to stand trial.

9-9.520 Person Cannot Compel A Certification Of Mental Incompetency Under 18 U.S.C. §4245

A person serving a sentence cannot compel the Director of the Bureau of Prisons to issue a certification of mental incompetency under 18 U.S.C. §4245. Such certification may be initiated only upon the finding of the board of examiners that there is probable cause to believe that defendant was mentally incompetent at the time of trial and only if the issue was not raised and determined during trial. While this issue can be subsequently raised in a habeas corpus proceeding, it is left to the court's discretion whether it is necessary for a psychiatrist to examine defendant or whether a hearing has to be held to determine if defendant was competent to stand trial. See Nunley v. Chandler, 308 F.2d 223 (10th Cir. 1962); Burrow v. United States, 301 F.2d 442 (8th Cir. 1962); United States v. Thomas, 291 F.2d 478 (6th Cir. 1961); Hoskins v. United States, 251 F.2d 51 (6th Cir. 1957).

DETAILED TABLE OF CONTENTS FOR CHAPTER 10

9-10.000 CAPITAL CRIMES

9-10.010 Federal Death Penalty Provisions

With the exception of the Aircraft Piracy statute, the various 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). These death penalty provisions are 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.

Subsequent to Furman, Congress amended the Aircraft Piracy statute, 49 U.S.C. §§1472-1473, which provides for the death penalty, but which places substantial constraints on the discretion of the fact-finder. Essentially, this statute provides that a separate hearing must be held before a defendant is sentenced to death. The hearing must be held before a jury, or, on motion of the defendant, before a judge. The fact-finder then must return a special verdict setting forth findings as to the existence or non-existence of specified mitigating and aggravating factors which are set forth in 49 U.S.C. §1473(c)(6) and (7). If any one of five mitigating factors is found to exist, the court may not impose sentence of death. If, however, the fact-finder determines that none of the mitigating factors exist and that one or more of the specified aggravating factors exist, the court may impose sentence of death. It is the Department's view that this procedure is constitutionally permissible because it provides specific guidelines which preclude the arbitrary and capricious imposition of the death penalty.

9-10.020 Recommendation of Death Penalty

The death penalty shall not be recommended without the approval of the Attorney General. See USAM 9-2.151, supra.

9-10.100 Procedural Requirements in Cases Under Statutes Authorizing Death Penalty--After Furman

Federal law contains various provisions which establish special procedures for the trial of capital cases. The provisions include the following:

A. 18 U.S.C. §3005 (appointment of two attorneys for defense in capital cases)

B. 18 U.S.C. §3148 (release on bail in capital cases)

C. 18 U.S.C. §3235 (venue in capital cases)

D. 18 U.S.C. §3281 (no time limitation on instituting proceedings in capital cases)

E. 18 U.S.C. §3432 (requiring disclosure of the government witness list and the list of persons summoned to be perspective jurors at least three days before trial)

F. Rule 7(a), Fed. R. Crim. P. (prohibiting waiver of indictment in capital cases)

G. Rule 24(b), Fed. R. Crim. P. (increased preemptory challenges in capital cases)

With regard to prosecutions under statutes having death penalty provisions that are unconstitutional under Furman, supra, there is some uncertainty about the applicability of the aforementioned procedural safeguards.

The majority of courts that have considered this issue have concluded that in prosecutions where the death penalty provision is unconstitutional, a defendant is not entitled to the special procedural safeguards applicable to capital cases. For example, it has been held that because the death penalty provision under the federal murder statute, 18 U.S.C. §1111, was invalid, a defendant is not entitled to two court appointed attorneys. See United States v. Dufer, 648 F.2d 512 (9th Cir. 1980), cert. denied, 450 U.S. 925 (1981); United States v. Shepherd, 576 F.2d 719 (7th Cir. 1978), cert. denied, 439 U.S. 852 (1978); United States v. Weddell, 576 F.2d 767 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978).

Similarly, such a defendant would not be entitled to additional peremptory challenges. See United States v. Maestos, 523 F.2d 316 (10th Cir. 1975); United States v. Martinez, 536 F.2d 886 (9th Cir. 1976), cert. denied, 429 U.S. 907 (1976); United States v. McNally, 485 F.2d 398 (8th Cir. 1973), cert. denied, 415 U.S. 978 (1974); United States v. Hoyt, 451 F.2d 570 (5th Cir. 1971), cert. denied 405 U.S. 995 (1972). Furthermore, a defendant would not be entitled to the government's witness list and a list of persons summoned to be perspective jurors three days before trial. See Hoyt, supra; United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977).

This view of the issue is given further support by a line of cases which antedates Furman, supra, and holds 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 Loux v. United States, 389 F.2d 911 (9th Cir. 1968); Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); Hall v. United States, 410 F.2d 653 (4th Cir. 1969); see also United States v. Crowell, 498 F.2d 324 (5th Cir. 1974).

A 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 majority opinion made no effort to reconcile its decision with the prior Fourth Circuit decision in Hall, supra. The dissenting judge in Watson, supra, agreed with the weight of authority that the procedural safeguards accorded to defendants in capital cases are applicable only where death was a possible penalty.

With regard to the unlimited statute of limitations (see 18 U.S.C. §3281) and the more restrictive bail provisions (see 18 U.S.C. §3148) in capital cases, it is the Department's view that these statutory provisions remain in effect in prosecutions for capital offenses with unconstitutional death penalty provisions. The unlimited statute of limitations and the more restrictive bail provisions clearly are not intended to provide additional safeguards to a defendant faced with the death penalty. Rather, these provisions are tied to the extremely serious nature of the offense charged and the possibility that the defendant may present a danger to another person or to the community. Because the purpose of these statutes derives from the nature of the offense rather than from the severity of the penalty, it is our view that they remain in effect so long as Congress has not downgraded the offense to non-capital status. See United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980); United States v. Provenzano, 423 F. Supp. 662 (S.D. N.Y. 1976) aff'd without opinion, 556 F.2d 562 (2d Cir. 1977); United States v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981).

DETAILED TABLE OF CONTENTS FOR CHAPTER 11

9-11.000 GRAND JURY

9-11.001 Monograph

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, FTS 724-7045.

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); Bransburg 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.

9-11.030 Presentment No Longer Used

The presentment has been obsolete for some time now as a method of instituting federal prosecutions. The presentment was a charge that the grand jury preferred on its own initiative. The word, "presentment," is still used today in various non-Constitutional senses, perhaps most commonly to refer to a grand jury report of the type authorized under 18 U.S.C. §3333. See Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); In re Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970). 8 Moore's Federal Practice-Cipes, Criminal §6.02(3); Wright, Federal Practice and Procedure, Criminal 3110.

9-11.040 Offenses that Must be Prosecuted by Indictment

The Fifth Amendment protection is embodied in Rule 7 of the Federal Rules of Criminal Procedure. Under Rule 7(a), an offense punishable by death must be prosecuted by indictment, while an offense punishable by imprisonment for more than one year or at hard labor must be prosecuted by indictment unless indictment is waived, in which event it may be prosecuted by information. All other offenses may be prosecuted either by indictment or information.

Federal Rules of Criminal Procedure 7 specifies what are "otherwise infamous" crimes within the meaning of the Fifth Amendment. See Ex parte Wilson, 114 U.S. 417 (1885). As classified in 18 U.S.C. §1, all felonies must be prosecuted by indictment absent an appropriate waiver (which may not occur in a capital case), and all misdemeanors (including petty offenses) may be prosecuted either by indictment or information. It follows from the provision in Rule 7 that a grand jury may properly inquire into the least (as well as the most) serious federal offenses. See In re Grand Jury Investigation, 186 F. Supp. 298 (D.D.C. 1960). See also USAM 9-12.000 on indictments.

9-11.100 INDICTMENT OF MEMBERS OF THE ARMED FORCES

It was once considered appropriate for the armed forces to prosecute their own members by court-martial for all offenses chargeable under the punitive articles of the Uniform Code of Military Justice (10 U.S.C. §§877-934). There is no grand jury in the military justice system. In 1969, the Supreme Court interpreted the Fifth Amendment to restrict courts-martial jurisdiction, at least within the United States and in peacetime, to

offenses which are "service-connected." See O'Callahan v. Parker, 395 U.S. 258 (1969). An offense committed by a member of the service on a military installation that affects the security of a person or of property there, is considered to be service-connected. See Relford v. Commandant, 401 U.S. 355 (1971). Without a service-connection, however, an offense committed by a member of the service in a civilian setting in the United States will have to be prosecuted like any other federal offense and cannot be left for prosecution by military authorities. In short, the offense will have to be charged under federal statutes other than the Uniform Code of Military Justice, and an indictment will have to be obtained if required under Federal Rule of Criminal Procedure 7.

The court-martial system is no part of the federal judiciary but is established under the Constitutional power of Congress to make rules for the government and regulation of the armed forces of the United States. See Manual For Court-Martial, United States, 1969 (revised edition), paragraph 8. The fact that an offender is prosecutable by court-martial does not prevent prosecution for the offense by civilian authorities; members of the armed forces are subject to federal and state prosecution on the same basis as civilians. See Caldwell v. Parker, 252 U.S. 376 (1920); Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974), aff'd, 515 F.2d 507; People v. Powers, 227 N.Y.S. 2d 433, cert. denied, 374 U.S. 811 (1962). But, as pertinent, consider the policies discussed at USAM 9-2.142 and possible double jeopardy. See Grafton v. United States, 206 U.S. 333 (1907).

9-11.200 POWERS AND LIMITATIONS OF GRAND JURIES

9-11.201 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 9-11.440, 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); 8 Moore's Federal Practice--Cipes, Criminal §6.02[3]; Application of Johnson 484 F.2d 791 (7th Cir. 1973) (and cases cited therein). 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 9-11.441, infra.

9-11.210 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 United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Morton Salt Co., 338 U.S. 632 (1950); Blair v. United States, 250 U.S. 273 (1919); Haye v. Henkel, 201 U.S. 43 (1906); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

9-11.220 Power of a Grand Jury Limited by Its Functions

However expansive the courts have been in describing the investigative powers of a grand jury, these powers must be exercised with a view toward possible return of an indictment. It is an abuse of grand jury process to call witnesses simply for purposes of discovery or trial preparation in a case instituted independently or under an indictment returned by a former grand jury. Such an abuse of process would not necessarily vitiate a conviction, however; and grand jury process is not abused when utilized after the return of one indictment with a view toward the possible return of a superseding or additional indictment, nor when information duly obtained in a criminal investigation is used for related civil purposes. There is no principle like double jeopardy or collateral estoppel to prevent a grand jury from conducting an investigation similar to one undertaken by another grand jury, even if that other grand jury returned a no-bill. See United States v. Proctor and Gamble Company, 356 U.S. 677 (1958); United States v. Thompson, 251 U.S. 407 (1920); United States v. Brasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973); United States v. Senak, 477 F.2d 304 (7th Cir. 1973); United States v. Star, 470 F.2d 1214 (9th Cir. 1972); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); United States v. Dardi, 330 F.2d 316 (2d Cir. 1964); Durbin v. United States, 330 F.2d 316 (D. D.C. 1954).

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

However, 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. Ordinarily, such approval will not be given in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice. For a case recognizing that the U.S. Attorney will often issue the subpoenas when the grand jury is not in session and collecting numerous cases on grand jury practice, see United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D. N.Y. 1974).

B. Use Of Grand Jury To Locate Fugitives

It is the Department's position that it is a misuse of the grand jury 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); and In re Wood, 430 F. Supp. 41 (S.D.N.Y. 1977), aff'd. In re Cueto, 554 F.2d 14 (2d Cir. 1977). Furthermore, while such investigations are often justified on the ground that the grand jury is actually investigating harboring violations, this explanation may well be viewed as merely a subterfuge, particularly when the person thought to be the harborer is compelled to testify under 18 U.S.C. §6003. Only in extraordinary situations (i.e., harboring by a number of individuals) will a request for an order to compel testimony be considered for an alleged participant in the harboring.

There are, however, some limited situations in which the courts have recognized that grand jury efforts to locate a fugitive are proper, as described below. In any of these situations, a proposed grand jury subpoena of witnesses or records aimed at locating a fugitive must be submitted to the General Litigation and Legal Advice Section of the Criminal Division and will require approval by the Assistant Attorney General in charge of the Criminal Division or other responsible Assistant Attorney General or by a designated Deputy Assistant Attorney General. Additional procedural requirements are detailed below.

1. The use of grand jury process to locate a fugitive is proper when the grand jury is interested in hearing the fugitive's testimony. Thus, in Matter of Archuleta, 432 F. Supp. 583, 595 (S.D.N.Y. 1977), the court stated:

> A grand jury may use its subpoena power to call witnesses to aid in finding other witnesses whose whereabouts are unknown and whom the grand jury believes it should hear.

In Matter of Wood, 430 F. Supp. 41, 48 (S.D.N.Y. 1977), the court stated:

> [T]he grand jury may properly be employed to locate other prospective witnesses, even when those persons may be fugitives from justice. See Hoffman v. United States 341 U.S. 479 (1951). As the Supreme Court stated in that case, 'the government may inquire of witnesses before the grand jury as to the whereabouts of unlocated witnesses . . . . 'Id. at 488.

Thus, if the grand jury seeks the testimony of the fugitive in the investigation of federal criminal violations before it, it may subpoena other witnesses and records in an effort to locate the fugitive witness. However, there are several cautions in this regard:

a. Interest in the fugitive's testimony must not be pretextual. The sole motive for inquiring into the fugitive's location must be the potential value of his/her testimony. A subpoena for the fugitive witness must be approved by the grand jury before seeking to subpoena witnesses or records to locate the fugitive; and

b. It is not proper to seek to obtain grand jury testimony from any witness, including a fugitive, concerning an already returned indictment. In Beverly v. United States, 468 F.2d 732, 742-43 (5th Cir. 1972); the court stated:

> It is true . . . 'it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial. United States v. Dardi, 330 F.2d 216 (2d Cir. 1964). It is a misuse of the grand jury to use it as a substitute for discovery.

Thus, it would not be proper to seek to locate a fugitive for the purpose of having him/her testify about matter for which an indictment has already been returned, unless there are additional unindicted defendants to be discovered or additional criminal acts to be investigated through the testimony of the fugitive. In re Russo, 448 F.2d 369, 374 (9th Cir. 1971); Beverly v. United States, supra, at 743.

c. Current policy on "target" witnesses must be observed See USAM 9-11.260. Grand jury subpoenas for witnesses and records aimed at locating a fugitive witness who is a target of the grand jury investigation will be approved only where a target subpoena already has been approved by the responsible Assistant Attorney General.

Such approval, per USAM 9-11.260, will depend on "A) The importance to the successful conduct of the grand jury's investigation of [the target's] testimony or other information sought; B) Whether the substance of his/her testimony or other information sought could be provided by other witnesses; C) whether the questions the prosecutor and grand jury intend to ask or the other information sought would be protected by a valid claim of privilege."

2. Use of the grand jury to learn the present location of a fugitive is proper when present location is an element of the offense under investigation.

a. Harboring, Misprision, Accessory: On adequate facts, the present location of a fugitive might tend to establish that another person is harboring him/her, 18 U.S.C. §§1071, 1072, 1381, or has committed misprision, 18 U.S.C. §4, or is an accessory after the fact in the present concealment of the fugitive, 18 U.S.C. §3. In Raymond v. United States, (6th Cir, Aug. 5, 1975) (unpublished), the court of appeals stated that "the present location of the fugitives in question is a relevant and necessary subject of inquiry in the investigation of possible offenses, such as harboring fugitives and misprision of a felony. . . ." And in In re Grusse, 402 F. Supp. 1232, 1237-38 (D. Conn. 1975), the court concluded that grand jury witnesses could properly be questioned on whether two fugitives had stayed in that district, in an investigation of harboring, 18 U.S.C. §1071, and accessory after the fact, 18 U.S.C. §3.

However, this justification could be viewed as a subterfuge if the suspected harborer (or the person potentially guilty of misprision or as an accessory) were to be subjected to an order under (18 U.S.C. §6003) to compel his/her testimony about the location of the fugitive. In order to insure the proper use of investigations for harboring, misprision, and accessory after the fact, based on acts of concealment, U.S. Attorneys are to consult with the General Litigation and Legal Advice Section of the Criminal Division prior to initiating grand jury investigations for these offenses.

b. Escape and Bondjump: The Criminal Division does not view the present location of a fugitive as relevant evidence in a grand jury investigation concerning escape by a federal prisoner, see 18 U.S.C. §751, or bondjump, see 18 U.S.C. §3150. These offenses address the circumstances of prior departure from a known location. The fugitive's present location is not a relevant factor as it is in harboring or misprision investigations. No case law supports such a rationale for use of the grand jury to locate a fugitive.

c. Unlawful Flight to Avoid Prosecution: It has been suggested that grand jury subpoenas might be used to locate a fugitive in investigations of unlawful flight to avoid prosecution, 18 U.S.C. §1073.

However, in such investigations "normally the federal complaint will be dismissed when the fugitive has been apprehended and turned

over to state authorities to await interstate extradition. See USAM 9-69.410. Since such cases are as a rule not prosecuted, and under the terms of 18 U.S.C. §1073 cannot be prosecuted without written authorization from the Attorney General or an Assistant Attorney General, we have concluded that any effort to use the grand jury in the investigation of such cases shall be preceded by consultation with the General Litigation and Legal Advice Section of the Criminal Division, and by written authorization to prosecute pursuant to 18 U.S.C. §1073, from the Assistant Attorney General in charge of the Criminal Division. See also USAM 1-3.115(c), INTERPOL-USNCB, Fugitive Unit.

3. Flight as evidence of consciousness of guilt.

The grand jury cannot be used to locate a fugitive on the rationale that present location is relevant to flight as consciousness of guilt. As in escape cases, the relevant facts concerning flight are those surrounding a prior departure from a known location and not the present location of the fugitive.

It is the Criminal Division's view that the areas of permissible use of grand jury subpoenas to locate fugitives here spelled out can be sustained in court against any challenge.

C. Obtaining Records to Aid in the Location of Federal Fugitives by use of the All Writs Act, 28 U.S.C. §1651; an Alternative to use of Grand Jury Subpoenas for Such Purpose

The Criminal Division recognizes the importance of providing to federal investigative agencies a means of obtaining records which would aid in the search for federal fugitives. Usually the records sought are telephone toll records of close associates and relatives of the fugitive, although other records might also be valuable in ascertaining the location of the fugitive. As a result of a careful study of this problem, it is the recommendation of this Division that such records may be obtained by a court order issued under the All Writs Act, 28 U.S.C. §1651, in those cases in which a complaint or an indictment and arrest warrant have been issued.

Generally, a grand jury subpoena may not be used to locate fugitives unless the grand jury is investigating the crime of harboring, 18 U.S.C. §1071, accessory after the fact, 18 U.S.C. §3, or misprision, 18 U.S.C. §4. A federal grand jury subpoena may be used to locate a fugitive if the grand jury wants the testimony of the fugitive. However, in those instances in which the sole purpose for obtaining records relating to the fugitive's whereabouts is to apprehend him/her for prosecution, a court order under 28 U.S.C. §1651 should be obtained for such records.

It is suggested that in those cases in which a complaint or an indictment has been returned against the fugitive and there is an outstanding warrant for his/her apprehension, telephone toll records or other records reasonably expected to furnish leads to the fugitive's whereabouts may be obtained by a proper application to the district court before which the complaint or indictment is pending for an order for production of such records to the United States Marshal, or other federal officer charged with the responsibility for locating and apprehending the fugitive. The authority for such a court order is the All Writs Act, 28 U.S.C. §1651. The All Writs Act provides:

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

The Supreme Court has recognized in numerous cases the power of a federal court to issue such 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). "This statute has served since its inception, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law.'" Harris v. Nelson, 394 U.S. 286, 299 (1969), quoting Price v. Johnson, 334 U.S. 266, 282 (1948). As the Supreme Court noted in Adams v. United States ex rel. McCann, 317 U.S. 269 (1942), "[u]nless appropriately confined by Congress, a Federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Id. at 273.

The Supreme Court has applied the All Writs Act flexibly to accomplish these purposes. See United States v. New York Telephone Co., supra. Adams v. United States ex rel. McCann, supra, held that the use of these supplemental powers is not limited to only those situations where it is "necessary" in the sense that the court could not otherwise discharge its duties. Thus, the All Writs Act has been used to produce a prisoner before the court of appeals to personally argue his/her appeal, Price v. Johnson, 334 U.S. 266 (1948); to produce federal prisoners in district courts for hearings under 28 U.S.C. §2255, United States v. Hayman, 342 U.S. 205 (1952); to issue discovery orders in the absence of statutory authority in habeas corpus proceedings, Harris v. Nelson, supra; to order the telephone company to assist the FBI to install pen registers ordered by the court, United States v. New York Telephone Co., supra; United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976); Michigan Bell Telephone

Co. v. United States, 565 F.2d 385 (6th Cir. 1977); to order the telephone company to assist the FBI to trace telephone calls by performing mechanical and manual traces, In the Matter of the Application of the United States, 610 F.2d 1148 (3d Cir. 1979). The Act may be used by courts to issue orders appropirate to assist them in conducting factual inquiries, Harris v. Nelson, supra, citing American Lithographic Co. v. Werckmeister, 221 U.S. 603, 609 (1911), or for producing documents for pre-trial discovery, Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126, 127 (1st Cir. 1941).

The All Writs Act may be applied to persons who are not parties to the original action or engaged in wrongdoing but may be in a position to frustrate the implementation of a court order or the proper administration of justice. It also encompasses those who have not taken any affirmative action to hinder justice. See United States v. New York Telephone Co., supra; Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), aff'd. 389 U.S. 579 (1968); Board of Education v. York, 429 F.2d 66 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Field v. United States, 193 F.2d 92 (2d Cir.), cert. denied, 342 U.S. 892 (1951). Thus, in Penn Central Transportation Co. v. Irving Trust Co., 594 F.2d 952 (3d Cir. 1979), the All Writs Act was used by a reorganization court under the Bankruptcy Act to enjoin interference with the property of a debtor and to enjoin proceedings in other courts. In United States v. State of Washington, 459 F. Supp. 1070 (W.D. Wash. 1978), the Act was used to close Puget Sound waterways to red salmon fishing during certain times of the year.

In upholding the authority of the district court to order the telephone company to assist the FBI in the installation of court authorized pen registers, the Supreme Court stated:

> We are unable to agree with the Company's assertion that 'it is extraordinary to expect citizens to directly involve themselves in the law enforcement process.' . . . The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions. See Babington v. Yellow Taxi Corp., 250 N.Y. 14, 17, 164 726, 272 (1928) (Cardozo, C.J.) ("Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand").

See also Michigan Bell Telephone Co. v. United States, 565 F.2d 385, 389, (6th Cir. 1977).

In applying these principles to the use of the All Writs Act to locate fugitives, it is clear that there must first be a proceeding in the issuing court to give jurisdiction to the court. See Adams v. United States ex rel. McCann, supra, at 273. Thus, any such application, which should be verified, for the use of the All Writs Act to obtain telephone company toll records or any other documents to locate a fugitive should be sought only from the U.S. district court in which a complaint or an indictment for the fugitive has been returned and is pending. It is further clear from the cases that there should be a warrant for the arrest of the fugitive named in the indictment in order that the order sought under 28 U.S.C. §1651 is in aid of and "to effectuate and prevent the frustration of orders . . . previously issued." See United States v. New York Telephone Co., supra, at 172. As the Supreme Court said in that case: "The order issued by the District Court compelling the company to provide technical assistance was required to prevent nullification of the court's warrant and the frustration of the government's right under the warrant to conduct a pen register surveillance." Id. at 175. The order obtained may then direct the production of the documents sought at some designated reasonable time to the appropriate official charged with the responsibility for excution of the warrant. The documents may be ordered produced to the court, or U.S. Attorney if necessary, but the preferred method is to provide the records to the enforcement officers. Sufficient time should be allowed for the affected party to challenge the order by appropriate motion in the district court.

The use of 28 U.S.C. §1651 as a means of obtaining telephone toll records or other documents to locate a fugitive is not a procedure to be used in every fugitive case. The willingness of courts to issue these orders will depend on the selectivity with which applications are made and courts will not condone a wholesale use of the All Writs Act for this purpose. Thus, this 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. The application should clearly demonstrate the reasonable belief that the records sought may reveal leads to the whereabouts of the fugitive. Telephone toll records of associates and relatives known, to have had recent and frequent contact with the fugitive seem the logical source for such information.

The order sought for such records must not be burdensome, United States v. New York Telephone Co., supra, at 172. In re Application of the United States, supra, where the order under the All Writs Act required the telephone company to use its facilities and manpower to mechanically and manually trace telephone calls, the appellate court said since the tracing order denied the company of the free use of its equipment and employees in a substantial manner, that due process required a hearing on the issue of burdensomeness. If, however, the deprivation of the use of the company's

It should further be noted that Rule 17(c), Federal Rule of Criminal Procedure, should not be used as an alternative to the grand jury subpoena to secure telephone toll records and other evidence to aid in the search for a fugitive even in cases where the fugitive is wanted on a federal indictment. Rule 17 of the Federal Rules of Criminal Procedures indicates that subpoenas issued under that rule are for the purpose of obtaining witnesses and documents for trial or in anticipation of trial. Use of a Rule 17(c) subpoena before the defendant has been located and arraigned is inappropriate. See United States v. General Department of International Air Services, 420 F. Supp. 98 (S.D.N.Y. 1976), where the court stated:

> Rule 17(c) was not intended to provide an additional means of discovery. Bowman Dairy Co. v. United States, 341 U.S. 214 . . . (1951); In re Magnus, Mahee and Reynard, Inc., 311 F.2d 12 (2d Cir. 19672), cert. denied 373 U.S. 902 . . . (1963); United States v. Murray, 297 F.2d 812 (2d Cir.), cert. denied, 369 U.S. 828 . . . (1962) . . . . Finally, it is well recognized that 'a motion of this nature [for rule 17 (c) subpoenas] should not be made or entertained before preliminary motions e.g., addressed to the indictment) have been disposed of.' 8 Moore Federal Practice, Par. 17.07 (1975 ed.). See also United States v. Long, 15 F. R.D. 25 (D.C. Pa. 1953).

See also United States v. Standared Oil Co., 316 F.2d 884 (7th Cir. 1963), and United States v. Nixon, 418 U.S. 683 (1974) at 698-99, where the court discussed the requirements for a Rule 17(c) subpoena. The court enumerated the requirements for Rule 17(c) subpoenas: (1) the documents sought are evidentiary and relevant; (2) they were not otherwise procurable in advance of trial; and (3) the party cannot prepare for trial without the documents, and the trial would be unreasonably delayed without production before trial; (4) application is in good faith and not a fishing expedition. It is clear that subpoenas issued before arrest of the defendant and for the sole purpose of locating him/her could not meet the requirements for Rule 17(c) subpoenas set forth in United States v. Nixon, supra, and any attempt to use such subpoena to locate the fugitive would be improper.

Following are sample forms which may be used when making applications for court orders under the All Writs Act, 28 U.S.C. §1651, for the production of telephone company toll records or any other records to be used for locating a federal fugitive. The forms in "Set A" consist of an application which is to be verified by the Assistant U.S. Attorney and an order for the court's signature. The verified application must contain a statement in paragraph 2 setting forth the factual basis for the reasonable belief that the records sought might lead to location of the fugitive.

equipment and personnel resources is de minimus, no hearing should be necessary. Thus, in applications for court orders for records to locate a fugitive, the request for records should be narrowly limited both in the types of records sought, the number of individuals involved, and the time period covered.

In those cases where disclosure by the telephone company to the individuals whose records are sought by the order might impede the fugitive investigation, the court should be requested to include in its order such a finding and an order that the telephone company make no disclosure for ninety days. As an alternative to seeking such an order from the court, the order for production of the telephone company records may be accompanied by a certification from the person making the application for the order stating that the records are sought in an official federal fugitive investigation, that disclosure could impede the investigation and interfere with enforcement of the law, and that the company should not disclose the existence of the order for ninety days. See Department of Justice Memorandum No. 796, February 20, 1974, "American Telephone and Telegraph Company Policy for Release of Toll Information."

Although there are no reported cases in which the All Writs Act has been used for the purpose indicated herein, several United States district courts have approved such orders. It must be reemphasized that this procedure should be used selectively and only in important cases where a demonstrable reasonable belief exists that the records sought should lead to the whereabouts of the fugitive. This procedure should rarely, if ever, be used to locate a state fugitive for whom an arrest warrant has been issued upon a complaint filed under 18 U.S.C. §1073 when there is no intention to prosecute that offense. See USAM 9-69.410, 9-69.450. Although location of such a fugitive is arguably in aid of the jurisdiction of the issuing court, the court might well consider such an application for its assistance an abuse of process. Cf. United States v. Love, 425 F. Supp. 1248 (S.D.N.Y. 1977) (Rule 40, Fed. R. Crim. P., cannot be used to remove a fugitive felon to the state from which he fled in the absence of an intention to prosecute the federal unlawful flight offense). Use of the procedure in unlawful flight cases should be reserved for those in which there has been a long, intensive and unsuccessful effort by state and federal authorities to locate a fugitive in a major and significant case. Any questions regarding the use of this procedure or the form or content of applications and orders thereunder should be addressed to the General Litigation Legal Advice Section, Criminal Division.

In fugitive cases, federal law enforcement agencies frequently seek to obtain telephone toll records or other documents in order to locate the fugitive. It is the Department's position that these records can be obtained through an order issued pursuant to the All Writs Act, 28 U.S.C. §1651. See USAM 9-11.220. But see United States v. Walters, 558 F. Supp. 726 (D. Md. 1980).

Prosecutors who have employed the All Writs Act for this purpose have encountered a recurring question: Can All Writs Act orders be directed to telephone companies or other third parties outside the territorial jurisdiction of the issuing court? This issue is very important because an interpretation of the All Writs Act which denies it extraterritorial effect significantly reduces the effectiveness of this statute as a law enforcement tool in fugitive cases.

28 U.S.C. §1651 is not an independent source of federal jurisdiction. Rather, it simply provides federal courts with the power to issue writs in aid of their existing jurisdiction. See Goodbar v. Banner, 599 F.2d 431, 433-34 (C.C.P.A.), cert. denied, 444 U.S. 927 (1979). Thus, in fugitive cases only the district court where the complaint, indictment, or warrant is pending may issue orders under the All Writs Act. A fugitive is, by definition, a person who is fleeing the jurisdiction of some court. Therefore, in many instances the fugitive will not be found in the district where the complaint or indictment has been filed or warrant has been issued. If All Writs Act orders are construed only to apply within the territorial limits of the issuing district, the Act loses much of its practical significance in fugitive cases.

It is the Department's position that orders obtained pursuant to the All Writs Act, 28 U.S.C. §1651, have extraterritorial effect. Indeed, in criminal cases several courts have expressly held that orders entered under the Act apply beyond the territorial limits of the issuing court. For example, in Carbo v. United States, 277 F.2d 433 (9th Cir. 1960), aff'd on other grounds, 364 U.S. 611 (1961), Carbo, a state prisoner in New York, tried to resist a writ of habeas corpus ad prosequendum issued by a district court in the Southern District of California by arguing that he was beyond the territorial jurisdiction of that court. The court of appeals flatly rejected this argument, concluding that the district court's power under the All Writs Act extended beyond the territorial limits of the district. Carbo v. United States, supra, at 436. The court noted that, in criminal cases, a district court may issue arrest warrants and subpoenas which have extraterritorial effect; id., citing Rules 4 and 17, Fed. R. Crim. P., and reasoned that the district court's power under the All Writs Act must be at least as extensive as its authority under the Federal Rules of Criminal Procedure. Therefore, in the court's view, the Act, like the Federal Rules of Criminal Procedure, applied beyond the territorial limits of the district court. Similarly, in Christian v. United States, 394 A.2d 1 (D.C. Cir. 1978), cert. denied sub nom. Clark v. United States, 442 U.S. 944 (1979), a prisoner outside the territorial jurisdiction of the District of Columbia argued that the All Writs Act could not be used to compel his/her presence in the District for a police line-up. The District of Columbia Court of Appeals rejected this narrow construction of 28 U.S.C. §1651, holding instead that, "in aid of its authorized jurisdiction the Superior Court [of the District of Columbia] may issue extraterritorial Writs." Christian v. United States, supra, at 45 [emphasis in original].

While the Supreme Court has not expressly addressed this question, several cases suggest that the Court would apply 28 U.S.C. §1651 extraterritorially. Indeed, in United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court expressly endorsed an extraterritorial use of the Act. Hayman involved a prisoner's petition, under 28 U.S.C. §2255, to vacate his sentence. At the time the prisoner filed this motion he was confined in a federal penitentiary outside the territorial limits of the sentencing court. In its opinion, the Supreme Court concluded that the prisoner was entitled to a hearing on this motion and held that the All Writs Act authorized the district court to compel his presence since, "[i]ssuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court. . . in 28 U.S.C. §2255 itself. . . . Id. at 220.

Similarly, in Carbo v. United States, 364 U.S. 611 (1961), the Supreme Court held that a district court could issue writs of habeas corpus ad prosequendum to persons outside its territorial limits. In reaching this conclusion the court relied exclusively on 28 U.S.C. §2241, the federal habeas corpus statute. Nonetheless, the court's rationale should apply with equal force to writs issued under 28 U.S.C. §1651 since these two sections share a common statutory antecedent. (Both 28 U.S.C. §1651 and 28 U.S.C. §2241 were derived from Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1789). See Carbo v. United States, supra, at 614-17 (1961)).

Indeed, a construction of 28 U.S.C. §1651 which does not give it extraterritorial effect creates a jurisdictional anomaly. District courts would be able to issue arrest warrants, subpoenas and writs of habeas corpus which could be served outside their districts; yet they could not rely upon the All Writs Act to issue orders of similar force and effect.

A more detailed analysis of this issue has been prepared by the General Litigation and Legal Advice Section of the Criminal Division. Prosecutors with questions concerning the extraterritorial effect of All Writs Act orders in fugitive cases are encouraged to contact the Section at FTS 724-7035.

The forms in "Set B" consist of an application by the Assistant U.S. Attorney which is not verified, and an affidavit to be signed by the investigating agent which sets forth the factual basis for a reasonable belief that the records sought will lead to location of the fugitive. "Set B" also contains a court order.

It is recommended that, when possible, "Set A" forms be used due to their brevity. Many U.S. Attorneys' offices have used forms similar to these which do not require an additional affidavit from the investigating agent.

These forms are suggested forms only. U.S. Attorneys may have already adopted a form for All Writs Act requests which vary in some respects. If the U.S. Attorney's forms contain all of the basic elements of these suggested forms, the U.S. Attorney's existing forms may be used.

Any questions regarding the use of the All Writs Act for the production of records in federal fugitive cases should be addressed to the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

*U.S. GOVERNMENT PRINTING OFFICE: 1986-491-510:40035

The following guidelines should be observed in All Writs Act application:

1. There must be an outstanding arrest warrant for the fugitive from the U.S. District Court or the U.S. Magistrate.

2. The All Writs Act Order can only be issued in the federal district where the criminal case is pending, not in the district where the records are located where that is a different district.

3. The order should be obtained from a judge of the U.S. District Court unless the U.S. District Court has delegated appropriate authority to the U.S. Magistrate. In some districts magistrates have issued such orders, however this authority may vary in some districts.

4. The records will be produced to agents of the field office which has jurisdiction over the city where the records are located.

5. The All Writs Act Order should allow approximately ten to twelve days between the date of the order and the required production of the records. The purpose of this requirement is to allow the affected company sufficient time to challenge the order in the District Court of issuance if it desires to do so. It should be noted that this time requirement does not preclude more timely production of the records if the company is cooperative.

6. The verified application of Set A, and the affidavit of Set B, should clearly demonstrate the reasonable belief that the records sought may reveal leads to the whereabouts of the fugitive. See suggestions in paragraph 2 of the form for a verified application, and paragraph 4 of the form for an affidavit.

7. Although the telephone toll records will probably be the most common records sought with this procedure, All Writs Act orders may be used for the production of other records which might assist in the location of the fugitive. For example, such orders have been used for the production of medical records and utility records. In any event, there must be a showing of a reasonable belief that the records sought will contain information leading to the location of the fugitive.

8. All Writs Act orders may not be utilized to obtain records to locate federal parole violators who are wanted on federal parole violators' warrants for the reason that there is no pending case in the U.S. District Court and the court therefore lacks jurisdiction.

ALL WRITS ACT FORMS, SET A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
	)	NO.
v.	)	
	)	
(Name of defendant)	)	
	)	
Defendant	)	

APPLICATION FOR PRODUCTION OF
(Telephone toll records or other records)

Comes now the United States of America by and through the United States Attorney for the District of _____ and makes application for an order pursuant to Title 28, United States Code, Section 1651, the All Writs Act, directing the (company) of (city), (state) to produce (telephone toll records or other records) for telephone number _____ subscribed to by (name of subscriber), (address of subscriber) for a period from _____ to _____ and in support of this application alleges and states:

1. That the defendant herein, (name of defendant), (indicted or charged by complaint) in this Court on (date) for violations of (statutes); that a warrant for the arrest of the defendant (name) on these charge was issued on (date); that since

that time the defendant has concealed himself/herself and remains a fugitive; that the order for the production of the records sought herein pursuant to Title 28, United States Code, Section 1651, is in aid of and to effectuate and prevent the frustration of the arrest warrant issued for the arrest of the defendant (name). United States v. New York Telephone Company, 434 U.S. 159, 172 (1977).

2. Based on the investigation of the agency (agency), it is reasonably believed that the (telephone toll records or other records) of the (company) of (city), (state), for telephone number _____ subscribed to by _____ will be of substantial assistance in locating and apprehending the defendant (name of defendant) on the warrant issued in this district for his/her arrest; that this reasonable belief is based upon the following:

(Set out the relationship between fugitive and subscriber (romantic, family, business, prison associate, or otherwise); frequency of past contacts, most recent contacts, reason why fugitive might contact subscriber, and any other information which might show why or how the records sought might lead to location of the fugitive.

3. Disclosure of the production to the (agency) of the records sought herein would prejudice the investigation of that agency in its efforts to locate and apprehend the fugitive (name of defendant).

WHEREFORE, the United States requests that this Court order, pursuant to Title 28, United States Code, Section 1651, that the custodian of records for the (company), of (city), (state), produce to agents of the (agency), on or before (date, at least 10-12 days after the date of order for telephone number _____ subscribed to by (name), (address), for the period _____ to _____; it is further requested that the (company), of (city), (state), and its agents and employees be ordered not to disclose the existence of this application and order for production or any production of records made thereunder unless authorized by this Court; it is further requested that the Clerk of this Court seal this application and the order issued thereon until further order of the Court.

(Name of U.S. Attorney), U.S. Attorney
for the District of _____

By:

_____
(Name of Assistant U.S. Attorney)

VERIFICATION

I, (name of Assistant U.S. Attorney), being first duly sworn, depose and state that I am an Assistant U.S. Attorney for the District of _____, and that the foregoing Application is made on the basis of information officially furnished and upon the basis of such information is true and correct.

_____

(Name of Assistant U.S. Attorney)

Subscribed and Sworn to before me this _____

day of _____, 198__

_____

NOTARY PUBLIC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	NO.
	)	
	)	
(Name of defendant)	)	

ORDER

This matter comes before the Court on the Verified Application of (name of U.S. Attorney) for the District of _____ by (name of AUSA) for an order for production of records pursuant to Title 28, United States Code, Section 1651.

It appearing that the Application is made in good faith, and that there is a reasonable belief that the (telephone toll records or other records) of the (company), (city), (state), for telephone number _____ subscribed by (subscriber), (address) _____, will assist the (agency), in locating and apprehending the defendant (name of defendant) on the arrest warrant issued in this Court on (date).

IT IS HEREBY ORDERED, pursuant to Title 28, United States Code, Section 1651, that the (company), (city), (state) produce and deliver to agents of the (agency)

on or before _____(date 10-12 days after date of order)_____, the __
(telephone toll records or other records) _____
for the telephone number _____ subscribed by __(name)_____,
__(address)_____, for a period from _____ to _____;

IT IS FURTHER ORDERED, that the __(company)_____ of __(city)
_____, _____(state)_____, and its agents and employees make no disclosure of the existence of this Application and Order for production or of any production of records made thereunder unless and until authorized by this Court;

IT IS FURTHER ORDERED that the Clerk of this Court seal the Application for Production of records and this Order until further order of this Court.

Dated this _____ day of _____, 198_.

_____

JUDGE

ALL WRITS ACT FORMS, SET B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	NO.
	)	
	)	
(Name of defendant),	)	
	)	
Defendant	)	

APPLICATION FOR PRODUCTION OF
(Telephone toll records or other records)

Comes now the United States of America by and through the United States Attorney for the District of _____ and makes application for an order, pursuant to Title 28, United States Code, Section 1651, the All Writs Act, directing the (company) of (city), (state), to produce (telephone toll records or other records) for the telephone number _____ subscribed to by (name of subscriber), (address of subscribed), for a period from _____ to _____ and in support of this application alleges and states:

1. That the defendant herein, (name of defendant), was (indicted or charged by complaint) in this court on (date) for violations of (statutes); that a warrant for the arrest of the defendant (name) on these charges was issued on (date); that since that

time the defendant has concealed himself/herself and remains a fugitive; that the order for the production of the records sought herein pursuant to Title 28, United States Code, Section 1651, is in aid of and to effectuate and prevent the frustration of the arrest warrant issued for the arrest of the defendant (name). United States v. New York Telephone Company, 434 U.S. 159, 172 (1977).

2. Based on the investigation of the (agency), it is reasonably believed that the (telephone toll records or other records) of the (company) of (city), (state), for telephone number _____ subscribed to by (subscriber) will be of substantial assistance in locating and apprehending the defendant (name of defendant) on the warrant issued in this district for his/her arrest; that this reasonable belief is based upon the affidavit of agent (name of agent) of the (agancy) which is attached hereto and made a part hereof.

3. Disclosure of the production to the (agency) of the records sought herein would prejudice the investigation of that agency in its efforts to locate and apprehend the fugitive (name of defendant).

WHEREFORE, the United States requests that this Court order, pursuant to Title 28, United States Code, Section 1651, that the custodian of records for the (company) of (city), (state), produce to agents of the (agency), on or before (date, at least 10-20 days after

date of order) the (telephone toll records or other records) for telephone number _____ subscribed to by (name), (address), for the period _____ to _____. It is further requested that the (company), of (city), (state), and its agents and employees be ordered not to disclose the existence of this application and order for production or any production of records made thereunder unless authorized by this Court. It is further requested that the Clerk of this Court seal this application and order issued thereon until further order of the Court.

(Name of U.S. Attorney), U.S. Attorney
for the District of _____

By: _____
(Name of Assistant U.S. Attorney)

AFFIDAVIT

(Name of agent), under penalty of perjury declares and states:

1. That he/she is an agent of (agency) assigned to conduct investigation to locate and apprehend (defendant) on an arrest warrant from the United States District Court for the District of _____;

2. That (defendant's name) was (indicted or charged by complaint) in the United States District Court for the District of _____ on (date) for violations of (statutes); that a warrant for the arrest of (defendant) on these charges was issued on (date); that affiant and the (agency) have conducted an investigation to locate and arrest (defendant); that since the issuance of the arrest warrant, the said (defendant) has concealed himself/herself and remains a fugitive;

3. That based on the investigation conducted by affiant and other agents of the (agency), and based on the experience of affiant in investigations to locate fugitives, affiant has a reasonable belief that the (telephone toll records or other records) of the (company) of (city), (state), for telephone number _____ subscribed

to by _____(name)_____, _____(address)_____, for the period _____ to _____ will be of substantial assistance in locating and apprehending the said _____(defendant)_____ on the arrest warrant referred to above;

4. That affiant's reasonable belief that the records of the _(company)_ referred to above will substantially assist the investigation to locate and apprehend the fugitive _____(defendant)_____ is based upon the following

(Set out the relationship between fugitive and subscriber (romantic, family, business, prison associate or other wise); frequency of past contacts, most recent contacts, reason why fugitive might contact subscriber, and any other information which might show why or how the records sought might lead to location of the fugitive.)

5. Based on affiant's knowledge of the investigation to locate _(defendant)_ and on affiant's experience in investigations to locate fugitives, it is believed that disclosure by _____(company)_____ or its agents and employees of the production of the records referred to above would prejudice the _____(agency)_____ investigation to locate and apprehend the fugitive _____(defendant)_____.

_____

(Name of agent)

I, ___(name of agent)___, declare and certify pursuant to Title 28, United States Code, Section 1746, that under penalty of perjury the above and foregoing is true and correct.

_____
(Name of agent)

(Note: This form of affidavit does not require signature and seal of Notary Public.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

UNITED STATES OF AMERICA)
)
)
v.) NO.
)
)
(Name of defendant) ,)

Defendant

ORDER

This matter comes before the Court on the Application of (name of U.S. Attorney) for the District of _____ by (name of Assistant U.S. Attorney) for an order for production of records, pursuant to Title 28, United States Code, Section 1651.

It appearing that the Application is made in good faith, and that there is a reasonable belief that the (records) of the (company), (city), (state), for telephone number _____ subscribed by (subscriber), (address), will assist the (agency), in locating and apprehending the defendant (name of defendant) on the arrest warrant issued in this Court on (date).

IT IS HEREBY ORDERED, pursuant to Title 28, United States Code, Section 1651, that the (company), (city), (state), produce and deliver to agents of the (agency)

on or before 10-12 days after date of order), the (telephone toll records or other records) for telephone number _____ subscribed by (name) (address) for the period from _____ to _____;

IT IS FURTHER ORDERED, that the (company) of (city), (state), and its agents and employees make no disclosure of the existance of this Application and Order for production or of any production of records made thereunder unless and until authorized by this Court;

IT IS FURTHER ORDERED that the Clerk of this Court seal the Application for Production or records and this Order until further order of this Court.

Dated this _____ day of _____, 1983.

_____
JUDGE

9-11.221 Power of a Grand Jury Limited by Venue

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 existance and cannot resist questions on the grounds of relevancy or materiality. The matter is discussed more fully below. See United States v. Blair, 250 U.S. 273 (1919); Brown v. United States, 245 F.2d 549 (8th Cir. 1957); United States v. Girgenti, 197 F.2d 218 (3d Cir. 1952).

9-11.222 Power of a Grand Jury Limited 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, 201 U.S. 43, 63 (1906); In re April 1956 Term Grand Jury, 230 F2d 263, 269 (7th Cir. 1956). 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); Wright, Federal Practice and Procedure, Criminal §§101, 112. Contrast the provisions governing discharge of special grand juries discussed at USAM 9-11.420, infra.

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).

The subpoena power of the court is limited to an extent under Rule 17 of the Federal Rules of Criminal Procedure, and this in turn affects the investigative power of the grand jury. The subject is treated below at USAM 9-11.230.

9-11.223 Power of a Grand Jury Limited by 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 Federal Rules of Criminal Procedure 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 United States v. Cox, 342 F.2d 167 (5th Cir.), cert. deined, 391 U.S. 935 (1965); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 391 U.S. 841 (1967).

9-11.224 Power of a Grand Jury Limited By Testimonial Privilege

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 Federal Rules of Evidence that is made applicable to grand jury proceedings is Rule 501 on testimonial privileges; see Fed. R. Evid. 101 and 1101(c) and (d). Federal Rule of Evidence 501 provides that, except as otherwise required by the testimonial privileges of witnesses "shall be governed by 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 Federal Rule of Evidence. 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 utililized 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 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.

9-11.230 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. In granting appellants' motion for an order of expungement in Briggs, the court of appeals held that, in charging them with criminal conduct without indicting them, the grand jury exceeded its power and authority and that its action was a denial of due process to appellants since it deprived them of an opportunity to challenge the correctness of the grand jury's accusation. See also United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977); Application of Jordan, 439 F. Supp. 199 (S.D. W.Va. 1977); United States v. Hansen, 422 F. Supp. 430 (E.D.Wis. 1976); cf. In Re Smith, 656 F.2d 1101 (5th Cir. 1981) (accusation in prosecutor's summary).

Primarily on the basis of Briggs, the American Bar Association has

recently adopted, as part of its policy on the grand jury, the following statement of principle. "The grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars." Principle 7 of 25 principles.

The Department did not oppose the adoption of this Principle by the ABA and generally concurs in it. 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.

9-11.240 Limitation on Grand Jury Subpoenas

Subpoenas in federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Federal Rules of Criminal Procedure. As authorized under the Rule, the clerk of the court makes available to the grand jury (or the attorney for the government) a supply of subpoenas signed and sealed but otherwise in blank. See United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974). Grand jury subpoenas are usually served by the marshals, but service by other persons is authorized if the other persons are not less than 18 years of age (and not parties to the litigation). Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rule 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.

Rule 17 of the Federal Rule of Criminal Procedure provides that, "on motion made promptly," a court may quash or modify any subpoena duces tecum if compliance therewith would be "unreasonable or oppressive." Unlike Rule 45(b) the Federal Rules of Civil Procedure, the Criminal Rule allows for the consideration of a motion to quash even if it is made as late as the time set for compliance with the subpoena. See Wright, Federal Practice and Procedure, Criminal §275. The party who files a motion to quash has the burden of showing that a subpoena is unreasonable and oppressive.

In Re Grand Jury Subpoenas, 391 F. Supp. 991 (D.RI. 1975) (collecting numerous cases on motions to quash subpoenas).

The breadth of the investigative powers of a grand jury does not justify the issuance of general subpoenas duces tecum. Subpoenas duces tecum must be reasonably specific. Rule 17 does not require a precise identification of the exact documents sought by the grand jury; a reasonable particularity is all that is necessary. The description given is usually in terms of the subjects to which the writings relate and if a subpoena is broader in one respect (covering, for example, a lengthy period of record-keeping), it may have to be more specific or narrower in describing the material sought, depending upon the overall circumstances. Illustrative cases are collected at Wright, Federal Practive and Procedure, Criminal §275.

It is sometimes said that Rule 17 implements the Fourth Amendment prohibition against unreasonable searches and seizures. A subpoena, however, is a process quite distinct from a search warrant. If at all applicable to subpoenas duces tecum, Fourth Amendment considerations simply militate against subpoenas that are sweeping in scope. See United States v. Dionisio, 410 U.S. 1 (1973); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); United States v. Universal Manufacturing Company, 525 F.2d 808 (8th Cir. 1975). A subpoena duces tecum is subject to no more stringent Fourth Amendment requirements than is the "ordinary" subpoena. See United States v. Miller, 425 U.S. 435 (1976), at No. 8. But see United States v. Hilton, 534 F.2d 556, 564-565 (3d Cir. 1976) (concerning irregularly issued subpoenas).

The breadth of the investigative powers of a grand jury does justify the issuance of subpoenas ad testificandum without any fine regard for the relevancy or materiality of the testimony likely to be adduced. It follows that witnesses cannot resist questions by a grand jury on the grounds of relevancy or materiality or require any showing of the reasons why individuals were subpoenaed. A grand jury may, for example, subpoena a large number of witnesses in order to obtain voice exemplars without being limited by Fourth Amendment standards. Only if there was a real abuse of the grand jury's powers--if, for example, the jury were to pry into someone's business or domestic affairs for idle purposes--would a court exercise its inherent power to control the grand jury's use of subpoenas ad testificandum. See Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Dioniosio, supra; Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Doe, 460 F.2d 328 (1st Cir. 1972); In re April 1956 Term Grand Jury, 230 F.2d 263 (7th Cir. 1956).

