DEPARTMENT OF JUSTICE
JOURNAL OF FEDERAL LAW AND PRACTICE

Volume 71 April 2023 Number 1

United States Department
of Justice

Executive Office for United
States Attorneys

Washington, D.C. 20530

The Department of Justice Journal
of Federal Law and Practice is
published pursuant to
28 C.F.R. § 0.22(c).

The Department of Justice Journal of
Federal Law and Practice is published
by the Executive Office for United States
Attorneys

Office of Legal Education

1620 Pendleton Street
Columbia, SC 29201

Cite as:

71 DOJ J. FED. L. & PRAC., no. 1, 2023.

Internet Address:

https://www.justice.gov/usao/resources/
journal-of-federal-law-and-practice

Page Intentionally Left Blank

New and Emerging Developments in Criminal Litigation

In This Issue

Page Intentionally Left Blank

Introduction

Robert Parker
Chief, Appellate Section
Criminal Division

I am pleased to welcome everyone to this special edition of the *Department of Justice Journal of Federal Law and Practice*. This edition focuses on novel legal issues—or, in some cases, issues that seemed to have gone dormant but now have returned—that are increasingly important in federal criminal cases. With so many developments occurring in the law, homing in on just a few topics was a challenge. The authors of the articles in this edition have done an excellent job selecting cross-cutting topics that may arise in a variety of cases, combining legal analysis and advocacy tips to help educate prosecutors and the public at large about the Department's important work.

The articles in this edition also highlight the many ways that Department attorneys are considering, implementing, and advocating for the goals outlined in the Department's recently issued 2022–2026 Strategic Plan. The plan "organizes the Justice Department's wide-ranging responsibilities into five strategic goals that will guide our work over the next four years," including (1) upholding the rule of law; (2) keeping our country safe; (3) protecting civil rights; (4) ensuring economic opportunity and fairness for all; and (5) administering just court and correctional systems.[1] Within each of those goals are specific objectives and strategies to guide prosecutors in fulfilling the Department's mission. As you will see, the lessons, analyses, and information contained in the articles that follow directly apply to those objectives and strategies, helping to equip Department attorneys in their ongoing pursuit of justice.

This edition is loosely organized based on the issues that one might encounter sequentially during the various phases of criminal litigation. Attorney Advisor Melissa Atwood and Assistant U.S. Attorney (AUSA) John Hundscheid delve into the thicket of the categorical approach, which, with every passing year, poses greater challenges to charging common federal criminal offenses. AUSA Edward Canter and U.S. Secret Service Network Intrusion Forensics Analyst Drew Moore explore the investigative and evidentiary advantages and challenges associated with electronic evidence, in particular the trove of data that cell phone forensics can re-

[1] Dep't of Just., FYs 2022–2026 Strategic Plan 10 (2022).

veal. Former Managing AUSA Howard Zlotnick gives us his 12 rules for presenting accomplices as witnesses during the pretrial and trial phases of criminal cases. Senior Litigation Counsel Paul Van de Graaf analyzes an emerging trend that requires prosecutors to take care when presenting hearsay testimony as investigative background. AUSA Stewart Young discusses perhaps the most novel trend in criminal litigation: the conduct of hearings and trials via videoconference and the issues involved therein. AUSA Gaines Cleveland teaches us to think outside the box by incorporating graphics and visuals in briefs and pleadings and to consider the power that images can have in affecting any court's decision. The final two articles in this edition apply and tie in many of the theoretical and practical lessons discussed in the previous articles. AUSAs Benjamin Traster and Joshua Satter examine a critical topic in prosecuting juveniles for violent crimes and the investigative and practical challenges of doing so. And AUSA Matthew Ramírez and Homeland Security Special Agent René Robles conclude with a comprehensive review of hostage taking at the United States–Mexico border, with discussion ranging from the origins of the illicit practice to the charging decisions and litigation procedures involved in prosecuting this crime.

In addition to thanking the authors for their excellent contributions, I also would like to thank all those who worked behind the scenes with editing, reviewing, publishing, and disseminating this edition of the *Journal*. I hope you find the articles interesting and helpful, and encourage all Department attorneys to consider contributing to future editions.

About the Author

Robert Parker is Chief of the Criminal Division's Appellate Section. He oversees the Criminal Division's work on cases before the United States Supreme Court and federal courts of appeals, serves as a principal advisor to Department leadership on criminal-law issues, and briefs and argues cases in federal courts throughout the country. Before becoming Chief, Rob served as an attorney and Deputy Chief in the Appellate Section; as an Assistant to the Solicitor General; and as an attorney-adviser in the Office of Legal Counsel. Rob clerked for the Honorable Richard J. Cardamone on the United States Court of Appeals for the Second Circuit and for the Honorable Thomas L. Ambro on the United States Court of Appeals for the Third Circuit, and spent several years in private practice before joining the Department.

The Categorical Approach: An Invasive Species

Melissa K. Atwood
Attorney Advisor
Office of Legal Education

John M. Hundscheid
Assistant U.S. Attorney
U.S. Attorney's Office for the Northern District of Alabama

If you're like one of us (Melissa), your instinct is to run and hide when the words "categorical approach" arise.[1] Much like a child pulling the covers over her head during a scary movie, she retreated from all things "categorical approach" for years by hiding in niches of practice that permitted that luxury. But those holes have diminished over time. Today, it is nearly impossible for any federal criminal or immigration law practitioner to avoid the implications of the categorical approach (and its spawn, the modified categorical approach).

Like many invasive species, the doctrine shows signs only of growth.[2] Thus, we offer this article as an overview of the categorical approach, how it has developed, and where it appears to be heading. After all, forewarned is forearmed.

---

[1] Melissa K. Atwood and John M. Hundscheid are both Assistant U.S. Attorneys (AUSAs) in the Northern District of Alabama, although Melissa currently is on detail to the Office of Legal Education. Melissa and John bonded over their mutual love of the theoretical aspects of trial work and practical implications of appellate practice. Because John is still a young and energetic knight, he sometimes enjoys fighting a dragon that Melissa would just as soon avoid.

[2] As natives of the southeastern United States, we immediately think of kudzu as the prototypical "invasive species." *See, e.g.*, *Kudzu: The Invasive Vine That Ate the South*, The Nature Conservancy, https://www.nature. org/en-us/about-us/where-we-work/united-states/indiana/stories-in-indiana/ kudzu-invasive-species/ (last visited Mar. 16, 2023). As with all opinions in this article, this one belongs to the authors and not the Department of Justice (Department).

I. So what *is* the categorical approach, and why was it ever a good idea?

A. Source and substance

The categorical approach debuted in 1990, as federal courts grappled with Congress's 1986 amendments to the Armed Career Criminal Act (ACCA) found in 18 U.S.C. § 924(e).[3] The doctrine took its moniker from the Supreme Court's observation that the ACCA sought to enhance sentences for certain unlawful gun possessors based on their previous convictions for certain "categor[ies] of crimes."[4] The Court explained that the ACCA "embodied a categorical approach to the designation of predicate offenses" so it applied to defendants with convictions for "crimes having certain common characteristics [outlined by federal law] . . . regardless of how [the offenses] were labeled by state law."[5]

Qualifying predicates included only "violent felon[ies]" and "serious drug offense[s]," as defined by the ACCA.[6] And Congress maintained a "general approach" to "designating predicate offenses" by "using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof . . . ."[7]

The Supreme Court concluded that the "only plausible interpretation of" the ACCA subsection defining "violent felony" was one that "generally requires the trial court to look only to the fact of [the previous] conviction and the statutory definition of the prior offense," ignoring the facts underlying the predicate.[8] That statutory definition—that is, the previous crime's elements—would be compared to the generic federal

---

[3] 18 U.S.C. § 924(e); *see* Arthur Taylor v. United States, 495 U.S. 575, 581–90 (1990). Two "Taylor" cases and two "Johnson" cases are relevant to this article. Because the United States is the opposing party in each of those four cases, we have chosen to reference the individuals in those cases by their first and last names.

[4] *Arthur Taylor*, 495 U.S. at 588.

[5] *Id.* at 589.

[6] 18 U.S.C. § 924(e).

[7] *Arthur Taylor*, 495 U.S. at 590. Because of how the case law developed, the historical portion of this article focuses on "violent felon[ies]," 18 U.S.C. § 924(e)(1), (e)(2)(B), and "crime[s] of violence," 18 U.S.C. §§ 16, 924(c); U.S. Sent'g Guidelines Manual § 4B1.2(a) (U.S. Sent'g Comm'n 2021) [hereinafter U.S.S.G.]. The categorical approach is used to analyze "serious drug offense[s]," 18 U.S.C. § 924(e)(1), (e)(2)(A), "drug trafficking crime[s]," 18 U.S.C. § 924(c), and "controlled substance offense[s]," U.S.S.G. § 4B1.2(b). Differences in the ACCA's definition of drug-conviction predicates cause that categorical analysis to take on a somewhat different form. *See* Shular v. United States, 140 S. Ct. 779, 782 (2020).

[8] *Arthur Taylor*, 495 U.S. at 602.

definition for the category of crime.[9] If they matched, or if the previous conviction's elements were narrower than the federal comparator, the "conviction necessarily implies that the defendant has been found guilty of all the elements of" the generic crime as federally defined, permitting it to serve as a predicate for an ACCA enhancement.[10]

The *Arthur Taylor* Court offered two primary reasons for establishing this "formal categorical approach."[11] First, section 924(e)'s text "generally supports the inference that Congress intended" this method, as does "the legislative history of the enhancement statute."[12] Second, a categorical approach avoided the "[daunting] practical difficulties and potential unfairness of a factual approach."[13] One of those possible problems took on new meaning after *Apprendi v. New Jersey*.[14] Specifically, the categorical approach ostensibly limited the sentencing court to factual findings permissible under the Sixth Amendment—that is, the fact of a prior conviction rather than facts about what the defendant had done.[15]

B. Details, details

Because the categorical approach is all about comparing a predicate to a federal standard, a few more details about that comparison process are instructive.

The ACCA provided three ways to categorize a crime as a violent felony: The predicate crime (1) has "as an element the use, attempted use, or threatened use of physical force against the person of another" (elements clause); (2) "is burglary, arson, or extortion, [or] involves the use of explosives" (enumerated-offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause).[16] To qualify as an ACCA predicate, the elements of a previous conviction must align with one of these three standards.[17]

---

[9] *Id.* at 599. For burglary, the violent felony at issue in *Arthur Taylor*, the Supreme Court provided a "generic, contemporary" definition of "burglary" to serve as the federal comparator. *Id.* at 598–99.

[10] *Id.* at 599.

[11] *Id.* at 600–01.

[12] *Id.*

[13] *Id.* at 601.

[14] 530 U.S. 466 (2000).

[15] Shepard v. United States, 544 U.S. 13, 24–26 (2005) (citing *Arthur Taylor*, 495 U.S. at 601). *But see Shepard*, 544 U.S. at 26–28 (Thomas, J., concurring in part) (contending that even the limited judicial factfinding authorized by *Taylor* and *Shepard* violates the Sixth Amendment).

[16] 18 U.S.C. § 924(e)(1)(B).

[17] *See Arthur Taylor*, 495 U.S. at 600–02 (enumerated-offenses clause).

In the context of the elements clause, "the phrase 'physical force,' means *violent* force—that is, force capable of causing physical pain or injury to another person."[18] Thus, a conviction only counts as a violent felony under this criterion if it has "as an element the use, attempted use, or threatened use of [violent] physical force against the person of another."[19] This usage "includes the amount of force necessary to overcome a victim's resistance" during a robbery, but not merely "nominal contact" as required for some battery offenses.[20]

If the ACCA criterion is an enumerated offense, the court will consider "the generic sense in which the term [naming the crime] is now used in the criminal codes of most States."[21] If a defendant has a previous conviction for burglary, breaking-and-entering, or the like, the trial court must weigh the elements of that crime against the "generic, contemporary" definition of "burglary" set as the federal comparator for ACCA purposes.[22]

Finally, where the metric for comparison is the residual clause, courts consider "whether the conduct encompassed by the elements of the [predicate] offense, *in the ordinary case*, presents a serious potential risk of injury to another."[23] The "ordinary case" framework saved courts from the need to consider "every conceivable factual offense covered by" the underlying statute and focused the inquiry on "whether the elements of the [predicate] offense are of the type that would justify its inclusion within the residual provision" regardless of the individual offender's actions.[24]

C. A modified approach

As courts applied the categorical approach, they encountered previous convictions that had occurred under "divisible" state statutes, that is, individual statutes that "comprise[] multiple, alternative versions of the [respective] crime."[25] To address those cases, the Supreme Court created

---

[18] Curtis Johnson v. United States, 559 U.S. 133, 140 (2010).

[19] 18 U.S.C. § 924(e)(2)(B)(i).

[20] Stokeling v. United States, 139 S. Ct. 544, 553, 555 (2019); *see also Curtis Johnson*, 559 U.S. at 138.

[21] *Arthur Taylor*, 495 U.S. at 598 (conducting this analysis in the context of burglary).

[22] *Id.* at 598–99.

[23] James v. United States, 550 U.S. 192, 208 (2007) (emphasis added). The residual clause bears mention in the ACCA context even though the Supreme Court since declared it unconstitutionally vague and, thus, void. Samuel Johnson v. United States, 576 U.S. 591, 606 (2015) (discussed *infra*). The "in the ordinary case" language that emerged from the analysis of the ACCA's residual clause still frames residual-clause analysis in other statutes. *See* Section II.B., *infra*.

[24] *James*, 550 U.S. at 202, 208 (emphasis omitted).

[25] Descamps v. United States, 570 U.S. 254, 262 (2013).

a "tool" for "implement[ing] the categorical approach when a defendant was convicted of violating a divisible statute"[26] This "modified" approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime."[27] The modified approach also "preserves the categorical approach's basic method: comparing [the predicate's] elements" with those of the "generic" (that is, federally defined) offense.[28]

Under the modified categorical approach, the court consults a limited universe of documents to identify the defendant's prior crime of conviction "from among several alternatives" in the predicate statute.[29] Once identified, the elements of the previous conviction would be categorically compared to the federal standard in the ACCA.[30]

II. How have we come to this "pretend place?"

Despite rendering "irrelevant" the facts underlying a given predicate offense,[31] the basic categorical approach functioned for a time. Eventually, however, things got complicated. Today, the mere mention of the categorical approach elicits groans from Justices, judges, and lawyers alike. For example, Judge Ed Carnes of the Eleventh Circuit compared the ACCA's violent-felony analysis to "go[ing] down the rabbit hole . . . to a realm where we must close our eyes . . . to what we know as men and women."[32] Expanding on this idea, Justice Clarence Thomas compared the experience to "a 'journey Through the Looking Glass,' during which we have found many 'strange things.' L. Carroll, Alice in Wonderland and Through the Looking Glass 227 (J. Messner ed. 1982)."[33] According to its critics, today's categorical approach takes us "to a 'pretend place' . . . far 'down the rabbit hole,'" where all has become "[c]uriouser and

---

26 *Id.* at 263.
27 *Id.*
28 *Id.*
29 *Id.* at 264; *see also* Shepard v. United States, 544 U.S. 13, 26 (2005) (documents reviewable for a predicate resulting from a guilty plea); Arthur Taylor v. United States, 495 U.S. 575, 602 (1990) (documents reviewable for a predicate resulting from a trial).
30 *Descamps*, 570 U.S. at 264. Whether a given statute truly was divisible became the subject of much debate in later cases. *See* Section II.C.1., *infra*.
31 Borden v. United States, 141 S. Ct. 1817, 1822 (2021) (plurality opinion).
32 United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017).
33 United States v. Justin Taylor, 142 S. Ct. 2015, 2026 (2022) (Thomas, J., dissenting) (citation in original).

curiouser . . . ."[34]

But how did we get here?

A. Expansion beyond the ACCA

Although explained initially in an ACCA context, the categorical approach did not stay confined to that statute.

1. Immigration and Nationality Act

Nearly 20 years after issuing *Arthur Taylor*, the Supreme Court faced the question of whether the categorical approach applied to the definition of "aggravated felony" in the context of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43).[35] The term "aggravated felony" has over two dozen meanings in the INA, including "an offense that... involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[36] The courts of appeals had split over whether this "$10,000 threshold . . . refers to an element of a fraud statute or to the factual circumstances surrounding commission of the crime on a specific occasion."[37] The Supreme Court concluded that the loss criterion was subject to a "circumstance-specific" analysis, rending the petitioner an aggravated felon.[38]

But the circumstance-specific approach was not applicable to each meaning of "aggravated felony" under the INA.[39] Instead, the Court concluded that 8 U.S.C. § 1101(a)(43) "contains some language that refers to generic crimes" subject to analysis through a categorical approach and other "language that almost certainly refers to the specific circumstances in which a crime was committed," warranting a circumstance-specific analysis.[40]

Drug trafficking was a generic crime to be analyzed under a categorical approach.[41] Thus, when another non-citizen challenged his classification as an "aggravated felon" based on a state marijuana conviction, the

---

[34] *Id.* at 2031 (Thomas, J., dissenting) (alteration in original) (quoting *Davis*, 875 F.3d at 595). These jurists certainly are not alone in their assessment of the categorical approach. Judge Peter Phipps of the Third Circuit recently provided a pithy summary of some of the more direct criticisms of the approach. *See* United States v. Scott, 14 F.4th 190, 200–01 (3d Cir. 2021) (Phipps, J., dissenting).

[35] Nijhawan v. Holder, 557 U.S. 29 (2009); 8 U.S.C. § 1101(a)(43).

[36] 8 U.S.C. § 1101(a)(43)(M)(i).

[37] *Nijhawan*, 557 U.S. at 33.

[38] *Id.* at 36, 42–43.

[39] *Id.* at 38.

[40] *Id.* (referencing 8 U.S.C. § 1101(a)(43)).

[41] *See id.* at 37.

Supreme Court applied the categorical approach to determine whether that state conviction was an aggravated felony.[42] Following the INA to Title 18 and through to the federal Controlled Substances Act (CSA), the Court concluded that the petitioner had not been convicted of an "aggravated felony" because his crime would have been a misdemeanor under the CSA.[43]

Another INA aggravated felony is a "crime of violence (as defined in section 16 of Title 18)."[44] As with drug trafficking, the Supreme Court evaluates crimes of violence under a categorical approach.