Motions to quash subpoenas duces tecum may be granted on more specific bases that appear in Rule 17; for example, the privileged character of the

material sought may place the material effectively beyond the reach of a subpoena. See Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964); United States v. Guterma, 272 F.2d 344 (2d Cir. 1959); cf. Gelbard v. United States, 408 U.S. 41 (1972), concerning grand jury inquiry based upon an illegal interception of an oral or wire communication. It is emphasized, again, that issues of privilege are determined under federal law, rather than state law. See Rule 501 of the Federal Rules of Evidence.

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 at USAM 9-2.161 and 1-5.410.

9-11.241 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).

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 is to be noted that this change does not reflect an abandonment or modification of the Department's legal position but is adopted solely for reasons of policy in order to facilitate grand jury access to credit reporting agency records.

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).

9-11.250 Authority to Arrest Material Witness

It has been inferred from Rule 46(b) of the Federal Rules of Criminal Procedure and from 18 U.S.C. §3149 that federal district courts have the

authority to order the arrest of material witnesses and to detain such witnesses or to require them to give bail to insure their future appearance as witnesses. There must be a showing and an independent determination by the court that probable cause exists for the arrest and detention of a material witness. See Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (and cases cited therein).

9-11.260 Advice of "Rights"

The policy concerning advice of rights to be given to grand jury witnesses has been changed. It is now 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 & 190-191 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976). 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. See United States v. Mandujano, supra. Similarly, in Washington the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. See United States v. 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 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 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 United States v. 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 preceeding 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.

9-11.261 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 United States v. Wong, 431 U.S. 174, 179 n.8 (1977); United States v. Washington, 431 U.S. 181, 190 n.6 (1977); United States v. Mandujano, 425 U.S. 564, 573-75 and 584 n.9 (1976); United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973); Kastigar v. United States, 406 U.S. 441, 446 (1972); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 102 (1964) (concurring opinion); Brown v. Walker, 161 U.S. 591, 610 (1896); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); United States v. Capoldo, 402 F.2d 821 (2d Cir. 1968); United States v. Scully, 225 F.2d 113 (2d Cir.), cert. denied, 350 U.S. 897 (1955). 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 9-11.260, 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.

9-11.262 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 9-11.260, 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., United States v. Calandra, 414 U.S. 338, 343 (1974).

9-11.263 Notification of Targets

Where a target is not called to testify pursuant to USAM 9-11.261, supra, and does not request to testify on his/her own motion (see USAM 9-11.262, 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 9-11.262, 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 or evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.264 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 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 9-11.260, 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. (See USAM 9-11.261, supra.)

9-11.270 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 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.

9-11.300 THE PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 6

9-11.310 Summoning Grand Juries (Fed. R. Crim. P. 6(a) and (b))

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 below at USAM 9-11.326 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 connot 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.

9-11.320 Objection to Grand Jury and to Grand Jurors

The U.S. Attorney's primary concern with the grand jury selection process arises under Rule 6(b) of the Federal Rules of Criminal Procedure. Rule 6(b) of the Federal Rules of Criminal Procedure allows for the making of two basic types of objections: Objections to the array (that the jurors were not selected, drawn, or summoned in accordance with law); and objections to individual jurors (that they are not legally qualified to serve). The Rule provides two methods for making these objections.

9-11.321 Challenges

Rule 6(b)(1) of the Federal Rules of Criminal Procedure 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 Federal Rules of Criminal Procedure 6.

9-11.322 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 Federal Rules of Criminal Procedure 6(b)(2) 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).

9-11.323 Tests for Determining Motions to Dismiss

Under Federal Rule Criminal Procedure 6(b)(2), an indictment shall not be dismissed because one or more of the grand jurors was not legally qualified to serve if it appears from the record (discussed below) that, after deducting the number not legally qualified, there were still twelve or more jurors who concurred in finding the indictment. Nor (as discussed below) shall an indictment be dismissed because of any other objection to an individual juror if his/her vote cannot have been decisive in returning an indictment.

Motions to dismiss on the basis of objections to the array must rest, under 28 U.S.C. §1867, "on the ground of substantial failure to comply" with the Jury Selection and Service Act; and the burden of proof rests with the party attacking the jury selection procedure. See United States v. Goodlow, 597 F.2d 159 (9th Cir.), cert. denied, 442 U.S. 913 (1979); Mobley v. United States, 379 F.2d 768 (6th Cir. 1967); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

9-11.324 Standing to Object

Only a defendant "who has been held to answer" is permitted under the Rule to challenge the grand jury prior to his indictment. See, e.g., United States v. Barone, 311 F. Supp. 496 (W.D. Pa. 1970). Any defendant has standing to object when a jury has been selected on an impermissible basis whether or not the defendant was a member of the excluded class or group. Peters v. Kiff 407 U.S. 492 (1972); Pallard v. United States, 329 U.S. 187 (1946). There is no standing to object, however, in a witness who is resisting a grand jury subpoena or court order to testify. United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, sub nom. Meisel v. United States, 412 U.S. 954 (1973); United States v. Duncan, 456 F2d 1401 (9th Cir. 1972).

9-11.325 Motion to Dismiss Because of Objections to Individual Jurors

Section 1865 of Title 28 enumerates the legal qualifications for jurors. Every person is to be considered qualified to serve on a jury (grand or petit) unless: (1) he/she is not a United States citizen eighteen years of age who has resided for one year within the judicial district; (2) he/she is unable to read, write, and understand English sufficiently to fill out the juror qualification form in a satisfactory manner; (3) he/she is unable to speak English; (4) he/she is incapable of rendering satisfactory jury service due to mental or physical infirmity; or (5) he/she has been convicted in a state or federal court of record of a felony and has not had his/her civil rights restored, or he/she is under a pending felony charge.

An individual may be legally qualified and still excluded from

serving as a juror, by reason, e.g., of an inability to be impartial or a tendency to be disruptive. See 28 U.S.C. §1866(c). Even if a motion to dismiss an indictment involves a complaint about a juror for reason other than his/her legal qualifications, the problem may be obviated, just as it is when the complaint concerns a juror's legal qualifications, by showing that at least twelve other jurors concurred in finding the indictment. See United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970); United States v. Brandt, 139 F. Supp. 349 (N.D. Ohio 1955).

9-11.326 Motions to Dismiss Based Upon Objections to the Array

An objection to the array under Rule 6(b) is an objection that the grand jury was not selected, drawn, or summoned according to law. Incorporated by reference into Rule 6, the provisions of 28 U.S.C. §1867 are made the exclusive means for raising objections to the array. A motion to dismiss based upon an objection to the array must, pursuant to 28 U.S.C. §1867(a) and (b), allege a "substantial failure" to comply with the Jury Selection and Service Act. The "substantial failure" should involve some frustration of the goals of the Jury Selection and Service Act. See United States v. Evans, 526 F.2d 701 (5th Cir. 1976).

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. §§1864-1866, 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 non-exempt 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.

Every grand jury plan must, under 28 U.S.C. §1863(b)(6), exempt the following from serving on juries: (1) members in active service in the armed forces of the United States; (2) members of the fire or police departments of any state, district, territory, possession, or subdivision thereof; and

(3) public officers in any of the three branches of the federal government or of any state, district, territory, possession, or subdivision thereof, who are actively engaged in the performance of official duties. Under 28 U.S.C. §1866(e), no person can be required to serve on more than one grand jury, or on both a grand jury and petit jury, within any two-year period.

There can be no proper reason for disqualifying, excluding, excusing, or exempting a person from jury service unless that reason can be found in one of the following: (1) 28 U.S.C. §1865; (2) 28 U.S.C. §1866 (note particularly the provision in §1866(c)); or (3) provisions of jury selection plans adopted in accordance with 28 U.S.C. §1863(b)(5), (6), or (7). In this connection, it is noted that the administration of the jury selection process rests within the sound discretion of the courts and their officers. See United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd. 385 U.S. 293 (1966); United States v. Anderson, 509 F.2d 312 (D. D.C. 1974), cert. denied, 420 U.S. 991 (1975).

The Jury Selection and Service Act was intended to guarantee a random selection of jurors from a fair cross section of the community, but it was recognized that the process could hardly result in jury panels that actually mirror the makeup of the community. See 1968 U.S. Code Congressional and Administrative News, 1794. The Act does not require that the selection be from a fair cross section of the total population of a district without any qualifications; to the contrary, the Act allows for and contemplates the imposition of certain restrictions that are not compatible with a statistically balanced representation in jury panels of all elements of a community. See United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd. 385 U.S. 293 (1966); United States v. McVean, 436 F.2d 1120 (5th Cir.), cert. denied, 404 U.S. 822 (1971); United States v. Gast, 457 F.2d 141 (7th Cir.), cert. denied, 406 U.S. 969 (1972).

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 source 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.

9-11.327 Giving the Court Information Pertinent to Jury Selection

Especially when a grand jury is to be selected to conduct a highly sensitive investigation, a U.S. Attorney will want 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). Care should be taken especially 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."

9-11.328 Dismissal Required by Substantial Failure to Comply

Motions challenging compliance with selection procedures shall, under 28 U.S.C. §1867(d), contain a sworn statement of the facts making out a substantial failure to comply. The moving party is entitled, in support of his/her motion, to utilize the testimony of the clerk or jury commissioner, any relevant records and papers of the jury commission or clerk that are not public or otherwise available, and any other relevant evidence. If the court finds that there has been a substantial failure to comply with the law in selecting the grand jury, the court shall stay the proceedings pending the proper selection of a grand jury, or dismiss the indictment, whichever is appropriate. See 18 U.S.C. §3288 and §3289 alleviating problems with statutes of limitation in returning new indictments.

Under 28 U.S.C. §1867(a) and (b), the rule applicable to the Attorney General and to defendants in criminal cases is that motions to dismiss or to stay the proceedings shall be made either before voir dire examination begins, or within seven days after discovery of grounds or the time when grounds could have been discovered by the exercise of diligence, whichever of these times is earlier.

Parties challenging compliance with selection procedures are entitled, under 28 U.S.C. §1867(f), to inspect records and papers used by the jury commission or clerk in connection with the jury selection process. United States v. Test, 420 U.S. 28 (1975).

A failure to make timely objection to the jury selection procedure constitutes a waiver of the objection. United States v. Jones, 687 F.2d 1265 (8th Cir. 1982); United States v. Bearden, 659 F.2d 590 (5th Cir. 1981), cert. denied, 102 S. Ct. 1993; United States v. Noah, 475 F.2d 688 (9th Cir. 1973), cert. denied, sub nom., Ross v. United States, 414 U.S. 821 (1973); United States v. Owen, 492 F.2d 1100 (4th Cir. 1974). The only proper way for a party to be heard is by means of a sworn statement of facts

which, if true, would establish a substantial failure to comply with the law. United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973); United States v. Jones, 480 F.2d 1135 (1st Cir. 1973); United States v. James, 453 F.2d 27 (9th Cir. 1971).

Waiver of the technical objection that jury selection requirements were not substantially complied with does not necessarily preclude a court from granting relief on the broader ground of an actual prejudice to a defendant. Thus, in United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); the court held that the defendant had waived an objection that a juror was disqualified from serving due to an inability to read; but the court indicated in dictum that, had the juror's disqualification extended to an inability to decide the case intelligently, appropriate relief should have been granted even in the absence of a timely objection.

Defendants may seek to avoid a waiver of the statutory grounds for objections by casting their objections in Constitutional terms. See Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Jones, supra; United States v. Geelan, 509 F.2d 737 (8th Cir. 1974), cert. denied, 421 U.S. 999 (1975); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); United States v. DeAlba Conrado, 481 F.2d 1266 (5th Cir. 1973). There is a specific provision in subsection (e) of 28 U.S.C. §1867 saving "any other" available remedy from the requirements set out in 28 U.S.C. §1867. It should be noted, however, that defenses and objections based on defects in the institution or the prosecution, or on defects in the indictment or information, must be raised prior to trial to comply with Rule 12 of the Federal Rules of Criminal Procedure. Accordingly, whether the objection be on procedural or constitutional grounds, it is raised too late after trial. A waiver will be enforced on the basis either of 28 U.S.C. §1867 or Rule 12. Davis v. United States, 411 U.S. 233 (1973); Little v. United States, 524 F.2d 335 (8th Cir. 1975).

9-11.329 Effect of a Dismissal Because of Objection to the Array

It was pointed out above that what happens before one grand jury does not limit investigation by a subsequent grand jury. A dismissal of an indictment because of a challenge to the array does not mean that the evidence obtained under subpoena duces tecum was illegally obtained, and the dismissal does not prevent any subsequent subpoenaing of or use of the evidence. See United States v. Wallace and Tiernan Co., 336 U.S. 739 (1948).

9-11.330 Objections to Grand Jury And Grand Jurors (Cont'd)

9-11.331 Motions to Dismiss on Other Bases; Illegally Obtained Evidence Before a Grand Jury

Apart from objections to individual jurors and objections to the array, other kinds of objections related to the grand jury have been made by means of motions to dismiss but, in general, they have been rejected by the courts. Objections have been made, for example, about the effect upon the grand jury of adverse publicity regarding the defendant, the use in the grand jury of illegally obtained or otherwise incompetent evidence, and the misconduct of the attorney for the government before the grand jury. See, Silverthorn v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971); United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967); Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963); Back v. Washington, 369 U.S. 541 (1962); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975), cert. denied, 423 U.S. 861 (1975); 8 Moore Federal Practice--Cipes, Criminal Rules §6.03[2]-6.04. It should be observed in this connection, that Rule 6(e) allows for pre-trial discovery of the grand jury transcript upon a showing that grounds may exist for a motion to dismiss the indictment because of matters "occurring before the grand jury."

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 unbaised grand jury, if valid on its face, is sufficient to call for trial of the charges on the merits. 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 United States v. Dionisio, 410 U.S. 1 (1973); United States v. Ryan, 402 U.S. 530 (1971); Lawn v. United States, 355 U.S. 359 (1956); United States v. Blue, 384 U.S. 251 (1966); United States v. Short, 671 F.2d 178 (6th Cir. 1982), cert. denied, 102 S. Ct. 932, United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); West v. United States, 359 F.2d 50 (8th Cir. 1966); Federal Rule of Evidence 1101(d)(2). 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 United States v. Calandra, 414 U.S. 338 (1974).

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.

> Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be 'protracted' interruption of grand jury proceedings, '***effectively transforming them into preliminary trials on the merits.'

The Court cited United States v. 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. At 414 U.S. 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.

The Calandra decision would be virtually meaningless without Costello to prevent the same sort of issues from being raised and litigated after indictment. It remains, however, that there is an exceptional situation. The Supreme Court has construed 18 U.S.C. §2515 as preventing a witness from being questioned on the basis of an illegal interception of an oral or wire communication. Gelbard v. United States, 409 U.S. 41 (1972). Still, there is dictum in Gelbard, at 409 U.S. 59-60, indicating that if a witness does not contest the questioning or answers questions based on an illegal interception, any resulting indictment is invulnerable to a motion to dismiss. See S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

9-11.332 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 him/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).

9-11.333 Presumption of Regularity

A presumption of regularity attaches to grand jury proceedings, to grand jury subpoenas, and to the actions of the attorneys for the government in making grand jury presentations. See United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); In re Lopreato, 511 F.2d 1150 (1st Cir. 1975); In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). The requirement in 28 U.S.C. §1867(c) that a motion to dismiss contain a sworn statement of the facts constituting a substantial failure to comply with the law on grand jury selection reflects this presumption of regularity and serves to minimize the incidence of litigation not involving the essential question of guilt or innocence.

9-11.334 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 (United States v. Leverage 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.), cerc. 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.

9-11.340 Foreman, Deputy Foreman, and Secretary (Fed. R. Crim. P. 6(c))

Rule 6(c) of the Federal Rules of Criminal Procedure provides that the

court shall appoint one of the jurors to be the foreman and another to be deputy foreman, who will act during the absence of the foreman. The foreman is empowered to administer oaths and affirmations. He/she signs all indictments. He/she or another juror designated by him/her maintains a record of the number of jurors who concurred in finding indictments. The record is filed with the clerk of the court and may be made public only upon order of the court. It is by means of this record that an indictment may be saved under Federal Rule Criminal Procedure 6(b)(2) if it should appear that one or more of the grand jurors was not qualified to serve, and the record will be the primary source of information if an issue arises regarding the number of votes for indictment. See United States v. Bullock, 448 F.2d 728 (8th Cir. 1975).

The foreman should control the sessions of the grand jury and be its spokesman vis-a-vis the witnesses in such matters as continuing subpoenas to another day or in directing recalcitrant witnesses to respond to questions. The foreman has authority to direct a witness to appear before the grand jury at a later day, under peril of contempt. See United States v. Germann, 370 F.2d 1019 (2d Cir. 1967), vacated, 389 U.S. 329 (1967). While the foreman should sign every indictment returned by the grand jury, any failure to do so is considered merely an irregularity that does not vitiate the indictment. On this point, the framers of the Rule adopted the decision in Frisbie v. United States, 157 U.S. 160 (1895). See the Advisory Committee's Note under Rule 6 of the Federal Rules of Criminal Procedure.

A grand juror designated to keep a record of the voting is usually called the secretary of the grand jury. Although not required by Rule 6, it is customary in many districts for the secretary to keep a record showing (in addition to the voting) the attendance of the jurors at each session, the particular matters presented to the jury, the witnesses who were called, and other matters. This record may be of critical importance in settling issues raised about grand jury proceedings, such as whether there was a quorum present at a particular session of the grand jury.

9-11.350 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. (Eavesdropping upon the deliberations or voting of a grand jury is punishable as an obstruction of justice under 18 U.S.C. §1508.)

The importance of a rigid adherence to this Rule is well recognized, since the presence of an unauthorized person at a grand jury session may

vitiate an indictment. See, e.g., United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 32 Cr. L. 4146 (1983); United States v. Echols, 542 F.2d 948 (5th Cir. 1976). The rule does not apply to the grand jury room as such, but only to a grand jury session. Martin v. United States, 266 F.2d 770 (5th Cir. 1959). A brief and unintentional interruption of a session by a person not permitted to be present may not be a sufficient reason for invalidating the preceedings. United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969). Other courts, however, have recognized a per se rule that any unauthorized intrusion into a grand jury session may be grounds for the dismissal of the indictment. United States v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981); United States v. Phillips Petroleum Corp., 435 F. Supp. 610, 618 (N.D. Okla. 1977); United States v. Furman, 507 F. Supp. 848 (D. Md. 1981).

9-11.351 DOJ Attorneys Authorized to Conduct Grand Jury Proceedings

Federal Rules 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 Federal Rules Criminal Procedure 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 by them. (Order No. 725-77.)

In the Criminal Division, requests for grand jury authorizations are processed by the Office of Enforcement Operations, FTS 724-7184. See USAM 9-1.161. Departmental attorneys directed to conduct grand jury proceedings will be provided with the following letter of authorization to evidence their designation:

> Dear _____:
>
> As an attorney for the government employed full time by the Department of Justice and assigned to the _____ Division, you are hereby authorized and directed to file informations and to conduct in the District of _____ and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.
>
> You may file a copy of this letter with the clerk of the District Court to evidence this a authorization.
>
> _____
> Assistant Attorney General
> _____ Division

Courts have upheld the delegation of the Attorney General's authority under 28 U.S.C. §515(a) to direct attorneys to conduct grand jury proceedings. See In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Agrusa, 520 F.2d 370 (8th Cir. 1975). The courts have also upheld broadly worded directions to attorneys to conduct such preceedings. See United States v. Prueitt, 540 F.2d 995 (9th Cir. 1976); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); Infelice v. United States, 528 F.2d 204 (7th Cir. 1975); In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Wrigley, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987 (1975).

9-11.352 Non-Department of Justice Government Attorneys

Federal Rules 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 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 at FTS 724-7184 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 Fed. R. Crim. P. 6(e) grand jury secrecy requirements.

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.

9-11.353 Presence of the Witness Under Examination

As the wording of the Rule indicates, witnesses should be called one at a time to testify before the grand jury. See United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971); but see United States v. Echols, 542 F.2d 948 (5th Cir. 1976) (movie projectionist). If it is necessary for an expert witness to be utilized, for example, to analyze a set of records produced by another witness, the expert should be called into the grand jury session separately and asked by the foreman to undertake an examination of the records and to report the results to the grand jury. See In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956). On the matter of grand jury secrecy and disclosure to government agents to aid an investigation, see USAM 9-11.368, infra.

9-11.354 Presence of a Stenographer--Recording Required

Federal Rules 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 grand jury secrecy requirements under Rule 6(e)(2). It is important that they be made aware of this requirement. For further information on grand jury reporters see USAM 10-3.324.

9-11.355 Presence of an Interpreter

Federal Rules Criminal Procedure 6(d) permits the presence of an interpreter when needed in grand jury proceedings. Such 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; see the discussion of Fed. R. Crim. P. 6(e) below. It is suggested that attorneys for the government make certain that any interpreter used in a grand jury proceeding is fully aware of his/her obligation of secrecy. See also USAM 10-3.240.

9-11.356 Counsel for Witnesses Excluded

A witness before a federal grand jury is not entitled to have his/her attorney accompany him/her into the grand jury room; indeed, the Rule forbids that. See United States v. Mandujano, 425 U.S. 564 (1976). However, the witness may leave the grand jury room from time to time, as reasonable, in order to consult with his/her counsel. In re Taylor, 567 F.2d 1183 (2d Cir. 1977); In re Tierney, 465 F.2d 806 (5th Cir. 1972).

9-11.357 No Exceptions

Federal Rules Criminal Procedure 6(d) does not admit of any exception under which persons not usually authorized to be present are allowed to attend a grand jury session under extraordinary circumstances. As noted in USAM 9-11.350, supra, 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).

9-11.360 Grand Jury Secrecy: Purpose

It is a matter of fundamental importance to the criminal justice system, especially in preserving the vitality of the investigative function of the grand jury, that grand jury proceedings be kept secret to the fullest extent practicable. Grand jury secrecy is maintained principally: (1) to encourage witnesses to come forward and to testify freely and confidentially; (2) to minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations and escape punishment; (3) to safeguard the grand jurors themselves and the proceedings from extraneous pressures and influences; (4) to avoid unnecessary disclosures that may make persons appear to be guilty of misconduct without their being afforded

adequate opportunity to challenge the allegations; and (5) to prevent information adduced under compulsion and for purposes of public justice from being used for insubstantial purposes, such as gossip, to the detriment of the criminal justice system. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Procter and Gamble Co., 356 U.S. 677, 681-2, n.6 (1953). Grand jury secrecy has also traditionally been invoked to justify the limited procedural safeguards available to targets and witnesses. Illinois v. Abbott & Associates, Inc., ___ U.S. ___at note 11 103 S.Ct. 1356, n.11 (1983) (51 L.W. 4311).

The reasons for grand jury secrecy may lose some of their force after the proceedings have been concluded. Nevertheless, grand jury secrecy may never be breached, for example, to spare private litigants or even public agencies from making their own investigations, unless the disclosure is authorized under the rule. See,e.g., United States v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 102 S.Ct. 932 (1982).

The rule for grand jury secrecy is Rule 6(e)(2) of the Federal Rules of Criminal Procedure. The rule of secrecy is subject to the three major exceptions discussed in the following three sections: a grand jury witness cannot be obliged to keep the proceedings secret; courts may order disclosure of grand jury proceedings; and disclosures may be made to the attorneys for the government for use in the performance of their duties and to subordinate government personnel to assist a government attorney to enforce federal criminal law. Under no circumstances, however, may any disclosure be made of the grand jury's deliberations or voting, and no one but grand jurors may be present during the deliberations and voting. It is only required, under Federal Rules Criminal Procedure 6(c), that a record be kept of the number of votes cast for indictment; the individual juror's vote is not recorded.

9-11.361 Who is Covered by Fed. R. Crim. P. 6(e): Persons Other Than Witnesses

All persons present at a session of a grand jury other than a witness are subject to a requirement of secrecy and can be relieved of that obligation only by a court. It is implicit in the rule, however, that the person who records the grand jury proceedings may utilize other persons as typists to transcribe the recorded testimony, because Federal Rules Criminal Proceudre 6(e) includes such typists among those who are prohibited generally from making disclosures.

9-11.362 Who is not Covered by Fed. R. Crim. P. 6(e): Only Witnesses

Federal Rules 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). This, however, should not prevent the grand jury foreman from requesting a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.

One of the purposes of grand jury secrecy--and a purpose it serves extremely well--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 proceedings will remain secret until such time as disclosure is required in court, and, therefore, that the witness's cooperation with grand jury will not be known publicy unless the witness chooses to make it known. A witness may be helped in fending off unwelcome questions if the witness is requested by the grand jury not to make disclosures.

9-11.363 What is Covered by Fed. R. Crim. P. 6(e)

Federal Rules of Criminal Procedure 6(e)(2) prohibits the disclosure to any person of "matters occurring before the grand jury," except when made in accordance with one of the exceptions contained in the rule. The phrase "matters occurring before the grand jury" is not further defined and its meaning has developed through case law. Its purpose has been described as being:

> . . . to prevent disclosure of the way in which information was presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicion focuses, and specific details of what took place before the grand jury. In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1302-3 (M.D. Fla. 1977).

This concept has been applied as described in the following sections.

9-11.364 Grand Jury Transcripts

Transcripts of the testimony of witnesses, statements made by attorneys for the government before the grand jury, and any other statements made by or before the grand jury while in session incontrovertibly constitute "matters occurring before the grand jury." Cf., United States v. Proctor and Gamble Co., 356 U.S. 677 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Consequently, grand jury transcripts may not be released except in conformity with one of the Federal Rules Criminal Procedure 6(e) exceptions as discussed in USAM 9-11.364 to 9-11.369, infra.

Some courts have held that witnesses may be shown the transcript of their own testimony without a court order. United States v. Bazzano, 570 F.2d 1120 (3d Cir. 1970); King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970). Other courts require a court order. United States v. Scrimgeour, 636 F.2d

1019, 1025 (5th Cir. 1981). However, there is agreement that a witness does not have a right to see his/her own transcript, and that such access will be granted over government objection only where is a special showing of need. United States v. Clavey 565 F.2d 111 (7th Cir. en banc, 1977); In re Bianchi, 542 F.2d 98 (1st Cir. 1976); Bost v. United States, 542 F.2d 893 (4th Cir. 1976).

9-11.364(a) Disclosure of a Defendant's Own Grand Jury Testimony

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure mandates a pre-trial disclosure to a defendant, on request, of any recorded testimony given by him/her before a grand jury. The testimony must relate to the offense charged before disclosure is required under the Rule.

If the defendant is a corporation, partnership, association, or labor union, and so requests by motion, the court may grant the defendant pre-trial discovery of any relevant recorded testimony of any grand jury witness who was either: (1) at the time of his/her testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense; or (2) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the alleged conduct in which he/she was involved. By implication, the corporation, partnership, association, or labor union is entitled to no broader discovery of grand jury testimony.

It is important to note that Federal Rules of Criminal Procedure 16 gives courts a discretion to grant or deny corporations and other business entities the pre-trial discovery of the grand jury testimony of its principal officers and employees. There is also considerable latitude given to the courts under Rule 16(d)(1) to restrict, defer, or otherwise regulate the discovery called for under Rule 16. The Rule, it is to be noted further, provides for discovery only of relevant testimony.

By cooperating with a grand jury investigation, an officer or employee of one of the business entities named in Rule 16(a)(1)(A) may risk serious prejudice to himself/herself in his/her employment, profession, or associations. To minimize such risks is one of the purposes for grand jury secrecy. The least that can be done to help protect such witnesses is to prevent disclosure of any testimony given that is not relevant to the charges in the indictment. Postponing disclosure may increase the possibility that disclosure will be obviated under a guilty plea or some other disposition of the case. This is not to suggest that Rule 16 offers a ready means of protecting witnesses from unnecessary injuries; to the contrary, it will require considerable skill and ingenuity to utilize the special features of Rule 16 effectively to protect witnesses. There is a clear advantage to be derived in preventing discovery when the witness was

not legally able to bind the defendant or otherwise does not fit the discriptions employed in Rule 16(a)(1)(A).

9-11.364(b) Disclosure to Defendant of the Grand Jury Testimony of Government Witnesses

A defendant may have access to the grand jury testimony of government witnesses only in the circumstances set out in 18 U.S.C. §3500. A grand jury transcript is a "statement" for purposes of the statute, and, under subsections (a) and (b) of 18 U.S.C. §3500, a defendant is entitled to the transcript of grand jury testimony of government witnesses only after they have testified on direct examination in the trial of the case. The court is authorized under 18 U.S.C. §3500(c) to inspect the grand jury transcript in camera before turning it over to the defendant and to excise any portion of the transcript that does not relate to the subject matter of the witness's testimony on direct examination. If a part is excised and the trial continues to an adjudication of guilt, the excision is subject to appellate review.

9-11.364(c) Pre-trial Discovery of Grand Jury Testimony Strictly Limited

Federal Rules of Criminal Procedure 16(a)(3) states specifically that the Criminal Rules do not relate to the discovery or inspection of grand jury transcripts other than as provided for in Rule 6 and in Rule 16(a)(1)(A). This is an important provision. Under the previous formulation of Federal Rules of Criminal Procedure 16, there was confusion and conflict among the courts regarding the proper scope of pre-trial discovery of grand jury transcripts. Pre-trial discovery of grand jury transcripts is now clearly limited under Rule 16. The limitations are underscored in 18 U.S.C. §3500(a).

9-11.364(d) Disclosure of Government Memoranda

A government document that records or summarizes any statement made or action taken before or by a grand jury is covered by the secrecy requirements of Rule 6(e). In re Grand Jury Proceedings, 613 F.2d 501, 505 (5th Cir. 1980); U.S. Industries, Inc. v. U.S. District Court, 345 F.2d 18 (9th Cir. 1965); United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978). On the other hand, government documents that relate information provided by grand jury witnesses outside of the grand jury room to government attorneys or other government personnel ordinarily are not covered by Rule 6(e). But see In re the Special February 1975 Grand Jury, 652 F.2d 1302 (7th Cir. 1981). However, where a witness is interviewed by the government after appearing before a grand jury and relates what was said before the grand jury, any record of that interview should be considered to be grand jury material and covered by Rule 6(e).

9-11.365 Documents: Generally Not Covered by Fed. R. Crim. P. 6(e)

Individual documents subpoenaed by the grand jury have come to be held by the courts ordinarily not to constitute "matters occurring before the grand jury." Hence, they are not usually covered by the restrictions of Rule 6(e). The rule that has become generally accepted is that Rule 6(e) does not restrict the release of subpoenaed documents that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury investigation. SEC v. Dresser Industries, 628 F.2d 1368, 1382-3 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Interstate Dress Carriers, 230 F.2d 52, 54 (2d Cir. 1960). But see Index Fund v. Hagopian, 512 F. Supp. 1122, 1127-9 (S.D. N.Y. 1981).

The most commonly denied requests for grand jury documents are requests for the disclosure of or access to all the documents subpoenaed by a particular grand jury or a list or inventory of all such documents. United States v. Stanford, supra, at n.6; In re Grand Jury Impanelled October 2, 1978, 510 F. Supp. 112 (D. D.C. 1981). While recent cases have generally favored disclosure, the best argument for resisting a disclosure request is to demonstrate how such disclosure would frustrate one or more of the purposes of grand jury secrecy set forth in USAM 9-11.360, supra. See Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 868-70 (D.C. Cir. 1981); Iglasias v. Central Intelligence Agency, 525 F.Supp. 547, 554-7 (D. D.C. 1981).

9-11.366 Documents: Court Order Still Necessary for Public Disclosure

While Federal Rules of Criminal Procedure 6(e) ordinarily does not apply to the release of documents subpoenaed by the grand jury, a court order nevertheless is required for their public disclosure. Such documents have been held to remain the property of the persons from whom they were subpoenaed, with the grand jury merely having taken temporary custody. Where the owner of the documents does not consent to their release, disclosure must be court authorized. The standard for such authorization, however, is not the Rule 6(e) exception. Rather, the test is whether the party seeking the documents is lawfully entitled to access to them. United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972). Note that disclosure may also be restricted by other laws; e.g., the Right To Financial Privacy Act of 1978 requires that protected financial records subpoenaed by a grand jury be accorded the same protections as Rule 6(e) material (12 U.S.C. §3420; USAM 9-4.844), and the Tax Reform Act of 1976

restricts disclosures of tax information obtained from the Internal Revenue Service irrespective of whether it has been presented to a grand jury (26 U.S.C. §6103; USAM 9-4.900 et seq.).

9-11.367 Disclosure Under Fed. R. Crim. P. 6(e): To Attorneys for the Government, Including for Civil Use

Disclosure of materials covered by Federal Rules 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 Federal Rules of Criminal Procedure 6(e)(3)(A)(i). "Attorney for the government" is defined in Federal Rules of Criminal Procedure 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., 103 S.Ct. 3133 (1983). See Guide on Rule 6(e) after Sells and Baggot 6-8, 18-32 (January 1984).

From the Federal Rules 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 forstall the disclosure until the criminal investigation is completed.

9-11.368 Disclosure Under Fed. R. Crim. P. 6(e): To Other Government Personnel

Disclosure of materials covered by Federal Rules 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. 95-354, 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. In re Perlin, 589 F.2d 260, 268 (7th Cir. 1978). 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).

As stated in the legislative history of the 1977 amendment to Rule 6(e), it is not necessary to obtain a court order to make the above-described disclosures nor to make investigators "agents of the grand jury" by having them take an oath in the grand jury. It is necessary, however, to "promptly" provide the supervising judge with a list of those agents to whom disclosure has been made. Although not required by the Rule, Congress contemplated that the list of names generally be furnished to the court before the information is disclosed. S. Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News 530. Failure to comply with the requirement that government personnel be listed with the court is not grounds to quash a grand jury subpoena. In re Grand Jury Proceedings (Larry Smith), 579 F.2d 836, 840 (3d Cir. 1978).

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).

Courts have differed over whether employees of state and local government are included under the "government personnel" exception. In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 95 (E.D. N.Y. 1979) (state and local personnel included); In re Miami Federal Grand Jury No. 79-9, 478 F. Supp. 490, 492 (S.D. Fla. 1979), and In re Grand Jury Proceedings, 445 F. Supp. 349 (D. RI.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978) (state and local personnel not included). Rather than relying solely on this provision, it is preferable to have the state or local personnel sworn as agents of the grand jury (see United States v. Stanford, supra,) and to seek a court order authorizing release under Federal Rules of Criminal Procedure 6(e)(3)(C)(i), which allows for release "preliminarily to . . . a judicial proceeding," as discussed in the next section. See In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981).

9-11.369 Disclosure Under Fed. R. Crim. P. 6(e): Preliminarily to or in Connection with a Judicial Proceeding

Under subsection (3)(C)(i) of Federal Rules of Criminal Procedure 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 preliminarily 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).

However, the courts have not been consistent in the application of this concept. The following proceedings have been found to fall within the definition of judicial proceedings: the grand jury's own proceedings, In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D. N.Y. 1979); other grand juries, United States v. Stanford, 589 F.2d (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); attorney discipline proceedings, United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980); United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977), aff'd, 580 F.2d 281 (8th Cir. 1978); police officer discipline proceedings, Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); In re Grand Jury Transcripts, 309 F. Supp 1050 (S.D. Ohio 1970); Internal Revenue Service proceedings, Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975); impeachment hearings, Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); and state criminal trials, In re Grand Jury Proceedings, 654 F.2d 268, 271-2 (3d Cir. 1981); In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979).

On the other hand, courts have denied disclosure of grand jury materials for use in: a U.S. Parole Commission parole revocation hearing, Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980); a Federal Energy Regulatory Commission preliminary investigation, In re J. Ray McDermott and Co., Inc., 622 F.2d 166 (5th Cir. 1980); a Federal Maritime Commission adjudicatory hearing, United States v. Bates, 627 F.2d 349 (D.C. Cir 1980); a state medical board investigation, United States v. Young 494 F. Supp. 57 (E.D. Tex. 1980); and a Federal Trade Commission investigation, In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

State grand jury proceedings have been held to constitute proceedings preliminarily to or in connection with a judicial proceeding. In Re Petition for Disclosure of Evidence Taken Before the Special Grand Jury, 650

F.2d 599 (5th Cir. 1981). One court has held that a state investigation not involving a grand jury may be "preliminarily to or in connection with a judicial proceeding," provided particularized need is shown. In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981).

The courts have split also on whether Internal Revenue Service civil proceedings are preliminarily to or in connection with a judicial proceeding. 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 Federal Rules of Criminal Procedures. United States v. Baggot, ____U.S.____, 103 S.Ct. 3164 (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 United States v. Young, supra (state medical board); and 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, 130-31 (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. 929 (D. Mass. 1975).

9-11.370 Penalty for Breach of Grand Jury Secrecy

Despite a significant incidence of unlawful breaches of grand jury secrecy, see, e.g., In re Biaggi, 478 F.2d 489 (2d Cir. 1973), no criminal statute exists to cover the problem adequately (see 18 U.S.C. §1508). Therefore, the contempt remedy, while not always wholly adequate, must be relied upon. Strict security should, of course, be maintained over grand jury transcripts and memoranda reflecting matters that occurred before the grand jury. Every unlawful breach of grand jury secrecy should be viewed as a very serious matter requiring attention, if not with a view toward punitive action, at least with the objective of preventing future breaches of grand jury secrecy. Special precautions may be considered at the start of a particularly sensitive investigation to safeguard against breaches of grand jury secrecy.

9-11.380 Sealing the Indictment Pending Arrest

A district court may, under Federal Rules of Criminal Procedure 6(e), direct that an indictment be kept secret until a defendant is in custody or has given bail (except insofar a disclosure of the indictment is necessary for issuance and execution of a warrant under Federal Rules of Criminal Procedure 4). Indictments have been kept sealed for lengthy periods of time under this provision. An indictment found within the period of limitations prescribed in chapter 213 of title 18 is not barred because it is kept sealed until the statutory period has expired. See United States v. Michael, 180 F.2d 55 (3d Cir. 1949), cert. denied, 339 U.S. 978 (1950).

9-11.381 Jurors not Continuously Present May Nevertheless Vote

Under Federal Rules of Criminal Procedure 6(f) an indictment may be found only upon the concurrence of 12 or more jurors. Indictments are not defective because jurors voted who had not been present during the entire investigation. See United States v. Garner, 663 F.2d 834 (9th Cir. 1981), cert. denied, 102 S.Ct. 1750 (1982); United States v. Provenzano, 688 F.2d 194, 201-202 (3d Cir. 1982), cert. denied, 103 S.Ct. 492 (1982); United States v. Lang, 644 F.2d 1232, 1235-1239 (7th Cir.), cert. denied, 454 U.S. 870 (1981); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 647-648 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); Lustiger v. United States 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968). It is good practice, however, to cause a juror who was absent during a significant part of a grand jury presentation to read (or be read) the transcript of the testimony the juror did not hear, or, depending upon the circumstances, some lesser measure can be taken to have the gist of the testimony communicated to a juror who had not been present for the testimony. The record should be made to reflect whatever is done in this regard.

9-11.382 Duty to Report a No Bill to the Court

When a defendant is in custody or has been released on bail and less than 12 jurors concur in finding an indictment, a duty is placed on the foreman of the grand jury by Rule 6(f) of the Federal Rules of Criminal Procedure to report the no bill to a federal magistrate "in writing forthwith." As indicated in the original Advisory Committee note, the purpose is to allow for the necessary release of a defendant or an exoneration of a defendant's bail as promptly as possible.

9-11.390 Tenure and Discharge of a Grand Jury

Under Rule 6(g) of the Federal Rules of Criminal Procedure, the tenure and powers of a grand jury are not affected by the beginning or the expiration of a term of court, and the grand jury serves until discharged by the court, provided, however, that no grand jury impaneled under Rule 6 may serve for more than 18 months. See United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Fein, 504 F.2d 1170 (2d Cir. 1974).

It is within the discretion of the district court, without assigning any reason, to discharge a grand jury before the expiration of its term. In re Texas Co., 201 F.2d 177 (D.D.C.), cert. denied, 344 U.S. 904 (1952). The discharge or expiration of the term of a grand jury usually warrants the return to the appropriate parties of subpoenaed materials, but this does not prevent making and retaining copies of documents or subsequently subpoenaing the same materials. See United States v. Wallace & Tiernam Co., 336 U.S. 793 (1948); In re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D.Va. 1957); Virginia Milk Producers Ass'n. v. United States 250 250 F.2d 425 (D.D.C. 1957).

9-11.391 Replacing a Grand Juror

Rule 6(g) of the Federal Rules of Criminal Procedure authorizes the district court, at any time for cause shown, to excuse a juror, either temporarily or permanently; and if a juror is excused permanently, the court may impanel another person to take the place of the juror who was excused. It is noted, however, that 28 U.S.C. §1866(c) governs the excusing of jurors, and the "cause shown" must be consistent with 28 U.S.C. §1866(c). When a juror is replaced, it is advisable to have the new juror in some manner apprised of the evidence already before the grand jury. There is no necessity for replacing a juror who was excused, provided that a sufficient number remains to constitute a quorum of sixteen jurors. If a bare quorum remains, however, it is well to impanel a new juror (or jurors) to obviate future quorum problems.

9-11.400 THE SPECIAL GRAND JURY - 18 U.S.C. §3331

It has been 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 has 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 Rules 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.

9-11.410 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.)

9-11.411 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.

9-11.412 Districts Where Special Grand Juries Must be Impaneled

At this writing, the following districts have more than four million inhabitants and are, therefore, to have special grand juries impaneled at least once in every eighteen months in addition to the regular grand juries impaneled: the Central, Eastern, and Northern Districts of California, the Middle District of Florida, the Northern District of Illinois, the District of Maryland, the District of Massachusetts, the Eastern District of Michigan, the District of Minnesota, the District of New Jersey, the Eastern and Southern Districts of New York, the Northern and Southern Districts of Ohio, the Eastern and Western Districts of Pennsylvania, and the Northern and Southern Districts of Texas. This list is based upon estimates made by the Bureau of the Census and is, of course, subject to revision from time to time as newer estimates become available.

9-11.413 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); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); Korman v. United States 486 F.2d 926 (7th Cir. 1973); United States v. Fein, 370 F. Supp. 466 (E.D.N.Y. 1974), aff'd. 504 F.2d 1170 (2d Cir. 1974).

9-11.420 Terms and Extensions of Terms of Special Grand Juries

Like regular grand juries, special grand juries serve a basic term of eighteen months, unless they are discharged earlier. Here the similarity ends, however, because 18 U.S.C. §3331 limits the authority of the courts to discharge grand juries and provides for extentions of service well beyond the initial term of eighteen months.

A special grand jury may be discharged before it has served its initial term of eighteen months only if the jurors themselves (by majority vote) determine that the grand jury's business has been completed. For the grand jury to serve longer than eighteen months requires a finding by the district court. If at the end of eighteen months or any extended period, the district court finds that the grand jury's business has not been completed, the court may extend its service, in increments of six months, for a maximum period of thirty-six months (subject to one exception discussed below). (Note that under 18 U.S.C. §1826 a recalcitrant witness confined for civil contempt may in no event be confined for longer than eighteen months.)

9-11.421 Appeals to Continue the Service of Special Grand Juries

Under 18 U.S.C. §3331(b), if a district court fails to extend the term of a special grand jury or orders the discharge of a special grand jury before the jurors determine that their business has been completed, the jurors may, by majority vote, apply to the chief judge of the circuit court for an order continuing the term of the special grand jury. While any such application is pending, the term of the special grand jury continues by operation of law, but the maximum term of service permissible is still thirty-six months.

9-11.430 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.

9-11.440 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 or 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 if (4) 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 if 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 deminsions as to be equitable with misconduct, may be a basis for a special grand jury report. See S. Rep. No. 91-617, 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 crimes;" 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). The court begins by sealing its order accepting the report and the report itself. The report may not be made public or disclosed under subpoena until at least 31 days after a copy has been served upon each public officer or employee named in the report, and an answer has been filed or the time for filing an answer has expired. (Despite use of the singular in the legislation, the Criminal Division takes the position that no report should be made public until all the answers have been filed or the time for filing has elapsed as to all the public officers or employees named.) Furthermore, the report may not be made public if an appeal is taken from the court's determination that the report is supported by the evidence until all rights of review of the public officers or employees have expired or terminated in an order accepting the report. In addition, the order accepting the report may not be entered until 30 days after delivery of the report to the public officer or body as prescribed in 18 U.S.C. §3333(c)(3).

The court is empowered to make appropriate orders to prevent unauthorized publication of the report and to punish for contempt anyone who does publish it without authorization.

Within 20 days after service of the order and report on him/her, a public officer or employee may file with the clerk a verified answer to the report in accordance with 18 U.S.C.§3333(c)(2). The court may extend the time within which the answer may be filed and may also order such limited publication of the report as may be necessary for the preparation of an answer. The answer should concisely state the facts and law constituting the accused's defense to the charges, and shall become the appendix to the report. The court may order that those portions of the answer which have been inserted scandalously, prejudiciously, or unnecessarily be omitted from the appendix.

The court is authorized, under 18 U.S.C. §3333(d), to put off the filing of the report as a public record if the court finds that the filing may prejudice the fair consideration of a pending criminal matter. In that situation, the court shall order that the report be sealed. The report will not be subject to subpoena or public inspection during the pendency of the criminal matter, except upon order of the court.

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 a 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 judisdiction 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)).

9-11.441 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 TABLE OF CONTENTS 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), Federal Rules of Criminal Procedure.

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), Federal Rules of Criminal Procedure. 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), Federal Rules of Criminal Procedure.

9-12.100 USE OF AN INDICTMENT OR INFORMATION

Rule 7(a), Federal Rules of Criminal Procedure, 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 (1980). 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, Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure. See Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).

9-12.200 WAIVER OF INDICTMENT

Rule 7(b), Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, 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 (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, Federal Rules of Criminal Procedure, 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, Federal Rules of Criminal Procedure, 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, 436 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, Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, deals with the drafting formalities discussed, infra.

9-12.311 Caption

Rule 7(c), Federal Rules of Criminal Procedure, 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, Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, provides, among other things, that the foreperson of the grand jury "shall signal indictments." This requirement is satisfied by his/her signature below the endorsement, "A True Bill," Jones v. Pescor, 169 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), Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, 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), Federal Rules of Criminal Procedure, 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. McGuire, 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. 290 (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 necessary 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.); United States v. Weiner, 578 F.2d 757, 776 (9th Cir. 1978).

9-12.314 Citation of the Statute Violated

Rule 7(c)(1), Federal Rules of Criminal Procedure, 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 Federal Rules of Criminal Procedure 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), Federal Rules of Criminal Procedure, 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. Logwood, 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 786, 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), Federal Rules of Criminal Procedure, 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/her 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. 946 (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 "guilty depends so critically 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 count 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 7 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 extortinate 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. The Appendix of Forms uniformly alleges that the crime took place "in the ... District of ..." but omits 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. Form 6 illustrates an indictment under 18 U.S.C. §2312, interstate transporation of a stolen motor vehicle, naming the state from which the vehicle was taken and into which it was transported, 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), Federal Rules of Criminal Procedure, 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. Crim. 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. Crim. 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 (6th Cir. 1972). The necessity of proving venue, however, does not require it to be alleged in the indictment. Rule 7(c)(1), Federal Rules of Criminal Procedure, does not require venue to be alleged in an indictment: United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976). In fact, the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, does provide for a statement of the district in which the offense occurred. 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, pettifoging 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 at first refused to "enter the fray," United States v. Harmon, 496 F.2d 21 (2d Cir. 1974), but finally did so in United States v. Rose, 500 F.2d 12 (2d Cir. 1974), where it held, following Guthrie, supra, that an allegation of fraudulent intent was not required. Forms 8 and 9 of the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, allege intent to defraud under both parts of the impersonation statute.

> 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 (1887).

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 Federal Rules of Criminal Procedure, 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), 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]." Pandilidis, supra, at 649.

DETAILED
TABLE OF CONTENTS
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. Crim. P. providing for the transfer of criminal cases among districts for the limited purposes of acceptance of guilty or nolo contendere pleas and sentencing 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, U.S.C. Hutto v. United States, 309 F. Supp. 489 (S.C. 1970).

Under Rule 20, Federal Rules of Criminal Procedure, 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, defendant's statement that he/she wished to plead guilty or nolo contendere shall not be used against him/her. Refusal of transferee court to receive nolo contendere plea does not remove its jurisdiction if defendant then enters 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 Federal Rule of Criminal Procedure 20 proceeding, that a Rule 20 transfer cannot be revoked by the withdrawl 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 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.

Federal Rule of Criminal Procedure 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

Federal Rule of Criminal Procedure 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, Rules 20, 28 U.S.C.A.) 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 even 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 district court for the district in which the defendant is present. The case will then proceed to arraignment in that plea is contemplated, the provisions of Rule 11, Federal Rules of Criminal Procedure pertaining thereto apply in the Rule 20 context.

9-14.111 Indictment Or Information Pending

When an indictment or information is pending against a person in another district,the person may state in writing that he/she wishes to plead guilty, or nolo contendere, to waive a trial in the district in which the indictment or information is pending, and consent to a disposition in

the district in which he/she finds him or 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; Snowden v. Smith, supra; Farr v. United States, 166 F.2d 963 (D.C. Cir. 1948).

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).

After the defendant signs his 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 the district in which the indictment or information is pending. Either U. S. Attorney may, under the Rule, refuse the 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 or information is pending should forward the signed consents to the clerk of his/her district court, who will transfer the court file to the district court for the district in which the defendant is present. The case will then proceed to arraignment in that district for pleading under Rule 11, Federal Rules of Criminal Procedure.

9-14.112 Complaint Only Pending

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.

9-14.113 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.

9-14.114 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 of offense.

9-14.115 Use of Fed. R. Crim. P. 20 and 7 Together

Rule 20 provides that a defendant may state in writing that he 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 and 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, Federal Rules of Criminal Procedure, 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 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).

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 Procedure 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); United States v. Parr, 17 F.R.D. 512 (S.D.Tex. 1955). 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. Griesa, 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. 1981), cert. denied, 455 U.S. 933; United States v. Noland, 495 F.2d 529 (5th Cir. 1974), cert. denied, 419 U.S. 966; United States v. Polizzi, 500 F.2d. 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120; 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 co-defendant'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 P. 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 prosection, United States v. Luros, 243 F. Supp. 160 (N.D. Iowa 1965), cert. denied 382 U.S. 956; and see dissent, United States v. Griesa, supra at 285; and 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 (1984).

9-14.212 Transfer For Prejudice In The District

After 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 in 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. 1970), cert. denied 398 U.S. 959, reh'g. denied 399 U.S. 938; United States v. Anguilo, supra.

The court must be sensitive to prejudicial publicity, Estes v. States of Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, supra; Rideau v. State of Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959). But 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, United States v. Marcello, supra; Irvin v. Dowd, supra; Sheppard v. Maxwell, supra.

While a showing of actual prejudice is not a prerequisite, Estes v. State of Texas, supra, there must be showing of identifiable prejudice, United States v. Hinton, supra.