2. Crimes of violence

While the ACCA conceptualizes a "violent felony,"[45] other federal statutes such as the INA use the term "crime of violence."[46] The definitions vary, but courts take a categorical approach to analyzing which offenses meet the statutory criteria.[47]

B. Goodbye, residual clauses

In 2015, the Supreme Court decided that it had made its last attempt to apply the categorical approach to the ACCA's residual clause.[48] The Court concluded that the "ordinary case" inquiry that it had created in *James* left too much uncertainty when compared to the potential risk required under the residual clause.[49] Accordingly, the Court overruled *James* and another case to find the residual clause unconstitutionally void for vagueness.[50] Now, ACCA violent felonies must meet the elements clause—as explicated in *Curtis Johnson* and *Stokeling*—or must align with the generic definition of one of the enumerated offenses.

Three years later, the Supreme Court addressed the residual clause of the "crime of violence" definition in 18 U.S.C. § 16, which had been incorporated into the INA's definition of aggravated felony.[51] Applying *Samuel Johnson*, the Court found that section 16's residual clause—section 16(b)—

---

42 Moncrieffe v. Holder, 569 U.S. 184, 187–90, 202–03 (2013).
43 *Id.* at 188, 206–07.
44 8 U.S.C. § 1101(a)(43)(F).
45 18 U.S.C. § 942(e)(2)(B).
46 *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. §§ 16, 924(c).
47 *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1211 n.1 (2018) (discussing categorical analysis under 18 U.S.C. § 16); United States v. Davis, 139 S. Ct. 2319, 2328 (2019) (categorically analyzing 18 U.S.C. § 924(c)).
48 *See* Samuel Johnson v. United States, 576 U.S. 591, 606 (2015).
49 *Id.* at 596–97.
50 *Id.* at 606.
51 *Dimaya*, 138 S. Ct. at 1211.

had "the same two features that conspired to make ACCA's residual clause unconstitutionally vague."[52] The Court announced the same fate for section 16(b), leaving only section 16(a)'s elements clause operable for the general "crime of violence" definition in the federal criminal code.[53]

The next year, the Supreme Court completed its hat trick by declaring the residual clause of 18 U.S.C. § 924(c)(3)(B) void for vagueness.[54] This opinion drew a four-Justice dissent on the ground that section 924(c) differed from the statutes in *Samuel Johnson* and *Dimaya* by "focus[ing] on the defendant's current conduct during the charged crime" rather than an additional penalty for a previous conviction.[55] Nevertheless, the Court successfully cast *Davis* "as the third installment in a trilogy with a predictable ending, one that was supposedly foreordained by *Johnson* and *Dimaya*."[56]

C. Challenges under the elements clause

As vagueness challenges assailed residual clauses, different criticisms plagued the categorical approach to elements clauses.

1. Means versus elements

As explained in Section I.C., *supra*, some statutes contain "multiple, alternative versions" of a crime, and thus, are subject to a modified categorical analysis.[57] But not all alternatives are created equally.

"A single statute may list *elements* in the alternative, and thereby define multiple crimes."[58] But there is "a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual *means* of committing a single element."[59] If the alternatives are elements, the statute is "divisible."[60] Accordingly, the modified categorical approach allows the court to screen the relevant portion of the predicate statute against the federal comparator.[61] If the alternatives are means, however, the statute is "indivisible,"

---

52 *Id.* at 1216 (quoting *Samuel Johnson*, 135 S. Ct. at 2557) (cleaned up).
53 *Id.* at 1223.
54 United States v. Davis, 139 S. Ct. 2319, 2336 (2019).
55 *Id.* at 2338 (Kavanaugh, J., dissenting).
56 *Id.* at 2343 (Kavanaugh, J., dissenting).
57 Descamps v. United States, 570 U.S. 254, 262–64 (2013).
58 Mathis v. United States, 579 U.S. 500, 505 (2016) (emphasis added).
59 *Id.* at 506 (emphasis added).
60 *Id.* at 505.
61 *See id.* at 505–06.

and the modified approach is not available.[62] Thus, the court can only examine the least culpable "means" of committing the crime when conducting its elemental comparison.[63]

Although the *Mathis* majority believed that the distinction between elements and means would be "easy" in "many" cases,[64] experience has proven otherwise. Two dissenting Justices recognized the "time consuming legal tangle" that this inquiry would become.[65] Unfortunately, they were correct.

2. Mens rea limitations

Even if a prior conviction otherwise meets the criterion of the ACCA's elements clause, it still will not qualify as a violent felony if the mens rea for the conviction is recklessness or negligence.[66] The Supreme Court reached this conclusion despite the lack of traditional mens rea language in the violent-felony definition because "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual."[67] Put another way, the plurality held, "The 'against' phrase indeed sets out a *mens rea* requirement—of purposeful or knowing conduct."[68] Although the Court reserved ruling on whether a mens rea "between recklessness and knowledge" could suffice as a violent felony under the ACCA,[69] the dissent warned that the opinion would exclude "reckless homicide" as an ACCA predicate.[70]

3. Inchoate offenses

Unlike the ACCA's enhanced penalty, 18 U.S.C. § 924(c) creates a stand-alone offense for possessing a firearm in furtherance of a crime of violence or drug-trafficking crime, with additional penalties for brandishing or discharging the gun. Nevertheless, the meaning of "crime of violence" in section 924(c) remains subject to a categorical-approach analysis.[71]

The Supreme Court applied that approach last term when a petitioner challenged the section 924(c) conviction resulting from his guilty plea to

---

62 *Id.* at 505.
63 *Id.* at 506, 517–20.
64 *Id.* at 517.
65 *Id.* at 531–32 (Breyer, J., dissenting).
66 Borden v. United States, 141 S. Ct. 1817, 1824–25 (2021) (plurality opinion).
67 *Id.* at 1825.
68 *Id.* at 1828.
69 *Id.* at 1825 n.4.
70 *See id.* at 1844–48 (Kavanaugh, J., dissenting).
71 United States v. Justin Taylor, 142 S. Ct. 2015, 2020 (2022).

that charge and the predicate of attempted Hobbs Act robbery.[72] The petitioner argued that the elements of attempted Hobbs Act robbery did not align with section 924(c)'s crime-of-violence definition.[73] The Court agreed: "Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause" of section 924(c).[74]

Because the attempted robbery at issue had resulted in the victim being shot dead, Justice Thomas opined that the categorical approach had led the Court on a "30-year excursion into the absurd."[75]

Despite his frustration and that of many other jurists, the categorical approach remains the law when comparing predicate convictions to certain definitions in the federal code, bringing us to ask where we go from here.

III. Where are we going?

Despite skepticism about the doctrine, the categorical approach is now deeply embedded into a slew of federal statutes, regulations, and sentencing guidelines. And it is no longer an issue that can be left for sentencing. Prosecutors are now forced to think about the categorical approach from the moment a file lands on their desk.

A. Current categorical realities

Whether a specific state offense sweeps broader than a generic federal offense is a familiar, if still occasionally perplexing, analysis at this point. But now prosecutors must consider more than the possible conduct that a statute covers. They must also consider the defendant's state of mind. After *Borden*, prosecutors must parse the statute under which a defendant was previously convicted to ascertain the applicable mens rea. Even if a statute explicitly covers intentional or knowing use of force, it may not qualify as a predicate offense if the statute also is indivisible and can be satisfied by recklessness.[76]

---

[72] *Id.* at 2018–19.

[73] *See id.* at 2019–20. By this point, section 924(c)'s residual clause was defunct. United States v. Davis, 139 S. Ct. 2319, 2336 (2019); *see* Section II.B., *supra*.

[74] *Justin Taylor*, 142 S. Ct. at 2020.

[75] *Id.* at 2026 (Thomas, J., dissenting).

[76] *See* Borden v. United States, 141 S. Ct. 1817, 1856 (2021) (Kavanaugh, J., dissenting) (predicting that some offenders who knowingly assault a victim will not be considered to have committed a crime of violence under the categorical approach "because several States criminalize felony assault in a single, indivisible provision that can be satisfied by intent, knowledge, or recklessness"). *But see* United States v. Garrett, 24 F.4th 485, 489 (5th Cir. 2022) ("[d]iffering mens rea requirements are a hallmark

As a result, whether a defendant qualifies as an Armed Career Criminal or a Career Offender will be the product of geography (where the conviction occurred) and statutory drafting (how the state legislature defined the offense).[77]

Venue of the current federal case also matters. Different circuits can interpret the same statute differently. For instance, the Fourth Circuit has held that Georgia robbery was broader than generic robbery because it can be committed by "sudden snatching," and that the statute was indivisible.[78] The neighboring Eleventh Circuit, by contrast, has found that statute divisible, meaning a conviction under it could be a crime of violence.[79] Co-equal courts can look at the same statute, apply the categorical approach, and reach divergent results.

B. The proliferation of the categorical approach

The categorical approach is typically associated with recidivist penalties for firearm and drug crimes. But a court is likely to deploy it any time it must analyze whether a defendant's previous conviction involved certain elements. "Although categorical analysis may be complicated," courts have reasoned that "if Congress has conditioned a statutory penalty on commission of an offense generally—rather than on specific acts—courts must consider the crime as defined, rather than the offender's conduct."[80] This scenario means that the categorical approach can pop up in some rather unexpected places.