Although 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, there is no requirement that the determination be made at voir dire, rather whenever the court "is satisfied", United States v. Marcello, supra; United States v. Mandel, 415 F. Supp. 1033 (Md. 1976); United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952). However, voir dire helps to confirm the court's decision and buttress the showing of no abuse in the court's decision, Greenhill v. United States, 298 F.2d 405 (5th Cir. 1962), cert. denied, 371 U.S. 830; Bearden v. United States, 320 F.2d 99 (5th Cir. 1963); Murphy v. State of Florida, 363 F. Supp. 1224 (S.D. Fla. 1973) reh'g. denied 497 F.2d 1368; United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973) cert. denied 416 U.S. 936, reh'g. denied, 416 U.S. 1000; Estes v. United States, 335 F.2d 609 (5th Cir. 1964) cert. denied 379 U.S. 964, reh'g. denied 380 U.S. 926; United States v. Green, 373 F. Supp. 149 (E.D. Pa. 1974), aff'd 505 F.2d 731 (3rd Cir. 1974);

United States v. Mandel, supra; Blumenfield v. United States, 284 F.2d 46 (8th Cir. 1960), cert. denied 365 U.S. 812. Dismissal on a showing of prejudicial pretrial publicity of the government is not a proper remedy on motion of a transfer nor has voir dire been 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.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. 1965), cert. denied, 382 U.S. 958 (1965), in which it was held defendant had no relief from court's order retransferring 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 TABLE OF CONTENTS FOR CHAPTER 15

9-15.000 EXTRADITION

9-15.001 International Extradition in General

9-15.100 PROCEDURES FOR REQUESTING EXTRADITION FROM A FOREIGN COUNTRY TO THE UNITED STATES

International extradition is the process by which a person found in one country is surrendered to another country for trial or punishment. It is a formal process, regulated by treaty and conducted between the federal government of the United States and the government of a foreign country. Thus, it has a legal basis different from that of interstate rendition (frequently referred to as "interstate extradition"), which is mandated by Article 4, Section 2 of the Constitution, and regulated chiefly by state law and 18 U.S.C. §3182. Every request for international extradition must be approved by the Department of Justice, and formally presented to the foreign government by the Department of State through diplomatic channels. It is important to remember that the terms of an extradition treaty can only be invoked by the Department of State or persons authorized by it to do so. Prosecutors, police officers, or investigators are generally free to communicate directly with their foreign counterparts for the purpose of giving or receiving information on law enforcement matters, but they may not request the arrest of a fugitive for extradition. Unauthorized requests for foreign arrests cause serious diplomatic difficulties, and can subject the requestor to heavy financial liability or other sanctions. Cf. Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979).

9-15.110 Determining if Extradition is Possible

A prosecutor or investigator interested in arranging for extradition should first contact the Office of International Affairs ("OIA"), Criminal Division, Department of Justice, Washington, D.C., telephone number: (202) 724-7600. Extradition specialists in OIA determine whether the extradition request can succeed, taking into account the facts of the particular case, the language of the applicable treaties, and the law of the foreign country involved. In order for OIA to make this determination, the inquirer should be prepared to provide the following information:

A. The country in which the fugitive is believed to be located, and his/her address or location there. OIA will need to know his/her status (i.e., at large, incarcerated for another offense, etc.);

B. The citizenship of the fugitive and whether the fugitive is a citizen of the foreign country from which extradition is contemplated. (It is not enough to determine that the fugitive is a United States citizen, since many persons have dual citizenship);

C. The precise crime for which the fugitive has been charged or convicted, including the citation to the specific statute involved;

D. The full title of the court in which criminal proceedings are pending, the name of the judge, the date on which the indictment or conviction was obtained, and the docket number of the proceedings;

E. A brief description of the specific acts committed in connection with the offense, i.e., who did what to whom, when, where, and why; and

F. A brief description of how the prosecutor intends to prove the violation (e.g., witness testimony, documentary evidence, undercover agents, codefendants who agreed to cooperate with the government). Based on this information, OIA determines whether an extradition request can be made, taking the following factors into account:

1. Whether there is an extradition treaty in force with the country in which the fugitive is located. (A list of the treaties on extradition to which the United States is a party (as of November 1, 1983) will be set out at USAM 9-15.111, infra, in the near future);

2. Whether the treaty provides for extradition for the crime in question;

3. Whether the offense in question is punishable under the law of the requested country;

4. Whether there is sufficient evidence to justify extradition in accordance with the terms of the treaty;

5. Whether the fugitive is a national of the requested country (many foreign countries do not extradite their own citizens); and

6. Whether extradition is in the interests of justice in light of all the circumstances.

9-15.111 Treaties in Force Respecting Extradition July 1, 1982

Afghanistan	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Albania	49 Stat. 3313, TS 902 (1935)
Algeria	No bilateral extradition treaty Single Convention on Narcotics
Antigua	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Argentina	23 UST 3501, TIAS 7510 (1972) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
Australia	27 UST 957, TIAS 8234 (1976) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Austria	46 Stat. 2779, TS 822 (1930) 49 Stat. 2710, TS 873 (1939) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
The Bahamas	47 Stat. 2122, TS 849 (1935) TIAS 9185 (1978) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Bahrain	No bilateral extradition treaty Single Convention on Aircraft Hijacking

Bangladesh	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Barbados	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Belgium	32 Stat. 1894, TS 409 (1902) 49 Stat. 3276, TS 900 (1935) 15 UST 2252, TIAS 5715 (1964) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Belize	28 UST 227, TIAS 8468 (1982)
Benin	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Bhutan	No bilateral extradition treaty
Bolivia	32 Stat. 1857, TS 399 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Botswana	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Brazil	15 UST 2093 TIAS 5691 (1964) 15 UST 2112, TIAS 5691 (1964) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Brunei	No bilateral extradition treaty
Bulgaria	43 Stat. 1886, TS 687 (1924) 49 Stat. 3250, TS 894 (1934) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats

Burma	47 Stat. 2122, TS 849 (1941) Single Convention on Narcotics
Burundi	No bilateral extradition treaty New York Convention on Terrorism Against Dipolmats
Cameroon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Canada	27 UST 983, TIAS 8237 (1976) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
Cape Verde	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Central African Republic	No bilateral extradition treaty
Chad	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Chile	32 Stat. 1850, TS 407 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
China (PRC)	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
China (Taiwan)	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Colombia	___ U.S.T. ___, TIAS ___ (1982) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

Comorro Islands	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Congo	37 Stat. 1526, TS 561 (1911) 46 Stat. 2276, TS 787 (1929) 50 Stat. 1117, TS 909 (1936)
Costa Rica	43 Stat. 1621, TS 668 (1923) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Cuba	33 Stat. 2265, TS 440 (1905)* 33 Stat. 2273, TS 441 (1905)* 44 Stat. 2392, TS 737 (1926)* Single Convention on Narcotics
Cyrus	47 Stat. 2122, TS 734 (1926) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Czechoslovakia	44 Stat. 2367, TS 734 (1926) 49 Stat. 3253, TS 895 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Denmark	25 UST 1293, TIAS 7864 (1974) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Djibouti	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Dominica	28 UST 227, TIAS 8468 (1982) Single Convention on Narcotics - Amending Protocol
Dominican Republic	36 Stat. 2468, TS 550 (1910) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

Ecuador	18 Stat. 199, TS 79 (1873) 55 Stat. 1196, TS 972 (1941) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Egypt	19 Stat. 572, TS 270 (1875) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
El Salvador	37 Stat. 1516, TS (1911) Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Estonia	43 Stat. 1849, TS 703 (1924)* 49 Stat. 3190, TS 886 (1935)*
Ethopia	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Fiji	47 Stat. 2122, TS 849 (1935) 24 UST 1965, TIAS 7707 (1973) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Finland	31 UST 944, TIAS 9629 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
France	37 Stat. 1526, TS 561 (1911) 22 UST 407, TIAS 7075 (1917) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Gabon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
The Gambia	47 Stat. 2122 TS 849 (1939) Single Convention on Narcotics Hague Convention on Aircraft Hijacking

E. Germany (Dem.)	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
W. Germany (Fed.)	32 UST 1485, TIAS 9785 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Ghana	47 Stat. 2122, TS 849 (1935) Single Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Greece	47 Stat. 2185, TS 855 (1932) 51 Stat. 357, EAS 1144 (1937) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Grenada	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Guatemala	33 Stat. 2147, TS 425 (1903) 55 Stat. 1097, TS 963 (1941) Single Convention on Narcotics - Amending Protocol
Guinea	No bilateral extradition treaty Single Convention on Narcotics
Guinea Bissau	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
Guyana	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Haiti	34 Stat. 2858, TS 447 (1905) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
Honduras	37 Stat. 1616, TS 568 (1912) Single Convention on Narcotics - Amending Protocol
Hungary	11 Stat. 691, TS 9 (1856) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

Iceland	32 Stat. 1096, TS 405 (1906) 34 Stat. 2887, TS 449 (1906) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
India	47 Stat. 2122, TS 849 (1942) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
Indonesia	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Iran	No bilateral extradition treaty Single Convention on Narcotics - Amending New York Convention on Terrorism against Diplomats
Iraq	49 Stat. 3380, TS 907 (1936) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Ireland	26 Stat. 1508, TS 139 (1889)* 32 Stat. 1864, TS 391 (1900)* 34 Stat. 2903, TS 458 (1905)* 8 Stat. 572, TS 119 (1842)* Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Israel	14 UST 1707, TIAS 5476 (1963) 18 UST 382, TIAS 6246 (1967) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Italy	26 UST 493, TIAS 8052 (1975) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Ivory Coast	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

Jamaica	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics New York Convention on Terrorism against Diplomats
Japan	31 UST 895, TIAS 9625 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Jordan	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kampuchea (Cambodia)	No bilateral extradition treaty
Kenya	47 Stat. 2122, TS 849 (1935) 16 UST 1866, TIAS 5916 (1965) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kiribati (Gilbert Islands)	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
N. Korea	No bilateral extradition treaty
S. Korea	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kuwait	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Laos	No bilateral extradition treaty Single Convention on Narcotics
Latvia	43 Stat. 1738, TS 677 (1924)* 49 Stat. 3131, TS 844 (1935)*
Lebanon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

Lesotho	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Liberia	54 Stat. 1733, TS 955 (1939) New York Convention on Terroris against Diplomats
Libya	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Liechtenstein	50 Stat. 1337, TS 915 (1937) Single Convention on Narcotics
Lithuania	43 Stat. 1835, TS 196 (1924)* 49 Stat. 3355, TS 904 (1936)*
Luxembourg	23 Stat. 808, TS 849 (1935) 49 Stat. 3077 TS 904 (1936) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Madagascar	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Malawi	47 Stat. 2122, TS 849((1935) 18 UST 1822, TIAS 6238 (1967) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Malaysia	47 Stat. 2122, TS 849 (1939) Single Convention on Narcotics - Amending Protocol
Maldives	No bilateral extradition treaty
Mali	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Malta	47 Stat. 2122, TS 849 (1935)
Mauritania	No bilateral extradition treaty Hague Convention on Aircraft Hijacking

Mauritius	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Mexico	31 UST 5059, TIAS 9656 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Monaco	54 Stat. 1780, TS (959 1940) Single Convention on Narcotics - Amending Protocol
Mongolia	No bilateral extradition treaty Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Morocco	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Mozambique	No bilateral extradition treaty Single Convention on Narcotics
Nauru	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Nepal	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
Netherlands	___ UST___, TIAS 10733 (1983) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
New Zealand	22 UST 1, TIAS 7035 (1970) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Nicaragua	35 Stat. 1869, TS 462 (1907) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Niger	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

Nigeria	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircrafting Hijacking
Norway	31 UST 5619, TIAS 9679 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Oman	No bilateral extraditon treaty Hague Convention on Aircraft Hijacking
Parkistan	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Panama	34 Stat. 2851, TS 445 (1905) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism agianst Diplomats
Papua New Guinea	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Paraguay	25 UST 967, TIAS 7838 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Peru	31 Stat. 1921, TS 288 (1901) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism agaist Dipolmats
Philippines	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

Poland	46 Stat. 2282, TS 789 (1929) 49 Stat. 3394, TS 908 (1936) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Portugal	35 Stat. 2071, TS 512 (1908) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Qatar	No bilateral extradition treaty
Romania	44 Stat. 2020, TS 713 (1925) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Rwanda	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
St. Lucia	28 UST 227, TIAS 8648 (1977) Single Convention on Narcotics - Amending Protocol
St. Vincent and the Grenadines	No bilateral extradition treaty
San Marino	35 Stat. 1971, TS 495 (1908) 49 Stat. 3198, TS 891 (1935)
Sao Tome and Principe	No bilateral extradition treaty Single Convention on Narcotics
Senegal	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Seychelles	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Sierra Leone	47 Stat. 2122, TS 849 (1935) Hague Convention on Aircraft Hijacking

Singapore	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Solomon Islands	28 UST 277, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol
Somalia	No bilateral extradition treaty
South Africa	2 UST 884, TIAS 2243 (1951) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Spain	22 UST 737, TIAS 7136 (1971) 29 UST 2283, TIAS 8938 (1978) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Sri Lanka (Ceylon)	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Sudan	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Suriname	26 Stat. 1481, TS 256 (1889) 33 Stat. 2257, TS 436 (1904) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Swaziland	47 Stat. 2122, TS 849 (1935) 21 UST 1930, TIAS 6934 (1970) Single Convention on Narcotics
Sweden	14 UST 1845, TIAS 5496 (1963) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Switzerland	31 Stat. 1928, TS 354 (1901) 49 Stat. 3192, TS 889 (1935) 55 Stat. 1140, TS 969 (1941) Single Convention on Narcotics Hague Convention on Aircraft Hijacking

Syrian Arab Republic	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Tanzania	47 Stat. 2122, TS 849 (1935)
Thailand	16 UST 2066, TIAS 5946 (1965) 43 Stat. 1749, TS 681 (1924) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Togo	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Tonga	47 Stat. 2122, TS 849 (1966) 28 UST 5290, TIAS 8628 (1977) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Trinidad and Tobago	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Tunisia	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Turkey	____ UST ____, TIAS 9891 (1981) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Tuvalu	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol
Uganda	No bilateral extradition treaty Hague Convention on Aircraft Hijacking

USSR	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
United Arab Emirates	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
United Kingdom	28 UST 227, TIAS 8468 (1977) 1/ Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Upper Volta	No bilateral extradition treaty Single Convention on Narcotics
Uruguay	35 Stat. 2028, TS 501 (1908) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Vanuatu	No bilateral extradition treaty
Vatican City	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Venezuela	43 Stat. 1698, TS 675 (1923) Single Convention on Narcotics
Vietnam 2/	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking Hague Convention on Aircraft Hijacking
W. Samoa	No bilateral extradition treaty
S. Yemen	No bilateral extradition treaty Single Convention on Narcotics
Yemen (Sanaa)	No bilateral extradition treaty

Yugoslavia	32 Stat. 1890, TS 406 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Zaire	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Zambia	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Zimbabwe	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics

* The State Department officially considers this treaty to be in force, but does not submit formal extradition requests to the country in question.

1/ Applies to Great Britain, Northern Ireland, the Channel Islands, the Isle of Man, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Christopher, Nevis and Anguilla, St. Helena and Dependencies, Sovereign Base Areas of Akrotiri and Dhekelia in the Islands of Cyprus, and the Turks and Caicos Islands.

2/ The listings in Treaties in Force for Vietnam, the Republic of Viet-Nam (South Viet-Nam), the Democratic Republic of Viet-Nam (North Viet-Nam), the provisional Revolutionary Government of the Republic of South Viet-Nam, and the Socialist Republic of Vietnam are based on the last notice received by the United States Government from the depositary for treaty or agreement in question. The United States has been informed by the Socialist Republic of Vietnam that "... in the principle, the Government of the Socialist Republic of Vietnam is not bound by the treaties, agreements signed by the former Saigon administration. However... the Government of the Socialist Republic of Vietnam will consider the agreements, on an individual basis, and will examine adherence to those agreements, treaties which are in the interests of the Vietnamese people..."

9-15.120 Provisional Arrest

If OIA concludes that extradition is in order, it is possible in many cases to arrange for the immediate arrest of the fugitive in order to prevent any further flight while the documents and evidence in support of a formal request for extradition are being prepared. This procedure is known as "provisional arrest." Provisional arrest should not be regarded as the ordinary method of initiating extradition proceedings. Rather, it should only be considered in emergency situations, where there is a real danger of the fugitive fleeing further before the extradition documents can be completed. Under some of the newer treaties--for example, those with Canada and Germany--the Department of Justice can arrange provisional arrest directly with the authorities abroad by telephone, telex, or via INTERPOL. In other cases, OIA asks the Department of State to instruct the appropriate U.S. Embassy or consulate to make the request. All requests for provisional arrest should be made to OIA and should be supported by the information called for on the attached form. The request should be in writing, but in urgent cases it can be made by phone with written confirmation immediately thereafter.

Because provisional arrest is reserved for exceptional cases, OIA requires that if the fugitive is wanted for federal charges the Section within the Criminal Division of the Department of Justice which has oversight responsibility for the case must also agree that provisional arrest is appropriate before further action is taken. For example, a request for the provisional arrest of a wanted narcotics trafficker must be approved by the Narcotic and Dangerous Drug Section. If the fugitive is wanted on state or local charges, the state extradition officer must support the request by attesting that the necessary documentation will be submitted on time, and that all of the expenses of the extradition request will be covered.

Please remember that when provisional arrest is effected, the time available to prepare, review, authenticate, translate, and transmit the documents in support of the extradition request is drastically reduced. The maximum period for provisional arrest under most treaties is shown on the following chart:

Time	Country
30 days	Denmark
40 days	Belgium, France, Germany, Guatemala, Sweden
45 days	Argentina, Australia, Canada, Italy, Japan, New Zealand, Paraguay, United Kingdom, Spain

Time	Country
60 days	Brazil, Colombia, Haiti, Israel, Mexico, Nicaragua, Turkey, Uruguay
2 months	Albania, Bolivia, Chile, Costa Rica, Czechoslovakia, Dominican Republic, El Salvador, Finland, Greece, Honduras, Liberia, Panama, Peru, South Africa, Switzerland, Venezuela, Yugoslavia
3 months	Austria, Bulgaria, Iraq, Poland

In most countries, the fugitive will be released from custody if the documents do not arrive within a deadline prescribed by treaty, and in some countries the fugitive can never be surrendered or extradited thereafter. Therefore, when provisional arrest is involved the documents must be completed and sent to OIA within 14 days.

9-15.121 Information Necessary to Institute Provisional Arrest

A. Requesting State/Federal District: _____

B. Name of Fugitive: _____

C. Description: _____

1. Date of Birth: _____ 5. Sex: _____
2. Place of Birth: _____ 6. Eyes: _____
3. Height: _____ 7. Hair: _____
4. Weight: _____ 8. Race: _____

Other Physical Attributes (tattoos, missing digits, etc.): _____

_____

D. Other Identity information (alias, passport number, SS number, etc.): _____

_____

E. Present Location (Country/City): _____

_____

F. Description of Facts of Case (with date and place of offense):

_____

_____

_____

G. Criminal Offense for which Extradition is Sought (with statutory citation):

1. _____
2. _____
3. _____

H. Details of indictment or complaint (date, location, file no., court, judge's name): _____

_____

I. Details of Arrest Warrant (date, location, file no, court, judge's name): _____

_____

J. Reason for Requesting Provisional Arrest: _____

_____

_____

K. Extradition Approved (name and phone number of authorizing official):

9-15.130 Documents Needed for Extradition

In general, extradition documents are prepared by the federal or state authorities responsible for prosecuting the charges for which extradition is requested. It should be noted that the authority which prepares the papers must also pay all the expenses incurred in connection with the request, including the cost of translating the documents, any cost of legal representation in the foreign country, any charges levied by the asylum country for boarding the fugitive pending extradition, the transportation and other expenses of the escort officers handling the fugitive's physical return to this country, and the cost of transportation for the fugitive to the United States. In federal cases, the U.S. Attorney or Strike Force Office should resolve any questions regarding costs with the Executive Office for U.S. Attorneys in Washington, D.C.

The documents needed for extradition are:

1. An affidavit from the prosecutor describing the case;

2. Authenticated copies of the indictment and arrest warrant; and

3. Evidence establishing the crime or proving that the fugitive was convicted, including sufficient evidence to identify the fugitive.

9-15.131 Prosecutor's Affidavit

Every extradition must be accompanied by an affidavit describing the state or federal laws applicable to the case, including the statute of limitations. Since this affidavit is sometimes the only opportunity that any United States authority will have to assist the foreign court in deciding whether extradition should be granted, it should be tailored to serve as a sort of "cover letter," introducing and explaining the rest of the documents.

The affiant (usually the prosecutor assigned to the case) should set forth enough of his/her background to assure foreign authorities that he/she is familiar with the case and with United States criminal law. If the documents are destined for Canada or England, the affiant's goal should be to qualify as an expert on federal criminal law or on the criminal law of his/her state. The affiant then should accomplish three major objectives:

First, he/she must identify and attest to the authenticity of any court papers, depositions, or other documents submitted in support of the extradition request.

Second, he/she should clearly identify the offenses with which the fugitive is charged, and the penalties prescribed for the offenses. He/she should also indicate that the statutes involved were in force when the offenses occurred and are currently in full force and effect. If the laws are not still in effect--e.g., Title 21, United States Code, Sections 173 and 174--an explanation should be given. He/she must also specifically state that the applicable statute of limitations has not expired. The affiant should set forth the text of each statute involved, including the applicable statute of limitations. If the statutes are relatively short ones, they can be set out in the affidavit itself, as shown in USAM 9-15.190, infra. If the statutes are lengthy, the text should be typed (not photocopied from an annotation) and attached as an exhibit to the affidavit. See USAM 9-15.185, infra.

Third, the prosecutor should give a brief description of the facts underlying the charges, indicating in general who is accused of doing what. This description of the crime should not simply track the language of the indictment, the applicable statute, or the treaty.

It is important that the language in the affidavit be as clear and lucid as possible. This is especially true when the extradition request is going to a non-English speaking country, because the papers will have to be translated into the language of that country. Please remember that the translators, who are usually from the State Department Language Services Division, are frequently unfamiliar with the precise meaning of jargon that attorneys take for granted, and hence will be unable to reproduce it accurately in the language of the country of refuge, which may not have an exactly equivalent term anyway. The following pointers are worth remembering:

1. Use plain language;

2. Use short sentences;

3. Avoid legal terms of art, even ones which sound simple in English (e.g., "due process of law");

4. Avoid "alleged," "purported," "aforementioned," "foregoing," "hereinafter," etc.; and

5. Avoid flowery expressions (most of it will be lost in translation anyway).

The prosecutor's affidavit may be executed before any person lawfully authorized to administer oaths, but it is highly desirable that the affidavit be executed before a judge or magistrate. In some jurisdic-

tions, judges decline to execute affidavits, and insist that the clerk or deputy clerk of the court perform this task. Where this is the case, the signature of a judicial official must appear somewhere on the affidavit. The preferred method is to have the judge or magistrate sign a jurat attesting to the signature and authority of the clerk or deputy clerk. See USAM 9-15.183, infra. Please make sure that the judge or magistrate certifies the signature that actually appears on the affidavit. Sometimes a deputy clerk signs in place of a clerk, and in such cases the judicial official must certify the signature, title and authority of the deputy clerk--not the clerk. See USAM 9-15.190, infra.

9-15.132 Indictment and Warrant

A fugitive can only be extradited on the basis of a formal criminal charge. Moreover, a person who has been extradited can be prosecuted or punished only for the specific charge for which he/she was surrendered--even if there are other charges which could otherwise have been brought against him/her. See United States v. Rauscher, 119 U.S. 907 (1886); Johnson v. Brown, 205 U.S. 309 (1907). Therefore, it is important to include in the extradition documents a copy of the outstanding indictment or complaint concerning all charges on which the fugitives will be tried or punished after his/her surrender.

The packet should also contain copies of the outstanding warrant of arrest for each offense for which the fugitive is sought. If the fugitive is merely accused of a crime, the outstanding warrant will usually show that it was unexecuted and any contrary indication should be explained. Where the fugitive has already been convicted, it is the outstanding warrant for bond jumping, jail break, etc.--not the executed warrant for the offense underlying the conviction--which must be submitted. Since the original indictment or complaint and warrant usually remain among the records of the court, the copies of those documents included in the extradition packet should show that they are true copies of the original. There are several ways to indicate this fact. The best way is to have the clerk of the court apply a stamp or seal to the document itself authenticating it as a true copy of original court records. Then the document should be attached as an exhibit to the prosecutor's affidavit. Alternatively, federal district court clerks have a standard form, A.O. Form 132, which is frequently used to achieve this end. See USAM 9-15.191, infra. Many state court clerks, too, use a standard form for this task; for example, California State court clerks use DA/8110-P76CL194C-REV.4/76. These forms are usually filled out by a clerk of the court, whose signature, title and authority are certified by the judge of the court.

9-15.133 Evidence Establishing the Case

All of the treaties condition the extradition of an accused person on the presentation of evidence sufficient to justify committal for trial under the law of the requested country. England, Canada and other common law countries usually demand that the documents show a prima facie case. A prima facie case for extradition exists when the court believes that "if the evidence before the (extradition) magistrate stood alone at trial, a reasonable jury properly directed could accept it and find a verdict of guilty." STANBROOK AND STANBROOK, EXTRADITION: THE LAW AND PRACTICE 28 (1980), citing Schtraks v. Government of Israel (1964) AC 556.

The preferred method for demonstrating to the foreign government that this requirement has been satisfied is for the prosecutor to attach to his/her affidavit enough sworn statements from investigating agents, witnesses, co-conspirators, or experts to indicate that each crime in question was committed and that the fugitive committed it. The affidavits, read together, should contain evidence on each charge for which extradition is sought.

Extradition affidavits should be prepared with formal captions showing the title of the case and the court in which the prosecution is pending. Each affiant should clearly and concisely set out the facts which he/she knows, avoiding hearsay if at all possible. The courts in England, Canada and other common law countries do not accept hearsay in extradition proceedings. In other countries, hearsay is admissable, but is accorded considerably less weight than statements based upon personal knowledge. Since the affidavits will be presented as exhibits to the prosecutor's affidavit, it is not absolutely necessary that they be signed by a judge, and they can be executed before any person authorized to administer an oath (including a notary public). It is also not necessary that all of the affidavits be executed within the state or federal district from which the request for extradition emanates. Where a witness resides or is located elsewhere, his/her affidavit can be taken wherever it is most convenient, then forwarded to the prosecutor preparing the request for inclusion in the packet. See, e.g., USAM 9-15.188, infra.

The other method of documenting the case is for the prosecutor to forward excerpts from the grand jury transcripts establishing that the fugitive committed the offense. We try to avoid using grand jury transcripts unless it is impossible to obtain affidavits, because the authorities in many foreign countries do not understand the purpose or function of a grand jury, and tend to accord grand jury transcripts less weight than affidavits or sworn statements containing the same information. Indeed, at least one country--Canada--has occasionally refused to accept grand jury transcripts as evidence. When grand jury transcripts are used, permission from the court for their release is

generally required by Rule 6(e), Federal Rules of Criminal Procedure. Grand jury transcripts are best presented as an exhibit accompanying a short affidavit from the witness who testified attesting that the transcript in fact reflects what he/she said before the grand jury. See USAM 9-15.189, infra. Alternatively, the prosecutor who appeared before the grand jury can identify the transcripts and attach them as an exhibit to his/her own affidavit.

When the fugitive has already been convicted in this country, the extradition packet generally need not contain evidence of a prima facie case. Instead, it should contain proof that the fugitive was convicted after having been present at trial, and that he/she is unlawfully at large without having fully served his/her sentence. In federal cases, the Judgment and Committal Order (CR Form 25) is the best proof of conviction and sentence. A copy of that document should be authenticated like the indictment and warrant of arrest and included as an attachment to the affidavit by the prosecutor. A similar judicial document proving conviction is available in state proceedings, and it should be submitted in state cases. Special problems arise when the defendant in a federal case is convicted but becomes a fugitive before any sentence is imposed. Since Rule 43, Federal Rules of Criminal Procedure, requires that the defendant be personally present at sentencing, United States v. Brown, 456 F.2d 1112 (5th Cir. 1972), there is usually no CR Form 25 available in these cases. One solution to this problem is to ask the court to complete the top half of CR Form 25 anyway, crossing out the phrase "and the defendant appeared in person and" in the second line and leaving blank the portion of the form describing the term of imprisonment. Another possible solution is for the court to actually impose sentence in absentia, with the understanding that the sentence will be vacated and the defendant resentenced after he/she is returned to the jurisdiction. See U.S. v. Brown, supra. Still another solution: obtain copies of the jury's verdict forms as proof of conviction. In any event, the prosecutor must explain in his/her affidavit exactly what occurred, and detail the procedural quirk involved, since in most foreign countries the defendant is sentenced immediately upon conviction. See USAM 9-15.190, infra.

Proof that a convicted and sentenced person is unlawfully at large can generally be presented in the form of an affidavit from the warden of the prison from which he/she escaped, or from his/her probation officer. Since some extradition treaties provide that a convicted person need not be surrendered unless a specified minimum period of imprisonment remains to be served, the affidavit should also indicate the portion of the sentence remaining to be served, and how the prisoner came to be at large. Please recall that in cases involving convicted persons the foreign government will still need a clear explanation of what the fugitive was convicted of doing, and since there will be no affidavits from witnesses,

the explanation of the case in the prosecutor's affidavit assumes special importance.

The affidavits or grand jury transcripts must leave no room for any doubt about the identity of the fugitive. "Mistaken identity" is a universally accepted defense to extradition, so it is crucial that the documents establish (1) that the person who is accused or convicted indeed committed the crime, and (2) that the person whose extradition is sought is the person accused or convicted. This is usually done by having the witnesses identify a photograph of the accused, which the foreign authorities can compare to the person arrested for extradition. However, fingerprint cards, photocopies of passports or other identity evidence can be used, provided they are accompanied by sufficient proof to tie them to the accused.

Do not have the witness recount having picked the fugitive's photo out of a photo spread, and do not include an entire photo spread in the extradition documents. The practice of using a photo spread instead of a single photo to avoid unduly suggestive identification wholly is a creature of United States constitutional law, and is inappropriate in the extradition context. Attaching a photo spread simply invites an argument into the extradition proceedings which can and should be avoided. All exhibits should be initialed by the affiant, dated, and attached to the upper left-hand corner of a separate page of the affidavit, in order that the ribbon attaching the certificates containing the State Department's seal may pass through them. The evidence establishing the identity of the fugitive can be included in the same affidavit or grand jury testimony setting out the evidence of the offense.

9-15.140 Transmission of the Completed Documents to Washington, D.C.

In cases prepared by federal prosecutors, the original and four copies of the documents should be sent directly to OIA, which reviews them for sufficiency and arranges for the seal of the Department of Justice to be affixed to them.

In cases prepared by state and local prosecutors, there are two paths the documents can take. In most jurisdictions, the original and four copies of the papers are first sent to the extradition officer for the state. The extradition officer reviews the documents, attaches to them a requisition bearing the seal of the state, and sends them to OIA for review. Alternatively, the original and four copies of the prosecutor's affidavit and its attachments can be sent directly to OIA for review, with a copy sent to the state extradition officer. OIA will then affix the Department of Justice seal to the papers (instead of the seal of the state) before sending them forward to the State Department. This latter

procedure is particularly useful when a provisional arrest has been made and it is essential that the documents get to the foreign authorities as soon as possible. Please remember that OIA will not take action on a non-federal extradition case until it receives assurances from the state's extradition officer that the state supports the request and will be responsible for expenses incurred in the case.

Once OIA is satisfied that the documents are in order, it forwards them to the Department of State for final screening (chiefly to detect possible foreign policy or political problems which might stem from the request) and action. The Department of State affixes its seal to the documents, and, if necessary, arranges for translation of the documents, or for authentication of the documents at the foreign country's embassy in Washington. The State Department then sends the documents to the appropriate United States diplomatic post abroad, along with instructions for formally requesting extradition.

9-15.150 Presentation of the Extradition Request

United States diplomatic agents abroad present the documents to the foreign country's equivalent of the Department of State. What happens to the extradition case beyond this point depends upon the extradition laws of the requested country. Usually, the requested country's diplomats forward the case to their country's equivalent of the Department of Justice, which directs the appropriate authorities to make arrangements for the fugitive's arrest.

In most cases, the courts of the requested country must also consider the matter, and judicial proceedings are conducted to determine whether the extradition request should be granted. The United States prosecutor, investigator and witnesses generally do not participate in these proceedings. If the foreign authorities require any evidence in addition to that already submitted, it is supplied by way of authenticated affidavits or depositions. If the court rules in favor of extradition, the fugitive may be able to appeal the decision in a higher court; in other countries, he/she can challenge the decision through habeas corpus or its equivalent; and in a few countries, the fugitive can do both. When the foreign court's approval of an extradition request has survived all review, the request goes back to the Executive authorities of the country where the ultimate decision whether or not to order the fugitive turned over to us is made.

United States embassies abroad are obliged to report all developments in connection with extradition requests to the Department of State, which passes this information on to OIA and the interested prosecutor.

In some countries the United States must retain an attorney to handle the arrangements for the arrest, detention, and extradition of the fugitive. Where this is the case, United States foreign service officers abroad aid in the selection and retention of foreign counsel. (See 22 C.F.R. 92.82) In federal cases, OIA assists the prosecutor in seeing to it that the foreign counsel is compensated by the Department of Justice. State authorities must make their own arrangements--and pay the necessary expenses--in cases involving the extradition of state fugitives.

9-15.160 Arrangements for Taking Custody After Extradition

Once the authorities in the foreign country indicate that they are ready to surrender the fugitive, OIA notifies the prosecutor and coordinates the logistics of the formal surrender. The law in many countries provides that a fugitive found extraditable is freed if he/she is not removed within a specified time. See, e.g., Article 12 of the English Extradition Act of 1870 (two months after committal for extradition); Article 16 of Denmark's Extradition of Offenders Law (Act No. 249, 1967) (30 days after committal for extradition). Several of the newer extradition treaties contain similar provisions. Therefore, these steps must be accomplished as quickly as possible.

First, agents must be selected to go to the foreign country, take custody of the fugitive, and return with him/her to the United States. Since the Marshals Service maintains a cadre of officers with special training and experience in international escort duty of this kind, OIA generally arranges for the Enforcement Operations Division of the United States Marshals Service headquarters in Washington to designate the agents. Usually, at least two escort agents are dispatched for each federal or state fugitive to be guarded. In exceptional circumstances the prosecutor handling the case may request that a state or federal law enforcement officer familiar with the case be permitted to assist the Marshals in the transfer.

Once OIA is notified of the names of the escort agents, it arranges for the Department of State to issue a President's Warrant, the special authorization law enforcement officers need to accept custody of the fugitive on behalf of the United States and to convey the fugitive to his/her place of trial. As the name implies, these warrants were formerly issued by the President of the United States in accordance with 18 U.S.C. §3193. Now they are issued by the Secretary of State pursuant to Executive Order 11517. After the warrant has been signed, arrangements are made for its delivery to the escort agents before their departure.

When all the arrangements have been made, OIA should be informed of the agents' travel plans so that this information can be transmitted to

the foreign government and the relevant United States diplomatic or consular post. This notification assures that the agents will receive the assistance and cooperation of United States officials in the requested country upon their arrival. The agents should plan their return trip to be nonstop if at all possible, since a stop in a third country may provide an opportunity for the fugitive to arrange to have counsel or friends there to obtain a local court order for his/her release and necessitate new extradition proceedings. If a stop in a third country is unavoidable, OIA must be notified so that appropriate arrangements can be made with the authorities in that country. Many extradition treaties contain clauses obliging each country to assist the other in the transit of prisoners being extradited from third states. By properly invoking these provisions, many of the problems of transit can be reduced.

If the foregoing has been handled smoothly, someone from the United States embassy or the investigative agency's liaison office in the requested country will meet the escort agents at the airport, see them through customs, and introduce them to the appropriate authorities in the requested country's law enforcement establishment. Custody of a fugitive is usually handed over at the airport just before the escort agents and their prisoner leave for their return to the United States.

Most treaties provide that evidence or fruits of the offense seized in the course of the fugitive's arrest are to be surrendered when extradition is granted. The agents may be asked to accept custody of such articles at the time the extraditee is surrendered. However, frequently the requested country chooses to make other arrangements, particularly if the articles are of significant value.

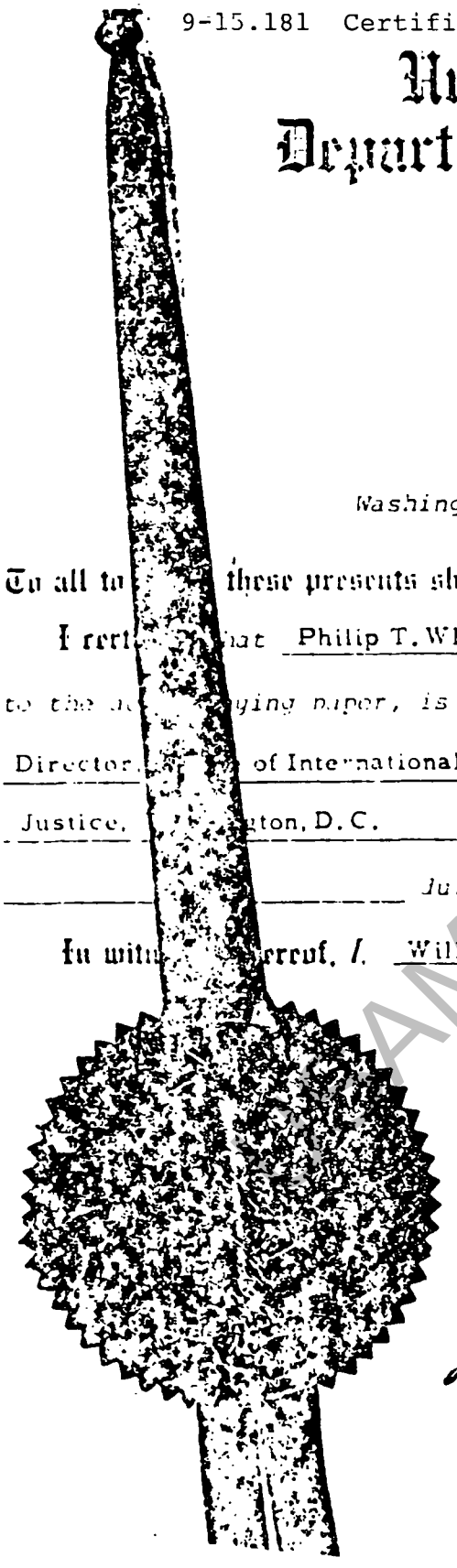
9-15.170 Alternatives to Extradition

If extradition is not possible, there are often alternative courses of action which can help bring the fugitive to justice. For example, OIA sometimes can arrange for the fugitive to be deported from the country of refuge to the United States, or to a third country from which extradition is available. If the fugitive is a citizen of the country of refuge, OIA can sometimes persuade that country to prosecute him/her there on the charges developed in the United States, because many countries have jurisdiction over their nationals' extraterritorial offenses.

9-15.180 Sample Documents

9-15.181 Certification by Attorney General

United States Department of Justice



Washington, D.C., September 23, 19 8

To all to [illegible] these presents shall come, Greeting:

I certify that Philip T. White whose name is subscribed to the annexed [illegible]ying paper, is now, and was at the time of signing the same, Director, Office of International Affairs, Criminal Division, U.S. Department of Justice, Washington, D.C.

[illegible] duly commissioned and qualified.

In witness whereof, I, William French Smith Attorney General of the United States, have hereunto caused the Seal of the Department of Justice to be affixed and my name to be attested by the Deputy Assistant Attorney General for Administration, of the said Department on the day and year first above written.

William French Smith
Attorney General

By [signature]
Deputy Assistant Attorney General for Administration

9-15.182 Certification of Director, Office of International Affairs

C E R T I F I C A T I O N

I certify that attached hereto is the original Affidavit in Support of Request for Extradition, with attachments A through E, prepared by Assistant United States Attorney Hamilton Burger. A true copy of these documents is maintained in the official files of the United States Department of Justice in Washington, D.C.

Philip T. White, Director
Office of International Affairs
Criminal Division
U.S. Department of Justice

9-15.183 Affidavit in Support of Extradition Request

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA

CRIMINAL DIVISION

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A "MAD DOG" NO. CR. 82-3456

Washington)
District of Columbia)

HAMILTON BURGER, being duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of Alexandria, Virginia.

2. I am 31 years old. In June, 1975, I received a Doctor of Law Degree, with Distinction, from Harvard University, and was admitted in that same year to the bar of the Supreme Court of Massachusetts. In September, 1976, I was admitted to the bar of the District of Columbia Court of Appeals. From July, 1976, to July, 1977 I was a law clerk to Judge John Marshall of the District of Columbia Court of Appeals.

3. From July 1977 until the present I have been an Assistant United States Attorney in the District of Columbia. My duties include the prosecution of persons charged with violations of federal and District of Columbia laws. I have personally participated in the preparation and trial of over three hundred cases involving alleged violations of these law. Based upon my training and experience, I am a an expert in the criminal laws and procedures of this District and of the United States.

4. I am currently assigned to the Superior Court Division of the United States Attorney's Office, and I am responsible for the preparation for trial of felony cases. In the course of my duties I have become familiar with the charges and the evidence in the case of United States v. John Smith, Docket Number 82-3456, and with the contents of the files of the Superior Court and of the United States Attorney's Office regarding this matter.

5. On May 15, 1982 John Smith was formally accused by Complaint of murder while armed with a dangerous and deadly weapon, in violation of Sections 22-2401 and 22-3202 of the District of Columbia Code. Based on these charges, Judge Dresden Black signed a warrant for Mr. Smith's arrest that same day.

6. Basically, the Complaint charges that Mr. Smith murdered one Fred Luckless on April 31, 1982. Mr. Smith is accused of shooting Mr. Luckless in the chest with a pistol after an altercation over admission to a house party at Mr. Luckless' home.

7. It is the practice of the Superior Court of the District of Columbia to retain the original Complaint and Warrant of Arrest on file among the records of the Court. Therefore, I have obtained a true and accurate copy of the Complaint and of the Warrant of Arrest from the Clerk of the Court, marked it Exhibit "A", and attached it to this affidavit.

8. I have also attached to this affidavit as Exhibit "B" a true and accurate copy of the text of Sections 22-2401, 22-2404, and 22-3202 of the District of Columbia Code, which are the statutes cited in the Complaint and applicable to this case. I have thoroughly reviewed these

statutes, and attest that each was duly enacted and in force at the time that the offense occurred, at the time that the Complaint was filed, and is currently in full force. A violation of any of these laws is a felony under United States law.

I have also included in Exhibit "B" a true and accurate copy of the text of Title 18, United States Code, Section 3281, which is the statute of limitations on prosecuting the crimes charged in the Complaint. I have thoroughly reviewed this statute, and attest that prosecution of the charges in this case is not barred by the statute of limitations.

9. I have attached to this affidavit a true and accurate copy of the statements of Mr. Charles Bystander (Exhibit C), Metropolitan Police Officer Joseph Friday (Exhibit D), former Assistant Medical Examiner Vinodbhai Patel (Exhibit E), and Mr. Stu L. Pidgeon (Exhibit F). Each of these affidavits was sworn to before a notary public duly and legally authorized to administer an oath for this purpose. I have thoroughly reviewed these statements and the attachments to them, and attest that this evidence indicates that JOHN SMITH is guilty of the offenses charged in the Complaint.

HAMILTON BURGER
Assistant United States Attorney

Sworn to and subscribed before me
this _____ day of _____, 1982.

JUDGE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

9-15.184 Complaint and Warrant of Arrest

USA 1789-84

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

No. _____

COMPLAINT

District of Columbia, ss:

The undersigned being duly sworn on oath deposes and says that on the 31st day of April, A.D. 1982, in the District aforesaid, one John Smith a/k/a/ "Mad Dog" while armed with a dangerous or deadly weapon did then and there unlawfully and feloniously, with purpose, with premeditation and with malice aforethought, kill and murder one Fred B. Luckless.

and 3202
in violation of Title 22 Section 2401 of the District of Columbia Code

Frank Erskine
Affiant's Name

Subscribed and sworn to before me this 15th day of May, A.D. 1982

Deputy Clerk

WARRANT

To *The United States Marshal or any other authorized federal officer or the Chief of Police of the District of Columbia*

WHEREAS the foregoing complaint and affidavit supporting the allegations thereof were submitted, and there appearing probable cause and reasonable grounds for the issuance of its arrest warrant for John Smith a/k/a "Mad Dog"

YOU ARE THEREFORE COMMANDED TO BRING THE DEFENDANT BEFORE SAID COURT OR OTHER PERSON ENUMERATED IN 16 D.C. Code forthwith to answer said charge.

Issued May 15, 1982

SEX: Male
DOB 02-23-63
DCR 366-985
ID
Charge Murder 1 D.C. Code while armed

Date of Arrest on or about
Officer Frank Erskine Homicide Div.
Badge No. 537

Judge
Superior Court of the District of Columbia

OFFICER MUST EXECUTE RETURN
Officer's Name
Title
Date

A TRUE COPY W00060861
TEST:

Clerk, Superior Court of the
District of Columbia
By
Deputy Clerk

(Exhibit A)

9-15.185 Text of Statutes Cited in Affidavit in Support of Extradition Request

Section 22-2401, District of Columbia Code, provides:

> §22-2401. Murder in the first degree -- Purposeful killing -- Killing while perpetrating certain crimes.
>
> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premediated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating, or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapons, is guilty of murder in the first degree.

Section 22-2404, District of Columbia Code, provides:

> §22-2404. Punishment for murder in first and second degrees.
>
> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall impose either a sentence of death by electrocution or life imprisonment.
>
> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.
>
> Whoever is guilty of murder in the second degree shall be imprisoned for life or not less than twenty years.
>
> Cases tried prior to March 22, 1962, and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to March 22, 1962: Provides, That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Act.

In any case tried under this Act as amended where the penalty prescribed by law upon conviction of the defendant is death except in cases otherwise provided, the jury returning a verdict of guilty may by unanimous vote fix the punishment at life imprisonment; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment the court shall sentence the defendant to suffer death by electrocution unless the jury by its verdict indicates that it is unable to agree upon the punishment in which case the court shall sentence the defendant to death or life imprisonment.

Section 22-3202, District of Columbia, states:

§22-3202. Committing crime when armed -- Added punishment.

(a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or limitation thereof) of other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machinegun, rifle, dirk, bowie knife, butcher knife switchblade knife, razor, blackjack, billy, or metallic or other false knuckles) --

(1) may, if he is convicted for the first time of having so commited a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment; and

(2) shall, if he is convicted more than once of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime to a minimum period of imprisonment of not less than five years and a maximum period of imprisonment which may not be less than three times the minimum sentence imposed and which may be up to life imprisonment.

(b) Where the maximum sentence imposed under this section is life imprisonment, the minimum sentence imposed under subsection(a) may not exceed fifteen years' imprisonment.

(c) Any person sentenced under subsection(a)(2) of this section may be released on parole in accordance with chapter 2 of title 24, at any time after having served the minimum sentence imposed under that subsection.

(d) (1) Chapter 402 of title 18 of the United States Code (Federal Youth Corrections Act) shall not apply with respect to any person sentenced under paragraph (2) of subsection(a).

(2) The execution or imposition of any term of imprisonment imposed under paragraph(2) of subsection(a) may not be suspended and probation may not be granted.

(e) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed.

(f) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.

Title 18, United States Code, Section 3281, states:

§ 3281. Capital offenses

An indictment for any offenses punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

9-15.186 Sworn Statement of Witness

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA

CRIMINAL DIVISION

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A "MAD DOG" NO. CR. 82-3456

Washington)
District of Columbia)

CHARLES O. BYSTANDER, being duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of Washington, D.C.

2. On April 31, 1982 I attended a party given by Fred Luckless at his home at 315 Ninth Street N.W., Washington, D.C. The purpose of the party was to raise money to donate to Fred's church, and the admission fee was six dollars. About thirty people were present.

3. At about 10:00 p.m. JOHN SMITH, whose nickname I know to be "MAD DOG," came to the door and asked to be admitted. "MAD DOG" said that he wanted to come in without paying the six dollars, but Fred would not let him. I saw them scuffle briefly, and saw Fred hit "MAD DOG" in the face. Then "MAD DOG" left.

4. At about 11:30 p.m. "MAD DOG" and three other men I do not know came to the door. One of them had a shotgun. They forced their way in, and one held the shotgun aimed at the guests while the others grabbed Fred and dragged him out on the porch. Though the open doorway

(Exhibit C)

I saw the two men hold Fred while "MAD DOG" beat him in the face and chest with his fists. Then "MAD DOG" took a silver colored pistol out of his pocket and held it against Fred's chest. "MAD DOG" said, "This is it buddy, I'll teach you not to say 'no' to a sociopath like me." Then he shot Fred. As Fred fell, the four men ran away.

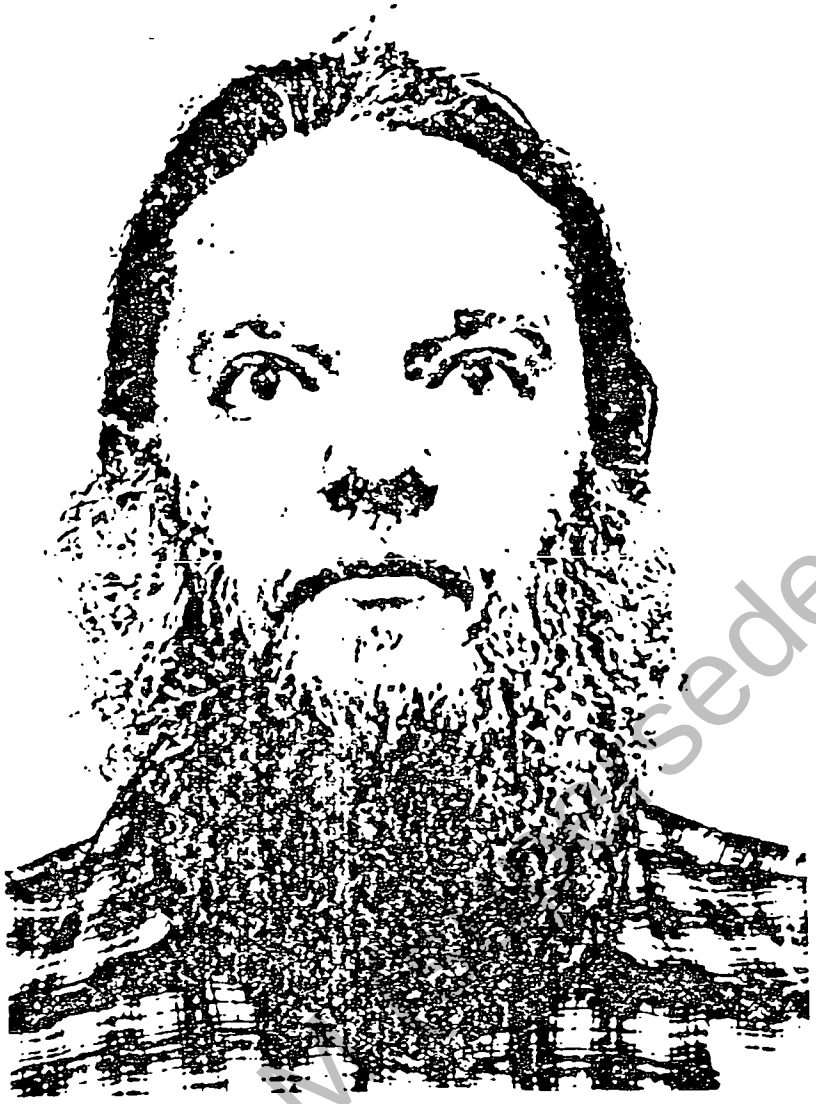
5. I went immediately to Fred's side, but I could see at once that he was dead. I shouted for someone to call the police.

6. I know JOHN SMITH, or "MAD DOG," quite well because he once lived in the same apartment building I live in. I have signed and dated a photograph of him, and attached it to this affidavit.

Charles Bystander
CHARLES BYSTANDER

Sworn to and subscribed before me
this 7th day of June, 1982.