1. Section 16: A proverbial Russian nesting doll

Section 16 defines a "crime of violence" as

> an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course

---

of divisibility") (alteration in original) (quoting United States v. Wehmhoefer, 835 F. App'x 208, 211 (9th Cir. 2020) (not precedential));; United States v. Brasby, 61 F.4th 127, 135 (3d Cir. 2023) ("*Mens rea* generally is one element of an offense, and the specific *mens rea* is simply a means.").

[77] *See* Sheldon A. Evans, *Categorical Nonuniformity*, 120 Colum. L. Rev. 1771, 1773–75 (2020) (comparing the case of Arthur Taylor's Missouri burglary offense, which the Supreme Court found was not an ACCA predicate, with Richard Mathis's Iowas burglary conviction, which the Supreme Court found to be a crime of violence).

[78] United States v. Fluker, 891 F.3d 541, 547–49 (4th Cir. 2018).

[79] United States v. Harrison, 56 F.4th 1325, 1331–36 (11th Cir. 2023).

[80] United States v. Simms, 914 F.3d 229, 239–40 (4th Cir. 2019).

of committing the offense.[81]

Section 16's definition of "crime of violence" is incorporated into dozens of other federal statutes. The term is imported into statutes governing the deportability of aliens,[82] money laundering predicates,[83] controlled substances,[84] and restitution,[85] to pick only a few examples. Any change to the interpretation of section 16 ripples through all these other statutes. Thus, when a court applies the categorical approach and determines that an offense is no longer considered to be a crime of violence under section 16, it instantly ceases to be a crime of violence in dozens of other sections of the United States Code as well.

2. Bail Reform Act

The Bail Reform Act allows the government to seek to detain a defendant before trial "in a case that involves . . . a crime of violence."[86] A "crime of violence" is defined as an "offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[87] Additionally, specific enumerated felonies are automatically considered "crime[s] of violence."[88]

Thus, like the ACCA, the Bail Reform Act's definition of "crime of violence" has an elements clause, a residual clause, and an enumerated-

---

[81] 18 U.S.C. § 16. As previously noted, the Supreme Court struck down section 16's residual clause in Sessions v. Dimaya. As a result, to be a "crime of violence" under current law, an offense must satisfy section 16's elements clause.

[82] 8 U.S.C. § 1101(43)(a)(F) (defining "aggravated felony" to include "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year"); 8 U.S.C. § 1227(a)(2)(E)(i) (making deportable any alien who commits a "crime of domestic violence," meaning "any crime of violence (as defined in section 16 of Title 18) against" certain defined persons).

[83] 18 U.S.C. § 1956(c)(7)(B)(ii) (defining "specified unlawful activity" to include "a crime of violence (as defined in section 16)").

[84] 21 U.S.C. § 841(b)(E)(7) (making it a separate offense "to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual . . . by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge.")

[85] 18 U.S.C. § 3663A(c)(1)(A)(i) (requiring restitution for any offense "that is . . . a crime of violence, as defined in section 16").

[86] 18 U.S.C. § 3142(f)(1)(A).

[87] 18 U.S.C. § 3156(a)(4).

[88] *Id.*

offense clause. Unlike the ACCA, however, the Bail Reform Act's residual clause has withstood vagueness challenges.[89] So while some of the bizarre results that the ACCA produced sans residual clause may not occur under the Bail Reform Act, the categorical approach still permeates the analysis.[90] Many courts apply the categorical approach to determine whether an offense is a "crime of violence" under the elements and residual clauses of the Bail Reform Act.[91]

Take, for instance, a defendant charged with being a prohibited person in possession of a firearm. Several courts have applied the categorical approach to determine that the offense is not a "crime of violence" under the Bail Reform Act.[92] For example, the D.C. Circuit determined that the plain language of the Bail Reform Act required a categorical approach to determining whether an offense was a "crime of violence" because "[e]ach of the three prongs of the statutory definition identify a fixed category of offenses that does not expand or contract based on the factual

---

89 *See, e.g.*, United States v. Watkins, 940 F.3d 152, 161 (2d Cir. 2019) ("In sum, because § 3142(f)(1) does not define criminal offenses, fix penalties, or implicate the dual concerns underlying the void-for-vagueness doctrine, it is not amenable to a due process challenge and is therefore not unconstitutionally vague.").

90 That is not to say counterintuitive decisions never occur. *See, e.g.*, United States v. Hunter, No. 4:22-MJ-30177, 2022 WL 1240386, at *2–3 (E.D. Mich. Apr. 27, 2022) (applying modified categorical approach and determining that charged murder-for-hire conspiracy was not a crime of violence within the meaning of the Bail Reform Act).

91 *See, e.g.*, United States v. Klein, 533 F. Supp. 3d 1, 8–13 (D.D.C. 2021) (applying modified categorical approach to determine that January 6 defendant charged under 18 U.S.C. § 111(b) was alleged to have committed a crime of violence and thus was eligible for detention). *But see* United States v. Liccardi, No. 3:21-MJ-1152, 2022 WL 260809, at *4 (N.D. Tex. Jan. 25, 2022) (explaining that "the court is not inclined to use either the categorial or modified categorical approach" to determine whether offense was "crime of violence" under Bail Reform Act given that the Fifth Circuit had not directly addressed the question).

92 *See, e.g.*, United States v. Bowers, 432 F.3d 518, 521 (3d Cir. 2005) ("We are persuaded . . . that the word 'offense' as used in § 3156(a)(4) 'refers to a legal charge rather than its factual predicate.'"); United States v. Rogers, 371 F.3d 1225, 1228 n.5 (10th Cir. 2004) ("[T]his court concludes that the use of the term 'by its nature' in § 3156(a)(4)(B) mandates a categorical approach to the determination of whether a given crime fits within § 3156(a)(4)(B)'s definition of crime of violence."); United States v. Johnson, 399 F.3d 1297, 1301 (11th Cir. 2005) ("The issue of whether § 922(g)(1) is a 'crime of violence' under § 3156(a)(4) is a categorical question, and thus is not dependent upon the specific facts of the case."). Even if it is not a "crime of violence" per se, a defendant charged with violating 18 U.S.C. § 922(g)(1) may be detained given that the offense involves a firearm. *See* 18 U.S.C. § 3142(f)(1)(E); *Watkins*, 940 F.3d at 165–67 (explaining that government was entitled to detention hearing in violating section 922(g)(1) case because offense involved a firearm).

peculiarities of a particular case."[93] Applying the categorical approach to the Bail Reform Act's residual clause, the D.C. Circuit found that "[w]hile felons with guns may as a class be more likely than non-felons with guns or felons without guns to commit violent acts, nothing inherent in a § 922(g) offense creates a 'substantial risk' of violence warranting pretrial detention."[94]

Consider another offense: cyberstalking. Courts have applied the categorical approach and found that cyberstalking is a "crime of violence" as defined in 18 U.S.C. § 3156(a)(4).[95] In *United States v. Harrison*, the defendant argued that her charged offense was not a "crime of violence" because "the actual course of conduct . . . did not involve a direct threat of physical harm."[96] The district court rejected that argument, reasoning that "[t]he defendant's emphasis on a narrow interpretation of the facts underlying the charge in this case overlooks" case law requiring that the categorical approach be used to determine whether an offense was a "crime of violence."[97]

3. Child-exploitation offenses and sex-offender registration requirements

The categorical approach is used to determine whether a defendant who has committed a child-exploitation offense is subject to an enhanced statutory penalty or guideline range because of a previous conviction. The categorical approach is also involved in determining how long a sex offender must register under federal law.

Federal law enhances the mandatory minimum sentence for offend-

---

93 United States v. Singleton, 182 F.3d 7, 11 (D.C. Cir. 1999).

94 *Id.* at 15.

95 United States v. Hollingberry, No. 20-03058MJ-001, 2020 WL 2771773, at *2–4 (D. Ariz. May 28, 2020), *aff'd*, No. 20-10183, 2020 WL 5237342 (9th Cir. July 23, 2020) ("[T]he Court finds that because the crime involves stalking with 'the intent to kill, injure, harass, or intimidate'—and because stalking requires repeated victimization through a 'course of conduct'—there is a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."); United States v. Harrison, 354 F. Supp. 3d 270, 278 (W.D.N.Y. 2018) ("[T]he Court . . . finds cyberstalking in violation of 18 U.S.C. § 2261A(2) categorically involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, so that pretrial detention is available pursuant to 18 U.S.C. § 3142(f)(1)(A) to address pretrial dangers posed by release of a defendant pending trial."). *But see* United States v. Wilson-Bey, No. 21-CR-00306, 2022 WL 1217188, at *2 (D. Nev. Apr. 25, 2022) (assuming in dicta that defendant's charged cyberstalking offense was "not otherwise a crime of violence").

96 *Harrison*, 354 F. Supp. 3d at 277–78.

97 *Id.* at 278.

ers who commit a child-exploitation offense after having been previously convicted of specified federal sex crimes or comparable state offenses "relating to" certain conduct.[98] To determine whether a defendant has a qualifying predicate offense under these statutes, courts use a categorical approach.[99]

Some courts have seized on the "relating to" language of 18 U.S.C. § 2252A(b) to loosen the limits of the categorical approach.[100] Defendants have challenged whether their state convictions for child pornography were predicate offenses because the statue under which they were convicted had a broader definition of child pornography than that under federal law. In rejecting these challenges, some courts have found that the "relating to" preface has a "broadening effect" on the categorical approach.[101]

Other courts continue to apply the traditional categorical approach to determining whether a defendant has a qualifying predicate conviction. For instance, some courts have refused to enhance sentences based on state convictions under statutes where the definition of child pornography is any broader than federal law.[102]

The categorical approach also arises when calculating a sex offender's guideline range. The U.S.S.G. enhance the advisory guidelines ranges of

---

98 *See* 18 U.S.C. § 2252A(b)(1) (enhancing penalties for offenders who transport, receive, distribute, advertise, reproduce, or sell child pornography); 18 U.S.C. § 2252A(b)(2) (possession); 18 U.S.C. § 2251(e) (production). The provisions use nearly identical language to define the scope of applicable state predicates but differ slightly. The nuances of those distinctions are beyond the scope of this article.

99 *See, e.g.*, United States v. Kushmaul, 984 F.3d 1359, 1364–67 (11th Cir. 2021) (using categorical approach to determine whether Florida conviction for promotion of sexual performance of a child was broader than "generic offenses listed in 18 U.S.C. §§ 2252A(b)(1) and (b)(2)"); *see also* United States v. Sinerius, 504 F.3d 737, 740–45 (9th Cir. 2007) (using categorical approach to determine that Montana sexual assault conviction "qualifies as a predicate offense under §§ 2252A(b)(1) & (2)").

100 United States v. Portanova, 961 F.3d 252, 254 (3d Cir. 2020) ("We conclude . . . that under our 'looser categorical approach,' 18 U.S.C. § 2252(b)(1)'s 'relating to' language does not require an exact match between the state and federal elements of conviction . . . .").

101 United States v. Bennett, 823 F.3d 1316, 1322 (10th Cir. 2016).

102 *See, e.g.,* United States v. Reinhart, 893 F.3d 606, 617–21 (9th Cir. 2018) (finding that California statutes were overbroad compared to federal definitions of "child pornography" and "sexually explicit conduct"); United States v. Davis, 751 F.3d 769, 775–77 (6th Cir. 2014) (finding that an Ohio obscenity conviction could not be a predicate offense because, unlike the federal definition of child pornography, the offense could be based on images involving nudity alone).

defendants who are considered repeat and dangerous sex offenders against minors.[103] A defendant who commits a "covered sex crime," is not otherwise a career offender under the U.S.S.G., and has a previous "sex offense conviction" is considered a repeat and dangerous sex offender.[104] Courts apply the categorical approach to determine whether a defendant's previous conviction is a "sex offense conviction" within the meaning of section 4B1.5.[105]

The categorical approach is also used to interpret portions of the Sex Offender Registration and Notification Act (SORNA).[106] SORNA requires states to implement a sex offender registry with certain features.[107] SORNA defines a "sex offender" as "an individual who was convicted of a sex offense."[108] A "sex offense" is defined as certain specified federal offenses as well as a "criminal offense that has an element involving a sexual act or sexual contact with another."[109] Encompassed in the definition of "sex offense" is also a set of "specified offense[s] against a minor," which are crimes that involve certain behavior with a minor, including "[a]ny conduct that by its nature is a sex offense against a minor."[110]

SORNA classifies sex offenders into three tiers: tier I, tier II, and tier III.[111] An offender's tier classification governs how long they will be required to register under SORNA.[112] To determine an offender's tier, a court will consider if the defendant's conviction is "comparable to or more severe than" certain federal offenses or involves specified conduct.[113] For instance, a "tier II sex offender" is a sex offender whose previous conviction is a felony "committed against a minor" that "is comparable to or more severe than" sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, or abusive sexual

---

103 U.S.S.G. § 4B1.5.

104 *Id.*

105 *See, e.g.*, United States v. Dahl, 833 F.3d 345, 357 (3d Cir. 2016) ("The District Court erred in failing to apply the categorical approach and subsequently applying U.S.S.G. § 4B1.5."); United States v. Wikkerink, 841 F.3d 327, 336 (5th Cir. 2016) (applying categorical approach and finding that defendant's convictions were not covered offenses under section 4B1.5).

106 Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, 120 Stat. 590 (2006).

107 34 U.S.C. § 20912.

108 34 U.S.C. § 20911(1).

109 34 U.S.C. § 20911(5)(A).

110 34 U.S.C. § 20911(5)(A)(ii), 20911(7)(I).

111 34 U.S.C. § 20911(2)–(4).

112 34 U.S.C. § 20915.

113 34 U.S.C. § 20911(3).

contact.[114] A conviction is also a tier II offense if it "involves . . . use of a minor in a sexual performance; . . . solicitation of a minor to practice prostitution; or . . . production or distribution of child pornography."[115]

Courts have adopted a provision-by-provision approach to interpreting whether the categorical or circumstance-specific approach applies to SORNA.[116] To determine whether an offender's conviction is registerable because it "has an element involving a sexual act or sexual contact with another," courts deploy the categorical approach.[117] But courts use the circumstance-specific approach to determine whether a conviction is a "specified offense against a minor" because it involved "conduct that by its nature is a sex offense against a minor."[118] Courts also use the circumstance-specific approach to analyze SORNA's exception that an offense involving consenting adults or "if the victim was at least 13 years old and the offender was not more than 4 years older than the victim" is not a covered sex offense.[119]

Courts typically apply the categorical approach to determine whether a conviction is "comparable to or more severe than" the listed offenses in the tier-classification sections.[120] That said, the circumstance-specific

---

114 *Id.*

115 34 U.S.C. § 20911(3)(B).

116 *See, e.g.*, United States v. Vineyard, 945 F.3d 1164, 1170 (11th Cir. 2019) (explaining that categorical approach applied to determination of "whether a conviction qualifies as a sex offense under the sexual contact provision of SORNA," but that conduct-specific approach governed "specified offense against a minor" provision.).

117 *See, e.g.,* United States v. Faulls, 821 F.3d 502, 511–12 (4th Cir. 2016) (collecting cases).

118 United States v. Price, 777 F.3d 700, 707–10 (4th Cir. 2015) ("[W]e conclude that Congress intended for reviewing courts to utilize the circumstance-specific approach to determine whether a prior conviction was for a sex offense under SORNA . . . ."); *see, e.g.*, United States v. Dodge, 597 F.3d 1347, 1353–56 (11th Cir. 2010) (en banc) ("[W]e hold that courts may employ a noncategorical approach to examine the underlying facts of a defendant's offense, to determine whether a defendant has committed a 'specified offense against a minor' and is thus a 'sex offender' subject to SORNA's registration requirement."); United States v. Byun, 539 F.3d 982, 990–94 (9th Cir. 2008) ("[T]he underlying facts of a defendant's offense are pertinent in determining whether she has committed a 'specified offense against a minor' and is thus a sex offender.").

119 34 U.S.C. § 20911(5)(C) ("An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim."); United States v. Gonzalez-Medina, 757 F.3d 425, 429–32 (5th Cir. 2014) (applying circumstance-specific approach to interpreting exception to what constitutes a "sex offense" under SORNA).

120 *See* United States v. Escalante, 933 F.3d 395, 397–98 (5th Cir. 2019) ("We employ the categorical approach when classifying the SORNA tier of a defendant's state

approach is still used to determine if the victim of the defendant's offense were a minor.[121]

As with the mandatory minimum enhancements for child-exploitation offenses discussed previously, some courts have used the statutory language to adopt a looser categorical approach than other contexts like the ACCA, finding that a state statute is comparable to its federal analogue even if it sweeps "slightly broader."[122] The upshot is that the language of the statute or guideline will drive whether the categorical or circumstance-specific approach applies and the type of analysis that a court will conduct under either approach.

C. Battles on the horizon

Litigation implicating the categorical approach continues to increase. Although no one can predict the next battle lines, recent cases suggest several emerging trends concerning what constitutes a qualifying previous conviction and different methods that defendants are using to challenge whether their previous convictions are predicate felonies.

---

law sex offense."). Although bound by precedent to apply the doctrine, *Escalante* noted that the case illustrated how the categorical approach had "metastasized into something that requires rigorous abstract reasoning to arrive at the conclusion that a 35-year-old who sexually abused a 14-year-old cannot be categorized as a tier II sex offender—notwithstanding the fact that his crime was actually 'committed against a minor'—because it is theoretically possible that someone else could be convicted under the statute without being four years older than the victim." *Id.* at 406–07.

121 *See* United States v. Berry, 814 F.3d 192, 197 (4th Cir. 2016) ("The language used to define a tier II sex offender also supports the conclusion that Congress intended courts to use a categorical approach when the sex offender tier definition references a generic offense, with the exception of the specific circumstance regarding the victim's age.").

122 United States v. Coleman, 681 F. App'x 413, 418 (5th Cir. 2017) (not precedential) ("[E]ven if the Minnesota statute has been applied to a slightly broader range of conduct than the federal statute, we conclude that the elements of the Minnesota statute are 'comparable or more severe than' the federal crime of criminal sexual abuse."). *But see Escalante*, 933 F.3d at 402 n.9 ("[W]e are skeptical that courts applying the categorical approach have leeway to hold that a broader offense can still be a predicate when it is deemed only 'slightly broader.'"); United States v. Navarro, 54 F.4th 268, 280 (5th Cir. 2022) ("[B]y criminalizing conduct that the federal statutes do not, Colorado's statute sweeps too broadly to serve as a predicate SORNA offense.").