Lowell E. Sachnoff
NOTARY PUBLIC



Charles O Bystedt
6/31/82

9-15.187 Sworn Statement of Police Officer

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA

CRIMINAL DIVISION

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A "MAD DOG"

NO. CR. 82-3456

Washington)
District of Columbia)

JOSEPH FRIDAY, being duly sworn deposes and says that:

1. I am a citizen of the United States and a resident of Washington, D.C. Since January 1972 I have been employed as a police officer with the Metropolitan Police. I hold the rank of Sargent.

2. At about 11:30 p.m. on April 31, 1982 I was on routine patrol in a police car with my partner, fellow officer Frank Erskine, when we received a radio transmission indicating that shots had been fired in the vicinty of Ninth and "D" Streets N.W. We activated our police lights and siren, and proceeded to the scene. As we arrived, I noticed four males running down Ninth Street in the opposite direction, and radioed for other officers to apprehend them.

3. When we arrived, we found the body of Mr. Fred Luckless sprawled on porch, his wife weeping by his side. There was a large gunshot wound in the body's chest area. I immediately checked the body for a pulse, a heartbeat, or other signs of life, but there were none.

(Exhibit D)

4. My partner took statements from the people at the house while I escorted the body to the City Morgue and remained with it during autopsy by Dr. V. Patel.

Joseph Friday
JOSEPH FRIDAY

Sworn to and subscribed before
this 3 day of Jan, 1982.

Lowell E Sanborn
NOTARY PUBLIC

9-15.188 Sworn Statement of Medical Examiner

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA

CRIMINAL DIVISION

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

"MAD DOG"

NO. CR. 82-3456

State of New York)
County of Queens)

Vinodbhai Patel, being duly sworn, deposes and says that:

1. I am a Doctor of Medicine fully licensed to practice in the State of New York and the District of Columbia. From January 1975 to May 3, 1982, I was employed as Associate Medical Examiner in the District of Columbia, and was assigned to the City Morgue. I am now retired, and reside in New York City.

2. On April 31, 1982, pursuant to my official duties, I performed an autopsy on the body of Fred Luckless.

(Exhibit E)

3. As a result of this autopsy I determined that Mr. Luckless died at about 11:30 p.m. that evening. I found that the cause of death was an internal hemorrhage, caused by a gunshot wound in the chest resulting severe in trauma to the heart, lung, diaphragm, liver, and stomach. The gunshot was clearly homicidal in nature. A copy of my autopsy report is attached hereto.

Vinodbhai Patel

Sworn to and subscribed before me
this 3 day of June, 1982.

NOTARY PUBLIC

9-15.189 Sworn Statement of Witness Attaching Transcript of Grand Jury Testimony

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA

CRIMINAL DIVISION

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A "MAD DOG" NO. CR. 82-3456

Washington)
District of Columbia)

STEWART L. PIDGEON, being duly sworn, deposed and says that:

1. I am a citizen of the United States and a resident of Washington D.C.

2. On May 15, 1982 I testified before a grand jury investigating the murder of Fred Luckless. A transcript of the proceedings, which I have signed and marked "Exhibit G-1," is attached to this affidavit. I attest that this transcript accurately reflects my testimony.

3. A photograph of the man I know as "Mad Dog" and refer to as such during my grand jury testimony is signed and marked Exhibit G-2," and attached to this affidavit.

Stewart L. Pidgeon

Sworn to and subscribed before me
this 3rd day of December, 1982.

NOTARY PUBLIC

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

IN RE: POSSIBLE VIOLATION

OF D.C. CODE 22-2401

Grand Jury Room 5
District of Columbia Superior Court
Washington, D.C.

June 15, 1982

The testimony of STEWART L. PIDGEON was taken in the presence of a full quorum of the Grand Jury before:

HAMILTON BURGER, Esquire
Assistant United States Attorney

Whereupon,

STEWART L. PIDGEON was called as a witness, and after being first duly sworn by the Foreman of the Grand Jury, was examined and testified as follows:

By MR. BURGER:

Q: Would you tell the Grand Jury your name, please?

A: Stewart L. Pidgeon.

Q: Mr. Pidgeon, in return for your cooperation in this matter, the Government has promised that you will not be prosecuted for first degree murder; is that correct?

A: Yeah.

Q: Have any other promises been made to you by the Government?

A: No, they have not.

Q: Now, directing your attention to the night of April 31, 1982. Where were you?

A: Look, man, you know all this. At around 11:00 p.m. I was in the Cutthroat Bar and Grill, shooting pool, when Mad Dog comes in, mad as can be.

Q: Wait a minute, who is "Mad Dog?"

A: John Smith.

Q: Where is he now?

A: He got away. I hear he left the country. Anyway "Mad Dog" said some guy embarassed him by not letting him into a party. Said he wanted to teach the guy a lesson. He gave me and "Fingers" Bailey and Rick Thomas twenty-five bucks apiece to help him.

Q: Did he say what he wanted you to do "to help" him.

A: Naw, but I thought I knew: hold the guy so Mad Dog -- he's kinda short -- could work him over.

Q: Did you agree to this proposal?

A: Yeah.

Q: Did you then proceed to the home of Fred Luckless?

A: Yeah.
Q: What happened when you arrived?

A: It started out fine. "Fingers" held a shotgun on the people in the party, so they wouldn't get any smart ideas, and Rick and I held the dude Mad Dog was after by his arms, and Mad Dog whacked him around a couple of times.

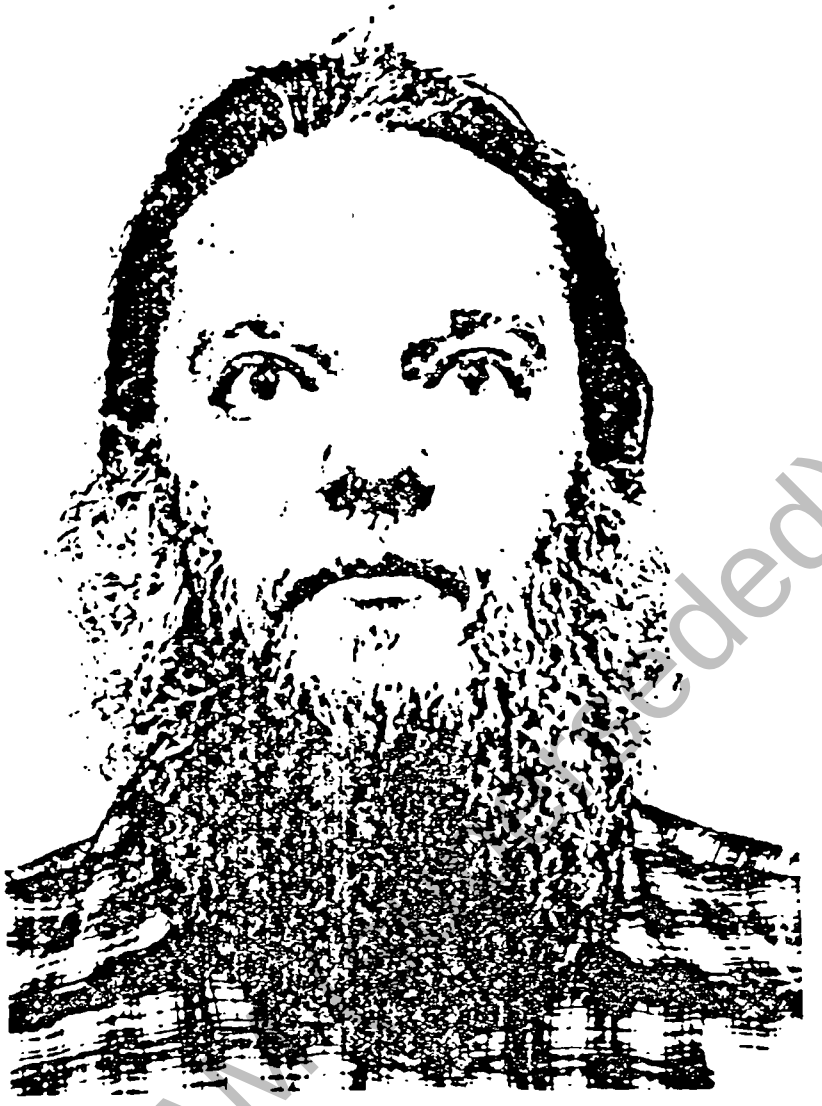
Then Mad Dog pulls out a pistol, says something to the guy, and shoots him. Just like that. I was so surprised I almost died, too.

Q: What happened then?

A: We all ran like hell. The cops picked me up five blocks away, down Ninth Street.

MR. BURGER: I have no further questions. Any questions from the Grand Jury? No? All right, Mr. Pidgeon, thank you very much. You may step outside.

(Witness excused.)



9-15.190 Sample Documents (Continued)

9-15.191 Affidavit in Support of Request for Extradition

J. WILLIAM HUNTER
United States Attorney

HAMILTON BURGER
Assistant United States Attorney

450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-9508

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO. CR-80-0462-SC
	)	
v.,	)	AFFIDAVIT IN SUPPORT OF
	)	REQUEST FOR EXTRADITION
	)	
JOE DOAKS,	)	
	)	
Defendant.	)	

I, HAMILTON BURGER, being duly sworn, depose and states:

1. I am a citizen of the United States, residing in San Francisco, California.

2. I am 31 years old. In June 1973, I received a Doctor of Laws Degree from the University of California, and I was admitted in the same year to the Bar of the State of California. From December 1973, to November 1979, I was employed by the United States Securities and Exchange Commission as an enforcement attorney in San Francisco, California.

3. From November 1979, until the present, I have been employed by the United States Department of Justice as an Assistant United States for the Northern District of California. My duties are to prosecute persons charged with criminal violations of the laws of the United States.

4. During my practice in the Office of the United States Attorney for the Northern District of California, I have become knowledgeable about criminal statutes and case law of the United States, and more particularly in that area of the criminal law relating to violations of

the Federal Counterfeiting Statutes. I also represented the Government in the case of United States v. Joe Doaks, CR-80-1234-SC (N.D. Cal.). Thus, I am familiar with the evidence and charges in the case, and the contents of the files of the United States District Court and of the Office of the United States Attorney regarding this matter.

5. On November 5, 1980, a grand jury formally accused Joe Doaks of violating the criminal laws of the United States. This indictment was replaced by a new or "superceding" indictment on January 7, 1981.

I have obtained true copies of the two indictments from the Clerk of Court, and attached them to this affidavits as Exhibits A and B.

6. The statutes cited in the indictment and applicable to this case are Title 18, United States Code, Sections 471 and 472. Section 471 states:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Section 472 states:

> Whoever, with intent to defraud, passes, utters, publishes or sell, of attempts to pass, utter, publish or sell, or with like intent brings into the counterfeited, or altered obligations or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

A violation of either of these statutes is a felony under United States law. Each of these statutes was the duly enacted law of the United States at the time that the offenses were committed, at the time that the indictment was filed, and is now in full force.

The statute of limitations on prosecuting these offenses is Section 3282 of Title 18, United States Code, which states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Since the applicable statute of limitations is five years, the indictments, which charged criminal violations beginning in July 1980, were filed within the prescribed time.

7. The superseding indictment charged three offenses. Count one charged that Mr. Doaks manufactured counterfeit obligations of the United States (in this case, money) and did so knowingly, willfully, and with the intent to defraud. Specifically, the indictment charged that Mr. Doaks printed counterfeit United States money appearing to be worth approximately $462,444.

Count Two charged that on November 6, 1980, Mr. Doaks knowingly and willfully and with intent to defraud, sold approximately $1,000 of the counterfeit obligations (money) of the United States which he had manufactured to one Roger Able. Roger Able is a Special Agent of the United States Secret Service, the United States government agency responsible for investigating the manufacture and distribution of counterfeit United States money.

Count three charged that on November 7, 1980, the defendant, Joe Doaks, attempted to sell $100,000 of the counterfeit obligations (money) which he had manufactured to Roger Able.

8. I was present in Court on February 2 through 5, 1981, as Mr. Doaks was tried before presiding Judge Samuel Conti and a jury. Mr. Doaks, who had been released from custody on bail, was present and was represented by his attorney, Joyce Davenport. I saw Mr. Doaks present in Court on each day of trial until the afternoon of February 5, 1981, when the jury began its deliberations. On February 9, 1981, the Court found Mr. Doaks guilty on all three charges of the indictment. I have attached a true copy of the jury's verdict form to this affidavit as Exhibit C.

9. Although he was required to appear in Court on February 5, 6 and 9, 1981, Mr. Doaks did not appear in Court those days, and has not returned for sentencing. Under United States law, a defendant who is present at the beginning of the trial but leaves the jurisidiction of the Court after the evidence in the case has been presented to the jury, and thereafter fails to return to court, can be found guilty by the jury without being personally present. However, under United States law the defendant may not be sentenced unless he is personally present. Accordingly, while Mr. Doaks has been convicted of the offenses as charged in the indictment, he has not been sentenced yet.

10. When Mr. Doaks failed to appear on February 9, 1981, United States District Judge Samuel Conti ordered the Clerk of the Court to issue a warrant for Mr. Doak's arrest. I have attached a true copy of this warrant to this affidavit as Exhibit D.

11. Attached as Exhibit E is the original affidavit of Richard Baker, Special Agent of the United States Secret Service. This affidavit is sworn to before a Clerk of the United States District Court, Northern District of California, who is a person duly empowered to administer an oath for this purpose. On November 7, 1980, Agent Baker, together with Agent Roger Able, placed Mr. Doaks under arrest shortly after Mr. Doaks attempted to sell the counterfeit money to Agent Able. Mr. Baker transported Mr. Doaks to the Secret Service offices, where he photographed Mr. Doaks and took his fingerprints. Attached as Exhibit 1 to the affidavit of Richard Baker is the photograph of Joe Doaks. Mr. Doak's fingerprints are attached as Exhibit 2 to Richard Baker's affidavit.

HAMILTON BURGER
Assistant United States Attorney
Northern District of California

SWORN AND SUBSCRIBED TO BEFORE ME
THIS __ DAY OF _____, 1981.

I. STAMPUM, Deputy Clerk
United States District of Court for the
Northern District of California

I, NOAH PEALE, Judge of the United States District Court for the Northern District of California, hereby certify that I, STAMPUM, whose name and signature appears on this affidavit, is and was on the date thereof Deputy Clerk of this Court, duly appointed and sworn, and is authorized to administer an oath for general purposes.
This __ day of _____, 1981.

9-15.192 Exemplification Certificate

A. O. Form 132 (Rev Dec 1954) Exemplification Certificate

United States District Court

for the

NORTHERN DISTRICT OF CALIFORNIA

I, WILLIAM L. WHITTAKER, Clerk of the United States District Court for the Northern District of California, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of CR80-462SC: Indictment, Superseding Indictment, Jury Verdict, Warrant of Arrest

now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at San Francisco Ca, this 2nd day of July 1981.

William L. Whittaker
William L. Whittaker Clerk.

I, WILLIAM T. SWEIGERT, United States District Judge for the Northern District of California, do hereby certify that William L. Whittaker whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation of record thereof, is in due form of law.

7/6, 1981

United States District Judge.
William T. Sweigert

I, WILLIAM L. WHITTAKER, Clerk of the United States District Court for the Northern District of California, and keeper of the seal thereof, hereby certify that the Honorable WILLIAM T. SWEIGERT whose name is within written and subscribed, was on the 6th day of July 1981, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of San Francisco, in said State, on this 6th day of July 1981.

William L. Whittaker Clerk.

(Exhibit A)

9-15.193 Indictment

FILED
JAN 7 4 05 PM '81
WILLIAM L. WHITTAKER
U.S. DISTRICT COURT
NO. DIST. OF CALIF.

COURTROOM 10

G. WILLIAM HUNTER
United States Attorney

Attorney for Plaintiff

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office
ATTEST
WILLIAM L. WHITTAKER
Clerk, U.S. District Court
Northern District of California
By: G. Gilette
Deputy Clerk
Dated: 6-29-81

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOE DOAKS, Defendant.	CR. NO: 80-0462-SC VIOLATIONS: Title 18, United States Code, Section 471 - Manufacturing Federal Reserve Notes; Title 18, United States Code, Section 472 - Selling Counterfeit Federal Reserve Notes

S U P E R S E D I N G I N D I C T M E N T

COUNT ONE: (Title 18, United States Code, Section 471)

The Grand Jury charges: T H A T

Between on or about July 1, 1980, and on or about November 7, 1980, in the City of Daly City, County of San Mateo, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, falsely make, forge, alter and counterfeit obligations of the United States. These obligations consisted of approximately $483,344 in counterfeited Federal Reserve Notes of the following [illegible] and serial [illegible], in the following amounts:

DENOMINATION	SERIES NO.	NUMBER OF NOTES	VALUE
1. $100	B-71348093-[illegible]	1293	$129,300
2. $100	[illegible]	2059	$205,900
3. $50	B-[illegible]	913	$ 45,650
4. $20	B-[illegible]	906	$ 18,120

EXHIBIT 4

	DENOMINATION	SERIAL NO.	NUMBER OF NOTES	VALUE
5.	$20	L-06167151-B	780	$ 15,600
6.	$20	L-82837057-D	1,149	$ 22,980
7.	$20	F-41836049-A	9	$ 180
8.	$10	C-86950644-B	133	$ 1,330
9.	$10	L-27669675-A	1,211	$ 12,110
10.	$10	L-49182452-A	525	$ 5,250
11.	$5	L-53937360-B	134	$ 670
12.	$5	L-18136473-A	1,205	$ 6,025
13.	$1	L-96630303-F	529	$ 529

COUNT TWO: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 6, 1980, in the City and County of San Francisco, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, keep in his possession, pass, utter, publish and sell to Roger Able approximately one thousand dollars ($1,000) in counterfeited obligations of the United States. These counterfeited obligations consisted of nine counterfeited $100 Federal Reserve Notes, Serial Number B-71348093-A, and five counterfeited $20 Federal Reserve Notes, Serial Number F-42842804-A.

COUNT THREE: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 7, 1980, in the City and County of San Francisco, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, keep in his possession, conceal, and attempt to pass, utter, publish and sell, and did pass, utter, publish and sell to Roger Able approximately $124,740 in counterfeited

obligations of the United States. These counterfeited obligations consisted of approximately 1,239 counterfeited $100 Federal Reserve Notes, Serial No. B-71348093-A; approximately 127 counterfeited $20 Federal Reserve Notes, Serial Number F-42842804-A; approximately 20 counterfeited $10 Federal Reserve Notes, Serial Number G-86950644-B; and approximately 20 counterfeited $5 Federal Reserve Notes, Serial Number L-53937360-B.

A True Bill.

FOREMAN

G. WILLIAM HUNTER
United States Attorney

Approved as to Form
DAI/AUSA

G. WILLIAM HUNTER
United States Attorney

Attorney for Plaintiff

FILED
NOV 25

COURTRAN

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office
ATTEST:
WILLIAM L. WHITTAKER
Clerk, U.S. District Court
Northern District of California
By _____ Deputy Clerk
Dated 6-29-81

COURTRAN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOE DOAKS, Defendant.	CR. [illegible] SO VIOLATIONS: Title 18, United States Code, Section 471 - Manufacturing Federal Reserve Notes; Title 18, United States Code, Section 472 - Selling Counterfeit Federal Reserve Notes

I N D I C T M E N T

COUNT ONE: (Title 18, United States Code, Section 471)

The Grand Jury charges: T H A T

Between on or about July 1, 1980, and on or about November 6, 1980, in the City of Daly City, County of San Mateo, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, falsely make and counterfeit obligations of the United States. These obligations consisted of approximately $462,744 in counterfeited Federal Reserve Notes of the following denominations and serial numbers, in the following amounts:

	DENOMINATION	SERIAL NO.	NUMBER OF NOTES	VALUE
1.	$100	B-71343093-A	1293	$129,300
2.	$100	L-07028917-A	2058	$205,800
3.	$50	D-55557474	913	$ 45,650
4.	$20	F-42042304-A	906	$ 18,120

EXHIBIT 8B

	DENOMINATION	SERIAL NO.	NUMBER OF NOTES	VALUE
5.	$20	L-06487151-B	780	$ 15,600
6.	$20	L-82837057-D	1,149	$ 22,980
7.	$20	F-41836049-A	9	$ 180
8.	$10	G-86950644-B	133	$ 1,330
9.	$10	L-27669675-A	1,121	$ 11,210
10.	$10	L-48182452-A	525	$ 5,250
11.	$5	L-53937360-B	134	$ 670
12.	$5	L-18136473-A	1,205	$ 6,025
13.	$1	L-96630363-F	529	$ 529

COUNT TWO: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 6, 1980, in the City and County of San Francisco, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, sell to Roger Able approximately one thousand dollars ($1,000) in counterfeited obligations of the United States. These counterfeited obligations consisted of nine counterfeited $100 Federal Reserve Notes, Serial Number B-71348093-A, and five counterfeited $20 Federal Reserve Notes, Serial Number F-42842804-A.

COUNT THREE: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 7, 1980, in the City and County of San Francisco, State and Northern District of California,

JOE DOAKS,

defendant herein, did knowingly, willfully, and with intent to defraud, sell to Roger Able approximately $126,740 in counterfeited obligations of the United States. These counterfeited obligations consisted of approximately 1,230 counterfeited $100 Federal Reserve Notes, Serial No. B-71348093-A;

approximately 127 counterfeited $20 Federal Reserve Notes, Serial Number F-42842804-A; approximately 39 counterfeited $10 Federal Reserve Notes, Serial Number G-86950644-B; and approximately 20 counterfeited $5 Federal Reserve Notes, Serial Number L-53937360-B.

A True Bill.

FOREMAN

G. WILLIAM HUNTER
United States Attorney

(Approved as to Form _____)
AUSA/DA

9-15.194 Jury Verdict

FILED

FEB 3 10 56 AM '81

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

39

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. Crim. 80-0462-SC

JOE DOARS,

Defendant

JURY VERDICT

WE, THE JURY, find the defendant at the bar, GUILTY of Count One (1) of the indictment.

WE, THE JURY, find the defendant at the bar, GUILTY of Count Two(2) of the indictment.

WE, THE JURY, find the defendant at the bar, GUILTY of Count Three (3) of the indictment.

Joseph Mickelson
Foreperson

Dated February 9, 1981

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office

ATTEST
Clerk, U.S. District Court
Northern District of California
By _____ Deputy Clerk
Date 6-29-81

EXHIBIT # C

9-15.195 Warrant of Arrest

WARRANT OF ARREST

UNITED STATES DISTRICT COURT

INSTRUCTIONS: Type or legibly print. Forward copies No. 1 through No. 3 intact to the U.S. Marshal or other authorized officer; retain No. 4 copy. If applicable, use No. 4 copy to withdraw warrant. After completion of return, U.S. Marshal will distribute copies No. 1 through No. 3 as appropriate.

NAME OF PERSON TO BE ARRESTED	DISTRICT OF ISSUE (Include City and State)	MAGISTRATE'S/CLERK'S DOCKET NO.
JOE DOAKS	NORTHERN DISTRICT OF CALIFORNIA	CR-90-0462-SC

REASON FOR WARRANT

☐ Complaint	☐ Indictment	☐ Information	☐ Probation Violation	☒ OTHER (Specify)

TITLE	SECTION	BRIEF DESCRIPTION OF CHARGES	BAIL (If applicable)
18	7193	Defendant was NOT present at time of the return of jury verdict. re: FAILURE TO APPEAR	Ordered that bail be revoked. No bail set.

DATE OF ISSUE	TITLE OF ISSUING OFFICIAL	SIGNATURE OF ISSUING OFFICIAL
2/9/91	Deputy Clerk	Mary G. Austin

To: ANY U.S. MARSHAL OR ANY OTHER AUTHORIZED OFFICER

☐ You are hereby commanded to arrest the above named person and bring this individual forthwith before the nearest available United States Magistrate or District Court Judge to answer the above stated charge(s) in the complaint.

☐ You are hereby commanded to arrest the above named person and bring this individual forthwith before the nearest United States District Court or *(if applicable)* before the nearest United States Magistrate in the arresting district to answer the above stated charge(s) in the indictment or information.

☐ You are hereby commanded to arrest the above named person and bring this individual forthwith before the United States District Court or *(if applicable)* before the United States Magistrate in the issuing district at the location shown above to answer to charges of violation of conditions of probation imposed by the United States District Court.

THE U.S. MARSHAL IN THE DISTRICT OF ARREST IS HEREBY FURTHER AUTHORIZED AND COMMANDED TO TAKE CUSTODY OF THE ABOVE NAMED PERSON. IF AFTER BRINGING THE PERSON BEFORE ANY APPLICABLE JUDICIAL OFFICER IN THE MANNER INDICATED ABOVE, THE INDIVIDUAL FAILS TO FURNISH BAIL FOR APPEARANCE PER ORDERS AND DIRECTIONS OF SUCH JUDICIAL OFFICER, THE U.S. MARSHAL IS AUTHORIZED AND COMMANDED TO KEEP SAFELY THIS INDIVIDUAL UNTIL DISCHARGED IN DUE COURSE OF LAW.

You are hereby commanded to withdraw this warrant and return it immediately to the issuing official with this No. 4 copy.

DATE	SIGNATURE OF ISSUING OFFICIAL	DATE WITHDRAWN	SIGNATURE OF U.S. MARSHAL

☐ TO U.S. ATTORNEY: ADVICE ON WITHDRAWAL OF WARRANT

NA Form 9 NORTHERN DISTRICT OF CALIFORNIA

4. ISSUING OFFICIAL

I hereby certify that the foregoing instrument is a true and correct copy of the original on file in my office.
ATTEST:
RICHARD W. WIEKING,
Clerk, U.S. District Court
By: _____
Deputy Clerk
Date: 6-22-94

EXHIBIT D

USAM (superseded)

9-15.196 Sworn Statement of Secret Service Agent

J. WILLIAM HUNTER
United States Attorney

HAMILTON BURGER
Assistant United States Attorney

450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-9508

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOE DOAKS, Defendant.	NO. CR-80-0462-SC AFFIDAVIT OF SPECIAL AGENT RICHARD BAKER IN SUPPORT OF REQUEST FOR EXTRADITION

I, RICHARD BAKER, being duly sworn, depose and states:

1. I am a citizen of the United States, residing in San Francisco, California.

2. I am a Special Agent with the United States Secret Service. I have been employed by the Secret Service for eleven (11) years. The Secret Service is the United States government agency responsible for protecting the President of the United States of America and other elected officials. In addition, the Secret Service is responsible for enforcement of the laws of the United States relating to the manufacture and distribution of counterfeit United States currency.

2. My duties included assisting Special Agent Roger Able in the investigation of Joe Doaks, suspected of counterfeiting U.S. Currency. On November 6, 1980 I placed on Agent Able a remote monitoring device. I then observed from a distance as Agent Able met with Mr. Doaks (who believed that Agent Able was a prospective purchaser of counterfeit money) and listened at my receiver as they talked. I heard Mr. Doaks brag that he had printed up "nearly half a million dollars" in counterfeit money, which he claimed "is so perfect even Secret Service would be fooled." He then offered to sell Agent Able a sample of the counterfeit money. I then saw him give Agent Able counterfeit bills apparently worth one thousand dollars in return for one hundred dollars

in genuine currency.

3. On November 8, 1980, I again outfitted Agent Able with a listening device, and listened and observed from a distance as he met with Mr. Doaks. I heard Mr. Doaks agree to sell Agent Able more counterfeit money, and saw him open a suitcase containing the counterfeit bills. Mr. Doaks then gave Agent Able counterfeit bills apparently worth $126,740 in return for one thousand dollars in genuine currency.

4. Agent Able and I then placed Mr. Doaks under arrest, and confiscated the suitcase. I then transported Mr. Doaks to the Secret Service Office, where I photographed him and took his fingerprints. Attached as Exhibit 1 to this affidavit is the photograph I took of Mr. Doaks after I placed him under arrest on November 7, 1980. Attached as Exhibit 2 to this affidavit is the fingerprint card on which I took the fingerprints of Mr. Doaks upon his arrest on November 7, 1980.

DATED: June 31, 1981

ROGER BAKER, Special Agent
United States Secret Service

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 31 DAY
OF June, 1981

WILLIAM L. WHITTAKER
Clerk, U.S. District Court
Northern District of California

(Exhibit 1)

DETAILED TABLE OF CONTENTS FOR CHAPTER 16

9-16.000 PLEAS - RULE 11 - FED. R. CRIM. P.

A defendent 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 Rule of Criminal Procedure 11(c) and (d). See Boykin v. Alabama, 395 U.S. 238 (1969).

9-16.010 Cases on Pleas

Particularly noteworthy on the subject of pleas are the three cases of North Carolina v. Alford, 400 U.S. 25; United States v. Gray, 438 F. 2d 1160 (9th Cir. 1971); and United States v. (1970) 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/she 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.

9-16.100 ACCEPTING THE PLEA

9-16.110 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 of, and determine that he 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 proceding 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.

9-16.120 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.

9-16.130 Youth Correction Act

United States Attorneys are also urged to be aware, that the defendant be fully advised of the maximum sentence that he/she may receive under the Youth Correction Act, 18 U.S.C. §5005, et. seq., before the defendant makes a guilty plea under such Act. Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963).

9-16.200 PLEA AGREEMENTS

9-16.210 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. 93-247, 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)-(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. However, 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 co-operate with the prosecution in another case or in another investigation. H.R. REP. No. 93-247, 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. 93247, 94th Cong., 1st Sess. 6 (1975).

After the plea agreement has been disclosed, the court may either accept or reject the plea agreement. 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, the Rule requires that the court, in appropriate cases, explain to the defendant the effect of any special parole term. In this regard, the Advisory Committee Note cites with approval the following procedure as recommended in Moore v. United States, 592 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 advise 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 consequence of sentencing be communicated to the defendant. See Bunker v. Wise, 550 F.2d 1155 (8th Cir. 1977).

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 counsel to be advised of the special parole provisions in the course of plea negotiations.

Rule 11(e), Federal Rules of Criminal Procedure, contains an ambiguity that could prove troublesome with respect to plea agreements pursuant to subparagraph (e)(1)(B) in which the prosecutor agrees to "make a recommendation, or ... 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." Under paragraph (e)(3), if the court "accepts" a plea agreement, it must "embody in the judgment and sentence the disposition provided for in the plea agreement." Under paragraph (e)(4), if the court rejects a plea agreement, it must afford the defendant the opportunity to withdraw the plea and advise him/her that if he/she persists in the plea, "the disposition of the case may be less favorable to [him/her] than that contemplated by the plea agreement."

It may be thought that, since a plea agreement under subparagraph 11 (e)(1)(B) involves merely a recommendation by the prosecutor, there is not the "disposition provided for" in the agreement within the meaning of paragraph (e)(3) 11, so that a court could "accept" the agreement and still impose a greater than recommended sentence, without affording the defendant the opportunity to withdraw his/her plea under paragraph (e)(4) 11.

Although such a scheme would be sensible and was espoused by the Department before Congress, the structure of the rule as enacted, and its legislative history, seem to support the contrary view that an acceptance

of a Rule 11(e)(1)(B) agreement obligates the court to impose a sentence no more severe than that recommended or not opposed by the government. See Statement of Representatives of the Judicial Conference of the United States before the Subcommittee on Criminal Justice, House Committee on the Judiciary, March 26, 1975, with respect to the provisions of FED. R. CRIM. P. 11 (e) as submitted to Congress (reprinted in hearings of the subcommittee, at 211); and see H. Conf. REP. No. 94-414, 94th Cong., 1st Sess. characterizing the addition of the phrase in FED. R. CRIM. P. 11 (e)(1)(B) beginning with the words "with the understanding that" as a "nonsubstantive change."

Since many district judges may labor under the impression that they may accept a FED. R. CRIM. P. 11 (b) agreement and yet impose a more onerous sentence upon the defendant than that recommended by the government, without affording the defendant an opportunity to withdraw his/her plea, it is important that prosecutors be aware and, where deemed necessary, advise judges that a subsequent imposition of a greater sentence may lead to a reversal of the conviction and a remand with instruction to permit the defendant the opportunity to replead. Cf. United States v. Hammerman, 528 F.2d 320 (4th Cir. 1975); United States ex. rel. Culbreath v. Rundle, 466 F.2d 730, 735 (3rd Cir. 1975).

The court may be informed that, if it wished to reserve the option of imposing a more severe sentence, the safer course is to follow the procedures of Rule 11(e)(4) in the first instance. The court should "reject" the plea agreement, advise the defendant that if he/she persists in the plea the sentence may be more severe than that recommended, and afford the defendant the opportunity to then withdraw his/her plea. Alternatively, the court may seek a waiver from the defendant of his/her right under Rule 11(e)(4) to object to a greater sentence. In order to be able to later demonstrate an intelligent and voluntary waiver the defendant should be warned of his/her right to withdraw the plea and his/her written or oral waiver thereof should be made to appear on the record.

It should be noted that FED. R. CRIM. P. 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 successul 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. 93-247, 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 of at some other time, prior to trial, as may be fixed by the court. FED. R. CRIM. P. 11(e)(5). Even though the court accepts a guilty plea, it is prohibited under FED. R. CRIM. P. 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. Rafael 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 of nolo contendere, the record must include, without any limitations, the following: the court's advise 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. FED. R. CRIM. P. 11(g).

9-16.220 Plea of Nolo Contendere - Consent To

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 Office of the Attorney General.

9-16.230 Approval Required for Certain Agreements

U.S. Attorneys should also be cognizant of the sensitive area where plea agreements involve either extradition or deportation. No U.S. Attorney or Assistant has the authority to negotiate regarding an

extradition or deportation other 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 Assistants, 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 or piracy. Consequently, authorization from the Criminal Division must be obtained by the U. S. Attorney before he enters into any agreement to forego an air piracy prosecution in return for a guilty plea to a lesser offense, or decides to otherwise not to fully prosecute an act of air piracy.

9-16.240 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 provided.

9-16.241 Plea Bargains in Fraud Cases

Whenever 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 9-16.240.

9-16.250 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).

The Court's Separation of Powers concern focused on a non-specific fear that a hypothetical future federal prosecutor might maliciously abuse his prosecutorial powers to harass Congressmen into resigning, thereby subverting the sovereign independence of the legislative branch. This same basic argument has been unsuccessfully advanced on numerous prior occations in support of the proposition that the Separation of Powers Doctrine limits the latitude of federal prosecutors to initiate criminal prosecutions of federal judges and members of Congress. In these instances, the federal courts have consistently and firmly rejected the notion that the Separation of Powers Doctrine protects Congressmen and federal judges against hypothetical prosecutorial overreaching. See e.f. United States, 202 U.S. 344 (1906); United States v. Hastings, 681 F. 2d 706 (11th Cir. 1982); United States v. Myers, 635 F. 2d 932 (2d Cir. 1980); Diggs v. United States, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 466 U.S. 982 (1980). As a practical matter, the power to initiate a criminal charge is more susceptible to abuse than the power to settle a charge already brought. Thus, it follows that if the Separation of Powers Doctrine does not limit the initiation of criminal charges, it also does not limit the disposition of them.

Powell v. McCormack, supra, involved a refusal by the Congress to seat a properly qualified member-elect who had tendered the requisite proof of his/her election and who desired to be seated. The Supreme Court held that the qualifications for Congressmen listed in the Constitution were exclusive, that the Congress lacked the constitutional authority to add to them, and that it was therefore obliged to seat a member-elect who produced sufficient evidence of his/her election. The McCormack Court did not imply that either the exclusive nature of the list of Congressional qualifications contained in the Constitution, or a Member of Congress' duty to his/her constituents, limit his/her freedom to voluntarily tender his/her resignation for personal reasons attending the settlement of personal criminal liability.

Finally, the Richmond case did not address the propriety of

negotiating the resignation of defendants who are not Members of Congress of federal judges. In that regard, the controlling authority is United States v. Tonry, 605 F. 2d 144 (5th Cir. 1979), which upheld against a federalism argument the propriety of resignation and non-candidacy conditions involuntarily imposed on a convicted federal defendant by the sentencing judge pursuant to the Federal Probation Act.

Although the Criminal Division considers the Richmond decision to have been incorrectly decided on its merits, the unusual procedural and factural 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 defendants 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, supra.

C. Resignation and non-candidacy with respect to Congressional or federal judicial office may be properly made the subject or 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 Members of Congress involved. Powell v. McCormack, supra.

5. 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: 724-6983.

9-16.300 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 of 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 Federal Rules of Evidence.

DETAILED TABLE OF CONTENTS FOR CHAPTER 17

9-17.000 SPEEDY TRIAL ACT OF 1974, AS AMENDED

The Speedy Trial Act of 1974, Pub. L. No. 93-619, as amended on August 2, 1979, by the Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, has two titles:

Title I, entitled "Speedy Trial," contains 18 U.S.C. §§3161-3174. It sets forth time limitations within which criminal proceedings must be commenced. It is applicable to all criminal proceedings except prosecutions of petty and military offenses (18 U.S.C. §3172(b)). See United States v. Baker, 641 F.2d 1311, 1319 (9th Cir. 1981). It is inapplicable to juvenile delinquency proceedings, which have their own speedy trial provision. See USAM 9-8.000.

Title II, entitled "Pretrial Agencies," contains 18 U.S.C. §§3152-3156. These sections mandate the creation of pilot agencies in ten judicial districts to supervise persons released pending trial on criminal charges. See USAM 9-17.300, infra.

9-17.010 Interpreting the Act

The case law may be found in West's Federal Practice Digest 2d, Criminal Law, at Key Numbers 577.1-577.16, and we hope at the same Key Numbers in its new Digest 3d.

The Federal Judicial Center has prepared a one volume legislative history of the Act that has been distributed to all U.S. Attorneys' offices. See Partridge, A., Legislative History of Title I of the Speedy Trial Act of 1974 (Federal Judicial Center 1980). Among the Congressional reports incorporated in the one volume legislative history are: S. Rep. No. 1021, 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 1508, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & 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. & Ad. News 805. Bear in mind that the legislation actually enacted is not always precisely the same as the bills discussed in the committee reports.

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 Second Circuit Guidelines have been strongly approved by Congress. See S. Rep. No. 212, 96th Cong., 1st Sess. 20 (1979).

9-17.100 TITLE I - SPEEDY TRIAL

9-17.101 Calendaring

18 U.S.C. §3161(a) requires the appropriate "judicial officer" (defined by 18 U.S.C. §3172(a) to include judges and magistrates) as soon as possible to "set the case for trial on a day certain" or place it on "a weekly or other short-term trial calendar," after consulting with defense and government counsel. The government and the district court share the responsibility for speedy trial enforcement and the government is obligated to call the court's attention to defense delays. See United States v. Turner, 725 F.2d 1154 (8th Cir. 1984), United States v. Piteo, 726 F.2d 50 (2d Cir. 1983); United States v. Perez-Reveles, 715 F.2d 1348, 1353 (9th Cir. 1983). The Fourth Circuit has held the Speedy Trial Act constitutional, rejecting an argument that the Act usurps a trial judge's scheduling authority in violation of Article III. United States v. Brainer, 691 F.2d 691 (4th Cir. 1982).

9-17.102 Securing the Presence of the Defendant

After a decision has been made to charge an individual with an offense a variety of procedures are available to secure that person's presence before the court, including one that may trigger the application of the Interstate Agreement on Detainers Act, 18 U.S.C. app. Both this Act and the Speedy Trial Act may affect the choice of the procedure to be used. The principal circumstances in which a defendant may be found and the applicable procedures are:

A. Defendant located within district.

1. Defendant at large. The presence of a defendant located physically within the district may be secured by: arrest on a complaint (see USAM 9-17.121, infra); service of a summons on a complaint (see USAM 9-17.122, infra); or, for cases initiated by the filing of an indictment or information, provision of notice pursuant to local practice, service of summons, or execution of a warrant. (See Fed. R. Crim. P. 9). For cases initiated by pre-indictment arrest or summons, the 30-day arrest to indictment clock is triggered by the arrest or the service of the summons. For cases initiated by indictment or information, the 70-day post-indictment clock is triggered by the defendant's first appearance before a judicial

officer in the district on the case. See USAM 9-17.130, infra. Note that where a defendant is arrested on an indictment warrant, the 70-day clock is triggered by any appearance before a judicial officer in the district, including an appearance before a magistrate for bail purposes.

2. Defendant in state custody.

a. Serving term of imprisonment. The Speedy Trial Act requires that where the attorney for the government knows that a defendant charged with an offense is serving a term of imprisonment, the attorney must promptly seek to obtain the presence of the defendant (see 18 U.S.C. §3161(j)(1) and USAM 9-17.160, infra). The presence of such a defendant in state custody serving a term of imprisonment may be secured by the use of either a detainer under the Interstate Agreement on Detainers Act, 18 U.S.C. app. (See USAM 9-2.145 and Speedy Trial Act, 18 U.S.C. §3161(j)) and a writ of habeas corpus ad prosequendum, or only a writ of habeas corpus ad prosequendum. A detainer serves to prevent that defendant's release by the state authorities. Relinquishment of the custody of the defendant is obtained by a subsequent written request from your court, ordinarily a writ of habeas corpus ad prosequendum.

However, note that the filing of a detainer automatically invokes the Interstate Agreement on Detainers Act. See United States v. Odam, 674 F.2d 228 (4th Cir. 1982). Under Article III of the Speedy Trial Act, a defendant has a right to demand trial within 180 days and to have disposed all federal charges in the district for which detainers have been lodged, and possibly, the federal charges for which detainers have been lodged in all districts (see USAM 9-2.145). Under the Speedy Trial Act, Article IV, if the prosecutor secures the presence of the prisoner, the trial must commence within 120 days unless good cause is shown for a continuance. In light of the requirements imposed by the Interstate Agreement on Detainers Act, it may be preferable to use only a habeas corpus writ. By itself such a writ does not invoke the Interstate Agreement. See United States v. Mauro, 436 U.S. 340 (1978). In all of the foregoing circumstances it is advisable to consult with the United States Marshal, who ordinarily will be responsible for any service on state authorities and for transporting the defendant.

b. In pre-trial custody. The Interstate Agreement on Detainers Act does not apply to defendants in pre-trial incarceration. See United States v. Reed, 620 F.2d 709, 711 (9th Cir. 1980). Consequently, the formal procedures by which the

appearance of a defendant in pre-trial state custody may be obtained are use of a writ of habeas corpus ad prosequendum or service of a summons or arrest warrant upon release from custody. Such a writ may not be issued, however, until the state proceedings are completed unless it can be shown that the defendant's absence will not unduly impede the state proceeding. The Supreme Court has stated that "in some circumstances considerations of comity and concerns for the orderly administration of justice requires a federal court to forgo the exercise of its habeas corpus power." Francis v. Henderson, 425 U.S. 536, 539 (1976). The best course of action usually is to await the completion of state proceedings before serving a defendant with federal charges.

To avoid inadvertent release of a defendant in state pre-trial custody against whom federal charges are pending, a detainer may be filed with the state custodial authorities. Such a detainer does not come under the Interstate Agreement on Detainers Act. Rather, it is a recognized but informal procedure, not founded on a specific statute, by which federal authorities request to be notified by state authorities before a defendant is released. See Ridgeway v. United States, 558 F.2d 357, 360 (6th Cir. 1977). State authorities generally honor these detainers.

Where federal charges have been served (through arrest, summons, or arraignment) on a defendant who is in state custody at the time of such service or who is placed in state custody subsequent to such service, the Speedy Trial Act clock will be running. In such cases, an exclusion for the period of state custody should be sought under either Speedy Trial Act 18 U.S.C. §3161(h)(1)(d) (delay resulting from trial on other charges) or 18 U.S.C. §3161(h)(3) (defendant unavailable). See United States v. Garrett, 720 F.2d 705, 707-708 (D.C. Cir. 1983). The trial on other charges provision has been interpreted to cover the entire pre-trial and trial period in another jurisdiction. See United States v. Lopez-Espindola, 632 F.2d 107 (9th Cir. 1980); United States v. Goodwin, 612 F.2d 1103 (8th Cir. 1980); and United States v. Allsup, 587 F.2d 31 (9th Cir. 1978). The Judicial Conference Guidelines, at 30-31, advise that only days actually on trial should be excluded, but this position has not been adopted in the reported decisions.

Under the unavailability of the defendant provision the government has the burden of proof (see 18 U.S.C. §3162(a)(2)). Consequently, a showing

must be made to the court that a duly diligent effort was made to secure the defendant's presence. See Lopez-Espindola, supra, at 920, and United States v. Morales, 460 F. Supp. 668 (E.D.N.Y. 1978). It may be advisable to raise with the court, at the time the defendant becomes unavailable, whether the court would issue a writ of habeas corpus ad prosequendum, even though it would disrupt the state proceeding. Unless the possibility is actively explored with the court, the government may have difficulty establishing that the due diligence requirement has been met.

If 18 U.S.C. §3161(h)(3) or (h)(1)(D) exclusions are not available or not allowed, the federal charges can be dismissed until disposition of the state charges.

B. Defendant located outside of district.

1. Defendant at large. A defendant at large outside of the district may be arrested on a warrant, may be served with a summons, or may be provided notice pursuant to local practice. See USAM 9-17.102 A.1., above, for a description of when the Speedy Trial Act clock begins to run in these circumstances.

2. Defendant in state custody. See USAM 9-17.102 A.2., above, with regard to defendant in state custody within district.

C. Defendant in federal custody. The presence in court of a defendant in a federal prison should be obtained by the use of a writ of habeas corpus ad prosequendum, served by the United States Marshals Service. (See also, USAM 9-17.160, infra.) The presence of a defendant in federal pre-trial custody in another district should be arranged through consultation with the U.S. Attorney for the other district and the United States Marshal.

D. Defendant in foreign country. The presence of a defendant located in a foreign country may be obtained by the invocation of extradition treaties or by other diplomatic means such as expulsion. The implementation of these procedures is the responsibility of the Office of International Affairs of the Criminal Division. Once a defendant is ready to be returned, transportation ordinarily is managed by the United States Marshals Service.

9-17.110 Time Limits

9-17.120 The 30-Day Pre-Indictment Interval

18 U.S.C. §3161(b) provides that if a defendant has been arrested or served with a summons in connection with criminal charges, an indictment or

information must be filed within 30 days of the arrest or service of summons. Superseding indictments need not be filed within 30 days of arrest. See United States v. Rabb, 680 F.2d 294, 296-297 (3d Cir. 1982); United States v. Wilks, 629 F.2d 669 (10th Cir. 1980); United States v. Mitchell, 723 F.2d 1040 (1st Cir. 1983).

For purposes of the Speedy Trial Act, an arrest must include the filing of a complaint against the defendant. If an individual is taken into custody, but then released without charging, the 30-day period does not begin to run. See United States v. Peterson, 698 F.2d 921, 923 (8th Cir. 1982). Note, however, that if a complaint is filed the next day, the time limits of the Act begin to run on the day of arrest. The Speedy Trial Act does not cover delay that occurs prior to indictment in a non-arrest case. Any defense based on pre-indictment delay in a non-arrest situation still must be based on the Fifth Amendment. See United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1977).

The Speedy Trial Act does not apply to the period between the dismissl of a complaint (provided the 30-day first interval has not been exceeded) and the subsequent return of an indictment against the same individual for the same offense. See United States v. Krynicki, 689 F.2d 289 (1st Cir. 1982); United States v. Alfarano, 706 F.2d 739, 741 (6th Cir. 1983). However, in some districts judges have expressed disapproval of the use of dismissal and subsequent indictment as a means of avoiding the 30 day first interval time limit. The practice is seen as not being consistent with the spirit of the Speedy Trial Act. It is Departmental policy to comply with the intentions of the Speedy Trial Act as fully as possible. For this reason, and to avoid possible conflict with judges, it is advisable to invoke exclusions when possible where additional time is needed during the first interval. See United States v. Mitchell, supra; United States v. Garrett, 720 F.2d 705, 707-711 (D.C. Cir. 1983). The dismissal-indictment procedure should be employed only where other recourse is not reasonably available.

The excludable time provisions apply to the arrest to indictment interval. See 18 U.S.C. §3161(h). It is important to note that under the "ends of justice" provision 18 U.S.C. §3161(h)(8)(B)(iii), excludable time can extend the 30-day limit if, because of the timing of arrest or because the facts of the case are unusual or complex, it is unreasonable to expect the grand jury to return an indictment within 30 days. See S. Rep. No. 212, 96th Cong., 1st Sess. 23 (1979); see USAM 9-17.159, infra; United States v. McGrath, 613 F.2d 361 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980) (voluminous documents; complex factual determinations). An 18 U.S.C. §3161(h)(8) continuance may be appropriate where an arrested

defendant cooperates, where investigative or laboratory reports cannot be completed, or where the full scope of the criminal scheme cannot be determined within 30 days. See United States v. Hope, 714 F.2d 1084 (11th Cir. 1983).

Moreover, although the 30-day interval will begin to run where the defendant is arrested outside the district where charges are pending, the time until the defendant's arrival in the district of prosecution will generally be excludable under 18 U.S.C. §3161(h)(G) and (H). See discussion at USAM 9-17.147, and USAM 9-17.148, infra.

9-17.121 Arrest

An arrest by state authorities for proceedings in connection with state charges generally does not constitute an arrest under the Speedy Trial Act. See United States v. Janik, 723 F.2d 537, 542 (7th Cir. 1983); United States v. Manuel, 706 F.2d 908, 914-915 (9th Cir. 1983); United States v. Iaquinta, 674 F.2d 260 (4th Cir. 1982); United States v. Leonard, 639 F.2d 101 (2d Cir. 1981); United States v. Tanu, 589 F.2d 82, 88 (2d Cir. 1979); United States v. Phillips, 569 F.2d 1315 (5th Cir. 1978). An "arrest," however, may be deemed to have taken place when the state arrest was made at the request of federal authorities, and will be deemed to have taken place when a defendant has been transferred from state to federal custody. See Judicial Conference Guidelines, at 3-4; United States v. Shahryar, 719 F.2d 1522 (11th Cir. 1983). But to reiterate, the dismissal sanction for a violation of the 30-day arrest to indictment period does not apply unless the defendant is formally charged in a federal complaint. See 18 U.S.C. §3162(a).

Not all federal arrests will constitute an "arrest" for Speedy Trial Act purposes. If a defendant is arrested for an offense that is not similar to the offense for which he/she is later indicted, then he/she is not deemed to have been under arrest for purposes of indicting within 30 days. See United States v. Lyon, 567 F.2d 777, 781 n.3 (8th Cir.), cert. denied, 436 U.S. 918 (1978)(defendant was indicted for bail jumping more than 30 days after his arrest on a bombing charge. The court refused to dismiss the indictment because the two offenses were different). See also, United States v. Antonio, 705 F.2d 1483, 1485 (9th Cir. 1983); United States v. Krynicki, supra; United States v. Brooks, 670 F.2d 148, 151 (10th Cir. 1982); United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972).

Whether a change in the conditions of incarceration of a prisoner as a result of his/her being accused of an in-prison offense will be considered

an arrest for purposes of the Act is uncertain. See United States v. Brooks, supra, at 150-151. Compare United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) (en banc), cert. granted, (October 17, 1983) (No. 83-128).

9-17.122 Summons

In cases initiated by the service of summons, the 30-day limitation for indictment begins to run on the date of the service of the summons. Thus, the days between the date of service and the initial court appearance count against the 30-day interval. In order to reduce the number of such days that elapse, the United States Marshal should be requested to serve the summons as close as possible to the court date stated on the face of the summons.