1. Pretrial predicate challenges

After the 2022 opinion in *Wooden v. United States*,[123] federal prosecutors have specifically alleged in indictments that a defendant has committed three or more violent felonies or serious drug offenses on occasions different from one another, and thus is subject to the ACCA's 15-year mandatory minimum sentence. Some defendants are making pretrial motions to dismiss to challenge whether their convicted offenses were committed on separate occasions.[124] Others, however, are using these specific allegations as an opportunity to challenge pretrial whether a previous conviction is a categorical match to the surviving ACCA standards.[125]

2. Drug offenses

Until recently, most litigation about the categorical approach centered on what was considered a violent felony or a crime of violence. But an apparent increasing number of cases concerns whether a previous conviction is a "serious drug offense" under the ACCA or a "controlled substance offense" under the Sentencing Guidelines' Career Offender provision.[126] Defendants are at least two types of arguments.

First, defendants are arguing that the state statutes under which they were convicted are overbroad because the definition of the controlled substance in question is broader than the federal definition. Fairly recently, the federal controlled substances schedule has been amended to change the definition of cocaine (ioflupane was removed in September 2015) and marijuana (hemp was removed in December 2018). Now defendants convicted of distributing cocaine or marijuana in states that have not amended their schedules to match the federal schedule are claiming that, under the categorical approach, the state statute is overbroad.

---

[123] 142 S. Ct. 1063 (2022). *Wooden* was not a categorical approach case and instead focused on the ACCA's separate occasions clause. *Id.* at 1067–68. The Supreme Court noted an argument that the *amici curiae raised* but the defendant did not brief: "[W]hether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." *Id.* at 1068 n.3. Indeed, that issue was left "simmer[ing] beneath the surface of" *Wooden*. *Id.* at 1087 n.7 (Gorsuch, J., concurring in judgment). Although not directly addressed in *Wooden*, federal prosecutors have responded to the decision by alleging in indictments the prior crimes and their separate occasions for ACCA purposes.

[124] *See, e.g.*, United States v. Collins, No. 20-CR-394, 2022 WL 4048531, at *5 (N.D. Ill. Sept. 4, 2022) (denying motion to dismiss as unripe).

[125] *See, e.g.*, United States v. Jones, No. 22-CR-20020, 2022 WL 10145419, at *3 (E.D. Mich. Oct. 17, 2022) (denying motion to dismiss ACCA allegations that argued that conviction for home invasion in the second degree under Michigan law was not a violent felony)

[126] *See* 18 U.S.C. 924(e)(1); U.S.S.G. §§ 4B1.1, 4B1.2.

Circuits are split on how to resolve these challenges. Some have found that where the state statute still includes the element removed from the federal definition, it is overbroad. For example, the Eighth and Tenth Circuits compare the previous conviction to the current federal drug schedule.[127] By contrast, the Eleventh Circuit has found controlling the federal controlled schedule in effect at the time of the previous conviction, rather than the instant offense.[128]

Second, defendants are challenging whether the offense conduct of their previous conviction involves manufacturing, distributing, or possessing with intent to distribute a controlled substance, which would render their prior a serious drug offense under the ACCA.[129] Other state statutes criminalizing the manufacturing and distribution of controlled substances also prohibit other conduct. For instance, some statutes also prohibit a person from unlawfully dispensing, administering, or selling a controlled substance. Given that, defendants have argued that those statutes are categorically broader than the ACCA's definition of serious drug offense.[130] Defendants have also argued that such statutes are divisible and that their prior conviction was not for manufacturing, distributing, or possessing with intent to distribute a controlled substance.[131]

3. Vagueness is in vogue

Defendants continue to mount vagueness challenges to statutes that the categorical approach implicates. Residual clauses remain under assault. While the Sentencing Guidelines' Career Offender residual clause

---

127 United States v. Perez, 46 F.4th 691, 701 (8th Cir. 2022) ("Because Perez's state statute of conviction included Ioflupane whereas the CSA specifically excludes Ioflupane as a controlled substance, the state statute is overbroad on its face, and our categorical analysis ends with the text of the statute."); United States v. Williams, 48 F.4th 1125, 1133 (10th Cir. 2022) ("We agree with Mr. Williams that, as he argued in district court and maintains on appeal, his prior state offenses are categorically broader than the definition of 'serious drug offense' because they apply to hemp, which was not federally controlled at the time of Mr. Williams' underlying offense under § 922(g).").

128 *See* United States v. Jackson, 55 F.4th 846 (11th Cir. 2022). *But see* United States v. Hope, 28 F.4th 487, 504 (4th Cir. 2022) ("Here, we will compare the definition of 'marijuana' under federal law at the time of Hope's sentencing, on August 12, 2020, with South Carolina's definition of 'marijuana' at the time he was sentenced for his state offenses on May 22, 2013.").

129 *See, e.g.*, United States v. Meux, 918 F.3d 589, 591–92 (8th Cir. 2019) (rejecting defendant's challenge that state statute encompassed simple possession and was thus overbroad).

130 *See id.*

131 *See, e.g.*, Shuman v. United States, No. 17-11279-A, 2017 WL 8683695, at *1 (11th Cir. Nov. 9, 2017) (rejecting challenge that defendant's conviction "for sale of a . . . controlled substance" under Georgia statute was not a serious drug offense).

survived a vagueness challenge,[132] defendants continue to attack SORNA's residual clause[133] as well as the Bail Reform Act's residual clause.[134] And after *Wooden*, Defendants have also challenged the different-occasions analysis as unconstitutionally vague.[135]

Defendants have also recently challenged the ACCA's definition of serious drug offense as unconstitutionally vague.[136] Given the evolution of categorical approach jurisprudence, it is unsurprising that more defendants are trying to apply *Johnson*-inspired reasoning to elements clauses and enumerated-offense clauses.

IV. Conclusion

The categorical approach has been criticized at every level of the federal judiciary.[137] The expansion of the doctrine and its intentional blindless to the realities of a defendant's conduct that led to the underlying conviction have led one circuit judge to wonder whether the categorical approach has "jumped the shark."[138] Despite those concerns, however, the categorical approach shows no signs of receding. Instead, it finds itself deeper entrenched in an ever increasing number of federal laws. Prudent prosecutors will prepare themselves for the inevitable reality that, if it has not already, the categorical approach will invade one of their cases soon. We wish you the best of luck.

---

132 Beckles v. United States, 580 U.S. 256 (2017).

133 *E.g.*, United States v. Schofield, 802 F.3d 722, 730–31 (5th Cir. 2015) (rejecting challenge to SORNA's residual clause in part because "application of the categorical approach to the SORNA residual clause does not suffer from the same problems as the application of this approach to the ACCA residual clause").

134 *E.g.*, United States v. Watkins, 940 F.3d 152, 161 (2d Cir. 2019).

135 *See, e.g.*, United States v. Jones, No. 20-11841, 2022 WL 1763403, at *2–3 (11th Cir. June 1, 2022) (rejecting argument "that the different-occasions provision is as 'hopelessly indeterminate' and 'shapeless' as the Act's now invalidated residual clause"); United States v. McCall, No. 18-15229, 2023 WL 2128304, at *7 (11th Cir. Feb. 21, 2023) (rejecting argument that different-occasions provision is unconstitutionally vague).

136 *E.g.*, United States v. Ojeda, 951 F.3d 66, 73–76 (2d Cir. 2020) (rejecting vagueness challenge).

137 *See* United States v. Scott, 14 F.4th 190, 200–02 (3d Cir. 2021) (Phipps, J., dissenting) (citing opinions criticizing the categorical approach).

138 Alvarado-Linares v. United States, 44 F.4th 1334, 1348 (11th Cir. 2022) (Newsom, J., concurring).

About the Authors

Melissa K. Atwood currently serves as an Attorney Advisor for the Office of Legal Education, where she is assigned to the Criminal and National Security Team. She is on detail from her nearly two decades as an Assistant U.S. Attorney in the Northern District of Alabama. Melissa lives at the intersection of minutiae and practicality, and her practice has reflected that. Immediately before beginning her detail, Melissa served in her district's Appellate Division and as Senior Litigation Counsel. Most of her career was spent on the trial line in the Criminal Division, investigating and prosecuting white-collar crimes and violent offenses.

John M. Hundscheid is an Assistant U.S. Attorney in the Northern District of Alabama. He works in the Huntsville Branch Office and serves as the district's Digital Currency Coordinator. John routinely prosecutes a wide range of cases, including white-collar, cyber, drug trafficking, firearm, and child-exploitation offenses.

Electronic Evidence: Cell Phone Forensics

Edward J. Canter
Assistant U.S. Attorney
Northern District of Alabama

K. Drew Moore
Network Intrusion Forensics Analyst
U.S. Secret Service Cyber Fraud Task Force

I. Introduction

In June 2021, news broke of a double homicide in South Carolina that involved lawyer Alex Murdaugh and his family.[1] The case shocked the small town of Hampton and gained national attention. It had all the elements of a dramatic true crime story—a wealthy and influential family, a double murder, and a suspected coverup.