9-17.123 Unavailability of Grand Jury

If no grand jury has been in session during the 30-day period succeeding arrest or service of summons upon a felony charge, the time for filing an indictment is extended for another 30 days. It is not clear whether the belated indictment may include or charge only a misdemeanor. Neither is it clear that a delayed indictment may be returned for a felony when the original charge in the complaint was a misdemeanor. It seems fairly clear, however, that where the original charge was for a misdemeanor, 18 U.S.C. §3161(b) does not permit the filing of a belated indictment or information charging a misdemeanor. Plea agreements resulting in such a disposition should be entered into with caution.

9-17.130 The 70-Day Post-Indictment Interval

The 70-day interval between indictment and trial of 18 U.S.C. §3161(c)(1) begins with the filing and publication of the indictment or information, or the defendant's first appearance before a judicial officer in the court where the charge is pending, whichever is later. See United States v. Stafford, 697 F.2d 1368, 1370 (11th Cir. 1983). See also, Judicial Conference Guidelines, at 7-8. Where the defendant has appeared before the court pursuant to an arrest or summons prior to indictment, the 70-day interval should be computed from the date of filing of the indictment or information. If an indictment or information is sealed after filing, the time begins to run from its publication, i.e., its unsealing. See United States v. Villa, 470 F. Supp. 315, 325 (S.D. N.Y. 1979). A superseding indictment that amends the original indictment without adding new charges or defendants does not start the 70-day period anew. See United States v. Brim, 630 F.2d 1307, 1311 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981).

If the defendant was not arrested prior to indictment, or was arrested in a different district and did not appear in the charging district prior to indictment, the trial interval does not begin to run until the defendant has appeared before a judicial officer in the district where the indictment or information has been filed. See Judicial Conference Guidelines, at 7-8; see also, United States v. Umbower, 602 F.2d 754, 758 (5th Cir. 1979), cert. denied, 444 U.S. 1021 (1980); United States v. Taylor, 569 F.2d 448 (7th Cir. 1978), cert. denied, 435 U.S. 952 (1978).

9-17.131 The 30-Day Minimum Preparation Time

Unless the defendant signs a written consent, the trial may not start for at least 30 days after the defendant first appears with counsel or waives the right to counsel and elects to proceed pro se. See 18 U.S.C. §3161(c)(2). See United States v. Mers, 701 F.2d 1321, 1332-1335 (11th Cir. 1983). Any pre-trial defense preparation period shorter than 30 days has been found to be inadequate per se. See United States v. Daly, 716 F.2d 1499, 1506 (9th Cir. 1983).

18 U.S.C. §3161(c)(2) was added by the 1979 amendments, and there are a number of uncertain areas concerning its application. For example, some courts hold that a defendant is not automatically entitled to a new 30-day preparation period when a superseding indictment is returned charging the same offenses. Instead, if additional preparation time is needed defense counsel can request a discretionary ends of justice continuance under 18 U.S.C. §3161(h)(8)(b). See United States v. Horton, 676 F.2d 1165 (7th Cir. 1983). The Ninth Circuit has concluded, however, that when a defendant is reindicted after a dismissal on the government's motion, 18 U.S.C. §3161(c)(2) guarantees the defendant an additional 30-day preparation time on the new indictment. See United States v. Arkus, 675 F.2d 245 (9th Cir. 1982); United States v. Harris, 724 F.2d 1452 (9th Cir. 1984), petition for reh'g pending, No. 83-5051. The Solicitor General has taken the position that Arkus and Harris were incorrectly decided. The Solicitor General notes that the courts of appeals have agreed that reindictment after a voluntary dismissal does not trigger a new 70-day indictment to trial period (see, e.g., United States v. Dennis, 625 F.2d 782, 783 (8th Cir. 1980)), and that if the 30-day minimum defense preparation period and the 70-day maximum period are not simultaneous, the 70-day period might expire before a defendant could be brought to trial. See Solicitor General's Brief in United States v. Horton, supra (No. 82-681 OT 1982). This problem, however, could be resolved in a particular case if the trial court grants an ends of justice continuance under 18 U.S.C. §3161(h)(8).

In computing the minimum trial preparation time period, the exclusions provided for under 18 U.S.C. §3161(h) have been found to be inapplicable despite conflicting language in the Senate Report to the 1979 amendments. See United States v. Wooten, 688 F.2d 941, 949-951 (4th Cir. 1982). See also, Judicial Conference Guidelines, at 12-13. It is also stated in the Judicial Conference Guidelines, at 10-11, that when a defendant has appeared with counsel prior to indictment, the 30-day period commences upon the filing of the indictment, rather than the date of the pre-indictment appearance.

9-17.132 Commencement of Trial

For purposes of meeting the 70-day limitation, both the Judicial Conference and Second Circuit Guidelines provide that a jury trial begins when voir dire begins, and that a bench trial begins the day the case is called, provided that some step in the trial procedure immediately follows. See United States v. Whitaker, 722 F.2d 1533, 1535 (11th Cir. 1984); United States v. Howell, 719 F.2d 1258, 1262 (5th Cir. 1983). Judicial Conference Guidelines, at 9; Second Circuit Guidelines, section I E. This reflects the time when a trial is generally deemed to begin, apart from the separate question of when jeopardy attaches. A short delay after the voir dire and the swearing of the jury also does not violate the Speed Trial Act. See United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983); United States v. Howell, supra, at 1262. In cases where juries have been selected in advance of trial, the Second Circuit Guidelines, however, do not deem a trial to have commenced until opening statement or the taking of testimony.

9-17.133 Magistrates' Proceedings

Where a defendant consents in writing to trial before a magistrate upon a complaint (28 U.S.C. §636(a)(3); 18 U.S.C. §3401), trial must commence within 70 days of such consent. See 18 U.S.C. §3161(c)(1). Where a defendant consents to trial before a magistrate upon a previously filed indictment or information, the filing date or date of first appearance rather than the date of consent would appear to control. See Judicial Conference Guidelines, at 8.

9-17.134 Reinstitution of Prosecution

As noted, 18 U.S.C. §3161(d)(1) specifically provides that after the dismisal of an indictment or information on defendant's motion or the dismissal of a complaint on the motion of any party, any subsequent charge for "the same offense or an offense based on the same conduct or arising from the same criminal episode" shall be subject to new 30 or 70-day time periods and a new 30-day minimum under 18 U.S.C. §3161(c)(2). See United States v. Dennis, supra.

9-17.135 Superseding Indictment

As we read 18 U.S.C. §3161(d), in conjunction with 18 U.S.C. §3161(h)(6), it provides a different rule when an indictment or information is dismissed on a motion by the government. In this situation, new time limits do not begin to run when a superseding indictment is filed; the time between dismissal of the old indictment and filing of the new one is simply excluded. See the discussion in USAM 9-17.131, infra, about minimum preparation time and USAM 9-17.156, infra, about excludable time resulting from dismissal and recharging. The distinctions are set forth in Frase, The Speedy Trial Act of 1974, 43 U. Chi. L. Rev. 667, 696 (1976), wherein Professor Frase states:

> Section 3161(d) provides that the time limits for indictment,... and trial begin to run anew when the original charge is dismissed upon motion of the defendant, or if the original charge was a complaint and it is dismissed by either party or on the court's own motion.
>
> If, however, an information or indictment is dismissed upon motion of the Government, the time limits applicable to any refiled charges apparently do not begin to run anew. Section 3161(h)(6) permits an exclusion under the following circumstances:
>
> > If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date that the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [is excludable].

> If the period between the dismissal of the first charge and the filing of the second is excludable, this implies that the "clock" is still running.
>
> Since the filing of superseding charges is entirely within the control of the Government, such a rule makes sense: the Government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode. Yet section 3161(d) clearly permits the Government to do just that with respect to charges in a complaint. [Footnote omitted.]

Id. at 696.

Accord United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978), in which the court states:

> Taken together, §§3161(d) and (h)(6) make it clear that Congress' purpose was to disregard the period after dismissal of a complaint and prior to the filing of an indictment for the same offense. Although §3161(h)(6), read literally, suspends the running of the Act's time limits upon the Government's dismissal of an indictment, as distinguished from a complaint, it follows a fortiori that upon a voluntary dismissal of a complaint the period thereafter up to the filing of an indictment should be excluded, if not disregarded entirely pursuant to §3161(d). [Footnote omitted.]

Id. at 459. See also United States v. MacDonald, 456 U.S. 1, 7 n.7 (1982).

In summary, if the court on its own or the defendant's motion dismisses an indictment, information or complaint, the clock starts over; if the government obtains the dismissal of the complaint, the clock starts over; if the government moves to dismiss the indictment or information, then the clock does not start over, and when a new indictment or information is filed the number of days used up before dismissal will be considered already elapsed under the new indictment or information. See discussion at USAM 9-17.131, supra, and USAM 9-17.156, infra.

9-17.136 Indictments Reinstated on Appeal

18 U.S.C. §3161(d)(2) provides that when an indictment or information dismissed by the trial court is reinstated on appeal, the trial must start within 70 days of the date "the action occasioning the reinstatement becomes final." If trial within 70 days is impractical, the court has discretion to enlarge the period up to 180 days. The date when the reinstatement becomes final should normally be the date the mandate of the court of appeals is filed with the district court. See United States v. Gilliss, 645 F.2d 1269, 1276 (8th Cir. 1981); Judicial Conference Guidelines, at 16; Second Circuit Guidelines, section I, F(3)(b). The courts of appeals, however, have interpreted the quoted phrases differently, making the starting date run from the date the mandate issues to the date that the district court enforces the mandate by vacating the sentence imposed. See United States v. Ross, 654 F.2d 612, 616 (9th Cir. 1981); United States v. Carreon, 626 F.2d 528, 532 n.7 (7th Cir. 1980). See also, United States v. Mack, 669 F.2d 28, 33 (1st Cir. 1982). In addition, the filing of a certiorari petition by the government has been held to stop the retrial clock even though the mandate has issued. See United States v. Dunn, 706 F.2d 153 (5th Cir. 1983). See also, United States v. Villamonte-Marquez, ___ U.S. ___,103 S.Ct. 2573, 2584 n.4 (1983) (Brennan, J. dissenting).

The excludable time periods of 18 U.S.C. §3161(h) apply to calculating the 70-day (or longer) period. The dismissal provisions of 18 U.S.C. §3162 also apply. See 18 U.S.C. §3161(d)(2); H.R. Rep. No. 390, 96th Cong., 1st Sess. 11 (1979); S. Rep. No. 212, 96th Cong., 1st Sess. 33 (1979).

9-17.137 Retrials

Pursuant to 18 U.S.C. §3161(e) the government has 70 days to retry a case after a trial judge declares a mistrial or enters an order granting a new trial. A 70-day retrial period will also apply following a defendant's successful appeal or collateral attack. See United States v. Gilliss, supra, at 1275-76. The 70-day period begins to run on "the date the action occasioning the retrial becomes final." The meaning of this phrase is uncertain. The Judicial Conference Guidelines, at 17-18, provide that the period begins to run when a mistrial is declared or when an order granting a new trial is entered, and not when the time for filing any appeal has expired. Cf., Second Circuit Guidelines, section I, F. Where retrial follows appeal or collateral attack, the court retrying the case has the discretion to extend the 70-day period up to 180 days if witnesses are unavailable or if "other factors resulting from the passage of time" make retrial within 70 days impractical.

The excludable time provisions of 18 U.S.C. §3161(h) and the sanctions of 18 U.S.C. §3162 apply to retrials. The filing of a timely motion for reconsideration of an order granting a new trial tolls the running of the 70-day period. See United States v. Spiegel, 604 F.2d 961, 971 (5th Cir. 1979).

9-17.140 Excludable Time

18 U.S.C.§3161(h) defines eight periods of time that are excludable when computing elapsed time for the other subsections of 18 U.S.C. §3161. This list is exclusive, according to United States v. Carrasquillo, 667 F.2d 382, 383 (3d Cir. 1981). Paragraphs 1 through 7 of 18 U.S.C. §3161(h) set forth a list of specific events that create excludable time, while paragraph 8 is a catch-all provision providing for the exclusion of delay resulting from a continuance granted by the judge to further the ends of justice. Significant changes in this section were made by the 1979 amendments.

To forestall unnecessary litigation, care should be taken that the record accurately reflects the commencement and termination of any excludable period, the reasons therefore, and any required findings.

In a number of districts, a judicial order is required before a clerk may enter an exclusion in the case docket. This practice appears to be desirable whether or not it is required, since it forestalls the possibility that the judge will subsequently disallow an exclusion that a court clerk and/or Assistant U.S. Attorney thought to be allowable. Such a disallowance could cause the allowable time for a case to be exceeded and the case dismissed.

It may be necessary to establish new procedures with local district courts for the first 30-day time interval in order to obtain judicial rulings on exclusions during that period. The Judicial Conference Model Speedy Trial Plan recommends that these rulings be secured through routine filing of motions with the court.

9-17.141 Other Proceedings Concerning the Defendant

The specific exclusions listed in 18 U.S.C. §3161(h)(1)(A)-(J) are not exhaustive of the proceedings that may be excluded under 18 U.S.C. §3161(h)(1). The section explicitly excludes "any period of delay resulting from other proceedings concerning the defendant, including but not limited to ..." the proceedings listed in paragraphs (A)-(J) of 18

U.S.C. §3161(h)(1) (emphasis added). The Judicial Conference Guidelines, at 42-43, provide examples of other proceedings which might be excludable: bail hearings, preliminary examinations, arraignment proceedings, pre-trial conferences, and depositions pursuant to Rule 15, Federal Rules of Criminal Procedure. See United States v. Severdija, 723 F.2d 791,793 (11th Cir. 1984) (bail hearing); United States v. Garrett, 720 F.2d 705, 709 (D.C. Cir. 1983) (bond violation and bail hearing). See also, United States v. Lopez-Espindola, 632 F.2d 107, 110 (9th Cir. 1980) (state probation revocation proceedings); United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980) (habeas corpus proceeding).

9-17.142 Competency Examinations

Paragraph (1)(A) of 18 U.S.C. §3161(h) covers proceedings, including examinations, concerning the defendant's mental and physical competency to stand trial (18 U.S.C. §4244), and sanity (Fed. R. Crim. P. 12.2). See United States v. Crosby, 713 F.2d 1066, 1077-1079 (5th Cir. 1983). The exclusion applies only to court-ordered examinations.

This exclusion, like paragraph (1)(B) of 18 U.S.C. §3161(h), was amended in 1979 to cover "proceedings" and not only examinations. The Judicial Conference Guidelines, at 27-28, provide that the exclusion covers the entire period between the date the competency proceeding is initiated (usually by motion) and the date that the court receives all materials expected before reaching a decision, i.e., the date that the examination report has been received, briefs have been filed, and any hearing has been completed. In a Rule 12.2, Federal Rules of Criminal Procedure, situation, the exclusion would ordinarily end when the examination report is received by the government attorney. Although time taken by the court for decision could arguably be subsumed under this paragraph, for accurate recording purposes such time should be computed under paragraph (1)(J) of 18 U.S.C. §3161(h), which limits automatically excludable time for periods of advisement to 30 days. See also, USAM 9-17.148 (Transportation), infra.

9-17.143 Examinations and Deferred Prosecution Under NARA

Paragraphs (1)(B) and (C) of 18 U.S.C. §3161(h) deal with deferral of prosecution under 28 U.S.C. §2902 (Narcotics Addict Rehabilitation Act). Paragraph (C) of 18 U.S.C. §3161(h) is a new addition under the 1979 Amendments. 28 U.S.C. §2902 provides for civil commitment to treat narcotics addicts. The program is a voluntary one to which the defendant must elect to submit.

The starting date for the exclusion under paragraph (1)(B) of 18 U.S.C. §3161(h) is the date the court advises the defendant he/she may elect to submit to examination under 28 U.S.C. §2902. The ending date is the date the defendant elects not to participate, or, if he/she participates, the latest of the dates the court receives an examination report, the last day of any hearing, or the submission of briefs. See Judicial Conference Guidelines, at 28-29. Since the exclusion as amended refers to "proceeding," rather than "examinations," additional excludable time is also available for making post-hearing submissions, and for the time in which the court has the matter under advisement, 18 U.S.C. §3161(h)(1)(J). See also, USAM 9-17.148 (Transportation), infra.

Paragraph (1)(C) of 18 U.S.C. §3161(h) appears to overlap the exclusion provided in 18 U.S.C. §3161(h)(5). If a commitment for treatment is made it would appear, under 28 U.S.C. §2902(c), that the charges would be dismissed when the court receives notice from the Surgeon General that the defendant has successfully completed the program. If the Surgeon General concludes that the defendant is not being helped by the program, he/she is required to notify the court, and presumably upon this notification the excludable time which began with the commitment order ends, both under paragraph (1)(C) of 18 U.S.C. §3161(h) and 18 U.S.C. §3161(h)(5). See USAM 9-17.155, infra.

All examinations under paragraphs (1)(A) and (B) of 18 U.S.C. §3161(h) must be conducted within a reasonable period of time.

9-17.144 Trial of Other Charges

"Other charges" as covered under paragraph (1)(D)of 18 U.S.C. §3161(h) include all pending state, (see United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980); United States v. Braunstein, 474 F. Supp. 1, 10 (D.N.J. 1979)), and federal charges, as well as any counts that were severed from the indictment or information by the trial court. Under the catch-all phrase "other proceedings" in 18 U.S.C. §3161(h)(1), this exclusion, according to the Second Circuit Guidelines, section II, C, also covers pre-trial motions and trial preparation for the "other charges." See also, United States v. Lopez-Espindola, supra, at 109 (delay between arrest and trial on state charges was excludable under this section). The Criminal Division agrees with this approach. The Judicial Conference Guidelines, at 30-31, however, allow only an exclusion for actual court days, but note that it might be appropriate to exclude preparation time on other charges under 18 U.S.C. §3161(h)(8). Either side should also be entitled under 18 U.S.C. §3161(h)(8) to a reasonable delay after conclusion of the earlier trial. See United States v. Braunstein, supra, at 10.

9-17.145 Interlocutory Appeals

The exclusion in 18 U.S.C. §3161(h)(1)(E), covers appeals taken by the United States under 28 U.S.C. §3731 from decisions or orders excluding evidence or requiring the return of seized property (see United States v. Saintil, 705 F.2d 415, 417 (11th Cir. 1983); United States v. McGrath, 613 F.2d 361 (2d Cir.), cert. denied, 446 U.S. 967 (1980)), and similar appeals by the government under 18 U.S.C. §2518(10)(b) (wire interception). Also included are interlocutory appeals by either party under 28 U.S.C. §1292. See United States v. Tedesco, 726 F.2d 1216 (7th Cir. 1984). See also, United States v. Albert, 595 F.2d 283, 287 (5th Cir. 1979) (Rule 50(b), Federal Rules of Criminal Procedure, Plan). Where the appeal is followed by a timely certiorari petition the exclusion further includes the period during which the case is pending in the Supreme Court. See United States v. Villamonte-Marquez, ___ U.S. ___ 103 S.Ct. 2573, 2584 n.4 (1983) (Brennan, J. dissenting). Delay resulting from an application for an extraordinary writ, which is technically not an interlocutory appeal, should be excludable as resulting from "other proceedings under (h)(1), or under the provisions of (h)(8)." See Judicial Conference Guidelines, at 31; Second Circuit Guidelines, at 19.

There is some dispute as to whether appeals from conditions of release under 18 U.S.C. §3147(b) are covered under this paragraph. The Judicial Conference Guidelines, at 31-32, state that such appeals are not covered because they have no bearing on the timing of a trial. The Second Circuit Guidelines are to the contrary. See Second Circuit Guidelines, section II, D.

Excludable time under this section will be measured from the date the notice of appeal is filed in the district court, or the date the application for an extraordinary writ is filed with the court of appeals, to the date the mandate of the court of appeals is filed in the district court. See Judicial Conference Guidelines, at 32. Cf. United States v. Ross, 654 F.2d 612, 616 (9th Cir. 1982); United States v. Gilliss, 645 F.2d 1269, 1276 (8th Cir. 1981). Although the Second Circuit Guidelines (section II, D) state that the ending date is either the date the mandate is filed in the district court, or 21 days following the decision of the appellate court, whichever is later, unless similar local circuit guidelines are adopted, the Criminal Division recommends that any additional time beyond the filing of the mandate be sought under 18 U.S.C. §3161(h)(8).

9-17.146 Pre-Trial Motions

This exclusion, now covered under 18 U.S.C. §3161(h)(1)(F), was expanded in the 1979 amendments. The former section, 18 U.S.C. §3161 (h)(1)(E), covered only the time during which hearings on pre-trial motions were held. Now the exclusion encompasses the period of time from the date the motions are filed through the conclusion of the hearings or "other prompt disposition" of such motions. The Senate Report states that the term "other prompt disposition" applies to situations where no hearing is held, and is not intended to permit circumvention of the 30-day "under advisement" provision of 18 U.S.C. §3161(h)(1)(J). See S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). The Judicial Conference Guidelines, at 32-33, state that the starting date for this exclusion is the date that the motion is filed or made orally, and the ending date is the date on which the court has received everything expected from the parties before reaching a decision--the date on which all anticipated briefs have been filed and any necessary hearing has been completed.

Some circuits have expressed concern that large periods may elapse between the filing and hearing date of a motion and have limited the length of the exclusion to the time that is "reasonably necessary" to process the motion. See, e.g., United States v. Mitchell, 723 F.2d 1040, 1047-1048 (1st Cir. 1983); New York v. Novak, 715 F.2d 810, 820 (3d Cir. 1983); United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1982). Yet other circuits have placed no such limitation on the length of the exclusion. See, e.g., United States v. Campbell, 706 F.2d 1138, 1143 (11th Cir. 1983); United States v. Stafford, 697 F.2d 1368, 1373 (11th Cir. 1983); United States v. Brim, 630 F.2d 1307, 1312 (8th Cir. 1980). Especially where the defendant is responsible for the delay in processing the motion, a lengthy exclusion should be granted. See, e.g., United State v. Turner, 725 F.2d 1154, 1160 (8th Cir. 1984); United States v. Bufalino, 683 F.2d 639, 646 (2d Cir. 1982).

Note that 18 U.S.C. §3161(h)(8)(B) has also been expanded to cover preparation of motions in those situations where the motions involve novel questions of law or complex facts. See United States v. Molt, 631 F.2d 258, 262 (3d Cir. 1980) (difficult suppression motion); S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). The time for preparation of routine motions is not excludable. See USAM 9-17.159, infra.

9-17.147 Removal and Transfer Proceedings

The original "proceedings related to transfer from other districts" provision (former section 3161(h)(1)(F)) has been expanded to apply clearly both to "transfer of cases" under Rules 20 and 21, Federal Rules of Criminal Procedure, and "removal of defendants" under Rule 40, Federal Rules of Criminal Procedure. (Commitment to Another District). See 18 U.S.C. §3161(h)(1)(G).

In Rule 20, Federal Rules of Criminal Procedure, proceedings, the exclusion will commence with the execution by the defendant of the consent to transfer, and will usually end with the receipt of the papers in the originating district after return by the transferee district following failure of the proceedings through the refusal of the defendant to plead guilty or the refusal of the court to accept the plea. See Judicial Conference Guidelines, at 36-38. However, it should be noted that the Criminal Division does not agree with the position taken by the Judicial Conference Guidelines that the legislative history of the Speedy Trial Act precludes an exclusion where the transfer proceedings abort through the action of government counsel. In this situation, the exclusion would end with the refusal of one of the U.S. Attorneys to consent to the transfer. In the ordinary course of events, the need for an exclusion will not arise where the transfer is effected and a plea of guilty entered. It should be noted that while it is arguable that the transportation of the defendant to the district where the charge is pending after failure of the Rule 20, Federal Rules and Criminal Procedure, proceedings could be subsumed under the heading of a delay attributable to those proceedings, it would seem more appropriate to attribute it to the Rule 40, Federal Rules of Criminal Procedure, removal proceedings, which is also recognized by paragraph (1)(G) of 18 U.S.C. §3161(h). See United States v. Hendricks, 661 F.2d 38, 42 n. 6 (5th Cir. 1981). Care should be taken that a double exclusion is not recorded. See, e.g., United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984).

In Rule 21, Federal Rules of Criminal Procedure, proceedings, the Judicial Conference Guidelines, at 38-39, state that 18 U.S.C. §3161 (h)(1)(G) excludes the time between the date a motion for change of venue is made and the date the court has received everything expected from the parties before making a decision; if the motion is granted, the time between the grant of the motion and the date the transferee district receives the case papers would also be excluded. See United States v. Wilson, 720 F.2d 608, 609-610 (9th Cir. 1983). The Division believes that it would be appropriate to calculate the excludable time for change of venue motions under 18 U.S.C. §3161(h)(1)(F) and (J), and to begin the 18 U.S.C. §3161(h)(1)(G) exclusion only when the motion is granted, to exclude the time needed for transfer of the proceedings. But see, United States v. Atkins, 698 F.2d 711, 714 (5th Cir. 1983). More importantly, the Division

believes that the time excludable under the Judicial Conference Guidelines when a change of venue motion is granted is too limited. It would seem appropriate to treat the time until the defendant's appearance in the court to which the case has been transferred as attributable to the transfer proceedings and excludable under 18 U.S.C. §3161(h)(1)(G). Alternatively, the court could be asked to exclude a specific period of time reasonably necessary under the circumstances of the transfer. See Second Circuit Guidelines, section II, F(6).

The exclusion for proceedings under Rule 40, Federal Rules of Criminal Procedure, should ordinarily commence with the arrest of the defendant in the district other than that in which the offense is alleged to have been committed, and extend through his/her appearance before a judicial officer of the charging district.

9-17.148 Transportation of Defendant

18 U.S.C. §3161(h)(1)(H) provides an exclusion for transportation of a defendant from another district or to or from hospitals or places of examination. In many instances, such transportation of the defendant will, be subsumed under another exclusion, such as 18 U.S.C. §3161(h)(1)(A), (B) or (G); in such instances, a separate exclusion under 18 U.S.C. §3161(h)(1)(H) should not be recorded, to avoid double counting.

Under 18 U.S.C. §3161(h)(1)(H) any period greater than 10 days between the date the order is entered directing removal or transportation and the arrival at the destination is presumed to be "unreasonable." The Judicial Conference Guidelines, at 39, state that this is a rebuttable presumption. Even assuming it were rebuttable, relief might nevertheless be available under 18 U.S.C. §3161(h)(8). Once treatment or examination is completed, the 10-day limitation would appear to apply to the return of the defendant as well.

Where transportation is being recorded as a separate exclusion pursuant to 18 U.S.C. §3161(h)(1)(H), the Judicial Conference Guidelines state that the clerk should not record time in excess of 10 days absent a court order. Where the clerk is recording another exclusion which encompasses transportation, more than 10 days transportation time may be recorded as excludable. See Judicial Conference Guidelines, at 39-40. This does not mean that time consumed in transportation in such cases can simply be ignored, however, or that effort should not be made to transport the defendant as quickly as possible. The U.S. Attorney should brief the United States Marshal on the time constraints imposed by the Speedy Trial Act. The attorney in charge of the case should monitor the defendant's whereabouts and the stage of any examination or hearing and make an

appropriate memorandum to the file, and, where necessary, a report to the judge or court clerk. Care should be taken in relying on any exclusion encompassing more than the 10 days "one-way" transportation time, since the presumption of unreasonableness contained in 18 U.S.C. §3161(h)(1)(H) may be applied to the transportation component of other exclusions.

9-17.149 Consideration of Proposed Plea Agreements

18 U.S.C. §3161(h)(1)(I) is a new subsection added in the 1979 amendments, and excludes the period of time during which the trial court is considering a proposed plea agreement between the government and the defendant. The exclusion does not apply to negotiations for an agreement to plead guilty but commences only when the agreement is submitted for court approval. The preliminary negotiations may warrant a continuance granted under 18 U.S.C. §3161(h)(8), and 18 U.S.C. §3161(h)(8) may allow the defendant or government further preparation time should negotiations fail or the court reject the plea agreement. But see, United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977); United States v. Roberts, 515 F.2d 642, 645, 647 (2d Cir. 1975).

9-17.150 Withdrawn Pleas

18 U.S.C. §3161(i) provides that when a guilty or nolo contendere plea is withdrawn and a new plea of not guilty entered, the defendant is "deemed indicted" on the day withdrawal is "final and trial must be commenced within 70 days thereafter. See United States v. Davis, 679 F.2d 845, 849-850 (11th Cir. 1982) (withdrawal of a tentative plea). Even when the guilty plea that is withdrawn only involved some of the counts in the indictment, all counts will have the benefit of the new time limits. See United States v. Gilliss, 645 F.2d 1269, 1275-76 (8th Cir. 1981). 18 U.S.C. §3161(e), rather than (i), applies where a plea and resulting conviction is vacated on collateral attack. See United States v. Mack, 669 F.2d 28, 30-34 (1st Cir. 1982).

Where a plea agreement involves dismissal of an entire indictment in exchange for a guilty plea to charges contained in another indictment, 18 U.S.C. §3161(i) may not automatically provide for a new time period. In such a situation, the Judicial Conference Guidelines, at 61, recommend use of 18 U.S.C. §3161(h)(8):

> To prevent a miscarriage of justice in the event of withdrawal of the guilty plea, the court should at the time of accepting the guilty plea on the second

indictment, grant a continuance under Section 31612(h)(8) with respect to the first indictment if necessary to keep that indictment alive up to the day of sentencing. If the plea should be withdrawn, additional continuances can be granted as appropriate to permit orderly resumption of the prosecution.

9-17.151 Proceedings Under Advisement

The time during which proceedings or pre-trial motions are under advisement is covered under 18 U.S.C. §3161(h)(1)(J). This time period is limited to a maximum of 30 days. Extra time would, under certain circumstances, be available under 18 U.S.C. §3161(h)(8). See United States v. Molt, 631 F.2d 1258 (3d Cir. 1980). The Judicial Conference Guidelines recommend that the starting date be the latter of the last date on which the court has received everything it expects to receive or the hearing date. The ending date would be the earliest of (1) the date the judge's decision is filed, or (2) the date the judge renders his/her decision orally in open court, or (3) the expiration of the 30-day period. See Judicial Conference Guidelines, at 41. Accord, United States v. Mers, 701 F.2d 1321, 1336 (11th Cir. 1983); United States v. Bufalino 683 F.2d 639, 643-644 (2d Cir. 1982).

9-17.152 Deferred Prosecution (Pre-Trial Diversion)

18 U.S.C. §3161(h)(2) covers situations where prosecution is deferred pursuant to a written agreement between the U.S. Attorney and the defendant. This exclusion would apply in cases where the defendant has been arrested or indicted and is subsequently placed on pre-trial diversion. The court must approve the agreement in order to qualify for excludable time. The starting date is the date of court approval, and the ending date is the date of dismissal of the case pursuant to the agreement, or the date the court receives a copy of the U.S. Attorney's notice to the defendant of an intention to resume prosecution. See Judicial Conference Guidelines, at 43; Second Circuit Guidelines, at 18. The time spent considering a defendant's request for pre-trial diversion can be grounds for 18 U.S.C. §3161(h)(8) continuance; the time from submission of an agreement to the court until the date of its approval or disapproval should be excludable under 18 U.S.C. §3161(h)(1)(J).

It should be noted that as a matter of policy the Department opposes pre-trial diversion subject to court approval. Wherever possible, diversion should be accomplished pursuant to the provisions of USAM 9-1.200 and USAM 9-2.022.

9-17.153 Absence or Unavailability of Parties and Witnesses

Any period of delay resulting from the absence or unavailability of the defendant or an essential witness is excludable. See 18 U.S.C. §3161(h)(3)(A). A defendant or witness is considered absent when his/her whereabouts are unknown to the prosecution and, in addition, he/she is attempting to avoid apprehension or prosecution or his/her whereabouts cannot be determined by due diligence. See United States v. Fielding, 645 F.2d 719 (9th Cir. 1981). See also, United States v. Garrett, 720 F.2d 705, 707-708 (D.C. Cir. 1983) (a defendant is not unavailable merely because he/she has violated a condition of his/her bail). See 18 U.S.C. §3161(h)(3)(B). Both the Judicial Conference Guidelines, at 45, and the Second Circuit Guidelines (section II, I) state that when a defendant or essential witness is absent, the excludable time starts on the earlier of the date he/she was required to make an appearance, or the date the court received notice that the whereabouts of the defendant or witness are unknown. The ending date is the date the prosecutor receives notice of the defendant's or witness' whereabouts.

A witness or defendant is unavailable when his/her whereabouts are known, but he/she is either resisting appearing or his/her presence cannot be obtained by due diligence. See 18 U.S.C. §3161(h)(3)(B). See also, United States v. Tedesco, 726 F.2d 1216, 1222 (7th Cir. 1984). Again, both the Judicial Conference Guidelines, at 46-47, and the Second Circuit Guidelines (section II, I) state that the starting date for excludable time in an unavailability situation is the date when the defendant or witness was scheduled to appear. The ending date is the date on which the defendant or witness could have been produced in court by the government. This interpretation of the exclusion will be unduly narrow in many situations, as where the anticipated unavailability of a witness on a particular date causes the trial to be postponed, and an 18 U.S.C. §3161 (h)(8) continuance should be sought in such instances. See United States v. Tedesco, supra.

It should be noted that for this exclusion to apply a witness must be "essential." Moreover, either the defendant's or witness' whereabouts must be unknown, despite due diligence, or presence at trial must be unobtainable despite due diligence. See United States v. Marrero, 705 F.2d 652, 656-658 (2d Cir. 1983) (accomplices were essential witnesses who were unavailable because they refused to testify). Appropriate records should be kept to support such findings. In addition, since the government has the burden of proof on this exclusion if a motion to dismiss is made by the defendant, 18 U.S.C. §§3161(a)(2)), 3161(h)(8), rather than this exclusion,

should be used where defense witnesses are absent or unavailable. See Judicial Conference Guidelines, at 44-45.

9-17.154 Physical or Mental Incompetency

Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial is excluded under 18 U.S.C. §3161(h)(4). The starting date for excludable time under this section is the day that the court determines that the defendant is mentally incompetent or physically unable to stand trial. The ending date is the date the court determines that the defendant is fit to stand trial. See Judicial Conferences Guidelines, at 47-48; Second Circuit Guidelines, section II. (The Division disagrees with the Judicial Conference Guidelines statement that the exclusion would end earlier upon notice to the court that the defendant is competent to stand trial.)

9-17.155 Commitment Under NARA

18 U.S.C. §3161(h)(5), like paragraph (h)(1)(C), allows the prosecution to be delayed while the defendant is rehabilitated through civil commitment for narcotics addiction under the Narcotics Addict Rehabilitation Act, 28 U.S.C. §2902. The starting date is the date the court determines that the defendant is an addict and likely to be rehabilitated through treatment. See 28 U.S.C. §2902(c). Preliminary proceedings are excludable under 18 U.S.C. §3161(h)(1)(B). The ending date is the date the court receives from the Surgeon General either a certificate that the defendant has successfully completed the treatment program, or advice that the defendant cannot be treated further. See 28 U.S.C. §2902(c); USAM 9-17.143, supra.

9-17.156 Recharging after Government Dismissal of Indictment or Information

Under 18 U.S.C. §3161(h)(6) the running of the "trial clock" is suspended from the date the information or indictment is dismissed upon motion of the attorney for the government until a charge is filed against the defendant for the same offense, or any offense required to be joined with the offense charged in the original indictment or information. See United States v. Hicks, 693 F.2d 32, 35 (9th Cir. 1982); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980). The operation of this section is well explained in the original Senate Report on the Speedy Trial Act which states:

> Subparagraph 3161(h)(6) provides for the case where the Government decides for one reason or another to dismiss charges on its own motion and to then recommence prosecution. Under this provision only the period of time during which the prosecution has actually been halted is excluded from the 60-day time limits. Therefore, under 3161(h)(6) when the Government dismisses charges only the time between when the Government dismisses charges to when it reindicts is excluded from the 60-day time limits. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant then waits six months and reindicts the defendant for the same offense the Government only has 10 days in which to be ready for trial.

S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).

The excludable period starts the day the original indictment or information is dismissed; the date of entry of the order, rather than the date of filing of the motion would appear to control. The time from the filing of the motion to dismiss to the entry of the order is arguably excludable under 18 U.S.C. §3161(h)(1)(F) and (J). The 18 U.S.C. §3161 (h)(6) exclusion ends the day the subsequent complaint, information, or indictment is filed. Since the exclusion begins only with the dismissal of the original charges, once a superseding indictment is intended, it is important to obtain dismissal of the original charge as soon as possible in order to stop the clock, unless there is some reason for keeping the original indictment alive. If the original indictment is not dismissed before the superseding indictment is returned, the clock continues to run. See United States v. Novak, 715 F.2d 810, 817 (3d Cir. 1983); United States v. McCown, 711 F.2d 1441, 1446 (9th Cir. 1983).

This section applies only when the government obtains dismissal of charges contained in an indictment or information. If the defendant successfully moves to dismiss the indictment or information (or a complaint is involved), 18 U.S.C. §3161(d) applies and all time limits on the new charges are figured without regard to the existence of the original charge. See United States v. Horton, 676 F.2d 1165, 1170 (7th Cir. 1982). See the discussion of 18 U.S.C. §3161(d) at USAM 9-17.134, supra.

Note also that even where the government obtained dismissal of the original indictment, time limits on new offenses charged in the superseding indictment--i.e. those which are not the "same offense" or "offenses

which are required to be joined with" the offense charged in the original indictment--would be computed without reference to the time limits on the original charge. Consequently, where the government dismisses an indictment and returns superseding charges, different time limits for trial will frequently apply to charges within the same indictment, particularly if the superseding indictment adds new defendants. 18 U.S.C. §3161(h)(7) can be used to equalize the trial date for multiple defendants charged in the same indictment. Where multiple charges with different time limits are contained in an indictment against a single defendant, an 18 U.S.C. §3161 (h)(8) continuance might be appropriate, to avoid the need for either multiple trials or trial of all charges by the earliest date.

9-17.157 Meaning of "Same Offense or Any Offense Required to be Joined with that Offense"

In the absence of any requirement for compulsory joinder imposed by statute or rule, the phrase "or any offense required to be joined with that offense" may be restricted to constitutional limitations imposed by the Double Jeopardy Clause, including concepts of collateral estoppel. See United States v. Pollock, 726 F.2d 1456, 1462-1463 (9th Cir. 1984); United States v. Novak, supra; Ashe v. Swenson, 397 U.S. 436 (1970); see also, United States v. Peters, 434 F. Supp. 357, 360-362 (D.D.C. 1977), aff'd, 587 F.2d 1267, 1270-1275 (D.C. Cir. 1978), (where both courts interpret the phrase in a local rule as synonymous with the phrase "offense based on the same conduct or arising from the same criminal episode" appearing in 18 U.S.C. §3161(d)); ABA Standards for Criminal Justice Relating to Speedy Trial §2.2(a); and the concurring opinion of Brennan, J., in Ashe v. Swenson, supra, at 453-454.

9-17.158 Effect of Joinder and Severance

A reasonable period of delay is excludable under 18 U.S.C. §3161(h)(7) when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted. A primary application of this exclusion would be in situations where co-defendants have had different periods excluded under other provisions of the Speedy Trial Act. See United States v. Edwards, 627 F.2d 460 (D.C. Cir. 1980), cert. denied, 449 U.S. 872 (1980); United States v. McGrath, 613 F.2d 361 (2d Cir.). cert. denied, 446 U.S. 967 (1980). According to the Judicial Conference Guidelines, at 50-51, the starting date for this excludable period is the day following the last day for commencement of trial for that defendant for whom the time for trial would otherwise have run. The ending day is the latest permissible date for commencement of trial of any co-defendant, subject to the "reasonableness" limitation. The

courts, however, have generally held that there is only one speedy trial clock for all defendants and an exclusion for one defendant is an exclusion for all. See United States v. Tedesco, supra; United States v. Yunis, 723 F.2d 795, 797 (11th Cir. 1984). Note that this provision does not apply pre-indictment. United States v. Garrett, 720 F.2d 705, 708 (D.C. Cir. 1984).

9-17.159 Ends of Justice

18 U.S.C. §3161(h)(8) permits a judge, on his/her own motion or at the request of the defendant, his/her counsel, or the attorney for the government, to grant a continuance on the basis of his/her findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant to a speedy trial. The court must set forth, in the record of the case, either orally or in writing, its reasons for such finding. See United States v. Molt, 631 F.2d 258 (3d Cir. 1980)(where there are multiple indictments, reasons need only be noted on one docket sheet); United States v. Bryant, 726 F.2d 510 (9th Cir. 1984) and United States v. Edwards, supra (reasons may be noted later). But see, United States v. Janik, 723 F.2d 537, 545 (7th Cir. 1983) (the continuance may not be granted retroactively).

The provision is a basic "safety valve" within the Speedy Trial Act, and permits the court to grant an excludable continuance where, on balance, the interest of justice warrants a later indictment or trial date than would otherwise be permitted by the statutory limits as extended by specific exclusions. The possibility of obtaining an 18 U.S.C. §3161(h)(8) continuance should be considered whenever circumstances not covered by the specific exclusions of the Speedy Trial Act would make indictment or trial within the statutory limits impossible or unreasonable.

18 U.S.C. §3161(h)(8)(B) lists a number of factors which, "among others," are to be considered by the court in determining whether to grant a continuance in the proceeding. Those factors are:

A. Whether the failure to grant such a continuance would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice. See United States v. Furlow, 644 F.2d 764 (9th Cir. 1981) (Mt. St. Helens eruption continuance); United States v. Edwards, supra; United States v. Dennis, supra (continuance to allow the government to decide whether to appeal an adverse pre-trial ruling); subsection (h)(8)(B)(i) of 18 U.S.C. §3161.

B. Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself within the time limits established by this section. See 18 U.S.C. §3161(h)(8)(B)(ii); United States v. Ruggiero, 726 F.2d 913, 925 (2d Cir. 1984). This subsection was amended in 1979 to include the reference to "novel questions of fact or law" and to permit a continuance to be granted for pre-trial motions presenting novel questions of law or complex facts. The time for preparation of routine motions is not excludable. See S. Rep. No. 212, 96th Cong., 1st Sess. 33-34 (1979); USAM 9-17.146, supra.

C. Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in 18 U.S.C. §3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex. See 18 U.S.C. §3161(h)(8)(B)(iii). See United States v. Mitchell, 723 F.2d 1040, 1042-1044 (1st Cir. 1983); United States v. McGrath, supra. This subsection was also amended in 1979, and is specifically directed at delay in the arrest to indictment interval. The section by section analysis of the Senate Committee Report states that the reference to delay caused by an arrest occurring "at such a time that is unreasonable to expect return and filing of the indictment within the period specified in section 3162(b)" was intended to cover instances where an arrest is made shortly before a grand jury, not continuously in session, is due to expire. See S. Rep. No. 212, 96th Cong., 1st Sess. 34-35 (1979). However, earlier in the Report the Committee indicated that the amendment was more broadly intended to clarify that an "ends of justice" continuance may be granted to "cover reasonable periods of delay during which reports from investigative agencies and evidentiary analyses from laboratories are completed..." Id. at 23.

Accordingly, the Division believes that an 18 U.S.C. §3161(h)(8) continuance can and should be sought where it is not possible to indict within 30 days after arrest either because (1) the grand jury expired shortly after the arrest and will not again be in session during the 30-day interval, or (2) the investigation cannot be completed and reports obtained before expiration of the 30-day period. Of course, an 18 U.S.C. §3161(h)(8) continuance would also be appropriate where the grand jury begins but cannot complete its deliberations within the 18 U.S.C. §3161(b) limits, due to the complexity of the case. See USAM 9-17.122, supra.

D. Whether the failure to grant a continuance in a case not meeting the criteria of 18 U.S.C. §3161(h)(8)(B)(ii) would deny the defendant

reasonable time to obtain counsel, would unreasonably deny the defendant or the government continuity of counsel, or would deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence, 18 U.S.C. §3161(h)(8)(B)(iv). See United States v. Phillips, 630 F.2d 1138 (6th Cir. 1980); United States v. Wilks, 629 F.2d 669, 672-73 (10th Cir. 1980); United States v. Aviles, 623 F.2d 1192 (7th Cir. 1980) (in each case the defendant's motion for a continuance was properly denied).

This subsection is a 1979 addition, allowing additional time for the defendant to obtain counsel and where the government or defense attorneys trying the case have scheduling conflicts or other problems, including illness and long planned vacations. This section also provides for excludable time when there simply is not enough time to prepare for trial, even though the case is neither unusual or complex. A continuance might be appropriate where, for example, additional time is needed to complete transcription of wiretap evidence. In this connection, the Senate Committee Report states:

> Third, and most important, the Committee amendment provides the court a basis for a continuance when, after due diligence on the part of counsel for either party, there is simply not enough time to effectively prepare for trial of a case which is neither unusual nor complex, within the meaning of new clause (ii), supra. The Committee intends that the Government would bear a heavy burden under this provision, in cases started by indictment, when it has been preparing a case for a substantial period of time prior to seeking and obtaining return of the indictment. In cases initiated by arrest, however, granting a motion for continuance under this provision should be easier. The original legislative history also stated that a defendant will to entitled to additional time when his attorney has not been diligent in preparing for trial.

S. Rep. No. 212, 96th Cong., 1st Session 35 (1979).

As noted in the Senate Report, the legislative history to the 1974 Act indicated that an "ends of justice" continuance might be appropriate to permit the defense additional time to prepare for trial even where defense counsel has not exercised "due diligence." See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 33-34 (1974); reprinted in 1974 U.S. Code Cong. & Ad. News 7401, 7426.

It should be noted that the factors listed in subsections (b)(i)-(iv) of 18 U.S.C. §3161(h)(8) are not the only factors that the court may consider in determining whether to grant an excludable continuance. But see, United States v. Fielding, 645 F.2d 719, 721 (9th Cir. 1981). The Second Circuit Guidelines, section III contain an extensive discussion of the circumstances that might warrant an 18 U.S.C. §3161(h)(8) continuance including: emergencies (i.e., natural disasters, transportation strikes, etc.); a defendant's cooperation (see also, USAM 9-17.149, supra); consideration by the government of a defendant's request for pre-trial diversion; absence or unavailability of defense witnesses (see also, USAM 9-17.153, supra); pending court of appeals or Supreme Court decision that would be dispositive of the case. An 18 U.S.C. §3161(h)(8) continuance will also be appropriate in many instances following the termination of a specific automatic exclusion under 18 U.S.C. §3161(h)(1)-(h)(7). See Judicial Conference Guidelines, at 52-59. The only factors that may not be considered as grounds for an 18 U.S.C. §3161(h)(8) continuance are listed in 18 U.S.C. §3161(h)(8)(C) which explicitly forbids the granting of a continuance under paragraph (8)(A) of 18 U.S.C. §3161(h) because of general congestion of the court's calendar (United States v. New Buffalo Amusement Corp., 600 F.2d 368 (2d Cir. 1979)), or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government.

The Judicial Conference Guidelines, at 58, suggest that an 18 U.S.C. §3161(h)(8) continuance may not be granted until the final day of the 70-day period and that trial must commence as soon as the continuance expires. The Second Circuit Guidelines, at 43-45, disagree and state that an ends-of-justice continuance may fall in the middle of the 70-day period. Thus, if only 40 non-excludable days have been used prior to the expiration of the continuance, the case need not be tried for another 30 days. The legislative history favors the Second Circuit's interpretation. See, e.g., S. Rep. No. 212, 96th Cong., 1st Sess. 17-20, 34-35 (1979); H.R. Rep. No. 390, 96th Cong., 1st Sess. 12 (1979); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 22 (1974); S. Rep. No. 1021, 93d Cong., 2d Sess. 39-40 (1974).

9-17.160 Defendants Incarcerated Elsewhere

18 U.S.C. §3161(j) provides that it is the duty of the attorney for the government when he/she knows that a person charged with an offense is serving a term of imprisonment in any penal institution, to promptly: (1) undertake to obtain the presence of the prisoner for trial; or (2) cause a detainer to be filed with the person having custody of the prisoner and request him/her to so advise the prisoner of his/her right to demand trial.

See United States v. Roper, 716 F.2d 611, 614 (4th Cir. 1983); United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980) (demand is a prerequisite to a speedy trial). See also, USAM 9-17.102, supra. The government does not bear the burden of proving that it lacked knowledge of a defendant's incarceration. See United States v. Hendricks, 661 F.2d 38,40 (5th Cir. 1981).

Upon receipt of notice that the defendant demands trial the attorney for the government shall promptly seek to obtain the presence of the prisoner for trial.

Under 18 U.S.C. §3161(b) the applicable time limitation does not begin to run until the defendant is in federal custody.

Note that under 18 U.S.C. §3161(j) the Speedy Trial Act is not called into play until a federal charge has been filed, United States v. Burkhalter, 583 F.2d 389 (8th Cir. 1978), and that the accused must be "serving a term of imprisonment." For cases construing identical language in the Interstate Agreement on Detainers Act, 18 U.S.C. app., see United States v. Roberts, 548 F.2d 665, 670, 671 (6th Cir. 1977); United States v. Harris, 566 F.2d 610 (8th Cir. 1977); United States v. Evans, 423 F. Supp. 528, 531 (S.D.N.Y. 1976), aff'd, 556 F.2d 561 (2d Cir. 1977). Where both the Speedy Trial Act and the Interstate Agreement on Detainers Act apply, effort should be made to comply with the time and other limitations of both. See United States v. Mauro, 436 U.S. 340, 356-357 n.24 (1978).

In view of the "constitutional duty" to make a good faith effort to bring a prisoner to trial imposed on the prosecutor (see Barker v. Wingo, 407 U.S. 514, 527 (1971); Smith v. Hooey, 393 U.S. 374, 383 (1969)), reliance upon filing of a detainer under 18 U.S.C. §3161(j)(1)(B) may be ill-advised. See USAM 9-2.145.

9-17.170 Sanctions

18 U.S.C. §3162(a)(1) provides that if an indictment or information is not timely filed the complaint shall be dismissed or "otherwise dropped." Where the defendant has been arrested but never charged in a complaint the dismissal sanction does not apply. See United States v. Janik, 723 F.2d 537, 542 (7th Cir. 1983); United States v. Sanchez, 722 F.2d 1501, 1509 (11th Cir. 1984). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a re-prosecution on the administration of justice. See United States v.

Bittle, 699 F.2d 1207, 1208 (D.C. Cir. 1983); United States v. Carreon, 626 F.2d 528 (7th Cir. 1980). There is no presumption in favor of a dismissal with prejudice. See United States v. Caparella, 716 F.2d 976, 978-980 (2d Cir. 1983).

Unlike 18 U.S.C. §3162(a)(2), 18 U.S.C. §3161(a)(1) does not explicitly require a motion by the defendant, allocate the burden of proof, or require timeliness. Nevertheless, the legislative history clearly contemplates the same conditions. See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 23 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7401, 7416. A motion to dismiss that alleges a violation of the 30-day arrest to indictment period is timely if made after indictment. See United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984). See also, 1974 U.S. Code Cong. & Ad. News at 7419 and S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979); and Rule 12(f), Federal Rules of Criminal Procedure, which provides that defenses and objections based on defects in the institution of prosecution must be raised prior to trial or are waived.

18 U.S.C. §3162(a)(2) provides that if trial is not timely commenced upon an indictment or information it must be dismissed. The defendant has the burden of proof of supporting such motion but the government has the burden of going forward with the evidence in connection with any exclusion of time under 18 U.S.C. §3161(h)(3). See United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981).

The denial of a motion to dismiss that alleges a Speedy Trial Act violation is not appealable prior to trial. See United States v. Mehrmanesh, 652 F.2d 766 (9th Cir. 1981); cf., United States v. MacDonald, 435 U.S. 850 (1978). If a motion to dismiss is granted, however, the case should be reported at once to the Appellate Section of the Criminal Division so that the Solicitor General may determine if the sanction applied is appropriate.

9-17.171 Waiver

18 U.S.C. §3162(a)(2) provides that failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section. See United States v. Tercero, 640 F.2d 190, 195 (9th Cir. 1980) (dismissal motions based solely on the Sixth Amendment do not preserve for appeal a claim under the Act); Smith v. United States, 635 F.2d 693, 697 (8th Cir. 1980); United States v. Runge, 593 F.2d 66, 71 (8th Cir. 1979), cf., Fed. R. Crim. P. 12(b), (f). Moreover, a defendant waives a speedy trial claim by pleading guilty unless the plea is conditioned on his/her right to raise the issue on appeal. See United States v. Yunis, 723 F.2d 795, 796 (11th Cir. 1984).

Whether a defendant may execute a valid express waiver of his/her right to move for dismissal is unclear. The Third Circuit has held that a defendant does not waive his/her right to a speedy trial by requesting a postponement. See United States v. Carrasquillo, 667 F.2d 382, 388-390 (3rd Cir. 1981). This decision is predicated on the Senate Committee Report, which states: "in the strongest possible terms that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his/her statutory conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." See S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979). This view is in accord with an earlier district court decision. See United States v. Beberfeld, 408 F. Supp. 1119, 1122-23 (S.D.N.Y. 1976); but see, Platt, The Speedy Trial Act of 1974: A Critical Commentary, 44 Brooklyn L. Rev. 757 (1978). The basic argument underlying this position is that the rights conferred by the Speedy Trial Act include a right conferred upon the public which the defendant is incompetent to waive.

The Criminal Division does not believe that either the Senate Committee Report or the arguments it advances are necessarily conclusive of the issue. Despite the public interest in holding trials within the time limits of the Speedy Trial Act, it might be argued that the right to move for dismissal if those limits are exceeded is primarily a right of the defendant which he/she should be competent to waive expressly as well as by procedural default, as in the case of statutes of limitations. See United States v. Wild, 551 F.2d 418 (D.C. Cir. 1977), cert. denied, 431 U.S. 916 (1977).

Nonetheless, there is a substantial risk that attempted defense waivers of the Speedy Trial Act will be held invalid. Moreover, there is little apparent reason why the liberalized automatic exclusions of 18 U.S.C. §3161(h)(1)-(h)(7) and the discretionary "ends of justice" provision of 18 U.S.C. §3161(h)(8) should be insufficient to allow all parties ample time to prepare for trial without resort to mechanisms of questionable validity. Accordingly, it is strongly recommended that government attorneys not initiate or affirmatively seek such waivers, and that they attempt to discourage their courts from exacting them by bringing to the court's attention the Committee statement quoted above.

9-17.172 Sanctions Apply to Retrials

The sanctions of 18 U.S.C. §3162 apply to new trials and retrials under 18 U.S.C. §3161(d) and (e).

9-17.173 Sanctions Against Attorneys

18 U.S.C. §3162(b) provides for sanctions that may be applied against government or defense attorneys for: allowing the case to be set for trial without disclosing the unavailability of a necessary witness; filing a frivolous motion solely for purposes of delay, making a false material statement for the purpose of obtaining a continuance, or otherwise willfully failing to proceed to trial without justification. See United States v. Carlone, 666 F.2d 1112, 1116 (7th Cir. 1981).

The court may punish appointed defense counsel by withholding up to 25% of the payments under the Criminal Justice Act 18 U.S.C. §3162(b)(A), or by fining retained counsel up to 25% of his/her fee, 18 U.S.C. §3162(b)(B). Government counsel can be fined up to $250, 18 U.S.C. §3162(b)(C). Both defense and government counsel may be barred from appearing before the court for up to 90 days, 18 U.S.C. §3162(b)(D), and reports to appropriate disciplinary committees may be made, 18 U.S.C. §3162(b)(E). In addition, other sanctions such as contempt are unimpaired.

9-17.174 Deferred Effective Date of Sanctions

The 1979 amendments to the Speedy Trial Act delayed imposition of the full dismissal sanctions and sanctions upon attorneys from July 1, 1979, to July 1, 1980. See 18 U.S.C. §3163(c). See United States v. Litton Systems, Inc., 722 F.2d 264, 265 (4th Cir. 1984); United States v. Horton, 646 F.2d 181, 188 (5th Cir. 1981); United States v. Gilliss, 645 F.2d 1769, 1774-1775 (8th Cir. 1981); United States v. Watson, 623 F.2d 1198 (7th Cir. 1980). Prior to the effective date of the mandatory sanctions provision, dismissal was discretionary in some circuits. See, e.g., United States v. Greer, 620 F.2d 1383 (10th Cir. 1980); United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980).

9-17.180 Detainees and "High Risk" Designees

18 U.S.C. §3164(a), as amended in 1979, requires priority of trial for "persons...being held in detention solely because they are awaiting trial," 18 U.S.C. §3164(a)(1); United States v. Furlow, 644 F.2d 764 (9th Cir. 1981)(the 90-day rule does not apply to persons detained on other charges), and persons released pending trial "who have been designated by the attorney for the Government as being of high risk" (18 U.S.C. §3164(a)(2)).

Trial of such persons must be commenced within 90 days of the beginning of continuous detention or risk designation. The 90-day period is subject to the exclusions of 18 U.S.C. §3161(h). See 18 U.S.C. §3164(b).

Failure to timely commence trial of a detainee, without his/her "fault" or that of his/her counsel, and failure to timely commence trial of a designee, without fault of the prosecutor, requires automatic review by the court of the conditions of release. The sanction for failing to meet the limit in the case of a detainee is his/her release (but not dismissal of the case). See Lambert v. United States, 600 F.2d 476 (5th Cir. 1976). In the case of a designee, the nonfinancial release conditions may be modified to assure his/her appearance if the court finds he/she has intentionally delayed his/her trial. See 18 U.S.C. §3164(c).

The term "high risk" is not defined in the Speedy Trial Act. The Senate Report does not explain the term but refers to prototype rules which suggest that the test is danger to self, witnesses or the community. See S. Rep. No. 1021, 93rd Cong., 2d Sess. 44, 45 (1974). The House Report, supported by the text of 18 U.S.C. §3164(c), defines the term exclusively in terms of fugitivity. See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 39 (1974). The Judicial Conference Guidelines refer only to danger to self, witnesses or the community.

The Speedy Trial Act specifies that the high risk designation is to be made by the U.S. Attorney, but it does not prescribe where, when or how the designation is to be made, or whether it is subject to dispute by the designee, or review and rejection by the court, or revocation by the U.S. Attorney.

9-17.190 Constitutional Aspects

18 U.S.C. §3173 provides that the Speedy Trial Act is not to be construed to bar any claim of denial of the right to a speedy trial guaranteed by the Sixth Amendment. The leading case on the constitutional aspects of speedy trial is Barker v. Wingo, 407 U.S. 514 (1971). See also, Strunk v. United States, 412 U.S. 434 (1973) (mandating dismissal with prejudice when Sixth Amendment rights are violated); Dillingham v. United States, 423 U.S. 64 (1975); United States v. MacDonald, 456 U.S. 1 (1982), (on the triggering of the Sixth Amendment); United States v. Marion, 404 U.S. 307 (1971); United States v. Lovasco, 431 U.S. 783 (1977) (on the Fifth Amendment aspects of pre-charge delay). The interplay of the Speedy Trial Act with Rule 48(b) and Rule 50(b), Federal Rules of Criminal Procedure, is unclear, as nebulous concepts of inherent power are involved. See, e.g., United States v. Novelli, 544 F.2d 800 (5th Cir. 1977).

9-17.200 TITLE I - SPEEDY TRIAL (CON'T.)

9-17.210 The Planning Group

9-17.211 Duties and Functions

18 U.S.C. §3165(a) obligates each district court to study its administration of justice and, with the aid of the Federal Judicial Center and the planning group mandated by 18 U.S.C. §3165(e) to formulate plans for the disposition of criminal cases in accordance with the Speedy Trial Act. The planning group is to advise the court on the formulation of 18 U.S.C. §3165 reports and to consider major reforms (e.g., grand jury system; collateral attacks; pre-trial diversion; excessive federal jurisdiction). See 18 U.S.C. §3168(a), (b). As amended in 1979, a plan must be filed before June 30, 1980, to govern procedures after July 1, 1980. A copy of all plans submitted to meet the 1980 requirement are in file in the Main Library of the Department of Justice.

9-17.212 Judicial Emergency

18 U.S.C. §3174 outlines a procedure to cope with the contingency that a district will be unable to meet the time limitations because of calendar congestion. It requires consultation by the chief judge with the planning group and then application to the judicial council of the circuit, 18 U.S.C. §3174(a). If the council has no other solution, it is authorized to suspend, prospectively only, for no more than one year, and only in cases where the defendant is not in custody awaiting trial, the limitations of 18 U.S.C. §3161(c)(indictment to trial). See, e.g., United States v. Rodriguez-Restrepo, 680 F.2d 920, 921 n.1 (2d Cir. 1982). Accord, United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982); United States v. Koger, 646 F.2d 1194 (7th Cir. 1981). In no event may it allow the period from indictment to trial to exceed 180 days. The suspension may not extend the 18 U.S.C. §3161(b) limits (arrest to indictment), nor may it suspend the sanctions of 18 U.S.C. §3162.

9-17.300 TITLE II - PRE-TRIAL SERVICE AGENCIES

9-17.310 Pilot Districts

18 U.S.C. §3152 requires the Administrative Office of the United States Courts to establish a pilot pre-trial service agency in ten "representative" districts, other than the District of Columbia, designated by the Chief Justice after consultation with the Attorney General.

9-17.320 Duties and Functions

The agency is supposed to collect, verify, and report relevant release information to the appropriate judicial officer, to make recommendations with respect to release and conditions of release (18 U.S.C. §3154(1)), and to review the release conditions in pending cases (18 U.S.C. §3154(2)). The information is to have limited confidentiality, and be generally inadmissible in legal proceedings (18 U.S.C. §3154(1)). The agency is responsible for supervision of releases (18 U.S.C. §3154(3)), and may be authorized to operate or contract for "appropriate facilities" for care and custody (e.g., half-way houses; narcotic and alcohol treatment centers; counseling)(18 U.S.C. §3154(4)), and must inform the court of violations of conditions and recommend modifications of the conditions of release (18 U.S.C. §3154(5)). It is also supposed to coordinate eligible custodial agencies and inform the court of their capabilities (18 U.S.C. §3154(6)).

The agency is further obligated to assist releases in obtaining "employment, medical, legal, and social services" (18 U.S.C. §3154(7)), to cooperate with the United States Marshal and U.S. Attorney in preparing pre-trial detention reports (18 U.S.C. §3154(8)), and to perform other functions assigned by the court (18 U.S.C. §3154(9)).

9-17.330 Administration

The powers of five of the ten agencies, and the policy making function are vested in the Division of Probation of the Administrative Office of the United States Courts (18 U.S.C. §3153(c)); but, in the remaining five, it is vested in a Board of Trustees, "appointed" by the Chief Judge, consisting of:

A. A district judge;

B. The U.S. Attorney;

C. Two defense counsel, one of whom must be the public defender, if there is one;

D. The chief probation officer; and

E. Two representatives of community organizations (18 U.S.C. §3153 (b).

The non-official members serve for three years (18 U.S.C. §3153(c)).

9-17.340 Pre-Trial Service Officer

The agency is to be directed and supervised by a "Pre-trial Service Officer," who is empowered to appoint and fix compensation of his/her subordinates, experts and consultants (see 18 U.S.C. §3153(3)). The Pre-trial Service Officer, in the five districts supervised by the Division of Probation will be a probation officer appointed by the Chief of the Division (see 18 U.S.C. §3153(d)(1); in the remaining five he/she will be appointed by the Board of Trustees, upon the judges' recommendation (see 18 U.S.C. §3153(d)(2)).

9-17.350 Annual Reports

18 U.S.C. §3155(a) obligates the Director of the Administrative Office of the United States Courts to report to Congress annually, and, in his/her fourth report, comprehensively, on the operation and effectiveness of the pilot agencies, with recommendations for future programs. 18 U.S.C. §3155(b) requires a similar comprehensive report with respect to the effect of the Speedy Trial Act as a whole to be filed on or before June 30, 1979.

9-17.360 Definitions

18 U.S.C. §3156 contains differing definitions of "judicial officer" and "offense" for different sections of title 18. See also, 18 U.S.C. §3172(a); USAM 9-17.101, supra.

9-17.400 SPEEDY TRIAL ACT TIMETABLE

August 2, 1979	Effective date of 30/70 time limits. (See 18 U.S.C. §3161.) Mandatory dismissal sanction suspended until July 1, 1980.
July 1, 1980	Effective date of sanction provisions.

DETAILED TABLE OF CONTENTS FOR CHAPTER 18

9-18.000 DEFENSES

9-18.100 ALIBI DEFENSES

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 defendants at the scene of the offense and rebutting defendants' 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). It should be recognized, however, that the constitutionality of excluding the testimony of an important defense witness for a failure to comply with discovery rules has not yet been firmly established. See Taliaferro v. Maryland, ___ U.S. ___, 103 S. Ct. 2114 (1983) (White, J., dissenting from denial of certiorari); Wardius v. Oregon, supra, at 472 n.4; Fendle v. Goldsmith, 717 F.2d 1552 (9th Cir. 1983); United States v. Fitts, 576 F.2d 837 (10th Cir. 1978).

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 himself/herself, on whom he/she proposes to rely in establishing his/her 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.

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 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. However, the rule does not limit the right of the defendant to testify in his/her own behalf.

Evidence of an intention to rely upon an alibi or of 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).

9-18.130 Suggested Form of Demand

A. Demand for Disclosure of Alibi Defense

To: [Defendant]

Pursuant to Rule 12.1, Federal Rules of Criminal Procedure, 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 receipt 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.

B. Note:

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 86 (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.

9-18.200 INSANITY DEFENSE

9-18.201 Introduction

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 a mental disease or defect who are involved in the criminal justice system. The most 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 became insane after having been found guilty or while serving a federal prison sentence.

9-18.202 Mental Competency of an Accused

Mental competency of an accused is discussed at USAM 9-9.000. The pertinent statutory provisions under the 1984 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 Historical Development of the Insanity Defense

9-18.211 M'Naghten's Case: Right-Wrong Test

The foundation of the defense, or excuse, of insanity is laid to the decision in M'Naghten's Case, 10 Cl. & F.200, 8 Eng. Re. 718 (House of Lords, 1843), which held that:

> [T]o establish a defense on the grounds of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id. at 210, 722.

The use of the term "disease of the mind" was significant since it firmly established the relevance of medical testimony. The jury now has a larger role--to evaluate medical testimony in light of the right-wrong criterion.

9-18.212 Modified M'Naghten Test--Added Volitional or "Irresistible Impulse" Test

The next stage after M'Naghten's Case was the widespread adoption of an additional volition test, exculpating a defendant who knew what he/she was doing and that it was wrong but whose actions were deemed, because of mental disease, to be beyond his/her control. This new test was stated by the Supreme Court in Davis v. United States, 165 U.S. 373 (1897), where the Court approved of an insanity charge to a jury which was as follows:

> The term "insanity," as used in this defense, means a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing,

> or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will--by which I mean the governing power of his mind--has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

In view of the fact that the above formulation does not require that the abnormality be characterized by sudden impulse as opposed to brooding and reflection, it is more appropriate to term this modified M'Naghten's Case test a "control" or "volitional" test rather than an "irresistible impulse" test.

9-18.213 Durham Test--Product of Mental Disease or Defect

The third stage in the development of the defense of insanity was the repudiation of both M'Naghten's Case and its volitional supplement as contained in Davis, supra, by the decision of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (Bazelon, Ch. J). Durham enunciated the following formulation: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Id. at 864. The primary reason for this new test was that the old formulations had come under attack as permitting too narrow an inquiry into the accused's mental condition, as it precludes doctors from presenting important medical data. The avowed purpose of the new test was to enable the jury "to consider all information advanced by relevant scientific disciplines." Id. at 872.

However, after adoption by the D.C. Circuit, the Durham test was not perceived to be achieving its full function, largely because many people thought that Durham was only an attempt to identify a clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc., may be inappropriate for assessing responsibility in criminal cases. Upon this premise, in McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (en banc), the D.C. Circuit modified the Durham test and decided to give mental illness a legal definition independent of its medical meaning. In McDonald it held that mental illness "includes any abnormal condition of the mind which substantially affects mental or emotional processes and which substantially impairs behavior control." Id. at 851.

After numerous appellate opinions which refined, clarified, expanded, and limited Durham over a period of eighteen years, the D.C. Circuit overruled Durham in United States v. Brawner, 471 F.2d 969 (D.C. Cir.

1972) (en banc), and followed other federal courts in using the A.L.I. test for the standard of deciding how to judge the defense of insanity. For a history and analysis of the Durham decision, see Symposium on United States v. Brawner, 1973 Wash. U.L.Q. 17-154.

9-18.214 A.L.I. Test

While Durham, supra, and its progeny were evolving in the D.C. Circuit, most federal courts (with the exception of the First Circuit), with some modifications and hesitations, had moved from M'Naghten's Case and its volitional modification to 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 (3d 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); United States v. Smith, 404 F.2d 908 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (9th 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).

9-18.215 Lyons Test

In April of 1984, the Fifth Circuit reconsidered the issue and concluded that the volitional prong of the insanity defense--lack of capacity to conform one's conduct to the requirements of the law--no longer comported with current medical and scientific knowledge. United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984). Consequently, they adopted a new standard, holding that "a person is not responsible for criminal conduct on grounds of insanity only if at the time of that

conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct."

9-18.220 The Present Statutory Test: 18 U.S.C. §20(a)

The Insanity Defense Reform Act of 1984, signed into law on October 12, 1984, adopted for the first time a uniform federal statutory standard for the insanity defense. This standard, codified at 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." S. Rep. No. 225, Pub. L. No. 98-473, 98th Cong. 1st Sess., p. 229, 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. §20(b)

Under 18 U.S.C. §20(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. See Davis v. United States, 160 U.S. 469, 486-93 (1895).

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. 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.

9-18.240 Scope of Expert Testimony

Section 406 of the 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." 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 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 of whether the relevant legal test for insanity has been met is a matter for

the legal factfinder. Id. at p. 231. 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.

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. 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 his/her 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 his/her release would not create a substantial risk to others of bodily injury to, or serious damages to the property of, another person. If the offense for which the defendant was tried involved bodily injury, serious property damage, or a substantial risk thereof, he/she must sustain his/her 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 the constitutionality of both mandatory commitment pending a release hearing and placing the burden of proof at the release hearing on a defendant who had the burden of proof on the insanity issue at trial to establish his/her suitability for release by the same standard used at trial. See Jones v. United States, 463 U.S. 354 (1983). Both the mandatory commitment procedures and the release hearing provisions of Section 4243 pass constitutional muster under Jones.

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 objecting prisoner may not be transferred unless a court finds by a preponderance of the evidence that he/she is presently suffering from a mental disease or defect for which he/she is in need of care or treatment at a "suitable facility"--a term that is meant to include a psychiatric section of a prison.

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 him/her for commitment. See S. Rep. No. 225, 98th Cong., 1st Sess., at 250.

9-18.270 [Reserved]

9-18.280 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. §20(a) to offenses committed before the date of enactment, October 12, 1984. See Dobbert v. Florida, 432 U.S. 282, 292 (1970), citing Beazell v. Ohio, 269 U.S. 167, 169-70 (1925); United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973) (D.C. statute shifting burden of proof on issue of insanity to defendant cannot be applied retroactively). However, in cases in which the defendant presents clear danger of serious violence, and in which there exists a likelihood of acquittal under the prior judicially-developed standard in the circuit but a likelihood of conviction under the standard recently adopted in the Fifth Circuit, prosecutors should consider arguing that a judicial acceptance of the Fifth Circuit standard is appropriate. See United States v. Lyons, 731 F.2d 243 (5th Cir. 1984). Before making such an argument, however, authorization must be obtained from the Assistant Attorney General for the Criminal Division. Attorneys for the government should telephone the Criminal contacts listed below regarding requests for authorization.

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. This policy is based on 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. 1/

1/ It is the position of the Department of Justice that the release provisions of the new Act are applicable to persons previously committed to St. Elizabeth's Hospital pursuant to D.C. Code §24-301(d) following an insanity acquittal in the United States District Court for the District of Columbia.

9-18.290 Criminal Division Contacts

Questions concerning the Insanity Defense Reform Act of 1984 should be directed to the General Litigation and Legal Advice Section at 724-6899 or 724-7083. In addition, copies of significant pleadings and decisions involving the insanity defense should be sent to the General Litigation and Legal Advice Section, 315 9th Street, N.W., Room 504, Washington, D.C. 20530.

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 him/her, for the purpose of instituting a criminal prosecution against him/her. 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 case 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.

It has been suggested that supervisory powers or due process possibly 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. Ramirez, 710 F.2d 535, 539-41 (9th Cir. 1983); United States v. Williams, 705 F.2d 603, 619-21 (2d Cir. 1983).

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.

9-18.400 STATUTE OF LIMITATIONS DEFENSES

9-18.401 Introduction

Although not known at common law and dependent on legislative enactment for their existence, statutes of limitations are today a part of the criminal law of virtually ever state as well as the federal government. See United States v. Cadarr, 197 U.S. 475, 478 (1905); United States v. Marion, 404 U.S. 307, 317-18 (1971).

The primary reasons for restrictions of time revolve around accepted notions that prompt investigation and prosecution insures that conviction or acquittal is a reliable result and not the product of faded memory or unavailable evidence; that time limitations may serve to encourage law enforcement authorities to expedite their investigation and discovery of crimes; that with certain exceptions involving particularly heinous offenses or offenses which are secretive in nature and thus difficult to discover, ancient wrongs should not be resurrected; and that community security and economy in the allocation of enforcement resources require that most effort be concentrated on recent crimes. See Toussie v. United States, 397 U.S. 112, 114-15 (1970).

9-18.402 Relationship to Constitutional Rights

Statutes of limitations are a defendant's primary safeguard against prejudice from preaccusation delay. United States v. Lovasco, 431 U.S. 783, 789 (1977). Protection under a statute of limitations should not be confused with fundamental constitutional rights such as speedy trial or due process. A period of limitation is an arbitrary cutoff point; constitutional rights (or for that matter the right to a prompt indictment under Rule 48(b) of the Federal Rules of Criminal Procedure), may or may not be abridged within the prescribed period. Unlike the bar of the limitation period, due process restrictions involve analysis of actual prejudice to the defendant and reasons for the delay. See United States v. Lovasco, supra.

9-18.403 Effect of Legislative Action

Since the statute of limitations, on expiration of the prescribed period, becomes a vested right, a prosecution once barred cannot be

maintained after an amendment to the statute enlarging the period. However, an enlargement of the applicable period prior to the expiration of the shorter period will apply to an offense committed before the enlargement. See Dennis v. United States, 302 F.2d 5, 14 (10th Cir. 1962); Flater v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

9-18.404 Period of Limitations

Current federal law contains a single statute prescribing a general period of limitations and a myriad of statutes of specific application.

18 U.S.C. §3282 is the statute of general application. Enacted in 1954, 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. The generally applicable period of limitations was originally two years and was later increased to three years before being expanded to its present term.

18 U.S.C. §3281 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, 704 F.2d 547 (11th Cir. 1983); see also Coon v. United States, 411 F.2d 422, 425 (8th Cir. 1969) (noting but failing to resolve the issue); United States v. Provenzano, 423 F. Supp. 662 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (table). See USAM 9-10.100.

18 U.S.C. §3283 provides a five-year time period for the bringing of prosecutions for violation of the "customs" or "slave trade" laws. Since the period prescribed is the same as that under 18 U.S.C. §3283, the statute is superfluous.

18 U.S.C. §3285 provides that a contempt proceeding under 18 U.S.C. §402 must be instituted within one year of the act complained of. It also provides that such a proceeding is not a bar to further prosecution for the same act. Moreover, court rulings have held that the Double Jeopardy Clause of the Fifth Amendment does not prohibit prosecution for contempt and another substantive offense arising out of the same conduct. See Jurney v. MacCracken, 294 U.S. 125, 151-52 (1935); United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971).

18 U.S.C. §3286 is similarly directed to a single offense, and provides that a prosecution under 18 U.S.C. §2198 for seduction of a female passenger on board a United States vessel by an employee of the vessel shall be commenced within one year after the vessel arrives at its port of destination.

18 U.S.C. §3291 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. §§792-794.

17 U.S.C. §507(a) 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.

26 U.S.C. §6531 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 9-18.414, infra.

50 U.S.C. §783(e) 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.

42 U.S.C. §2278 provides a similar ten-year period for prosecution of restricted data offenses under the atomic energy laws, 42 U.S.C. §§2274-2276.

9-18.405 Fugitivity

Beginning with the first statute of limitations a "person fleeing from justice" was to receive no benefit from the passage of time. Thus, statutes of limitations are tolled during periods of fugitivity. See 18 U.S.C. §3290. Physical absence from the jurisdiction is not required to trigger this tolling provision, but there is a division of authority in the federal courts on whether an intent to avoid justice must be established in order to defeat a plea of statute of limitations. See United States v. Singleton, 702 F.2d 1159 (D.C. Cir. 1983); Jhirad v. Ferrandina, 486 F.2d 442, 444 (2d Cir. 1973).

9-18.406 Continuing Offenses

Normally, a statute of limitations begins to run when the offense is completed. This is so even when the acts committed are charged as an offense having characteristics of finality (contempt in the presence of the court) but could have been charged as a continuing offense (obstruction of justice). See United States v. Irvine, 98 U.S. 450 (1878). It is the offense charged in the indictment, not the general nature of the act involved, that governs. A continuing offense involves, as its name implies, attributes of nonfinality. Hence, falsification by scheme, even though the falsifying act was committed beyond the period of limitation, is deemed a continuing offense if the act continued to produce fruits within that period. See Bramblett v. United States, 231 F.2d 489 (D.C. Cir. 1956), cert. denied, 350 U.S. 1015 (1956). Possession-of-contraband offenses are continuing offenses. Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958). Of course, conspiracy during its life is a continuing offense. A conspirator must terminate his/her association by going to the authorities or communicating to his/her co-conspirators actual disassociation in the venture before the period will begin to run for him/her. See United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); United States v. Schwensha, 383 F.2d 395 (2d Cir. 1967), cert. denied, 390 U.S. 904 (1968).

9-18.407 Conspiracy

Where conspiracy charges are involved, the statute of limitations begins to run from the date of the last overt act. See Fiswick v. United States, 329 U.S. 211 (1946); United States v. Johnson, 165 F.2d 42 (3d Cir. 1947), cert. denied, 332 U.S. 852 (1948); United States v. Boyle, 338 F. Supp. 1028, 1036-37 (D.D.C. 1972); United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972), cert. denied, 408 U.S. 922 (1972); United States v. Andreas, 458 F.2d 491 (8th Cir. 1972), cert. denied, 409 U.S. 848 (1972); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970). With regard to conspiracies not requiring proof of an overt act, such as RICO, see USAM 9-18.409, infra.

9-18.408 Assimilative Crimes Act

The Assimilative Crimes Act of 1948 (18 U.S.C. §13) makes punishable in federal courts 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. 1972), cert. denied, 405 U.S. 981 (1972); United States v. Andem, 158 F. 996 (D.N.J. 1908) (cited by Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966). Cf. United States v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir. 1984).

9-18.409 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, supra. The reference to state law in the statute is simply to define the conduct, and is not meant to incorporate state procedural law.

With respect to conspiracy statutes such as RICO that do not require proof of an overt act, the indictment satisfies the limitation statute if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished. See United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983).

9-18.410 Statute of Limitations Defenses (cont.)

9-18.411 Not Appealable Prior to Trial

Denial of a statute of limitations defense is not appealable by the defendant prior to trial. See United States v. Levine, 658 F.2d 113 (3d Cir. 1981).

9-18.412 Defective 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 not broaden the charges made in the first. See 18 U.S.C. §§3288, 3289; see United States v. Grady, 544 F.2d 598 (2d Cir. 1976).

9-18.413 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)); 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).

9-18.414 Lesser Included Offenses

Rule 31(c) of the Federal Rules of Criminal Procedure permits a finding of guilty of an offense necessarily included in the offense charged in appropriate evidentiary circumstances. Out of this rule arises the problem whether a conviction for a lesser included offense may be sustained where the lesser offense is barred by the statute of limitations even though the charged parent offense is not. The law in most state jurisdictions, as well as the District of Columbia, is that a conviction under the lesser included offense in these circumstances will not stand. See Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960), rev'd in part but cert. denied on this issue, 366 U.S. 209 (1961); Askins v. United States, 251 F.2d 909 (D.C. Cir. 1958). Although the doctrine may work an injustice in some situations, the underlying rationale seems to be that to permit the opposite result would enable prosecutors to revive barred offenses merely by obtaining an indictment for a greater offense.

9-18.415 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. 1974), 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.

*U.S. GOVERNMENT PRINTING OFFICE:1987-191-487:60091

DETAILED TABLE OF CONTENTS 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. §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." At present these are: arson, 18 U.S.C. §81; assault, 18 U.S.C. §113; maiming, 18 U.S.C. §114; larceny, 18 U.S.C. §661; receiving stolen property, 18 U.S.C. §662; murder, 18 U.S.C. §1111; manslaughter, 18 U.S.C. §1112; attempted murder or manslaughter, 18 U.S.C. §1113; kidnapping, 18 U.S.C. §1201(a)(2); malicious mischief, 18 U.S.C. §1363; rape, 18 U.S.C. §2031; carnal knowledge, 18 U.S.C. §2032; and robbery 18 U.S.C. §2111. 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; 18 U.S.C. §1205.

The term "special maritime and territorial jurisdiction of the United States" is defined in six 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). Only subsections (1), (2), (3) and (5) of 18 U.S.C. §7 will be discussed, and Guano Islands are of only historical

significance and places outside the jurisdiction of any nation are unlikely to generate concrete issues in the near future.

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 so long as that did not interfere with the United States' governmental functions, e.g., the right to levy certain taxes, 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 reserved 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).

A. Summary

The United States may exercise plenary criminal jurisdiction over lands within state borders:

1. Where it reserved such jurisdiction upon entry of the state into the union;

2. Where, prior to February 1, 1940, it acquired property for a purpose enumerated in the Constitution with the consent of the state;

3. 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

4. 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. Borjan, 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. It provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in §7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

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).

18 U.S.C. §13 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. 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. 1, §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 1207, 1277 (10th Cir.), cert. denied, 459 U.S. 103 S. Ct. 789 (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. 1, §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.

In O'Callahan v. Parker, 395 U.S. 258 (1969), 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." Although O'Callahan attempted no definition of "service connection," that case concerned an

off-base crime committed against a civilian. For a list of factors to be considered in determining service connection, see Relford v. Commandant, 401 U.S. 355 (1971). The court there held that a member of the armed services charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or property therein may be tried by a court martial.

The U.S. Attorneys should ensure that federal investigative agencies such as the FBI and DEA maintain sufficient liaision with military authorities so that serious crimes committed by persons ruled not subject to military jurisdiction can be considered for prosecution by their office.

9-20.120 Maritime Jurisdiction

18 U.S.C. §7 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. Homles, 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 occured 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 most of the "enclave statutes" (18 U.S.C. §§113, 114, 661, 1111, 1112, 1113, 2031, 2032 and 2111) 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, _____ U.S. _____, No. 82-1253

(decided Feb. 22, 1984). The assistance of the Field Solicitor of the Department of 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.

18 U.S.C. §1153 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, except for burglary, involuntary sodomy, and incest which look to the law of the state where the crime was committed for definition and punishment. In paragraph three, Congress has left the door open to apply similar "borrowing" provisions to any other listed offense "not defined and punished by federal law."

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 9-20.231 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, 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 978 (9th Cir.), cert. denied, _____ U.S. _____, 103 S. Ct. 1204 (1983); United States v. John, 587 F.3d 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, federal jurisdiction will be under 18 U.S.C. §2023 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. §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 Federal-State Jurisdiction

Although it might be assumed that whoever has jurisdiction over a particular category of crimes may assert it exclusively, the Department has given the matter additional consideration. A substantial case can be made for the proposition that the states are not ousted from jurisdiction over offenses committed by non-Indian offenders which pose a direct and substantial threat to Indian victims, but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable state law as well.

The issue is a difficult one. Although McBratney, supra, firmly establishes that state jurisdiction is exclusive in the absence of a clear Indian victim, it is the Department's position that despite contrary Supreme Court dicta it does not necessary follow that state jurisdiction must be ousted where an offense is stated against a non-Indian defendant under federal law.

The exclusivity of federal jurisdiction with regard to the Major Crimes Act, see 18 U.S.C. §1153, was established in United States v. John, 437 U.S. 634, 651 (1978). 18 U.S.C. §1152 has likewise been viewed as ousting state jurisdiction where Indian defendants are involved. See, e.g., United States ex rel. Lynn v. Hamilton, 233 F.2d 685 (W.D.N.Y 1915); In re Blackbird, 109 F. 139 (W.D. Wis. 1901); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893); Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 921 (1960). Supreme Court dicta, moreover, suggests that federal jurisdiction may similarly be exclusive where offenses by non-Indians within the terms of 18 U.S.C. §1152 are concerned. See Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979); Williams v. Lee, 358 U.S. 217, 219-20 (1959); Williams v. United States, 327 U.S. 711, 714 (1946).

The Montana and North Dakota supreme courts have held that state jurisdiction is ousted where federal jurisdiction under 18 U.S.C. §1152

applied to the unlawful theft or killing of livestock owned by an Indian on a reservation where the perpetrator was non-Indian. See State v. Greenwalt, 663 P.2d 1178 (Mont. 1983) (divided court); State v. Kuntz, 66 N.W. 2d 531 (D. N.D. 1954). But three earlier cases suggest a contrary result, recognizing that, as in McBrateny, supra, the states have a continuing interest in the prosecution of offenders against state law even while federal prosecution may at the same time be warranted. See State v. McAlhaney, 220 N.C. 387, 17 S.E. 2d 352 (1941); Oregon v. Coleman, 1 Ore. 191 (1855). See also United States v. Barnhart, 22 F. 285, 291 (D. Ore. 1884).

Although it would mean that 18 U.S.C. §1152 couild not be uniformly applied to provide for exclusive federal jurisdiction in all cases of interracial crimes, a conclusion that both federal and state jurisdiction may lie where conduct on a reservation by a non-Indian which presents a direct and immediate threat to an Indian person or property constitutes an offense against the laws of each sovereign could not be criticized as inconsistent or anomalous. 18 U.S.C. §1153 was enacted many years after 18 U.S.C. §1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no state jurisdiction over such crimes was contemplated. Consistent with this purpose, 18 U.S.C. §1152 may properly be read to preempt state attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The state interest in such cases, as recognized by McBratney, supra, is strong. 18 U.S.C. §1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian, federal jurisdiction is to be exercised only where the offender is not prosecuted in his/her own tribal courts. But in no event would the state courts have jurisdiction in such a case absent a separate grant of jurisdiction such as that provided by Public Law No. 280, Act of Aug. 1953, 67 Stat. 588. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the federal interest is not to preempt the state courts, but only to retain authority to prosecute to the extent that state proceedings do not serve the federal interest.

This result follows from the preemption analysis set forth in Williams v. Lee, 358 U.S. 217 (1959), where the Court recognized that, in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect

Indian interest in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under state law for conduct occurring on the reservation, no equivalent damage would be done if state as well as federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other federal enclaves. It is generally recognized that a state may condition its consent to a cession of land involving government purchase or condemnation by reserving jurisdiction to the extent consistent with the federal use. See Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Paul v. United States, 371 U.S. 245, 264-65 (1963). Most Indian reservations are, however, unique because they existed prior to statehood and did not arise as a result of a cession agreement or condemnation proceedings. Nonetheless, the analogy to other federal enclaves may be helpful in building the case for concurrent jurisdiction.

States often retain concurrent jurisdiction except to the extent that it would interfere with the federal use. Accordingly, they may do so here as well by prosecuting non-Indian offenders while federal jurisdiction simultaneously remains as needed to protect Indian victims in the event that a state prosecution is not undertaken or is not prosecuted in good faith. For these reasons, therefore, the Department believes that prosecution may be commenced under state law against a non-Indian even in cases where, as a result of conduct on the reservation which represents a direct and immediate threat against an Indian person or property, federal jurisdiction may also attach.

U.S. 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. U.S. 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, U.S. 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 BIA 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

18 U.S.C. §§1151-1165 (1976), as amended 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, and Department of Justice Memorandum of March 21, 1979, on Victimless Crimes by Non-Indians.

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

1/ A substantive federal offense is any of the special jurisdiction offenses such as murder, arson, or rape.

OFFENDER	VICTIM	APPLICABLE LAW (continued)
		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.

9-20.240 Embezzlement and Theft from Tribal Organization

18 U.S.C. §1163 makes embezzlement, theft, criminal conversation and wilful 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

---

2/ State courts have no jurisdiction over Indians for any crimes in Indian country.

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).

9-20.250 Bibliography

A. Cohen, Handbook of Federal Indian Law (Michie 1982);

B. Felix S. Cohen, Handbook of Federal Indian Law (U. of New Mexico reprint);

C. Kappler, Indian Affiars: Laws and Treaties (U.S.G.P.O.); Indian Law Reporter.

U.S. GOVERNMENT PRINTING OFFICE: 1986-491-510:40086

DETAILED TABLE OF CONTENTS FOR CHAPTER 21

9-21.000 PURPOSE AND SCOPE

9-21.010 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to the Witness Security Reform Act of 1984, which is Part F of Chapter XII of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473) and repeals Title V of the Organized Crime Control Act of 1970. This chapter prescribes the procedures for establishing a person as a protected witness.

9-21.020 Scope

These procedures apply to all organizations within the Department of Justice.

The Witness Security Reform Act of 1984 continues the authority of the Attorney General to provide protection and security by means of relocation for witnesses, and their relatives and associates, in official proceedings brought against persons involved in organized criminal activity or other serious offenses if it is determined that an offense described in Chapter 73 (Obstruction of Justice) of Title 18 or a similar state or local offense involving a crime of violence directed at a witness is likely to occur.

28 U.S.C. §524 provides authority to use appropriations of the Department of Justice for the payment of ". . . compensation and expenses of witnesses and informants all at the rates authorized or approved by the Assistant Attorney General for Administration. . ."

9-21.100 ELIGIBILITY

A witness may be considered for the Witness Security Program if the person is an essential witness in a specific case of the following types:

A. Any offense defined in Title 18 U.S.C. §1961(1) (organized crime and racketeering);

B. Any drug trafficking offenses described in Title 21 U.S.C.;

C. Any other serious federal felony for which a witness may provide testimony which may subject the witness to retaliation by violence or threats of violence;

D. Any state offense that is similar in nature to those set forth above; and

E. Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

The Witness Security Reform Act of 1984 requires that the Attorney General obtain and evaluate all available information regarding the suitability of a witness for inclusion in the Witness Security Program. This information must include any criminal history and a psychological evaluation for each candidate for the Program and each adult (18 years and older) member of the household. Additionally, the Attorney General is required to make a written assessment of the risk the witness may present to his/her new community. Factors which must be evaluated in the risk assessment include, but are not limited to, the person's criminal record, alternatives other than protection which have been considered, and the possibility of securing the testimony from other sources. If it is determined that the need for prosecution of the case is outweighed by the danger that the witness would pose to the relocation community, the Attorney General is required to exclude the witness from the Program.

To avoid the necessity of making follow up calls, please note the following:

A. In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing this testimony at trial;

B. As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant, and certain in coming.

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

9-21.110 Informants

Informants are the responsibility of the investigative agency that the informant has assisted. An informant is not eligible for participation in the Witness Security Program unless he/she becomes a witness as defined in 18 U.S.C. §3521 et seq.

9-21.120 Utilization of Federal Prisoners in Investigations

All requests from investigative agencies to utilize federal prisoners (non-Witness Security participants) in investigations, when consensual monitoring devices, furloughs, or extraordinary transfers are necessary must be referred to the Office of Enforcement Operations for review and coordination with the Bureau of Prisons. This also applies to inmates in local halfway houses. The following information must be provided:

A. Name of prisoner and identifying data, including Bureau of Prisons register number, if known;

B. Location of the prisoner;

C. Necessity of utilizing the prisoner in the investigation;

D. Name(s) of target(s) of the investigation;

E. Nature of the activity requested;

F. Security measures to be taken to ensure the prisoner's safety, if necessary;

G. Length of time the prisoner will be needed in the investigation;

H. Whether the prisoner will be needed as a witness;

I. Whether the prisoner will have to be moved to another institution upon completion of the activity; and

J. Whether the prisoner will remain in the custody of the investigative agency or will be unguarded.

These requests must be endorsed by the appropriate investigative agency headquarters. Upon completion of the review, the Office of Enforcement Operations will make a recommendation to the Director, Bureau of Prisons. The requestor will be advised of the decision of the Bureau of Prisons by the Office of Enforcement Operations. The Bureau of Prisons will coordinate arrangements for the activity directly with the requestor.

Because of the gravity of the responsibility assumed by the Federal Bureau of Prisons when it consents to the use of its inmates by investigative agencies as informants, new guidelines for approval of such requests will be employed. Effective immediately, all requests for release of an inmate, from the custody of the Bureau of Prisons/United States Marshals Service to the custody of the investigative agency, must be requested by an Assistant Director of the agency. Similarly, all requests to use residents of halfway houses or community treatment centers, or to transfer an inmate from one institution to another to perform informant or undercover activities must also be requested by an Assistant Director. Other requests to use inmates as informants, which do not require release or movement of such inmates may be submitted from the appropriate section chief.

Requests for utilization of federal prisoners in an undercover capacity should be addressed to the personal attention of the Director or the Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

In exigent circumstances, the Office of Enforcement Operations will accept requests and pertinent information by telephone. However, confirmation of the request and appropriate supporting information must be submitted as soon thereafter as possible. The information provided will be held in the strictest confidence, and no dissemination of the information will be made without prior approval from the appropriate agency or office.

9-21.130 Prisoner-Witnesses

Prisoners in a state or federal institution are eligible for participation in the Witness Security Program providing all other criteria are met. If the prisoner is in state custody, the state must agree to the prisoner serving his/her sentence in a federal institution. Application should be made as prescribed for other witnesses.

9-21.140 State and Local Witnesses

The Witness Security Reform Act of 1984 authorizes the Attorney General to provide protection to state and local witnesses if the state agrees to reimburse the United States for expenses incurred in providing protection, and enters into an agreement in which the state agrees to cooperate with the Attorney General in carrying out the provisions of the Witness Security Reform Act. The terms of the reimbursement agreements will be determined by the U.S. Marshals Service. Requests from local authorities should be directed to the U.S. Attorney or Strike Force Chief and should contain all of the information required in the Witness Security Program application. The U.S. Attorney or Strike Force Chief should review the application and furnish his/her recommendation to the Office of Enforcement Operations for consideration.

9-21.200 APPROVAL AUTHORITY

The Witness Security Reform Act provides that the Attorney General may delegate the authority to place individuals in the Witness Security Program to the Deputy Attorney General, the Associate Attorney General, the Assistant Attorneys General of the Criminal and Civil Rights Divisions, and one other person. By Order No. 1072-84, the Attorney General has specially designated those individuals named above and the Senior Associate Director of the Office of Enforcement Operations, Criminal Division, to authorize applications for witness or prospective witnesses to be admitted into the Witness Security Program. In the absence of the Senior Associate Director, Office of Enforcement Operations, the Director of the Office of Enforcement Operations is authorized to exercise this authority.

9-21.210 Approval Procedure

Approval of requests to use the Witness Security Program will be made by the Director or Senior Associate Director of the Office of Enforcement Operations. The approval will be conveyed to the Director, U.S. Marshals Service and/or the Director, Bureau of Prisons, by memorandum.

9-21.220 Emergency Authorization

Protection of a witness for whom relocation is being requested remains the responsibility of the investigative agency until such time as the Office of Enforcement Operations has reviewed the application and all other relevant information, including the results of the psychological examination, approved admission of the witness into the Program and the U.S.

Marshals Service has had the opportunity to arrange the safe removal of the witness and his/her family.

If it is determined that a witness is in immediate danger and the investigative agency is not able to provide the necessary protection, temporary protection may be provided before making the written risk assessment or entering into the memorandum of understanding. However, the assessment and memorandum of understanding must be completed as soon as possible following the authorization for emergency protection.

9-21.300 REQUEST FOR PRE-ENTRY INTERVIEWS

The U.S. Marshals Service will interview prospective witnesses prior to their entry into the Program. This initial interview will serve two purposes; first, it will ensure that the prospective witness understands what can be expected from the Program; and second, it will allow the U.S. Marshals Service to evaluate potential problems with a view toward resolving them as quickly as possible.

Interviews will be arranged when a request for entry into the Program is received. It will, therefore, be necessary that the Office of Enforcement Operations be advised of the witness' likely entry into the Program as soon as it appears that the individual will be a witness, will be endangered, and will, therefore, need to enter the Witness Security Program.

9-21.310 Representations and Promises

Investigative agents and attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Program services. These matters are for decision by authorized representatives of the U.S. Marshals Service only. Representations or agreements made without authorization will not be honored by the U.S. Marshals Service.

9-21.320 Expenses

Any expenses incurred by investigative agencies or divisions for witnesses and/or their dependents prior to approval by the Office of Enforcement Operations are the responsibility of the concerned agency or division.

9-21.330 Psychological Testing and Evaluation

Before authorizing any witness to enter the Program, the Office of Enforcement Operations will arrange for psychological testing and evaluation for each prospective witness and the adult (18 years and older) members of his/her household. This testing will be done by psychologists from the Federal Bureau of Prisons, and will, to the extent possible, determine if the individuals may present a danger to their relocation communities. Since the reports of the psychologists may contain information which is discoverable as Brady material in the criminal prosecution in which the witness is testifying, all materials submitted by the psychologists will be forwarded to the appropriate U.S. Attorney's Office. The consent form will be executed by each individual being evaluated. See Forms, USAM 9-21.971, infra.

9-21.340 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Program candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be housed in a Bureau of Prisons facility. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witnesses.

The Witness Security candidate will be expected to sign the polygraph examination form acknowledging his/her voluntary submission to the examination. It will be the responsibility of the prosecutor/agent to advise the Witness Security candidate of this requirement prior to submitting the application for the Program. In addition, depending on the location and other pertinent factors the prosecutor/agent or the Bureau of Prisons will be asked to disseminate the form to the prisoner. Copies of this form are available from the Office of Enforcement Operations upon request. See Forms, USAM 9-21.972, infra.

9-21.400 PROCEDURES FOR SECURING PROTECTION

Requests for protection of witnesses must be made as soon as it appears likely the individual will be a witness and will need relocation. A witness is not to be publicly disclosed, thereby endangering his/her life or that of his/her family, without the prior authorization of the Office of Enforcement Operations. It is incumbent upon each U.S. Attorney, his/her assistants, and the investigative agencies to present to the Office of Enforcement Operations at the earliest possible time during the investiga-

tive process the request for authorization to place an individual in the Witness Security Program. This will allow time for U.S. Marshals Service preliminary interview, psychological testing, appropriate review, and the actual preparation of assistance by the U.S. Marshals Service and/or the Bureau of Prisons, minimizing the disruption both to the witness and the concerned government agencies.

United States Attorneys and Division Attorneys should transmit requests by memorandum, telecopy, or teletype to the Office of Enforcement Operations. Communications should be addressed to the Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600, or teletyped to the Office of Enforcement Operations, Criminal Division, (telecopy number: FTS 633-5143), (teletype code JCOEO). These requests must be signed by the U.S. Attorney or Criminal Division Field Office Chief. The request must include the following information:

A. Identification of the Witness: Name, address, date and place of birth, sex, race, citizenship, FBI or police numbers of witness. Attach copies of witness' record of arrests and convictions, if any;

B. Significance of the Case(s): Importance of the case and names, locations, and importance of prospective defendants. Describe illegal organization in which the defendants are participants and their respective roles. U.S. Attorney's case number must be included.

Defendant's arrest and conviction record must be attached. If applicable, whether case is or is not a Narcotic Task Force investigation;

C. Expected Testimony of the Witness: A summary of the testimony to be provided by the witness.

Copies of indictments, complaints, prosecutive memoranda, etc., must be attached fully describing the nature of the case. List all cases in which the witness is expected to testify. List all agencies which may make use of the witness' information;

D. Trial Dates: A realistic estimate of the trial date and trial completion (with respect to each trial in which the witness is expected to testify);

E. Other Witnesses: The names of individuals for whom witness protection has previously been approved in connection with the same case; also, the names and locations of any other individuals connected with this case likely to be placed under the Witness Security Program;

F. Threat: A comprehensive recitation of the danger to the witness. List all individuals known or believed by the U.S. Attorney and investigative agent to pose a threat to the witness. Include complete names and addresses and request the investigative agency to forward photographs of each if available. If not available, so indicate. Include any individuals incarcerated who may pose a threat to the witness in prison and upon their release. Additionally, the investigative agency must submit a report concerning the danger to the witness to its Washington headquarters for review. The headquarters will forward the report, along with its recommendation, to the Office of Enforcement Operations;

G. Members of Witness' Household: List by name, date and place of birth, and relationship to the witness those persons recommended for relocation;

H. Assets and Liabilities: A complete recitation of the witness' financial posture to include real and personal property value, debts, alimony, support payments, mortgages, bank accounts, pensions, securities, income and information concerning monies which the witness receives or expects to receive from other state or federal agencies.

I. Medical Problems: A complete recitation of all medical problems experienced by the witness and members of his/her household including any history of drug or alcohol abuse;

J. Parole/Probation: Indicate any parole or probation restrictions for the witness and members of his/her household. If the witness and/or any household members are on state parole or probation, supervision will be transferred to the Probation Division of the Administrative Office of the U.S. Courts. In order to effect the transfer, the appropriate state authorities must provide written consent to such supervision.

For those state parolees who are released from state institutions (rather than a federal institution) the following documents must be obtained by the requestor and forwarded to the Office of Enforcement Operations before relocation can occur:

1. Pre-sentence or background report detailing the circumstances of the instant offense and prior criminal conviction history;

2. A sentence data record indicating the type and length of sentence imposed by the state court;

3. A signed parole or release certificate; and

4. All available institutional materials such as progress reports and classification materials.

For state probationers, the following documents must be obtained:

1. Pre-sentence or background report providing a description of the instant offense and prior criminal conviction history;

2. The Order of Probation from the state court indicating the sentence or probation imposed; and

3. Signed conditions of release and any other pertinent materials.

In addition, in order to comply with the provisions of the Witness Security Reform Act of 1984, the following information must be supplied for all witnesses:

K. The seriousness of the investigation or case;

L. The possible danger to other persons or property in the relocation area if the witness is placed in the Program;

M. What alternatives to Program use were considered and why they will not work;

N. Whether or not the prosecutor can secure similar testimony from other sources;

O. What the relative importance is of the witness' testimony; and

P. Whether or not the need for the witness' testimony outweighs the risk of danger to the public.

9-21.410 Illegal Aliens

Upon the submission of a Witness Security Program application for an illegal alien, the sponsoring attorney and/or investigative agency must obtain from the Immigration and Naturalization Service (INS) appropriate documents which authorize the prospective witness and family members to remain in the United States and facilitate relocation by the U.S. Marshals Service out of the state in which they registered. Witness Security candidates who are illegal aliens cannot be relocated by the U.S. Marshals

Service until all INS requirements are satisfied and necessary documents have been provided to the Office of Enforcement Operations or U.S. Marshals Service. In cases where the INS procedure to legalize the alien status may require a lengthy time period, the sponsor or agent should secure from INS a letter of intent to change the witness' status as part of the requirements for relocation under the Witness Security Program.