That attention quickly zeroed in on Alex Murdaugh, a member of one of the state's most influential legal families.[2] Murdaugh had initially told authorities that he had discovered the bodies of his wife Maggie and son Paul when he returned home after visiting a family member.[3] As the investigation progressed, however, authorities began to suspect that Murdaugh may have been involved in their deaths. Thirteen months after his wife and son were found dead on the family's property, a South Carolina grand jury indicted Murdaugh.[4]

---

[1] *Mother, Son from Prominent SC Legal Family Found Shot Dead*, Associated Press (June 8, 2021), https://apnews.com/article/sc-state-wire-business-300a08e54e280bc4cd486a43378ece47.

[2] Steve Garrison, Olivia Diaz & Thad Moore, *Rumors Swirl About Double Homicide Involving SC Law Family. Some Details Begin to Emerge*, Post & Courier (June 9, 2021), https://www.postandcourier.com/murdaugh-updates/rumors-swirl-about-double-homicide-involving-sc-law-family-some-details-begin-to-emerge/article_67286588-c926-11eb-9e15-fb18705b4843.html.

[3] Jeffrey Collins, *911 Call Released in Killing of Mother, Son in S. Carolina*, Associated Press (July 22, 2021), https://apnews.com/article/shootings-7f93dfc192114685af06c432254a366a.

[4] Nicholas Bogel-Burroughs, *South Carolina Lawyer Alex Murdaugh Charged with Killing Wife and Son*, N.Y. Times (July 14, 2022), https://www.nytimes.com/2022/07/ 14/us/alex-murdaugh-indicted.html.

At Murdaugh's trial earlier this year, South Carolina prosecutors were able to draw on a wealth of digital evidence to tell the story of what happened to Maggie and Paul Murdaugh.[5] That digital evidence included a Snapchat video recovered from Paul Murdaugh's cell phone, which contained Alex's, Maggie's, and Paul's voices—together—in the minutes before the shooting.[6] This information provided crucial evidence for the prosecution because it directly connected Alex Murdaugh to the crime scene and contradicted the initial story that he told police. In addition to the video, prosecutors were able to use cell phone evidence and evidence from the telematics unit in Murdaugh's 2021 Chevy Suburban to provide jurors with a minute-by-minute breakdown of the Murdaughs' activities on the night of the murder. After a six-week trial, it took the jury three hours to convict Murdaugh of killing both family members.[7]

The Murdaugh trial drives home what prosecutors have known for some time: Digital evidence—and, in particular, cell phone evidence—can contain powerful proof of guilt. As discussed below, the evidence at trial illustrates some typical issues that arise as prosecutors and investigators deal with cell phone evidence, including the fact that not all relevant evidence will necessarily be on the device itself.

To help prosecutors marshal cell phone evidence and present it at trial, this article builds on an earlier article published in the November 2011 issue of the *Department of Justice Journal of Federal Law and Practice* (then, the *U.S. Attorney's Bulletin*), "Admissibility of Forensic Cell Phone Evidence."[8] Our article proceeds in two parts. First, we provide a primer on cell phone forensics and address technical issues that may arise during an investigation. This Part uses the Murdaugh investigation as a case study and sets out to update "Admissibility of Forensic Cell Phone Evidence."[9] Second, we provide a primer on admitting cell phone evidence at trial. This Part draws from Judge Paul Grimm's authoritative law review article titled "Authenticating Digital Evidence," a helpful

---

[5] *See* Nicholas Bogel-Burroughs, *What Phone and Other Data Showed About the Night of the Murders*, N.Y. Times (Mar. 3, 2023), https://www.nytimes.com/2023/03/03/us/phone-records-murdaugh.html.

[6] Jeffrey Collins, *Both Sides Use Trove of Cell Data at Alex Murdaugh Trial*, Associated Press (Feb. 1, 2023), https://apnews.com/article/south-carolina-homicide-crime-3da14ec557407f0a253b460bee9573f1.

[7] Nicholas Bogel-Burroughs, *Alex Murdaugh Convicted of Murdering Wife and Son*, N.Y. Times (Mar. 2, 2023),
https://www.nytimes.com/2023/03/02/us/alex-murdaugh-guilty.html.

[8] *See generally* Timothy M. O'Shea & James Darnell, *Admissibility of Forensic Cell Phone Evidence*, 59 U.S. Att'y Bull., no. 6, Nov. 2011, at 42.

[9] *See id.*

resource for prosecutors preparing for trial.[10]

II. Cell phone forensics

Much has changed in the years since "Admissibility of Forensic Cell Phone Evidence" was first published in the *U.S. Attorney's Bulletin*. As the Supreme Court has written, cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[11] Now, not only do nearly all Americans own a cell phone of some kind, but also the vast majority of the cell phones they own are smartphones.[12] According to the Pew Research Center, the share of Americans who own a smartphone is now 85%, up from just 35% in Pew's survey of smartphone ownership conducted in 2011.[13]

The industry has consolidated around two main smartphone operating systems: iOS, which Apple developed; and Android, which Google developed.[14] One of the principal features of these devices is their "immense storage capacity."[15] They are effectively "minicomputers that also happen to have the capacity to be used as a telephone."[16] But "[t]hey could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[17]

Today's smartphones may contain evidence of communications through email, text message, instant message, and social networking applications, as well as financial records, consumer data, photographs, videos, and evidence of internet activity.[18] They also contain health and fitness information and collect data about the environment around the device, for example, the ambient temperature in the area where the device is located. That is because today's smartphones employ various sensors—including ac-

---

[10] Paul W. Grimm, Daniel J. Capra & Gregory P. Joseph, *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1 (2017).

[11] Riley v. California, 573 U.S. 373, 385 (2014).

[12] *See Mobile Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/.

[13] *Id.*

[14] Kavita Iyer, *iPhone Overtakes Android to Claim 50% of U.S. Market Share: Report*, Techworm (Sept. 5, 2022), https://www.techworm.net/2022/09/iphone-overtake-android-u-s-market-share.html.

[15] *Riley*, 573 U.S. at 393.

[16] *Id.*

[17] *Id.*

[18] Joey L. Blanch & Stephanie S. Christensen, *Biometric Basics: Options to Gather Data from Digital Devices Locked by a Biometric "Key,"* 66 U.S. Att'y Bull., no. 1, Jan. 2018, at 3.

celerometer, gyroscope, magnetometer, Global Positioning System (GPS), and biometric sensors—to enable smartphone features like step counting and turn-by-turn directions.[19]

In the Murdaugh trial, prosecutors used this information to great effect. They provided the jury with a detailed timeline that was compiled, in large part, using evidence from cell phone extraction reports.[20] In addition to call logs and text messages, the jury saw GPS data and information regarding the number of steps the family members took at various points on the date of the murders, as well as information about whether the devices were locked or unlocked, whether they were connected to Wi-Fi, whether the backlights on the devices were on, and changes to the phones' orientations at various points in time.[21] These data points, in combination with information from the OnStar system in Murdaugh's Chevy Suburban, provided the jury with a detailed timeline of the events on the night of the murders.[22]

As noted above, this timeline was punctuated by a 50-second Snapchat video that was taken minutes before Paul and Maggie Murdaugh died.[23] While the video is relatively innocuous on its face—Paul Murdaugh focuses his cell phone camera on his friend's dog throughout—the audio corroborated the government's timeline, as it appeared to contain the voices of three individuals: Paul, Maggie, and Alex Murdaugh.[24] In doing so, it placed Alex Murdaugh at the scene of the crime and contradicted the initial story he told law enforcement.

This evidence was only available because of the power of modern cell phone forensics. Although Paul Murdaugh appeared to have tried to send the video that night, it was not delivered. As a result, prosecutors were only able to retrieve the video months later when they "cracked" his iPhone passcode and analyzed his phone.[25]

---

19 David Nield, *All the Sensors in Your Smartphone, and How They Work*, Gizmodo (June 29, 2020), https://gizmodo.com/all-the-sensors-in-your-smartphone-and-how-they-work-1797121002.

20 Chase Laudenslager, *Detailed Timeline Presented in Alex Murdaugh Murder Trial,* Count on News 2 (Feb. 17, 2023), https://www.counton2.com/the-murdaugh-investigation/defense-to-cross-examine-sled-agent-in-alex-murdaughs-roadside-shooting/.

21 *Id.*

22 *Id.*

23 David Mack, *Alex Murdaugh Sobbed as Jurors Saw a Snapchat Video from His Son Allegedly Placing Him at the Scene of the Murders*, BuzzFeed News (Feb. 1, 2023), https://www.buzzfeednews.com/article/davidmack/alex-murdaugh-snapchat-video-paul-dog-kennels.

24 *Id.*

25 *Id.*

A. Cell phone extraction methodologies

So how does the examiner get there? There are various methods of extracting and examining cell phone data, including manual, logical, file system, and physical extractions.[26] These methodologies differ in the type and amount of data that can be recovered.

First, at the most basic level, an examiner may process a phone by taking pictures of the phone screen while scrolling through the relevant information. Law enforcement may employ this method in an exigent circumstance where the information on the phone must be processed immediately. It also may be employed if the device is unsupported by commercial tools or contains security features that prevent extraction.