9-21.500 RESPONSIBILITIES AND PREROGATIVES OF THE U.S. MARSHALS SERVICE

When it is determined that a witness is to enter the Program the witness and adult members of his/her family will be asked to sign a Memorandum of Understanding. The U.S. Marshals Service will be obligated to satisfy each commitment documented and will not be required to provide amenities not included in the document.

9-21.510 Witness Services

The U.S. Marshals Service will be responsible for providing the witness with one reasonable job opportunity, and will provide a second opportunity when the witness has a persuasive reason for rejecting the first. The U.S. Marshals Service will also provide assistance in finding housing, will provide identity documents for witnesses and family members whose names are changed for security purposes, and will arrange for severely troubled witnesses and family members to receive counseling and advice by psychologists, psychiatrists, or social workers when requested.

In cases in which the Witness Security Program is used to protect government witnesses, sentencing judges should be made aware of the additional cost to the government for their consideration of fines. A report of the amount spent for each witness may be obtained from the U.S. Marshals Service Witness Security Inspector in the district.

Additional information may be obtained from the Office of Enforcement Operations, Criminal Division, FTS 633-3684.

9-21.520 Subsistence Guidelines

The Director, U.S. Marshals Service, shall administer Witness Security Program funds. The Witness Security Division, U.S. Marshals Service, will supervise the administration of subsistence funds under guidelines set forth by the Director based upon Department of Labor cost of living indices.

Witnesses who are able to support themselves and their family and/or household members will not be furnished subsistence funding assistance.

The U.S. Marshals Service will make every effort to assure that protected persons pay debts for which the Department is furnishing funds and return loaned property provided by the government. If necessary, final subsistence allowances will be withheld until all such debts are cleared and loaned property recovered.

Maintenance allowance assistance will normally be provided until the protected witness has obtained employment or is self-sufficient by other means of income. Subsistence shall terminate not later than six months after the first payment, or once employment is secured, whichever is earlier. The prosecutor will be advised of the scheduled termination of a witness' funding and invited to comment.

An extension for no longer than 90 days may be authorized when circumstances beyond the control of the witness so dictate.

9-21.530 Employment of Protected Witnesses

Protected witnesses are expected to become self-sufficient as soon as possible after acceptance into the Program. The U.S. Marshals Service will endeavor to assist the witness to find employment but the witness himself/herself is expected to aggressively seek employment. Under no circumstances will witnesses be considered "entitled" to subsistence payments until they have testified. Failure to aggressively seek employment or rejection of an employment opportunity will be grounds for discontinuance of subsistence payments.

9-21.600 PRISONER-WITNESSES

A. Prosecutor's Responsibility: The prosecutor handling a case, whether an Assistant U.S. Attorney or a division attorney, will be responsible for notifying the Office of Enforcement Operations when a prisoner-witness or potential prisoner-witness is cooperating with the government, and from whom that person should be separated, whether or not the witness is formally in the Witness Security Program. The Office of Enforcement Operations will then coordinate the placement of the prisoner with the Bureau of Prisons, and in conjunction with the Bureau of Prisons, will monitor the movement of cooperating witnesses, including protected witnesses, when then are moved from one federal facility to another or back and forth from federal to state custody (on writs of habeas corpus ad testificandum or otherwise), to make sure that they are not housed even

on a temporary basis in facilities where persons from whom they are to be separated are also housed.

The following information concerning prisoner-witnesses must be provided:

1. Name of offender;

2. Date of birth;

3. Race and Sex;

4. Whether state or federal prisoner (if state, reimbursable or nonreimbursable);

5. Current offense;

6. Current sentence (and Judge's name);

7. FBI rap sheet;

8. Outstanding warrants or detainers;

9. Names of all those from whom witness should be separated, FBI numbers and current locations;

10. Pre-sentence investigation and/or prison classification material;

11. Judgment and Commitment papers, and

12. Bail bond status.

From time to time, U.S. Attorneys' Offices may be requested to assist the U.S. Marshals Service in securing appropriate documents for prisoner-witnesses. The U.S. Marshals Service Witness Security Inspector will assure that Judgment and Commitment papers in the prisoner-witness' new name will be delivered to the institution with the prisoner-witness. A second set of Judgment and Commitment papers in the witness' original name will be forwarded to Bureau of Prisons Headquarters in Washington, D.C.

B. Bureau of Prisons: Special prisoner designations will be made by the Bureau of Prisons as they deem necessary. U.S. Marshals Service involvement in these instances will be limited to insuring the proper security when it is necessary for the prisoner to be transported from one

institution to another or back to the danger area for interview and/or trial. When the prisoner-witness is released from incarceration, relocation services will be provided if they are deemed necessary by the Office of Enforcement Operations. The Bureau of Prisons has advised that because of the extraordinary difficulty in determining the appropriate institution for the safe housing of a prisoner-witness, it is imperative that they be furnished the following information on all persons who have been identified as posing a threat to the witnesses and who are likely to come into federal custody:

1. Name;

2. Alias;

3. Date of birth;

4. FBI #;

5. Race;

6. Sex;

7. Ethnic origin;

8. Offense/Charge; and

9. State of appeal, fugitive escape, non-incarcerated, etc.

Compliance in providing this information is essential and will enable the Bureau of Prisons to adequately monitor the separation needs of protected prisoner-witnesses.

The information must be provided to the Office of Enforcement Operations at the time witness protection is being requested for a prisoner-witness in accordance with USAM 9-21.000, infra.

C. Metropolitan Correctional Centers (MCC) will be used primarily to house protected prisoner-witnesses during periods of debriefing, grand jury, and trial. Ordinarily, prisoner-witnesses will not serve their sentences at an MCC. Requests to house prisoner witnesses at an MCC must be directed to the Office of Enforcement Operations for consideration.

D. Interviews of Prisoner-Witnesses must be arranged through the Office of Enforcement Operations. Requests must be submitted at least ten (10) working days in advance and must include all the information required for regular witnesses. The Office of Enforcement Operations will coordi-

nate all requests with the U.S. Marshals Service and the Bureau of Prisons. The Bureau of Prisons will not allow prisoner-witnesses to be interviewed without prior authorization from the Office of Enforcement Operations.

9-21.700 REQUEST FOR WITNESS' RETURN TO DANGER AREA FOR COURT APPEARANCES

Attorneys should make requests for the appearance of a relocated witness for trial or pre-trial conferences to the U.S. Marshals Service Witness Security Specialist in their district at least TEN (10) WORKING DAYS in advance of the requested appearance date. Requests should include purpose, date, estimated duration of the appearance, place, time, and, if applicable, name of contact person (if other than the requestor).

Investigative agents should make requests for the appearance of a protected witness through the authorized agency channels to the Office of Enforcement Operations, Criminal Division, for approval. Requests should include purpose, date, and estimated duration of the appearance, and if applicable other persons to be present in addition to the requestor. The Office of Enforcement Operations will forward approved requests to the Witness Security Division, U.S. Marshals Service or to the Inmate Monitoring Branch, Bureau of Prisons (whichever is appropriate). The Witness Security Division, U.S. Marshals Service, will determine the place for the meeting and advise the requestor.

Communications should be addressed to Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600. In case of emergency, you may contact the office telephonically at FTS 633-3684. In order to conserve the U.S. Marshals Service's personnel resources however, emergency requests should be avoided. Prosecuters and investigators will be requested to conduct interviews in neutral sites which will substantially reduce the personnel requirements of the U.S. Marshals Service.

During the witness' appearance in the danger area, it will be the responsibility of the prosecutor and the investigative agents to ensure that maximum use is made of the witness' time. In the interests of security and limiting the expense involved, the witness must be returned to the relocation area as soon as possible.

9-21.800 USE OF RELOCATED WITNESSES AS INFORMANTS

A witness, having entered the Witness Security Program, maintains a continuing and unique relationship with the Department. Even after subsistence allowances and other material support are terminated, the residual

relationship requires that investigative agencies and attorneys observe certain restraints in dealing with witnesses insofar as investigations and/or new cases are concerned.

The consent of the Office of Enforcement Operations is required before a protected witness or anyone relocated because of a witness' cooperation may be used as an informant. The following list is representative of the type of issues the Office of Enforcement Operations deems important when evaluating requests to use relocated witnesses as informants:

A. Significance and/or scope of criminal activity and suspects;

B. Whether or not the witness is successfully relocated and living within Program guidelines; whether new informant activity will result in relocation, if so, whether agency will bear the expense; whether informant activity will require new Witness Security Program application and relocation;

C. Whether witness represents a poor risk (e.g. witness has caused problems in the past with his/her sponsoring attorney or agency);

D. Whether witness has been involved in subsequent criminal activity-making him/her less reliable;

E. Whether the request centers on witness' new criminal involvement and witness expects relief because of his/her informant role; how witness is aware of new criminal activity;

F. Whether informant activity will require witness to testify;

G. Whether witness has completed testimony for which he/she was placed in the Program;

H. Whether other agencies have used witness since relocation;

I. Whether witness is on probation or parole; whether U.S. Probation Office and U.S. Parole Commission should be notified;

J. Whether alternatives to informant activity were considered and why they will not work;

K. Whether witness is incarcerated; if so, whether prosecutor and/or judge should be advised; whether court order is necessary;

L. Whether witness will be endangered--security and protective measures to be undertaken by the agency;

M. Why witness will be effective in informant role;

N. Length of time required by agency for informant activity; and

O. Cost of the activity and how much money U.S. has expended on witness.

After a request has been granted, the Office of Enforcement Operations requires that status reports be filed with it after the first 45 days an informant is being utilized and thereafter quarterly.

9-21.900 MISCELLANEOUS

9-21.910 Dual Payments Prohibited

The U.S. Marshals Service is authorized to provide for the maintenance and housing of protected witnesses whenever they appear for trial, pre-trial conferences or return to a danger area for other appearances approved by the Office of Enforcement Operations. The U.S. Marshals Service is authorized to pay for the costs of travel and other associated maintenance expenses. Attorneys should not prepare "Fact Witness Certificates" and Fact Witness fees and allowances should not be disbursed to protected witnesses who are under the protection and maintenance of the U.S. Marshals Service. (Witnesses who voluntarily withdraw from participation in the Witness Security Program are exempt from this restriction.)

9-21.920 Payments of Reward Monies

Payment of reward monies to Witness Security Program participants must be authorized by the Office of Enforcement Operations of the Criminal Division.

The appropriate investigative agency headquarters must take a written request to the Office of Enforcement Operations reflecting the reason(s) for the payment and the name of the contact for appropriate coordination with the U.S. Marshals Service and/or the Bureau of Prisons (whichever is applicable) for disbursement of the funds. The Office of Enforcement Operations will advise the requestor in writing (or telephonically depending on the circumstances) of the approval or denial of the request. Neutral site meetings for the sole purpose of disbursing funds to participants of the Witness Security Program are prohibited. Payments must be sent C/O Chief, Witness Security Division, U.S. Marshals Service, One Tysons Corner Center, McLean, Virginia 22102.

9-21.930 Use of Department of Defense Facilities

All requests to use Department of Defense facilities for protected witnesses must be made through the Office of Enforcement Operations.

9-21.940 Special Handling

All documents relating to a protected witness or an individual nominated for protection will be accorded special handling to ensure disclosure on a strict "need to know" basis. All documents should be marked with the security designation "Sensitive Investigative Matter."

9-21.950 Relocation Site

The area of relocation must not be known to the case attorney/agent or his/her staff since all contact with the witness should be through the Office of Enforcement Operations. The witness should be instructed to keep secret the area of his/her relocation and all associated matters.

9-21.960 Duty Officers

The U.S. Marshals Service can be reached after hours at (703) 285-1100.

The Office of Enforcement Operations duty officer may be reached at (202) 633-3684 or (202) 633-2000.

The Bureau of Prisons duty officer may be reached at (202) 724-3036 or (202) 633-2000 (after hours).

9-21.970 Other Requests

A. Requests by members of Congress or their staffs shall be forwarded to the Office of Legislative Affairs who in turn will refer the requests to the Office of Enforcement Operations for processing;

B. Requests by the news media or public should be referred to the Office of Public Affairs; and

C. Other inquiries not covered in this Order should be referred to the Office of Enforcement Operations.

9-21.980 Training

The Marshals Service, Bureau of Prisons, and Criminal Division will coordinate special training about the Witness Security Program to be given to Deputy Marshals, Bureau of Prisons personnel, investigative agents, Assistant U.S. Attorneys, and Criminal Division attorneys.

9-21.990 Continuing Protection Responsibilities

Witnesses in the Program undertake the duty of providing testimony in criminal investigations and trials. Protection will be provided during the performance of those duties. After the testimony is completed and any relocation is accomplished, the government will have no further obligations to the witness except that if there is clear evidence that the witness is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, further protective services will be provided.

9-21.1000 Arrests of Relocated Witnesses

In accordance with 18 U.S.C. §3521(b)(1)(H), the U.S. Marshals Service, the Federal Bureau of Investigation, and the Office of Enforcement Operations have worked out a mechanism to, when warranted, securely disseminate protected witnesses' arrest records and information in response to legitimate law enforcement requests. It should be noted that no effort will be made to interfere with legitimate legal procedures.

9-21.1010 Results of Witnesses' Testimony

The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General reflecting the results of the testimony provided by relocated witnesses. Prosecutors and agents will be asked to provide the following information on a monthly basis:

A. Name of Witness;

B. Name of case;

C. Jurisdiction;

D. Did the witness testify before grand jury? Trial? If the witness did not testify, why not?

E. Status of witness in case;

1. Defendant

2. Unindicted co-conspirator

3. Prisoner

4. Victim

5. Other

F. Names of all defendants;

G. Statutory violations charged;

H. Date of indictment;

I. Date of conviction;

J. Disposition of the case as to each defendant;

K. If convicted, details of sentence imposed on each defendant, including fines levied, etc.;

L. Any information as to significant forfeitures or seizures accomplished because of assistance of witness; and

M. Any information as to contributions made by this witness to the law enforcement effort, federal, state, and local, in your district and elsewhere, for example, furnishing probable cause for Title III's, search warrants, locations of fugitives, etc.

9-21.1020 Victims Compensation Fund--(18 U.S.C. §3525)

A fund has been established to compensate victims of crimes committed by participants in the Witness Security Program. In general, the fund will, up to a statutory limit, cover expenses for medical and/or funeral costs and lost wages that are not reimbursable from other sources. The fund does not apply to those crimes committed by participants who have been terminated from the Program by the U.S. Marshals Service. The Office of Enforcement Operations has been delegated the authority to administer the operations of the fund and should be contacted if information about the fund and the payment of claims is needed.

9-21.1030 Forms

9-21.1031 Psychological Evaluation Form

PSYCHOLOGICAL EVALUATION FORM

The Witness Security Reform Act of 1984 requires a psychological evaluation of each individual who is being considered for inclusion in the Witness Security Program.

The suitability of a witness for the Program must be determined before acceptance into the Program. One of the factors which must be considered in determining the suitability of the witness for the Program is the report of the psychological evaluation of the witness.

After a witness has been psychologically evaluated, the examining authority will prepare and submit a report to the Office of Enforcement Operations, Criminal Division, Department of Justice, so that a determination can be made as to the suitability of the witness for the Program.

I, _____, certify that I have read and understand the foregoing and that I voluntarily submit to this psychological evaluation. I also understand that my acceptance into the Witness Security Program is not solely dependent upon the results of this psychological evaluation.

I also certify that I have no objection if the contents of the report of my psychological evaluation are disclosed to others in connection with my consideration for the Witness Security Program.

_____ _____
(Date) (Signature)

_____
(Witness)

9-21.1032 Polygraph Examination Form

POLYGRAPH EXAMINATION FORM

A polygraph examination is required of all Witness Security candidates who are incarcerated, in order to maintain the security of those indi-

viduals who are now, or who will be housed in protective custody units Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witnesses.

I, _____, acknowledge that I have read and understand the foregoing, and that I voluntarily submit to this polygraph examination. I further understand that my acceptance or rejection for placement in the Witness Security Program is not solely dependent upon the results of the polygraph examination.

_____ _____
(Date) (Signature)

_____
(Witness)

* U.S. GOVERNMENT PRINTING OFFICE:1987-181-487:60030

DETAILED TABLE OF CONTENTS FOR CHAPTER 27

The following text was originally printed in a booklet which was distributed prior to publication in this Manual. Numbering has been changed and headings have been added within the text for purposes of USAM format. Cross-references within the text have been changed to reflect USAM numbers.

9-27.000 PRINCIPLES OF FEDERAL PROSECUTION

9-27.001 Preface

The publication of these Principles of Federal Prosecution is a significant event in the history of federal criminal justice. It provides to federal prosecutors, for the first time in a single authoritative source, a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority, and contribute to the fair, evenhanded administration of the federal criminal laws.

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances--recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. Consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's contribution during the sentencing process may assist the court in imposing a sentence that fairly accommodates the interests of society with those of convicted individuals.

These Principles of Federal Prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility.

The availability of this statement of Principles to federal law enforcement officials and to the public should serve two important

purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles will provide convenient reference points for the process of making prosecutorial decisions; they will facilitate the task of training new attorneys in the proper discharge of their duties; they will contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of the 95 United States Attorney's offices and between their activities and the Department's law enforcement priorities; they will make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they will inform the public of the careful process by which prosecutorial decisions are made.

Important though these Principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

/s/ Benjamin R. Civiletti
Attorney General

July 28, 1980

9-27.100 GENERAL PROVISIONS

9-27.110 Purpose

A. The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;

2. Selecting charges;

3. Entering into plea agreements;

4. Opposing offers to plead nolo contendere;

5. Entering into non-prosecution agreements in return for cooperation; and

6. Participating in sentencing.

B. Comment

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F. 2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966). This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed". U.S. Const. art. II, §3. See Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law--assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders--are adequately met, while making certain also that the rights of individuals are scrupulously protected.

9-27.120 Application

A. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each U.S. Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

B. Comment

It is expected that each federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to USAM 9-27.140, infra. However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

9-27.130 Implementation

A. Each U.S. Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and

2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions when warranted, as are deemed appropriate.

B. Comment

Each U.S. Attorney and each Assistant Attorney General responsible for the enforcement of federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his/her office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The U.S. Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

9-27.140 Modifications or Departures

A. A U.S. Attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

B. Comment

Although these materials are designed to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each U.S. Atttorney is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys

for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, USAM 9-27.150, supra, is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the U.S. Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 INITIATING AND DECLINING PROSECUTION

9-27.210 Generally: Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;

2. Commence or recommend prosecution;

3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;

4. Decline prosecution and initiate or recommend pre-trial diversion or other non-criminal disposition; or

5. Decline prosecution without taking other action.

B. Comment

USAM 9-27.210 sets forth the courses of action available to the attorney for the government once he/she has probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a compliant (see Rule 4(a), Federal Rules of Criminal Procedure), for a magistrate's decision to hold a defendant to answer in the district court (see Rule 5.1(a), Federal Rules of Criminal Procedure), and is the minimal requirement for indictment by a grand jury (see Branzburg v. Hayes, 408 U.S. 665, 686 (1972)). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution:

2. The person is subject to effective prosecution in another jurisdiction; or

3. There exists an adequate non-criminal alternative to prosecution.

B. Comment

USAM 9-27.220 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain

and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he/she intends to rely at trial: it is sufficient that he/she have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that--despite the law and the facts that create a sound, prosecutable case--the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt--viewed objectively by an unbiased fact-finder--would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: USAM 9-27.220 notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult USAM 9-27.230, 9-27.240, or 9-27.250, infra, as appropriate.

9-27.230 Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;

2. The nature and seriousness of the offense;

3. The deterrent effect of prosecution;

4. The person's culpability in connection with the offense;

5. The person's history with respect to criminal activity;

6. The person's willingness to cooperate in the investigation or prosecution of others; and

7. The probable sentence or other consequences if the person is convicted.

B. Comment

USAM 9-27.230 lists factors that may be relevant in determining whether prosecution should be declined because no substantial federal interest would be served by prosecution in a case in which the person is believed to have committed a federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. Federal Law Enforcement Priorities

Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual U.S.

Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

2. Nature and Seriousness of Offense

It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature, and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute, whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is disinterested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in

weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. Deterrent Effect of Prosecution

Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. The Person's Culpability

Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. The Person's Criminal History

If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to initiate or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. The Person's Willingness to Cooperate

A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the

determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. The Person's Personal Circumstances

In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. The Probable Sentence

In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and

to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal (see USAM 9-2.142).

Just as there are factors that it is appropriate to consider in determining whether a substantial federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

9-27.240 Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;

2. The other jurisdiction's ability and willingness to prosecute effectively; and

3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. Comment

In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities. USAM 9-27.240 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute

effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to him/her in a particular case.

1. The Strength of the Jurisdiction's Interest

The attorney for the government should consider the relative federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

2. Ability and Willingness to Prosecute Effectively

In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. Probable Sentence Upon Conviction

The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also the particular characteristics of the offense or of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction

under state law may in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;

2. The likelihood that an appropriate sanction will be imposed; and

3. The effect of non-criminal disposition on federal law enforcement interests.

B. Comment

When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pre-trial diversion (see USAM 1-12.000).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact

be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. It should be noted that referrals for non-criminal disposition, other than to Civil Division attorneys or other attorneys for the government, may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained.

9-27.260 Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by:

1. The person's race; religion; sex; national origin; or political association, activities, or beliefs;

2. His/her own personal feelings concerning the person, the person's associates, or the victim; or

3. The possible effect of his/her decision on his/her own professional or personal circumstances.

B. Comment

USAM 9-27.260 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the files of his/her office.

B. Comment

USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up. This might be done, for example, through the appropriate Federal-State Law Enforcement Committee.

9-27.300 SELECTING CHARGES

9-27.310 Charging Most Serious Offenses

A. Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. §201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. §1621 but not under 18 U.S.C. §1623.

USAM 9-27.310 expresses the prinicple that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is likely to result in a sustainable conviction. Ordinarily, this will be the offense for which the most severe penalty is provided by law. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320, infra), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

The exception noted at the beginning of USAM 9-27.310 refers to pre-charge plea agreements provided for in USAM 9-27.330, infra.

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgment, additional charges:

1. Are necessary to ensure that the information or indictment:

a. Adequately reflects the nature and extent of the criminal conduct involved; and

b. Provides the basis for an appropriate sentence under all the circumstances of the case; or

2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment

It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive--and potentially unfair--exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: when necessary adequately to reflect the nature and extent of the criminal conduct involved; when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. Nature and Extent of Criminal Conduct

Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

2. Basis for Sentencing

Proper charge selection also requires consideration of the end result of successful prosecution--the imposition of an appropriate

sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. The phrase "all the circumstances of the case" is intended to include any factors that may be relevant to the sentencing decision. Examples of such factors are the basic purposes of sentencing (deterrence, protection of the public, just punishment, and rehabilitation); the penalty provisions of the applicable statutes; the gravity of the offense in terms of its actual or potential impact, or in terms of the defendant's motive; mitigating or aggravating factors such as age, health, restitution, prior criminal activity, and cooperation with law enforcement officials; and any other legitimate legislative, judicial, prosecutorial, or penal or correctional concern, including special sentencing provisions for certain classes of offenders and other post-conviction consequences such as disbarment or disqualification from public office or private position.

3. Effect on Government's Case

When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant.

In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

9-27.330 Pre-Charge Plea Agreements

A. The attorney for the government may file or recommend a charge or charges without regard to the provisions of USAM 9-27.310 and 9-27.320, supra, if such charge or charges are the subject of a pre-charge plea agreement entered into under the provisions of USAM 9-27.400, infra.

B. Comment

USAM 9-27.330 addresses the situation in which there is a pre-charge agreement with the defendant that he/she will plead guilty to a certain agreed-upon charge or charges. In such a situation, the charge or charges to be filed or recommended to the grand jury may be selected without regard to the provisions of USAM 9-27.310 and 9-27.320, supra.

Before filing or recommending charges pursuant to a pre-charge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.400, infra, and should give special attention to USAM 9-27.430, infra, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

9-27.400 ENTERING INTO PLEA AGREEMENTS

9-27.410 Plea Agreements Generally

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action.

B. Comment

USAM 9-27.410 permits, in appropriate cases, the disposition of federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the

absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400.

Negotiated plea dispositions are explicitly sanctioned by Rule 11 (e)(1), Federal Rules of Criminal Procedure, which provides that:

> The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) Move for dismissal of other charges; or
>
> (B) Make a recommendation, or agree 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
>
> (C) Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.410, agreements whereby, in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

It should be noted that the provision relating to "charge agreements" is not limited to situations in which the defendant is the subject of charges to be dismissed. Although this will usually be the case, there may be situations in which a third party would be the beneficiary of the dismissal of charges. For example, one family member may offer to plead guilty in return for the termination of a prosecution pending against another family member, or a corporation may tender a plea in satisfaction of its own liability as well as that of one of its officers. Although plea agreements of this sort are permitted under paragraph 1 they can easily be misunderstood as manifestations of a double standard of justice. Accordingly, they should not be entered into routinely, but only after careful consideration of all relevant factors, including those specifically set forth in USAM 9-27.420, infra.

The language of USAM 9-27.410 with respect to "sentence agreements" is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine, probation, or sentencing under a specific statute such as the Youth Corrections Act), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500, infra, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

9-27.420 Considerations to be Weighed

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;

2. The defendant's history with respect to criminal activity;

3. The nature and seriousness of the offense or offenses charged;

4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;

5. The desirability of prompt and certain disposition of the case;

6. The likelihood of obtaining a conviction at trial;

7. The probable effect on witnesses;

8. The probable sentence or other consequences if the defendant is convicted;

9. The public interest in having the case tried rather than disposed of by a guilty plea;

10. The expense of trial and appeal; and

11. The need to avoid delay in the disposition of other pending cases.

B. Comment

USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Federal Rules of Criminal Procedure. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved in any case in which it would be helpful to have its views concerning the relevance of particular factors or the weight they deserve.

1. Defendant's Cooperation

The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under Title 18, U.S.C. §§6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction.

2. Defendant's Criminal History

One of the principal arguments against the practice of plea-bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past convictions, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials.

3. Nature and Seriousness of Offense Charged

Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing these factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. Defendant's Attitude

A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence.

Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, infra, the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. Prompt Disposition

In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last-minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and judicial time reserved for the aborted trial. For these reasons, government attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. Likelihood of Conviction

The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In

this connection, the prosecutor should weigh the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the presecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. Effect on Witnesses

Although the public has "the right to every person's evidence," attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that, sometimes, to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. Probable Sentence

In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware

of the need to preserve the basis for an appropriate sentence under all the circumstances of the case.

9. Trial Rather Than Plea

There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrong-doing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. Expense of Trial and Appeal

In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. Prompt Disposition of Other Cases

A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the workloads of prosecutors, judges, and defense attorneys in the district.

9-27.430 Selecting Plea Agreement Charges

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That bears a reasonable relationship to the nature and extent of his/her criminal conduct;

2. That has an adequate factual basis;

3. That makes likely the imposition of an appropriate sentence under all the circumstances of the case; and

4. That does not adversely affect the investigation or prosecution of others.

B. Comment

USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information.

1. Relationship to Criminal Conduct

The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his/her criminal conduct is not inflexible. There may be situations involving

cooperating defendants in which considerations such as those discussed in USAM 9-27.600, infra, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

2. Factual Basis

The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11 (f), Federal Rules of Criminal Procedure, a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted infra, in cases in which Alford or nolo contendere pleas are tendered the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently, in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

3. Basis for Sentencing

In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge

agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, a sufficient number of counts should be retained under the agreement to provide a basis for an adequate restitution order, since the court's authority to order restitution as part of the sentence it imposes is limited to the offenses for which the defendant is convicted, as opposed to all offenses that were committed. See 18 U.S.C. §3651; United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977); USAM 9-16.210.

4. Effect on Other Cases

In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 Plea Agreements When Defendant Denies Guilt

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies that he/she has in fact committed the offense to which he/she offers to plead guilty, 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.

B. Comment

USAM 9-27.440 concerns plea agreements involving "Alford" pleas--guilty pleas entered by defendants who nevertheless claim to be innocent. In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." See United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the goverment and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements without the approval of the responsible Assistant Attorney General.

Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11(b), Federal Rules of Criminal Procedure), at least one court has concluded that it is abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." United States v. Gaskins, 485 F.2d 1046, 1048 (D.C. Cir. 1973); but see United States v. Bednarski, supra; United States v. Biscoe, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the

government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the U.S. Attorney or, in cases handled by departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Federal Rules of Criminal Procedure in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Federal Rules of Criminal Procedure, the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. See United States v. Navedo, 516 F.2d 293 (2d Cir. 1975); Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974); United States v. Davis, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(f) of the Federal Rules of Criminal Procedure, but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

9-27.450 Records of Plea Agreements

A. If a prosecution is to be terminated pursuant to a plea agreement, the attorney for the government should ensure that the case file contains a record of the agreed disposition, signed or initialed by the defendant or his/her attorney.

B. Comment

USAM 9-17.450 is intended to facilitate compliance with Rule 11, Federal Rules of Criminal Procedure, and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11(e)(2), Federal Rules of Criminal Procedure, requires that a plea agreement be disclosed in open court (except upon a showing of good cause, in which case disclosure may be made in camera), while Rule 11(e)(3), Federal Rules of Criminal Procedure, requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. If time does not permit the preparation of a record of the plea agreement in advance, as when the plea disposition is agreed to on the

morning of arraignment or trial, the attorney for the government should subsequently include in the case file a brief notation concerning the fact and terms of the agreement.

9-27.500 OPPOSING OFFERS TO PLEAD NOLO CONTENDERE

9-17.510 Opposition Except in Unusual Circumstances

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the (Assistant Attorney General with supervisory responsibility over the subject matter) U.S. Attorney concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest.

B. Comment

Rule 11(b), Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus, it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr., in a departmental directive in 1953:

> One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and

> as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

For these reasons, government attorneys have been instructed for more than twenty-five years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. However, despite continuing adherence to this policy by attorneys for the government, and despite the continuing validity of the policy's rationale, the federal criminal justice system continues to suffer from misuse of nolo contendere pleas, particularly in white collar crime cases.

As federal prosecutors focus more of their attention on white collar crime activities, greater numbers of defendants seek to dispose of the charges against them by means of nolo pleas, and the frequency with which such pleas are accepted by the courts is increasing. The acceptance of nolo pleas from affluent white collar defendants, as opposed to other types of defendants, lends credence to the view that a double standard of justice exists. Moreover, even though a white collar defendant whose nolo plea is accepted may not be sentenced more leniently than one who is required to plead guilty, such a defendant often persists in his/her protestations of innocence, maintaining that his/her plea was entered solely to avoid litigation and save business expense.

The continued adverse consequences to the criminal justice system of the misuse of nolo pleas--diminished respect for law, impairment of law enforcement efforts, and reduced deterrence--warrant re-examination of the government's response to such pleas. Heretofore, it was believed that a posture of non-consent by government attorneys would prevent the acceptance of nolo pleas except in extraordinary cases. Now the forthright expression of opposition is required. Accordingly, as stated in paragraph A above, federal prosecutors should henceforth oppose the acceptance of a nolo plea, unless the (responsible Assistant Attorney General) U.S. Attorney concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest. Such a determination might be made, for example, in an unusually complex antitrust case if the only alternative to a protracted trial is acceptance of a nolo plea.

9-27.520 Offer of Proof

A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof

of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged.

B. Comment

If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 Argument in Opposition

A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

B. Comment

When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

9-27.600 ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION

9-27.610 Non-Prosecution Agreements Generally

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify, and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

b. Second, the person may be willing to cooperate if the charges or potential charges against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining charges. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430, supra, to the extent practicable.

c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. §§6001-6003. Those statutory provisions govern the conditions

under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. (See USAM 1-11.000).

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.610 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official.

2. Unavailability or Ineffectiveness of Other Means

As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods--seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order--involves prosecuting the person or, at least, leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free". Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought, and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, as where use of the procedures of 18 U.S.C. §§6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious

development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. Public Interest

If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. §6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620, infra.

4. Supervisory Approval

Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a U.S. Attorney must seek the approval of the U.S. Attorney or a supervisory Assistant U.S. Attorney. Departmental attorneys not supervised by a U.S. Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the U.S. Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, infra, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in return for cooperation.

9-27.620 Considerations to be Weighed

A. In determining whether a person's cooperation may be neessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

1. The importance of the investigation or prosecution to an effective program of law enforcement;

2. The value of the person's cooperation to the investigation or prosecution; and

3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment

This paragraph is intended to assist federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

1. Importance of Case

Since the primary function of a federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

2. Value of Cooperation

An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. See United States v. Carter, 454 F.2d 426 (4th Cir. 1972); cf. Santobello v.

New York, 404 U.S. 257 (1971). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which the cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. Relative Culpability and Criminal History

In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law, in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution, as well as his/her history of criminal involvement. Of course, it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. §§6001-6003 or has

escaped prosecution by virtue of an agreement not to prosecute. The latter information may be available by telephone from the Witness Records Unit of the Criminal Division.

9-27.630 Limiting Scope of Commitment

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

1. Non-prosecution based directly or indirectly on the testimony or other information provided; or

2. Non-prosecution within his/her district with respect to a pending charge or to a specific offense then known to have been committed by the person.

B. Comment

The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts. In United States v. Carter, 454 F.2d 426 (4th Cir. 1972), the court held that a conviction in the Eastern District of Virginia on charges of forgery and

conspiracy involving stolen Treasury checks must be vacated and the case remanded for an evidentiary hearing to determine whether, in a prior related investigation and prosecution in the District of Columbia involving stolen government checks, a promise had been made to the defendant by an Assistant U.S. Attorney for the District of Columbia that he would not be prosecuted in that district or elsewhere for any related offense if he would plead guilty to one misdemeanor count and cooperate with federal investigators in naming his accomplices. The court indicated that if the facts were as the defendant contended, then the conviction in the Virginia district would have to be reversed and the indictment dismissed. No issue of double jeopardy was involved. The effect of this decision is that a non-prosecution agreement by a government attorney in one district may be binding in other judicial districts even though the U.S. Attorneys in the other districts are not privy to, or aware of, the agreement.

In view of the Carter decision, it is important that non-prosecution agreements be drawn in terms that will not bind other federal prosecutors without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement should communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000, supra.

9-27.640 Agreements Requiring Assistant Attorney General Approval

A. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

2. The person is:

a. A high-level federal, state, or local official;

b. An official or agent of a federal investigative or law enforcement agency; or

c. A person who otherwise is, or is likely to become, of major public interest.

B. Comment

USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. See USAM 6-2.410, 6-2.420 (tax offenses); USAM 9-2.111 (bankruptcy frauds); USAM 9-2.132, 9-2.146 (internal security offenses); and USAM 9-2.158 (5), 9-2.134 (air piracy). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

9-27.650 Records of Non-Prosecution Agreements

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney, and a copy should be forwarded to the Witness Records Unit of the Criminal Division.

B. Comment

The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of Brady v. Maryland, 373 U.S. 83 (1965) and Giglio v. United States, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

A copy of each non-prosecution agreement should be sent to the Criminal Division's Witness Records Unit. The Witness Records Unit will then be able to identify persons who have been the subject of such agreements, as well as to provide federal prosecutors, on request, with copies of the types of agreements used in the past.

9-27.700 PARTICIPATING IN SENTENCING

9-27.710 Participation Generally

A. During the sentencing phase of a federal criminal case, and the initial parole hearing phase, the attorney for the government should assist the sentencing court and the Parole Commission by:

1. Attempting to ensure that the relevant facts are brought to their attention fully and accurately; and

2. Making sentencing and parole release recommendations in appropriate cases.

B. Comment

Sentencing in federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed and to aid the Parole Commission in its determination of a release date for a prisoner within its jurisdiction. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.760, infra, endeavor to ensure the accuracy and completeness of the information upon which the sentencing and release decisions will be based. In addition, as provided in USAM 9-27.730 and 9-27.760, infra, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed and with respect to the granting of parole.

9-27.720 Establishing Factual Basis for Sentence

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;

2. Review material in the presentence investigation report that is disclosed by the court to the defendant or his/her attorney;

3. Make a factual presentation to the court when:

a. Sentence is imposed without a presentence investigation and report;

b. It is necessary to supplement or correct the presentence investigation report;

c. It is necessary in light of the defense presentation to the court; or

d. It is requested by the court; and

4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. Comment

1. Cooperation with Probation Service

To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(c)(2), Federal Rules of Criminal Procedure, the report should contain "any criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service; especially in a district where the Probation Office is overburdened, this may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since portions of the report may be shown to the defendant or defense

counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. Review of Presentence Report

Rule 32(c)(3)(A), Federal Rules of Criminal Procedure, requires the court, upon request, to permit the defendant or his/her counsel to read and comment upon such portions of the presentence report as do not reveal diagnostic opinion, confidential sources of information, or information which if disclosed might result in harm to the defendant or others. Pursuant to Rule 32(c)(3)(C), Federal Rules of Criminal Procedure, any material disclosed to the defendant or his/her counsel must also be disclosed to the attorney for the government. Consequently, if the defense inspects portions of the presentence report, the attorney for the government should not forego his/her opportunity to examine the same material. Such examination may reveal factual inaccuracies in, or omissions from, the report that should be corrected. And even if no inaccuracies or omissions appear, such an examination will enable the attorney for the government to assess the validity of any comments made by the defense and, under Rule 32(a)(1), Federal Rules of Criminal Procedure, to respond appropriately.

3. Factual Presentation to Court

In addition to assisting the Probation Service with its presentence investigation and reviewing the portions of the presentence report disclosed to the defense, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(a)(1), Federal Rules of Criminal Procedure, which permits the defendant and his/her counsel to address the court and states that "[t]he attorney for the government shall have an equivalent opportunity to speak to the court." It has been suggested that failure to permit the government to address the court after the defense presentation may necessitate a remand for resentencing in order to afford the government its opportunity to speak to the court. See United States v. Jackson, 563 F.2d 1145, 1148 (4th Cir. 1977).

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

a. Furnishing Information in Absence of Presentence Report

Rule 32(c)(1), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the defendant consents or if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing discretion. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as where a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(a)(1), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. Correcting or Supplementing Presentence Report

As noted above, whenever portions of the presentence report are shown to the defense, the attorney for the government should take advantage of his/her opportunity to examine the same material. If he/she discovers any significant inaccuracies or omissions, he/she should bring them to the court's attention at the sentencing hearing, together with the correct or complete information.

c. Responding to Defense Assertions

Having read the presentence report prior to the sentencing hearing, the defendant or his/her attorney may dispute specific factual statments made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report, while stressing any favorable information and drawing all inferences beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be

expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government should respond by correcting factual errors in the defense presentation, pointing out facts and inferences ignored by the defense, and generally reinforcing the objective view of the defendant and his/her offense expressed in the presentence report.

d. Responding to Court's Requests

There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. Substantiation of Disputed Facts

In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross-examination or, if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. See United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978).

9-27.730 Conditions for Making Sentencing Recommendations

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement require him/her to do so; or

2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

B. Comment

USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require him/her to do so, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation, a fine, incarceration); for imposition of sentence under a specific statute (e.g., the Youth Corrections Act, 18 U.S.C. §§5005 et seq., or the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§4251 et seq.); for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. Recommendations Required by Plea Agreement

Rule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. See Machibroda v. United States, 368 U.S. 487, 493 (1962); Santobello v. United States, 404 U.S. 257, 262 (1971).

2. Recommendations Warranted by the Public Interest

From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning

the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor--the U.S. Attorney or a supervisory Assistant U.S. Attorney, or the responsible Assistant Attorney General or his/her designee.

In considering the public interest question, the prosecutor should bear in mind the attitude of the court towards sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If he/she has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly warranted and that, under all the circumstances the public interest would be served by his/her making a recommendation to that effect, he/she should make such a recommendation even though the court has not invited or requested him/her to do so. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant make full restitution for actual damage or loss caused

by the offense of which he/she convicted, that he/she participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 Considerations to be Weighed in Determining Sentencing Recommendations

A. In determining what recommendation to make with respect to the sentence to be imposed, the attorney for the government should weigh all relevant considerations, including:

1. The seriousness of the defendant's conduct;

2. The defendant's background and personal circumstances;

3. The purpose or purposes of sentencing applicable to the case; and

4. The extent to which a particular sentence would serve such purpose or purposes.

B. Comment

When a sentencing recommendation is to be made by the government--whether as part of a plea agreement or as otherwise warranted in the public interest--the recommendation should reflect the best judgment of the prosecutor as to what would constitute an appropriate sentence under all the circumstances of the case. In making this judgment, the attorney for the government should consider any factors that he/she believes to be relevant, with particular emphasis on the four considerations specifically set forth in USAM 9-27.740: the seriousness of the defendant's conduct; the defendant's background and personal circumstances; the purpose or purposes of sentencing applicable to the particular case; and the extent to which a particular sentence would serve such purpose or purposes. In this connection, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibilty for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

1. Seriousness of Defendant's Conduct

The seriousness of the defendant's conduct should be assessed not only with reference to the type of crime committed and the penalty provided for the offense in the abstract, but also in terms of

factors peculiar to the commission of the offense in the particular case. Among such factors might be circumstances attending the commission of the offense that aggravate or mitigate its seriousness, such as: the age of the victim; the number of victims; the defendant's motivation and culpability; the nature and degree of harm caused or threatened by the offense, including the reparability or irreparability of any damage caused; the extent to which the defendant profited from the offense; the degree to which the offense involved a breach of special trust, particularly public trust; the complicity of the victim; and public concern generated by the offense.

2. Defendant's Background and Personal Circumstances

In formulating a sentence recommendation, the attorney for the government should always consider the defendant's criminal history, the degree of his/her dependence on criminal activity for a livelihood, and his/her timely cooperation in the investigation or prosecution of others. Beyond these factors, it may also be appropriate to consider the defendant's age, education, mental and physical condition (including drug dependence), vocational skills, employment record, family ties and responsibilities, roots in the community, remorse or contrition, and willingness to assume responsibility for his/her conduct.

3. Applicable Sentencing Purposes

The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

a. To deter the defendant and others from committing crime;

b. To protect the public from further offenses by the defendant;

c. To assure just punishment for the defendant's conduct; and

d. To promote the correction and rehibilitation of the defendant.

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

4. Relationship Between Sentence and Purpose of Sentencing

Having in mind the purpose or purposes sought to be achieved by sentencing in a particular case, the attorney for the government should consider the available sentencing alternatives in terms of the extent to which they are likely to serve such purpose or purposes. For example, if the prosecutor believes that the primary objective of the sentence should be to encourage the rehabilitation of the defendant, he/she may conclude that a term of imprisonment would not be appropriate. If, on the other hand, the primary purpose of the sentence is to incapacitate the defendant from committing additional crimes, then a substantial term of imprisonment might be warranted. And, in a case involving neither the need for rehabilitation nor for protection of the public from further criminal acts by the defendant, the objectives of deterrence and just punishment might best be achieved by a substantial fine, with or without a short period of imprisonment.

9-27.750 Disclosing Factual Material to Defense

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment

Due process requires that the sentence in a criminal case be based on accurate information. See, e.g., Moore v. United States, 571 F.2d 179,182-184 (3d Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. See, e.g.,

United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1229-30 (2d Cir.), cert, denied, 417 U.S. 950 (1974); United States v. Robin, 545 F.2d 775 (2d Cir. 1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

9-27.760 Assisting Parole Commission

A. If the sentence imposed includes a term of confinement that subjects the defendant to the jurisdiction of the Parole Commission, the attorney for the government should:

1. Forward to the Commission information necessary to ensure the proper application of the Commission's parole guidelines; and

2. Make a recommendation with respect to parole if required to do so by the terms of a plea agreement, or if there exist particularly aggravating or mitigating circumstances that justify a period of confinement different from that recommended in the parole guidelines.

B. Comment

The Parole Commission has authority to set release dates for federal prisoners who have been sentenced to a term of imprisonment for more than one year or who have been incarcerated pursuant to the Narcotic Addict Rehabilitation Act (18 U.S.C. §4251 et seq.) or the Youth Corrections Act (18 U.S.C. §5005 et seq.). The Commission's determination in a particular case is made with reference to parole guidelines that "indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics." See 28 C.F.R. §2.20(b).

The information necessary to determine a prisoner's offense and offender characteristics may be available to the Commission through the presentence report. In some cases there may be no presentence report, however. In other cases the report may not reflect all the facts about the offender or the offense that the prosecutor believes are necessary to the informed application of the Parole Commission's guidelines. For example, the report may not contain an adequate description of the defendant's cooperation with the government, or it may omit information relating to charges that have been or will be dropped as part of a plea agreement. There may also be cases in which the attorney for the

government does not have access to the presentence report and, consequently, cannot judge its adequacy in terms of the Parole Commission's requirements. Moreover, the prosecutor should bear in mind that the Parole Commission will not know what took place at the sentencing hearing unless one of the parties provides it with a transcript of the proceedings. Finally, if the defendant is released on bail pending appeal, the attorney for the government should bear in mind the possibility that the defendant's post-sentence conduct may be pertinent to the Parole Commission's determination.

To ensure that the Parole Commission has all the information it needs, the attorney for the government should forward to the Chief Executive Officer of the institution to which the defendant will be committed U.S.A. Form 792 ("Report on Convicted Prisoner"), setting forth such information as he/she believes is necessary to ensure the proper application of the parole guidelines (see USAM 9-34.220 and 9-34.221). The Form 792 submission should be made promptly after the sentencing hearing, and may be supplemented therafter if necessary, since the Commission's initial parole determination ordinarily will be made within a short time after the defendant's incarceration.

In supplying information to the Parole Commission, the prosecutor should bear in mind that the Commission, like the sentencing judge, is permitted to consider unadjudicated charges in assessing the seriousness of an individual's criminal behavior. See Billiteri v. United States Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). Accordingly, the information supplied need not be related solely to the offense or offenses for which the person was convicted, but should reflect the full range and seriousness of the conduct that could have been charged and proved. On the other hand, Commission regulations require that the information it considers meet "a threshold test of reliability." See 44 Fed. Reg. 12692-93 (March 8, 1979). Thus the same standard should be applied to Form 792 submissions as is applied to factual presentations at judicial sentencing hearings and, with respect to contested facts, there should be included a summary of corroborating information sufficient to overcome a denial by the prisoner.

Recommendations by the prosecutor concerning parole should be made when, as a part of a plea agreement, the prosecutor has agreed to make a recommendation, or when the prosecutor concludes, preferably after consultation with his/her supervisor, that the period of confinement recommended in the parole guidelines would be inappropriate in light of particularly aggravating or mitigating circumstances of the case. In the latter situation, the recommendation should be accompanied by a statement of the aggravating or mitigating circumstances and, if the severity rating of the criminal conduct involved is at issue, should specify the severity rating that the prosecutor believes to be applicable.

DETAILED TABLE OF CONTENTS FOR CHAPTER 34

9-34.000 PROBATION, PAROLE AND PARDON

9-34.100 PROBATION

9-34.110 Authority To Grant Probation

Upon entering a judgment of conviction of any offense other than offenses punishable by death or life imprisonment, and other than certain violations of the Narcotic Control Act of 1956, the court may, in its discretion, suspend either the imposition or execution of sentence and place the defendant on probation for a period not exceeding 5 years. 18 U.S.C. §3651. Probation may be granted where the offense is punishable only by a fine (United States v. Berger 145 F.2d 888 (2d Cir. 1944)), or by both fine and imprisonment. When the offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. In such case, payment of the fine may be made one of the conditions of probation.

The fact that a statute prescribes a minimum penalty, as is the case in certain of the internal revenue statutes relating to liquor violations, is not a bar to suspension of imposition or execution of sentence and the grant of probation. Where the defendant is a corporation, the court may suspend imposition or execution of sentence and place the corporation on probation.

Upon conviction for an offense not punishable by death or life imprisonment, but punishable by imprisonment for more than 6 months, the court may impose a sentence in excess of 6 months; may direct that 6 months or less of such sentence be served in a jail or a treatment institution; or may suspend execution of the remainder of the sentence and place the defendant on probation for such period and upon such conditions as the court deems best. 18 U.S.C. §3651.

9-34.120 Restitution as Condition

The court may not order restitution, as a condition of probation, in excess of the actual damage or loss to the victim of the offense for which conviction is had or to which a plea of guilty is entered. Karrell v. United States, 181 F.2d 981 (9th Cir. 1950), cert. denied., 340 U.S. 891 (1950). Consequently, an order of restitution cannot include sums representing alleged losses caused by offenses which were not charged in the indictment, or which were charged in counts which have been dismissed, or on which the defendant has been acquitted.

9-34.130 Advantage To Government Of Suspending Imposition

If sentence is imposed, its execution suspended, and the defendant placed on probation, the court is without power to increase the sentence if probation is subsequently revoked. On the other hand, if the court suspends imposition of sentence and places the defendant on probation, it has authority, upon revoking probation, to impose any sentence which it could have imposed originally. 18 U.S.C. §3653. Thus, there is ordinarily a distinct advantage in suspending imposition rather than execution of sentence when probation is contemplated. Furthermore, suspension of imposition of sentence may prove to be an incentive to good conduct because of the uncertainty of the extent of punishment which violation of the conditions of probation may incur.

9-34.140 Termination of Power to Place on Probation

The power to suspend execution of sentence and place a defendant on probation is terminated immediately upon imprisonment under such sentence, and is terminated as to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence. Affronti v. United States, 350 U.S. 79 (1955).

9-34.150 Effective Date Of Probation

Absent a specific direction to the contrary, the probationary period will commence to run at the time the court grants probation. This is true though the defendant is sentenced to imprisonment on another count of the same indictment or is at the time of probation order already serving a state or federal sentence of imprisonment. In such case the period of probation will run concurrently with the prison sentence. Engle v. United States, 332 F.2d 89 (6th Cir. 1964); Sanford v. King, 136 F.2d 106 (5th Cir. 1943). However, the court has power by specific direction to make the probation period take effect upon termination of the prison term. Frad v. Kelly, 320 U.S. 312 (1937); Cosman v. United States, 302 U.S. 617 (1938); Graddis v. United States, 280 F.2d 334 (6th Cir. 1960).

9-34.160 Revocation

If within the period of probation the defendant violates any of the conditions which have been imposed by the court, the order granting probation may be revoked and sentence imposed, or if sentence has been previously imposed, such sentence or any lesser sentence may be ordered executed. An order of revocation may be entered only after hearing upon the alleged violation of probation at which the probationer is entitled to representation by counsel. Counsel will be appointed for those who are

financially unable to retain their own counsel. 18 U.S.C. §3006A; Escoe v. Zerbst, 295 U.S. 490 (1935); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Any warrant for the arrest of the probationer for violation of probation must be issued no later than 5 years from the effective date of the grant of probation. 18 U.S.C. §3653; compare Justras v. United States, 340 F.2d 305 (1st Cir. 1965); Demarois v. Farrell, 87 F.2d 957 (8th Cir. 1937), cert. denied, 302 U.S. 683; United States v. Gernie, 228 F. Supp. 329 (S.D.N.Y. 1964).

9-34.200 PAROLE

9-34.210 Eligibility

Every prisoner, with exceptions outlined below, who is in custody under a federal sentence of more than one year becomes eligible for parole consideration upon serving one-third of the term or terms imposed if he/she has observed the rules of the institution in which he/she is being held. 18 U.S.C. §4205(a). When plural sentences are ordered to run consecutively the aggregate term is the basis for computing parole eligibility. Consecutive sentences are aggregated without regard to their length and no distinction is made as to a term of imprisonment imposed under a felony conviction and another imposed under a misdemeanor conviction. The law also provides that a prisoner serving a life sentence or a term exceeding 30 years shall be eligible for parole consideration after serving 10 years. 18 U.S.C. §4205(a).

9-34.211 Exception for Juveniles

Committed juvenile delinquents and committed youth offenders may be released on parole supervision at any time after commitment. See 18 U.S.C. §5041 and 18 U.S.C. §5017(a), respectively.

9-34.212 Eligibility Date Specified By Court

The court has certain discretionary powers as to parole eligibility upon entering a judgment of conviction if the court pronounces a sentence of more than 1 year, it may designate in the sentence a minimum term at which time the prisoner shall become eligible for parole consideration. Such minimum terms may be less than, but shall not be more than, one-third of the maximum sentence imposed. 18 U.S.C. §4205(b)(1). It provides further that the court may fix the maximum term of imprisonment and specify in the sentence that the prisoner may become eligible for parole consideration at such time as the Parole Commission may determine. 18 U.S.C. §4205(b)(2). If the court imposes a sentence of not less than six months but not more

than one year, the court may at the time of sentencing provide for the release of the prisoner as if on parole after service of one-third of the sentence. 18 U.S.C. §4205(f).

9-34.220 Preparation of Reports on Convicted Prisoner for the Parole Commission

All U.S. Attorneys, Assistant U.S. Attorneys, and Criminal Division Attorneys are required to prepare a Form 792 "Report on Convicted Prisoners by United States Attorney" in all cases in which a defendant has been sentenced to a prison term in excess of one year. The completed forms are to be submitted to the Chief Executive Officer of the institution to which the defendant will be committed as soon as the defendant has been sentenced.

9-34.221 Duty to Complete the Report

It is especially important that the Parole Commission be apprised of the specific data it needs for decision making. An attorney's responsibility for the case continues through the sentencing process. All attorney should be familiar with the Principles of Federal Prosecution, which appear in USAM 9-27.000, in particular, Part G6 at pages 55 and 56. That part fully sets forth the responsibilities of federal prosecutors to prepare and submit a completed Form 792.

9-34.222 Preparation Of Form 792

The Parole Commission needs to be fully informed of aggravating and mitigating factors surrounding each offense. To accomplish that end observe the following when preparing Form 792.

A. Describe the details of the offense itself. Include the dollar amounts involved in the crime; this is important to the Parole Commission when it rates the severity of an offense, particularly in income tax, fraud, embezzlement, drug and theft cases. In drug cases, provide information on the quantity and purity of the drugs.

B. Explain the prisoner's role in the offense. The Parole Commission should be told of the nature and severity of the prisoner's involvement relative to that of his/her codefendants; this will prevent unjust disparity in the treatment among codefendants and help the Parole Commission to compare the prison terms of principals and accessories.

C. Outline related charges dismissed upon entry of a guilty plea or not proved at trial. Whatever the government was prepared to prove should be

reported fully, because the Parole Commission is entitled to consider unadjudicated charges so long as the prisoner has notice of them.

D. Provide investigative information concerning the prior history of the prisoner and/or the offense (if it was part of an on-going pattern of behavior). The Parole Commission needs specific data on the magnitude and duration of the criminal behavior; considered are the amount of sophistication and/or planning of the offense, and the degree to which the offense was part of a large scale criminal conspiracy or a continuing criminal enterprise. While the prisoner's general reputation is not specific enough for consideration in parole release decision making, his/her criminal reputation should be reported to the Parole Commission so that a determination can be made whether or not to treat his/her case under the original jurisdiction procedure. 28 C.F.R. §217.

The Parole Commission must disclose to the prisoner the reports and documents used in parole release decision making; if materials are considered which fall within the three broad exemptions of 18 U.S.C §4208(c), the Parole Commission need only furnish the prisoner with a summary though the Parole Commission may consider the report in full. Information on Form 792 which falls within these exemptions should be summarized in general terms; the precise exemption chosen need not be revealed or justified. As a standard precaution, the name of the preparing attorney can be deleted from the disclosable copy of the report.

Summaries should be typewritten on a separate page with the heading SUMMARY OF INFORMATION WITHHELD, and should be attached to the copy Form 792 which has been excised for disclosure to the prisoner. Send the original and excised copy to the institution in which the prisoner is confined. If investigative reports are included with the prosecuting attorney's report, the responsibility agency should be requested to provide summaries if any material is deemed by that agency to be exempt form disclosure.

9-34.223 Form 792

A copy of the current Form USA-792 follows. See pages 6 and 7 of this chapter. All previous editions of the form are obsolete and should be destroyed.

9-34.224 Parole Commission Guidelines

All prosecuting attorneys should be familiar with the Parole Commission's guidelines, both in plea negotiations and in completing the Form 792. The Commission's most recent guideline table (full text to appear at 28 C.F.R. §2.20) follows. See pages 8-30 of this chapter.

NAME _____

CONVICTED OF _____

TERM IMPOSED _____

CRIMINAL CASE NO. _____

U.S.C. _____

DISTRICT _____

NOTE: This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

1. DESCRIPTION OF THE OFFENSE: Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

II. CORROBORATING EVIDENCE: If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

III. COOPERATION: Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unrewarded as a possible circumstance in mitigation of punishment.

IV. RECOMMENDATION RELATIVE TO PAROLE: This section is optional. *(See the paroling policy guidelines at 28 CFR § 2.20)*

DISCLOSURE INSTRUCTIONS (to institution staff):

_____ This report may be disclosed to the prisoner.

_____ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208 (c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

NOTIFICATION REQUEST:

_____ I wish to be notified of the date and place set for this prisoner's parole hearing.

_____ I wish to be notified of the Commission's decision in this case.

For the United States Attorney

_____
DATE

Signed: _____
Assistant U.S. Attorney

Disposition of copies: This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed. (The U.S. Marshal can put you in contact with your local CPO.)

GUIDELINES FOR DECISION-MAKING
[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One *[formerly 'low severity']*	Adult Range <=6 months	6-9 months	9-12 months	12-16 months
	(Youth Range) (<=6) months	(6-9) months	(9-12) months	(12-16) months
Category Two *[formerly 'low moderate severity']*	Adult Range <=8 months	8-12 months	12-16 months	16-22 months
	(Youth Range) (<=8) months	(8-12) months	(12-16) months	(16-20) months
Category Three *[formerly 'moderate severity']*	Adult Range 10-14 months	14-18 months	18-24 months	24-32 months
	(Youth Range) (8-12) months	(12-16) months	(16-20) months	(20-26) months
Category Four *[formerly 'high severity']*	Adult Range 14-20 months	20-26 months	26-34 months	34-44 months
	(Youth Range) (12-16) months	(16-20) months	(20-26) months	(26-32) months
Category Five *[formerly 'very high severity']*	Adult Range 24-36 months	36-48 months	48-60 months	60-72 months
	(Youth Range) (20-26) months	(26-32) months	(32-40) months	(40-48) months

10/01/83

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category Six *[formerly 'Greatest I severity']*	Adult Range 40-52 months	52-64 months	64-78 months	78-100 months
	(Youth Range) (30-40) months	(40-50) months	(50-60) months	(60-76) months
Category Seven *[formerly included in 'Greatest II severity']*	Adult Range 52-80 months	64-92 months	78-110 months	100-148 months
	(Youth Range) (40-64) months	(50-74) months	(60-86) months	(76-110) months
Category Eight* *[formerly included in 'Greatest II severity']*	Adult Range 100+ months	120+ months	150+ months	180+ months
	(Youth Range) (80+) months	(100+) months	(120+) months	(150+) months

*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

U.S. PAROLE COMMISSION OFFENSE BEHAVIOR SEVERITY INDEX

CHAPTER ONE. OFFENSES OF GENERAL APPLICABILITY

CHAPTER TWO. OFFENSES INVOLVING THE PERSON
- Subchapter A - Homicide Offenses
- Subchapter B - Assault Offenses
- Subchapter C - Kidnaping and Related Offenses
- Subchapter D - Sexual Offenses
- Subchapter E - Offenses Involving Aircraft
- Subchapter F - Communication of Threats

10/01/83

CHAPTER THREE. OFFENSES INVOLVING PROPERTY
- Subchapter A - Arson and Property Destruction Offenses
- Subchapter B - Criminal Entry Offenses
- Subchapter C - Robbery, Extortion, and Blackmail
- Subchapter D - Theft and Related Offenses
- Subchapter E - Counterfeiting and Related Offenses
- Subchapter F - Bankruptcy Offenses
- Subchapter G - Violations of Securities or Investment Regulations and Antitrust Offenses

CHAPTER FOUR. OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

CHAPTER FIVE. OFFENSES INVOLVING REVENUE
- Subchapter A - Internal Revenue Offenses
- Subchapter B - Customs Offenses
- Subchapter C - Contraband Cigarettes

CHAPTER SIX. OFFENSES INVOLVING GOVERNMENTAL PROCESS
- Subchapter A - Impersonation of Officials
- Subchapter B - Obstructing Justice
- Subchapter C - Official Corruption

CHAPTER SEVEN. OFFENSES INVOLVING INDIVIDUAL RIGHTS
- Subchapter A - Offenses Involving Civil Rights
- Subchapter B - Offenses Involving Privacy

CHAPTER EIGHT. OFFENSES INVOLVING EXPLOSIVES AND WEAPONS
- Subchapter A - Explosives and Other Dangerous Articles
- Subchapter B - Firearms

CHAPTER NINE. OFFENSES INVOLVING ILLICIT DRUGS
- Subchapter A - Heroin and Opiate Offenses
- Subchapter B - Marihuana and Hashish Offenses
- Subchapter C - Cocaine Offenses
- Subchapter D - Other Illicit Drug Offenses

CHAPTER TEN. OFFENSES INVOLVING NATIONAL DEFENSE
- Subchapter A - Treason and Related Offenses
- Subchapter B - Sabotage and Related Offenses
- Subchapter C - Espionage and Related Offenses
- Subchapter D - Selective Service Offenses
- Subchapter E - Other National Defense Offenses

CHAPTER ELEVEN. OFFENSES INVOLVING ORGANIZED CRIMINAL ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION, AND NON-GOVERNMENTAL BRIBERY
- Subchapter A - Organized Crime Offenses
- Subchapter B - Gambling Offenses
- Subchapter C - Obscenity
- Subchapter D - Sexual Exploitation of Children
- Subchapter E - Prostitution and White Slave Traffic
- Subchapter F - Non-Governmental Bribery
- Subchapter G - Currency Offenses

CHAPTER TWELVE. MISCELLANEOUS OFFENSES

10/01/83

CHAPTER THIRTEEN. GENERAL NOTES AND DEFINITIONS
Subchapter A - General Notes
Subchapter B - Definitions

CHAPTER ONE - OFFENSES OF GENERAL APPLICABILITY

101 Conspiracy
Grade conspiracy in the same category as the underlying offense.

102 Attempt
Grade attempt in the same category as the offense attempted.

103 Aiding and Abetting
Grade aiding and abetting in the same category as the underlying offense.

104 Accessory After the Fact*
Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

--- NOTE TO CHAPTER ONE
The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense). *[[Notes and Procedures.* In grading unconsummated conspiracy offenses, care must be taken to distinguish the specific and imminent elements of the offense (which are to be considered) from those which are speculative and remote]].

CHAPTER TWO - OFFENSES INVOLVING THE PERSON

SUBCHAPTER A - HOMICIDE OFFENSES

201 Murder
Murder*, or a forcible felony* resulting in the death of a person other than a participating offender, shall be graded as Category Eight.

202 Voluntary Manslaughter*
Category Seven.

203 Involuntary Manslaughter*
Category Four.

SUBCHAPTER B - ASSAULT OFFENSES

211 Assault During Commission of Another Offense
(a) If serious bodily injury* results or if 'serious bodily injury is clearly intended'*, grade as Category Seven;
(b) If bodily injury* results, or a weapon is fired by any offender, grade as Category Six;
(c) Otherwise, grade as Category Five.

212 Assault
(a) If serious bodily injury* results or if 'serious bodily injury is clearly intended'*, grade as Category Seven;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(b) If bodily injury* results or a dangerous weapon is used by any offender, grade as Category Five;
(c) Otherwise, grade as Category Two.
(d) Exception: If the victim was known to be a 'protected person'* or criminal justice official, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.

SUBCHAPTER C - KIDNAPING AND RELATED OFFENSES

221 Kidnaping
(a) If the purpose of the kidnaping is for ransom or 'political' terrorism, grade as Category Eight.
(b) If a person is held hostage in a known place for purposes of extortion (e.g., forcing a bank manager to drive to a bank to retrieve money by holding a family member hostage at home), grade as Category Seven;
(c) If a victim is used as a shield or hostage in a confrontation with law enforcement authorities, grade as Category Seven;
(d) Otherwise, grade as Category Seven.
(e) Exception: If not for ransom or terrorism, and no bodily injury to victim, and limited duration (e.g., abducting the driver of a truck during a hijacking and releasing him unharmed an hour later), grade as Category Six.

222 Demand for Ransom
(a) If a kidnaping has, in fact, occurred, but it is established that the offender was not acting in concert with the kidnapper(s), grade as Category Seven;
(b) If no kidnapping has occurred, grade as 'extortion'.

SUBCHAPTER D - SEXUAL OFFENSES

231 Forcible Rape or Forcible Sodomy
(a) Category Seven.
(b) Exception: If a prior consensual sexual relationship is present between victim and offender, grade as Category Six.

232 Carnal Knowledge*
(a) Category Four.
(b) Exception: If the relationship is clearly consensual, and the victim is at least 14 years old, and the age difference between victim and offender is less than four years, grade as Category One.

SUBCHAPTER E - OFFENSES INVOLVING AIRCRAFT

241 Aircraft Piracy
Category Eight.

242 Interference with a Flight Crew
(a) If the conduct or attempted conduct has potential for creating a significant safety risk to an aircraft or passengers, grade as Category Seven;
(b) Otherwise, grade as Category Two.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER F - COMMUNICATION OF THREATS

251 Communicating a Threat [to kill, assault, or kidnap]
(a) Category Four;
(b) Notes:
(1) Any overt act committed for the purposes of carrying out a threat in this subchapter may be considered as an aggravating factor.
(2) If for purposes of extortion or obstruction of justice, grade according to Chapter Three, Subchapter C, or Chapter Six, Subchapter B, as applicable.

CHAPTER THREE - OFFENSES INVOLVING PROPERTY

SUBCHAPTER A - ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

301 Property Destruction by Arson or Explosives
(a) If the conduct results in serious bodily injury* or if 'serious bodily injury is clearly intended'*, grade as Category Seven;
(b) If the conduct (i) involves any place where persons are present or likely to be present; or (ii) involves a residence, building, or other structure; or (iii) results in bodily injury*, grade as Category Six;
(c) Otherwise, grade as 'property destruction other than listed above' but not less than Category Five.

302 Wrecking a Train
Category Seven.

303 Property Destruction Other Than Listed Above
(a) If the conduct results in bodily injury* or serious bodily injury*, or if 'serious bodily injury is clearly intended'*, grade as if 'assault during commission of another offense';
(b) If damage of more than $500,000 is caused, grade as Category Six;
(c) If damage of more than $100,000 but not more than $500,000 is caused, grade as Category Five;
(d) If damage of at least $20,000 but not more than $100,000 is caused, grade as Category Four;
(e) If damage of at least $2000 but less than $20,000 is caused, grade as Category Three;
(f) If damage of less than $2000 is caused, grade as Category One.
(g) Exception: If a significant interruption of a government or public utility function is caused, grade as not less than Category Three.

SUBCHAPTER B - CRIMINAL ENTRY OFFENSES

311 Burglary or Unlawful Entry
(a) If the conduct involves an armory or similar facility (e.g., a facility where automatic weapons or war materials are stored) for the purpose of theft or destruction of weapons or war materials, grade as Category Six;
(b) If the conduct involves an inhabited dwelling (whether or not a victim is present), or any premises with a hostile confrontation with a victim, grade as Category Five;
(c) If the conduct involves use of explosives or safecracking, grade as Category Five;
(d) Otherwise, grade as 'theft' offense, but not less than Category Two.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(e) Exception: If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense.

SUBCHAPTER C - ROBBERY, EXTORTION, AND BLACKMAIL

321 Robbery
(a) Category Five.
(b) Exceptions:
(1) If the grade of the applicable 'theft' offense exceeds the grade for robbery, grade as a 'theft' offense.
(2) If any offender forces a victim to accompany any offender to a different location, or if a victim is forcibly detained for a significant period, grade as Category Six.
(3) Pickpocketing (stealth-no force or fear), see Subchapter D.
(c) Note: Grade purse snatching (fear or force) as robbery.

322 Extortion
(a) If by threat of physical injury to person or property, or extortionate extension of credit (loansharking)*, grade as Category Five;
(b) If by use of official governmental position, grade according to Chapter Six, Subchapter C.
(c) Exceptions:
(1) If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense;
(2) If a victim is physically held hostage for purposes of extortion, grade according to Chapter Two, Subchapter C.

323 Blackmail [threat to injure reputation or accuse of crime]
Grade as a 'theft' offense according to the value of the property demanded, but not less than Category Three. Actual damage to reputation may be considered as an aggravating factor.

SUBCHAPTER D - THEFT AND RELATED OFFENSES

331 Theft, Forgery, Fraud, Trafficking in Stolen Property*, Interstate Transportation of Stolen Property, Receiving Stolen Property, Embezzlement, and Related Offenses
(a) If the value of the property* is more than $500,000, grade as Category Six;
(b) If the value of the property* is more than $100,000 but not more than $500,000, grade as Category Five;
(c) If the value of the property* is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the value of the property* is at least $2000 but less than $20,000, grade as Category Three;
(e) If the value of the property* is less than $2000, grade as Category One.
(f) Exceptions:
(1) Offenses involving stolen checks or mail, forgery, fraud, interstate transportation of stolen or forged securities, trafficking in stolen property*, or embezzlement shall be graded as not less than Category Two;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(2) Theft of an automobile shall be graded as no less than Category Three. Note: where the vehicle was recovered within 72 hours with no significant damage and the circumstances indicate that the only purpose of the theft was temporary use (e.g., joyriding), such circumstances may be considered as a mitigating factor.

(g) Note: In 'theft' offenses, the total amount of the theft committed or attempted by the offender, or others acting in concert with the offender, is to be used. *[[Notes and Procedures.* Example (1): Seven persons in concert commit a theft of $70,000; each receives $10,000. Grade according to the total amount ($70,000). Example (2): Seven persons in concert fraudulently sell stock worth $20,000 for $90,000. Grade according to the loss ($70,000)]].

332 Pickpocketing [stealth-no force or fear]
Grade as a 'theft' offense, but not less than Category Three.

333 Fraudulent Loan Applications
Grade as a 'fraud' offense according to the amount of the loan.

334 Preparation or Possession of Fraudulent Documents
(a) If for purposes of committing another offense, grade according to the offense intended;
(b) Otherwise, grade as Category Two.

335 Criminal Copyright Offenses
(a) If very large scale (e.g., more than 100,000 sound recordings or more than 10,000 audio visual works), grade as Category Five;
(b) If large scale (e.g., 20,000-100,000 sound recordings or 2,000-10,000 audio visual works), grade as Category Four;
(c) If medium scale (e.g., 2,000-19,999 sound recordings or 200-1,999 audio visual works), grade as Category Three;
(d) If small scale (e.g., less than 2000 sound recordings or less than 200 audio visual works), grade as Category Two.

SUBCHAPTER E - COUNTERFEITING AND RELATED OFFENSES

341 Passing or Possession of Counterfeit Currency or Other Medium of Exchange*
(a) If the face value of the currency or other medium of exchange is more than $500,000, grade as Category Six;
(b) If the face value is more than $100,000 but not more than $500,000, grade as Category Five;
(c) If the face value is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the face value is at least $2000 but less than $20,000, grade as Category Three;
(e) If the face value is less than $2000, grade as Category Two.

342 Manufacture of Counterfeit Currency or Other Medium of Exchange* or Possession of Instruments for Manufacture
Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession)), but not less than Category Five. The term 'manufacture' refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER F - BANKRUPTCY OFFENSES

351 Fraud in Bankruptcy or Concealing Property
Grade as a 'fraud' offense.

SUBCHAPTER G - VIOLATION OF SECURITIES OR INVESTMENT REGULATIONS AND ANTITRUST OFFENSES

361 Violation of Securities or Investment Regulations (15 U.S.C. 77ff,80)
(a) If for purposes of fraud, grade according to the underlying offense;
(b) Otherwise, grade as Category Two.

362 Antitrust Offenses
(a) If estimated economic impact is more than one million dollars, grade as Category Four;
(b) If the estimated economic impact is more than $100,000 but not more than one million dollars, grade as Category Three;
(c) Otherwise, grade as Category Two.
[[Notes and Procedures: The term 'economic impact' refers to the estimated loss to any victims (e.g., loss to consumers from a price fixing offense).]]

CHAPTER FOUR - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

401 Unlawfully Entering the United States as an Alien
Category Two.

402 Smuggling of Alien(s) into the United States
Category Three.

403 Offenses Involving Passports
(a) If making an unlawful passport for distribution to another, possession with intent to distribute, or distribution of an unlawful passport, grade as Category Three;
(b) If fraudulently acquiring or improperly using a passport, grade as Category Two.

404 Offenses Involving Naturalization or Citizenship Papers
(a) If forging or falsifying naturalization or citizenship papers for distribution to another, possession with intent to distribute, or distribution, grade as Category Three;
(b) If acquiring fraudulent naturalization or citizenship papers for own use or improper use of such papers, grade as Category Two;
(c) If failure to surrender canceled naturalization or citizenship certificate(s), grade as Category One.

CHAPTER FIVE - OFFENSES INVOLVING REVENUE

SUBCHAPTER A - INTERNAL REVENUE OFFENSES

501 Tax Evasion [income tax or other taxes]
(a) If the amount of tax evaded or evasion attempted is more than $500,000, grade as Category Six;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(b) If the amount of tax evaded or evasion attempted is more than $100,000 but not more than $500,000, grade as Category Five;
(c) If the amount of tax evaded or evasion attempted is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the amount of tax evaded or evasion attempted is at least $2000 but less than $20,000, grade as Category Three;
(e) If the amount of tax evaded or evasion attempted is less than $2000, grade as Category One.
(f) Notes:
(1) Grade according to the amount of tax evaded or evasion attempted, not the gross amount of income. *[[Notes and Procedures.* Example: An offender fails to report income of $30,000, thus avoiding $10,000 in taxes; the severity rating is determined by the tax avoided (i.e., $10,000)]].
(2) Tax evasion refers to failure to pay applicable taxes. Grade a false claim for a tax refund (where tax has not been withheld) as a 'fraud' offense.

502 Operation of an Unregistered Still
Grade as a 'tax evasion' offense.

SUBCHAPTER B - CUSTOMS OFFENSES

511 Smuggling Goods into the United States
(a) If the conduct is for the purpose of tax evasion, grade as a 'tax evasion' offense.
(b) If the article is prohibited from entry to the country absolutely (e.g., illicit drugs or weapons), use the grading applicable to possession with intent to distribute of such articles, or the grading applicable to tax evasion, whichever is higher, but not less than Category Two;
(c) If the conduct involves breaking seals, or altering or defacing customs marks, or concealing invoices, grade according to (a) or (b), as applicable, but not less than Category Two.

512 Smuggling Goods into Foreign Countries in Violation of Foreign Law (re: 18 U.S.C. 546)
Category Two.

SUBCHAPTER C - CONTRABAND CIGARETTES

521 Trafficking in Contraband Cigarettes (re: 18 U.S.C. 2342)
Grade as a tax evasion offense.

CHAPTER SIX - OFFENSES INVOLVING GOVERNMENTAL PROCESS

SUBCHAPTER A - IMPERSONATION OF OFFICIALS

601 Impersonation of Official
(a) If for purposes of commission of another offense, grade according to the offense attempted, but not less than Category Two;
(b) Otherwise, grade as Category Two.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER B - OBSTRUCTING JUSTICE

611 Perjury
(a) If the perjured testimony concerns another offense, grade according to the underlying offense, but not less than Category Three;
(b) Otherwise, grade as Category Three.
(c) Suborning perjury, grade as perjury.

612 Unlawful False Statements Not Under Oath
Category One.

613 Tampering With Evidence or Witness, Victim, or Informant
(a) If the underlying purpose concerns another offense, grade according to the offense involved, but not less than Category Three;
(b) Otherwise, grade as Category Three.
(c) Exception: Intimidation by threat of physical harm, grade as not less than Category Five.

614 Misprision of a Felony*
Grade as if 'accessory after the fact' but not higher than Category Three.

615 Harboring a Fugitive
Grade as 'accessory after the fact' but not higher than Category Three. Use the category of the offense for which the fugitive is wanted as the underlying offense.

616 Escape
If in connection with another federal offense for which a severity rating can be assessed, grade the underlying offense and apply the rescission guidelines to determine an additional penalty. Otherwise, grade as Category Three. *[[Notes and Procedures.* Grade as Category Three only if the underlying offense behavior cannot be established in accord with Commission regulations]].

617 Failure to Appear*
(a) In Felony Proceedings. If in connection with an offense for which a severity rating can be assessed, add to the guidelines otherwise appropriate the following: (i) <=6 months if voluntary return within 6 days, or (ii) 6-12 months in any other case, Otherwise, grade as Category Three. *[[Notes and Procedures.* Grade as Category Three only if the underlying offense behavior cannot be established in accord with Commission regulations]].
(b) In Misdemeanor Proceedings. Grade as Category One.
(c) Note: For purposes of this subsection, a misdemeanor is defined as an offense for which the maximum penalty authorized by law (not necessarily the penalty actually imposed) does not exceed one year."

618 Contempt of Court
(a) Criminal Contempt. Where imposed in connection with a prisoner serving a sentence for another offense, add <=6 months to the guidelines otherwise appropriate.
(b) Civil Contempt. See 28 C.F.R. 2.10.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER C - OFFICIAL CORRUPTION

621 Bribery or Extortion [use of official position - no physical threat]
(a) Grade as a 'theft offense' according to value of the bribe, demand, or the favor received (whichever is greater), but not less than Category Three.
(b) If the above conduct involves a pattern of corruption (e.g., multiple instances over a period exceeding six months), grade as not less than Category Four.
(c) If the purpose of the conduct is the obstruction of justice, grade as if 'perjury'.
(d) Notes:
(1) The grading in this subchapter applies to each party to a bribe.
(2) The extent to which the criminal conduct involves a breach of public trust, causing injury beyond that describable by monetary gain, may be considered as an aggravating factor.

622 Other Unlawful Use of Governmental Position
Category Two.

CHAPTER SEVEN - OFFENSES INVOLVING INDIVIDUAL RIGHTS

SUBCHAPTER A - OFFENSES INVOLVING CIVIL RIGHTS

701 Conspiracy Against Rights of Citizens (re: 18 U.S.C. 241)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

702 Deprivation of Rights Under Color of Law (re: 18 U.S.C. 242)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

703 Federally Protected Activity (re: 18 U.S.C. 245)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

704 Intimidation of Persons in Real Estate Transactions Based on Racial Discrimination (re: 42 U.S.C. 3631)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

705 Transportation of Strikebreakers (re: 18 U.S.C. 1231)
Category Two.

SUBCHAPTER B - OFFENSES INVOLVING PRIVACY

711 Interception and Disclosure of Wire or Oral Communications
(re: 18 U.S.C. 2511)
Category Two.

712 Manufacture, Distribution, Possession, and Advertising of Wire or Oral Communication Intercepting Devices (re: 18 U.S.C. 2512)
(a) Category Three.
(b) Exception: If simple possession, grade as Category Two.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

713 Unauthorized Opening of Mail
Category Two.

CHAPTER EIGHT - OFFENSES INVOLVING EXPLOSIVES AND WEAPONS

SUBCHAPTER A - EXPLOSIVES OFFENSES AND OTHER DANGEROUS ARTICLES

801 Unlawful Possession of Explosives; or Use of Explosives During a Felony
Grade according to offense intended, but not less than Category Five.

802 Mailing Explosives or Other Injurious Articles with Intent to Commit a Crime
Grade according to offense intended, but not less than Category Five.

803 Improper Transportation or Marking (re: 18 U.S.C. 832, 833, 834)
(a) If resulting in death or serious bodily injury, grade as Category Four;
(b) Otherwise, grade as Category Three.

SUBCHAPTER B - FIREARMS

811 Possession by Prohibited Person (e.g., ex-felon)
Category Three.

812 Unlawful Possession or Manufacture of Sawed-off Shotgun, Machine Gun, Silencer, or Assassination kit*
(a) If silencer or assassination kit*, grade as Category Six;
(b) If sawed-off shotgun or machine gun, grade as Category Five.

[[Notes and Procedures. Consider unlawful possession of a weapon combined with other offenses under the multiple separate offense procedure of Chapter Thirteen]].

813 Unlawful Distribution of Weapons or Possession with Intent to Distribute
(a) If silencer(s) or assassination kit(s)*, grade as Category Six;
(b) If sawed-off shotgun(s) or machine gun(s), grade as Category Five;
(c) If multiple weapons (rifles, shotguns, or handguns), grade as Category Four;
(d) If single weapon (rifle, shotgun, handgun), grade as Category Three.

CHAPTER NINE - OFFENSES INVOLVING ILLICIT DRUGS

SUBCHAPTER A - HEROIN AND OPIATE* OFFENSES

901 Distribution or Possession with Intent to Distribute
(a) If extremely large scale (e.g., involving 3 kilograms or more of 100% pure heroin, or equivalent amount), grade as Category Eight [except as noted in (c) below];
(b) If very large scale (e.g., involving 1 kilogram but less than 3 kilograms of 100% pure heroin, or equivalent amount), grade as Category Seven [except as noted in (c) below];
(c) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) or (b) as Category Six;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(d) If large scale (e.g., involving 50-999 grams of 100% pure heroin, or equivalent amount), grade as Category Six [except as noted in (e) below];
(e) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (d) as Category Five.
(f) If medium scale (e.g., involving 5-49 grams of 100% pure heroin, or equivalent amount), grade as Category Five;
(g) If small scale (e.g., involving less than 5 grams of 100% pure heroin, or equivalent amount), grade as Category Four [except as noted in (h) below];
(h) If evidence of opiate dependence and very small scale (e.g., involving less than 1.0 grams of 100% pure heroin, or equivalent amount), grade as Category Three.

902 Simple Possession
Category One.

SUBCHAPTER B - MARIHUANA AND HASHISH OFFENSES

911 Distribution or Possession with Intent to Distribute
(a) If extremely large scale (e.g., involving 20,000 pounds or more of marihuana/6,000 pounds or more of hashish/600 pounds or more of hash oil), grade as Category Six [except as noted in (b) below];
(b) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) as Category Five;
(c) If very large scale (e.g., involving 2,000-19,999 pounds of marihuana/600-5,999 pounds of hashish/60-599 pounds of hash oil), grade as Category Five;
(d) If large scale (e.g., involving 200-1,999 pounds of marihuana/60-599 pounds of hashish/6-59.9 pounds of hash oil), grade as Category Four;
(e) If medium scale (e.g., involving 50-199 pounds of marihuana/15-59.9 pounds of hashish/1.5-5.9 pounds of hash oil), grade as Category Three;
(f) If small scale (e.g., involving 10-49 pounds of marihuana/3-14.9 pounds of hashish/.3-1.4 pounds of hash oil), grade as Category Two;
(g) If very small scale (e.g., involving less than 10 pounds of marihuana/less than 3 pounds of hashish/less than .3 pounds of hash oil), grade as Category One.

912 Simple Possession
Category One.

SUBCHAPTER C - COCAINE OFFENSES

921 Distribution or Possession with Intent to Distribute
(a) If very large scale (e.g., involving more than 1 kilogram of 100% purity, or equivalent amount), grade as Category Six [except as noted in (b) below];
(b) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) as Category Five;
(c) If large scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount), grade as Category Five;
(d) If medium scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount), grade as Category Four;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(e) If small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount), grade as Category Three;
(f) If very small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.

922 Simple Possession
Category One.

SUBCHAPTER D - OTHER ILLICIT DRUG OFFENSES*

931 Distribution or Possession with Intent to Distribute
(a) If very large scale (e.g., involving more than 200,000 doses), grade as Category Six [except as noted in (b) below];
(b) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) as Category Five;
(c) If large scale (e.g., involving 20,000-200,000 doses), grade as Category Five;
(d) If medium scale (e.g., involving 1,000-19,999 doses), grade as Category Four;
(e) If small scale (e.g., involving 200-999 doses), grade as Category Three;
(f) If very small scale (e.g., involving less than 200 doses), grade as Category Two.

932 Simple Possession
Category One.

--- NOTES TO CHAPTER NINE
(1) Grade manufacture of synthetic illicit drugs as listed above, but not less than Category Five.
(2) 'Equivalent amounts' for the cocaine and opiate categories may be computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure, etc.

CHAPTER TEN - OFFENSES INVOLVING NATIONAL DEFENSE

SUBCHAPTER A - TREASON AND RELATED OFFENSES

1001 Treason
Category Eight.

1002 Rebellion or Insurrection
Category Seven.

SUBCHAPTER B - SABOTAGE AND RELATED OFFENSES

1011 Sabotage
Category Eight.

1012 Enticing Desertion
(a) In time of war or during a national defense emergency, grade as Category Four;
(b) Otherwise, grade as Category Three.

1013 Harboring or Aiding a Deserter
Category One.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER C - ESPIONAGE AND RELATED OFFENSES

1021 Espionage
Category Eight.

SUBCHAPTER D - SELECTIVE SERVICE OFFENSES

1031 Failure to Register, Report for Examination or Induction
(a) If committed during time of war or during a national defense emergency, grade as Category Four;
(b) If committed when draftees are being inducted into the armed services, grade as Category Three;
(c) Otherwise, grade as Category One.

SUBCHAPTER E - OTHER NATIONAL DEFENSE OFFENSES

1041 Offenses Involving Nuclear Energy
Unauthorized production, possession, or transfer of nuclear weapons or special nuclear material or receipt of or tampering with restricted data on nuclear weapons or special nuclear material, grade as Category Eight.

CHAPTER ELEVEN - OFFENSES INVOLVING ORGANIZED CRIME ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION, AND NONGOVERNMENTAL BRIBERY

SUBCHAPTER A - ORGANIZED CRIME OFFENSES

1101 Racketeer Influence and Corrupt Organizations (re: 18 U.S.C. 1961-63)
Grade according to the underlying offense attempted, but not less than Category Five.

1102 Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise (re: 18 U.S.C. 1952)
Grade according to the underlying offense attempted, but not less than Category Three.

SUBCHAPTER B - GAMBLING OFFENSES

1111 Gambling Law Violations - Operating or Employment in an Unlawful Business (re: 18 U.S.C. 1955)
(a) If large scale operation [e.g., Sports books (estimated daily gross more than $15,000); Horse books (estimated daily gross more than $4,000); Numbers bankers (estimated daily gross more than $2,000); Dice or card games (estimated daily 'house cut' more than $1,000)]; grade as Category Four;
(b) If medium scale operation [e.g., Sports books (estimated daily gross $5,000 - $15,000); Horse books (estimated daily gross $1,500 - $4,000); Numbers bankers (estimated daily gross $750 - $2,000); Dice or card games (estimated daily 'house cut' $400 - $1,000)]; grade as Category Three;

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

(c) If small scale operation [e.g., Sports books (estimated daily gross less than $5,000); Horse books (estimated daily gross less than $1,500); Numbers bankers (estimated daily gross less than $750); Dice or card games (estimated daily 'house cut' less than $400)]; grade as Category Two;
(d) Exception: Where it is established that the offender had no proprietary interest or managerial role, grade as Category One.

1112 Interstate Transportation of Wagering Paraphenalia (re: 18 U.S.C. 1953)
Category Three.

1113 Wire Transmission of Wagering Information (re: 18 U.S.C. 1084)
Grade as if 'operating a gambling business'.

1114 Operating or Owning a Gambling Ship (re: 18 U.S.C. 1082)
Category Three.

1115 Importing or Transporting Lottery Tickets; Mailing Lottery Tickets or Related Matter (re: 18 U.S.C. 1301, 1302)
(a) Grade as if 'operating a gambling business';
(b) Exception: If non-commercial, grade as Category One.

SUBCHAPTER C - OBSCENITY

1121 Mailing, Importing, or Transporting Obscene Matter
(a) If for commercial purposes, grade as Category Three;
(b) Otherwise, Category One.

1122 Broadcasting Obscene Language
Category One.

SUBCHAPTER D - SEXUAL EXPLOITATION OF CHILDREN

1131 Sexual Exploitation of Children* (re: 18 U.S.C. 2251, 2252)
(a) Category Six;
(b) Exception: Where the Commission finds the offender had only a peripheral role (e.g., a retailer receiving such material for resale but with no involvement in the production or wholesale distribution of such material), grade as Category Five.

SUBCHAPTER E - PROSTITUTION AND WHITE SLAVE TRAFFIC

1141 Interstate Transportation for Commercial Purposes
(a) If physical coercion, or involving person(s) of age less than 16, grade as Category Six;
(b) If involving person(s) of ages 16-17, grade as Category Five;
(c) Otherwise, grade as Category Four.

1142 Prostitution
Category One.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER F - NON-GOVERNMENTAL BRIBERY

1151 Bribery not Involving Federal, State, or Local Government Officials

(a) If the value of the bribe or of the favor received (whichever is greater) is $20,000 or more, grade as Category Three; otherwise, grade as Category Two.

(b) If the conduct involves bribery in a sporting contest, grade as Category Three.

SUBCHAPTER G - CURRENCY OFFENSES

1161 Currency Offenses (e.g., laundering money)

(a) If very large scale (e.g., the estimated gross amount of currency involved is more than $500,000), grade as Category Six;

(b) If large scale (e.g., the estimated gross amount of currency involved is more than $100,000 but not more than $500,000), grade as Category Five;

(c) If medium scale (e.g., the estimated gross amount of currency involved is at least $20,000 but not more than $100,000), grade as Category Four;

(d) If small scale (e.g., the estimated gross amount of currency involved is less than $20,000), grade as Category Three.

CHAPTER TWELVE - MISCELLANEOUS OFFENSES

If an offense behavior is not listed, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed in Chapters One - Eleven. If, and only if, an offense behavior cannot be graded by reference to Chapters One - Eleven, the following formula may be used as a guide.

Maximum Sentence Authorized by Statute [Not necessarily the sentence imposed]	Grading (Category)
< 2 yrs	1
2 - 3 yrs	2
4 - 5 yrs	3
6 - 10 yrs	4
11 - 20 yrs	5
21 - 29 yrs	6
30 yrs - life	7

CHAPTER THIRTEEN - GENERAL NOTES AND DEFINITIONS

SUBCHAPTER A - GENERAL NOTES

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

2. If an offense behavior involved multiple separate offenses, the severity level may be increased. Exception: in cases graded as Category Seven, multiple separate offenses are to be taken into account by consideration of a decision above the guidelines rather than by increasing the severity level. *[[Notes and Procedures.* In certain instances, the guidelines specify how multiple offenses are to be rated. In offenses rated by monetary loss (e.g., theft and related offenses, counterfeiting, tax evasion) or drug offenses, the total amount of the property or drugs involved is used as the basis for the offense severity rating (e.g., a number of check thefts should ordinarily be treated according to the total loss, rather than as multiple separate offenses). In instances not specifically covered in the guidelines, the decision-makers must exercise discretion as to whether or not the multiple offense behavior is sufficiently aggravating to justify increasing the severity rating. The following chart is intended to provide guidance in assessing whether the severity of multiple offenses is sufficient to raise the offense severity level; it is not intended as a mechanical rule.

MULTIPLE SEPARATE OFFENSES

Severity	*Points*	*Severity*	*Points*
Category One	= 1/9	Category Five	= 9
Category Two	= 1/3	Category Six	= 27
Category Three	= 1	Category Seven	= 45
Category Four	= 3		

Examples: 3 Category Five Offenses [3x(9)=27] = Category Six
5 Category Five Offenses [5x(9)=45] = Category Seven
2 Category Six Offenses [2x(27)=54] = Category Seven

The term 'multiple separate offenses' generally refers to offenses committed at different times. However, there are certain circumstances in which offenses committed at the same time are properly considered multiple separate offenses for the purpose of establishing the offense severity rating. These include (a) unrelated offenses, and (b) offenses involving the unlawful possession of weapons during commission of another offense.

Examples:
(1) An offender commits a robbery (Category Five) in which he steals $80,000 (Category Four). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Five) and not as multiple separate offenses.
(2) An offender commits a robbery (Category Five) in which shots are fired to scare the bank employees (Category Six). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Six) and not as multiple separate offenses.
(3) An offender when arrested for smuggling three aliens is found also in possession of $8,000 worth of stolen goods. Even though the offenses were discovered at the same time, they are unrelated; therefore consideration under the multiple separate offenses procedure is appropriate.
(4) An offender commits two robberies with a sawed-off shotgun. Grade under the multiple offense procedure as 3 Category Five offenses (3 x 9 = 27 points) = Category Six.]].

***Terms marked by an asterisk are defined in Chapter Thirteen.**

10/01/83

3. In cases where multiple sentences have been imposed (whether consecutive or concurrent, and whether aggregated or not) an offense severity rating shall be established to reflect the overall severity of the underlying criminal behavior. This rating shall apply whether or not any of the component sentences has expired.

4. The prisoner is to be held accountable for his own actions and actions done in concert with others; however, the prisoner is not to be held accountable for activities committed by associates over which the prisoner has no control and could not have been reasonably expected to forsee. *[[Notes and Procedures.* Example: An offender on one occasion steals $2000 worth of property and sells it to a fence, who is engaged in an ongoing operation. It if is not established that the offender was himself an active participant in the ongoing operation, he is to be held accountable only for the one incident]].

5. The following are examples of circumstances that may be considered as aggravating factors: extreme cruelty or brutality to a victim; the degree of permanence or likely permanence of serious bodily injury resulting from the offender's conduct; an offender's conduct while attempting to evade arrest that causes circumstances creating a significant risk of harm to other persons (e.g., causing a high speed chase or provoking the legitimate firing of a weapon by law enforcement officers).

6. The phrase 'may be considered an aggravating/mitigating factor' is us J in this index to provide guidance concerning certain circumstances which may warrant a decision above or below the guidelines. This does not restrict consideration of above or below guidelines decisions only to these circumstances, nor does it mean that a decision above or below the guidelines is mandated in every such case.

SUBCHAPTER B - DEFINITIONS

1. 'Accessory after the fact' refers to the conduct of one who, knowing an offense has been committed, assists the offender to avoid apprehension, trial, or punishment (e.g., by assisting in disposal of the proceeds of an offense). Note: Where the conduct consists of concealing an offense by making false statements not under oath, grade as 'misprision of felony'. Where the conduct consists of harboring a fugitive, grade as 'harboring a fugitive'.

2. 'Assassination kit' refers to a disguised weapon designed to kill without attracting attention. Unlike other weapons such as sawed-off shotguns which can be used to intimidate, assassination kits are intended to be undetectable in order to make the victim and bystanders unaware of the threat. A typical assassination kit is usually, but not always, a firearm with a silencer concealed in a briefcase or similar disguise and fired without showing the weapon.

3. 'Bodily injury' refers to injury of a type normally requiring medical attention [e.g., broken bone(s), laceration(s) requiring stitches, severe bruises].

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

4. 'Carnal knowledge' refers to sexual intercourse with a female who is less than 16 years of age and is not the wife of the offender.

5. 'Extortionate extension of credit' refers to any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

6. 'Failure to appear' refers to the violation of court imposed conditions of release pending trial, appeal, or imposition or execution of sentence by failure to appear before the court or to surrender for service of sentence.

7. 'Forcible felony' includes, but shall not be limited to, kidnaping, rape or sodomy, aircraft piracy or interference with a flight crew, arson or property destruction offenses, escape, robbery, extortion, or criminal entry offenses, and attempts to commit such offenses.

8. 'Involuntary manslaughter' refers to the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

9. 'Misprision of felony' refers to the conduct of one who, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority. The 'concealment' described above requires an act of commission (e.g., making a false statement to a law enforcement officer).

10. 'Murder' refers to the unlawful killing of a human being with malice aforethought. 'With malice aforethought' generally refers to a finding that the offender formed an intent to kill or do serious bodily harm to the victim without just cause or provocation.

11. 'Opiate' includes heroin, morphine, opiate derivatives, and synthetic opiate substitutes.

12. 'Other illicit drug offenses' include, but are not limited to, offenses involving the following: amphetamines, hallucinogens, barbiturates, methamphetamines, and phencyclidine (PCP).

13. 'Other medium of exchange' includes, but is not limited to, postage stamps, governmental money orders, or governmental coupons redeemable for cash or goods.

14. 'Peripheral role' in drug offenses refers to conduct such as that of a person hired as a deckhand on a marijuana boat, a person hired to help offload marijuana, a person with no special skills hired as a courier of drugs on a commercial airline flight, or a person hired as a chauffeur in a drug transaction. This definition does not include persons with decision-making or supervisory authority, persons with relevant special skills (e.g., a boat captain, chemist, or airplane pilot), or persons who finance such operations.

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

15. 'Protected person' refers to a person listed in 18 U.S.C. 351 (relating to Members of Congress), 1114 (relating to certain officers and employees of the United States), 1116 (relating to foreign officials, official guests, and internationally protected persons), or 1751 (relating to presidential assassination and officials in line of succession).

16. 'Serious bodily injury' refers to injury creating a substantial risk of death, major disability or loss of a bodily function, or disfigurement.

17. 'Serious bodily injury clearly intended' refers to a limited category of offense behaviors where the circumstances indicate that the bodily injury intended was serious (e.g., throwing acid in a person's face, or firing a weapon at a person) but where it is not established that murder was the intended object. Where the circumstances establish that murder was the intended object, grade as an 'attempt to murder'.

18. 'Sexual exploitation of children' refers to employing, using, inducing, enticing, or coercing a person less than 16 years of age to engage in any sexually explicit conduct for the purpose of producing a visual or print medium depicting such conduct with knowledge or reason to know that such visual or print medium will be distributed for sale, transported in interstate or foreign commerce, or mailed. It also includes knowingly transporting, shipping, or receiving such visual or print medium for the purposes of distribution for sale, or knowingly distributing for sale such visual or print medium.

19. 'Trafficking in stolen property' refers to receiving stolen property with intent to sell.

20. 'Value of the property' refers to the estimated replacement cost to the victim.

21. 'Voluntary manslaughter' refers to the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion."

---

*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SALIENT FACTOR SCORE (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) ..... ☐☐

None ..... = 3
One ..... = 2
Two or Three ..... = 1
Four or more ..... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS ..... ☐☐
(ADULT OR JUVENILE)

None ..... = 2
One or two ..... = 1
Three or more ..... = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS ..... ☐☐

Age at commencement of current offense
26 years of age or more ..... = 2
20-25 years of age ..... = 1
19 years of age or less ..... = 0

***Exception: If five or more prior commitments of more than thirty days (adult or juvenile), place an "X" here____ and score this item ..... = 0

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS), ... ☐☐

No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense..... = 1

Otherwise ..... = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS ..... ☐☐
VIOLATOR THIS TIME

Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time ..... = 1

Otherwise ..... = 0

Item F: HEROIN/OPIATE DEPENDENCE ..... ☐☐

No history of heroin/opiate dependence ... = 1
Otherwise ..... = 0

TOTAL SCORE ☐☐

Note: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as a conviction, even if a conviction is not formally entered.

10/1/83

9-34.230 Communication With Parole Commission

In order to insure that all pertinent information is made available to the Pardon Attorney and the Parole Commission when U.S. Attorneys contact these offices in connection with individuals who are subject to their jurisdictions, it is requested that such contacts be by letter over the signature of the U.S. Attorney, with a copy of the letter forwarded to the Criminal Division. This procedure will enable the Criminal Division to check its files and personnel for other pertinent information which should be considered by the Pardon Attorney or the Parole Commission.

9-34.240 Period of Supervision

A prisoner released on parole remains under supervision to the expiration of the maximum term of sentence. 18 U.S.C. §4201(a). However, the Parole Commission has the power to terminate supervision at an earlier date, 18 U.S.C. §4211(a), and must terminate supervision five years after the parolee's release on parole unless the Commission finds after a hearing that it is likely that the parolee will engage in future criminal conduct. 18 U.S.C. §4211(c).

9-34.250 Mandatory Release

A prisoner who is denied parole serves his/her term less good-time deductions, and is then released under parole supervision for the remainder of his/her maximum term less 180 days. 18 U.S.C. §4164. This form of release is called mandatory release.

9-34.260 Violator Warrants

In the case of a prisoner released on parole, or mandatory release, a summons or a warrant charging violation of the conditions of parole may be issued by the Parole Commission. 18 U.S.C. §4213.

If the misconduct constituting the violation of parole is a new criminal offense punishable by imprisonment and results in a conviction, either state or federal, the revocation of parole causes the parolee to forfeit sentence credit for the time he/she spent on parole. 18 U.S.C. §4210(b)(2); see Harris v. Day, 649 F.2d 755 (10th Cir. 1981). If the misconduct is not also the subject of a separate criminal conviction, however, the time spent on parole is not forfeited.

A federal court has no power to direct that a sentence shall run concurrently with the time owing as a parole violator under a previous sentence unless the Parole Commission has already ordered that the parole be revoked. 18 U.S.C. §4210. See Zerbst v. Kidwell, 304 U.S. 359 (1938); Tippit v. Squier, 145 F.2d 211 (9th Cir. 1944).

9-34.270 Release on Bail

When a parolee has been arrested as a parole violator, a federal court has no inherent power to order the release of the parolee on bail pending his/her parole revocation hearing. If a prisoner has filed a habeas corpus petition, the court has the power to grant his/her release on bail pending the disposition of the habeas corpus petition, but only upon a showing of extraordinary circumstances. Luther v. Molina, 627 F.2d 71 (7th Cir. 1980); Galante v. Warden, 573 F.2d 707 (2d Cir. 1977).

9-34.300 PARDON

Please refer to USAM 1-3.108 (Office of the Pardon Attorney). With respect to correspondence with the Pardon Attorney, please adhere to USAM 9-34.230, supra.

9-34.400 SENTENCING REFORM ACT OF 1984

9-34.410 Introduction

The Sentencing Reform Act of 1984, when it is implemented, will completely reform the federal sentencing system. The new system is intended to promote the goals of fairness--to the public and to defendants --and uniformity in sentencing by (1) providing a comprehensive and consistent statement of the purposes of sentencing and of the sentences available to achieve those purposes; (2) requiring judges to impose sentences pursuant to detailed guidelines established by an independent Sentencing Commission; (3) permitting defense appeals of sentences above the guideline ranges and permitting government appeals of sentences below the guideline ranges; and (4) abolishing parole. Although most of the Act will not become effective until November 1, 1986, the repeal of the Youth Corrections Act took effect on October 12, 1984. See USAM 9-8.200. However, the Department's position is that the Act continues to be applicable to defendants whose offenses were committed before the latter date.

9-34.420 The New Sentencing Scheme, Policy [Reserved]

9-34.430 Criminal Division Contacts

Questions on the sentencing chapter, other than those concerning fine collection, should be directed to attorneys in the General Litigation and Legal Advice Section (FTS 724-7081).