Second, an examiner may process a device using a logical extraction. This widely used method usually provides data that "would be visible during a manual search of the phone."[27] This information may include, among other things, text messages, call logs, pictures, phonebook contacts, videos, audio, and certain application data.[28] A logical extraction, however, does not recover deleted data or contain a full byte-by-byte copy of the device.[29]

Third, an examiner may use a file system extraction, which is a type of forensic analysis that involves extracting data from an electronic device by accessing its file system.[30] A file system extraction accesses files embedded in the memory of a mobile device and allows the examiner to retrieve hidden system files, databases, and other files that may not be visible via a logical extraction—allowing the examiner to obtain additional information from the device.[31] Based on law enforcement testimony, the

---

[26] *See* United States v. Jean-Claude, No. 18-cr-601, 2022 WL 2334509, at *20 (S.D.N.Y. June 27, 2022) (discussing "logical extractions," "file system extractions," and "physical extractions").

[27] United States v. Gallegos-Espinal, 970 F.3d 586, 589–90 (5th Cir. 2020) (explaining the difference between logical and physical extractions).

[28] *Logical Extraction - Mobile Device Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/logical-extraction-mobile-device-forensics (last visited Mar. 13, 2023).

[29] *Logical Extraction Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/logical-extraction-forensics (last visited Mar. 13, 2023).

[30] *File System Extraction Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/file-system-extraction-forensics (last visited Mar. 13, 2023).

[31] *File System Extraction - Mobile Device Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/file-system--extraction-mobile-device-forensics (last visited Mar. 13, 2023); *see also* David Smalley & Jay Varda, *Logical Extraction vs. File System Extraction*, Grayshift,

South Carolina Law Enforcement Division located the Snapchat video on Paul Murdaugh's phone after examiners accessed his iPhone passcode and conducted a file system extraction.[32]

Finally, physical extraction involves obtaining a byte-for-byte copy of a phone's storage device, including the operating system files and deleted data.[33] It requires accessing the device's flash memory and creating a forensic image of the device's storage.[34] Using this method, examiners are able to search for deleted items in unallocated space on the device.[35] In doing so, they may be able to locate and extract deleted passwords, files, photos, videos, text messages, call logs, GPS tags, and other artifacts.[36] One of the techniques that an examiner may use in conjunction with a physical extraction is the so-called "chip off" method, which involves obtaining memory straight from the device's memory chip.[37] This process is manual and intrusive. Still, because the memory chip stores all the data on the device, including deleted data, the chip off method can be used to recover data that is not otherwise accessible using the data extraction methods discussed above. This may be because the user has taken steps to wipe the device, or because the device is severely damaged.[38] For example,

---

https://www.grayshift.com/blog/the-graykey-difference-logical-vs-file-system (last updated Apr. 2021).

32 *Alex Murdaugh Trial: Data Taken from Paul, Maggie, and Alex Murdaugh's Cell Phones*, First Coast News, https://www.firstcoastnews.com/article/news/special-reports/alex-murdaugh-live-trial-updates-february-1/101-712aea59-0989-4baa-83db-9cb6287eae86 (last updated Feb. 1, 2023).

33 United States v. Palms, 21 F.4th 689, 695 (10th Cir. 2021) (explaining that "[t]he physical extraction created a byte-for-byte copy of the cell phone with data and metadata").

34 *Physical Extraction Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/physical-extraction-forensics (last visited Mar. 13, 2023).

35 *See* United States v. Gallegos-Espinal, 970 F.3d 586, 590 n.3 (5th Cir. 2020) (explaining that the deleted video evidence would only be recoverable during a physical extraction).

36 Cellebrite, *supra* note 34.

37 *Chip-off - Mobile Device Forensics*, *Cellebrite Digital Intelligence Glossary*, Cellebrite, https://cellebrite.com/en/glossary/chip-off-mobile-device-forensics (last visited Mar. 13, 2023).

38 Prosecutors and investigators should not assume that examiners will not be able to recover relevant data from a damaged device just because it does not turn on. *See* Aya Fukami and Kazuhiro Nishimura, *Forensic Analysis of Water Damaged Mobile Devices*, 29 Digital Investigation, 571, 571–79 (2019). In recent cases that one of the authors of this article has worked on, examiners at the U.S. Secret Service Cyber Fraud forensic lab have been able to perform "surgery" on a device that a bullet had pierced, extracting critical memory components of the device and transplanting them in a donor device. Examiners have used the same technique to extract data from

in a recent case in the Northern District of Alabama, examiners were able to use the chip off method to locate fragments of videos containing child sexual abuse material that a subject had deleted from an older Android device.[39]

The method that an examiner uses to extract cell phone data will be influenced by a variety of factors, including the state of the phone (for example, "Before First Unlock" or "After First Unlock"), whether it is unlocked at the time of the examination, and the existence—and level—of encryption. Encryption may include full-disk encryption, which would involve encoding all user data on a device using a single key.[40] For newer model phones, it may also include file-based encryption, which encrypts different files with different keys that can be unlocked independently.[41] These factors will influence the amount of data that can be retrieved and the method of extraction.[42]

B. Relevant evidence outside the phone

In addition to data or evidence found on a cell phone through a forensic examination, additional evidence relating to cell phone use may be obtained outside the cell phone. Put another way, investigators may find that a phone—or files on a phone—is inaccessible because of encryption. That complication, however, does not mean that information is out of reach. This is particularly the case given the rise in cloud computing and device synchronization. Many of us synchronize our cell phones with computers and wearable technology or use third-party services like Google and Apple that result in information such as text messages, email, voice mail, transcribed voice mails, and Internet search terms being stored outside the phone itself.[43] In other instances, information from third parties may corroborate evidence on the phone or fill in gaps in the evidence if phone data has been deleted.[44]

---

devices that have been flushed in the toilet.

39 Plea Agreement at 5–7, United States v. Ramirez, No. 22-cr-056 (N.D. Ala. May 10, 2022), ECF No. 18.

40 *See* Heather Mahalik, *Understanding Different Types of Encryption on Mobile Devices*, Cellebrite, https://cellebrite.com/en/understanding-different-types-of-encryption-on-mobile-devices. (June 22, 2020)

41 *Id.*

42 *Id.*

43 O'Shea & Darnell, *supra* note 8, at 44.

44 Wearable devices like Apple watches are encrypted. *See System Security for WatchOS,* Apple Platform Sec., https://support.apple.com/guide/security/system-security-for-watchos-secc7d85209-d/web (last visited Apr. 4, 2023). But they may contain significant data and be used to access cloud-based information. Accordingly, investigators should remember to

Several examples from the Murdaugh trial are illustrative. First, during the examination of Paul Murdaugh's cell phone, law enforcement recovered a thumbnail of a Snapchat video that Paul Murdaugh had taken of Alex Murdaugh at approximately 7:39:55 p.m.[45] The video showed Alex Murdaugh at the Murdaugh home roughly an hour before the murders. He was wearing different clothes than what he was wearing later that night when the police responded to his distressed 911 call.[46] At trial, the prosecutors introduced a copy of the video that they had obtained through legal process issued to Snapchat's parent company. Although the full video was not on Paul Murdaugh's device, he had saved it using Snapchat's "Memories" function, and it remained available on the cloud. As a result, the government was able to obtain a copy through the issuance of timely process.

Second, during the examination of Alex Murdaugh's cell phone, law enforcement observed that dozens of phone calls that appeared on call logs from other devices were absent, including phone calls that Alex Murdaugh had exchanged with his wife and son on the date of the murders.[47] In response to legal process, Verizon produced call detail records showing that Alex Murdaugh had sent or received more than 70 phone calls that did not appear on his phone—suggesting that they had been deleted.[48] The lesson for prosecutors is simple: Because cell phone evidence may not be stored on the device itself, prosecutors and investigators should remember to issue process to service providers so that they can corroborate and potentially supplement what they are seeing on a device extraction report.

To further illustrate how relevant data can be found both inside and outside a particular device, it is also helpful to consider historical location information, some of which was used in the Murdaugh trial.[49] Relevant location-related information will likely be discoverable in various locations on the device itself, as well as in records from various service providers. As detailed below, this information may include cell-site location from a wireless service provider, Enhanced 911 (E911) information, GPS data from the device or various service providers, information from mobile applications and photographs on the device, and information like Wi-Fi

---

seek permission to seize wearable devices when pursuing search warrants.

45 *See* Peter Rudofski, S.C. Law Enf't Div., Murdaugh Murders Timeline of Events: Condensed Timeline 10.

46 *See id.* at 10–11.

47 *See id.*

48 *See id.*

49 *See* O'Shea & Darnell, *supra* note 8, at 44.

and Bluetooth connections.[50]

A wireless provider will maintain—for a time—call detail records, which provide the date, time, duration, and parties to a phone call, as well as the cell tower through which a call was channeled and the sector of that cell tower that handled the call.[51] Because cell phones typically communicate through cell towers that are proximate to the phone, these "tower records" give an approximate location of a phone during a call.[52] Cell towers are typically divided into three sectors, each representing 120 degrees of a 360-degree spectrum.[53] The specific cell tower sector that the cell phone call was channeled through further approximates the cell phone's location.[54] In addition, when a cell phone moves during a call, the call may channel through multiple towers and sectors, thus indicating the direction that the cell phone user moved during the call.[55] These data points can all be used to approximate the location of a phone during a phone call.[56] However, cell tower information is described as "approximate" for good reason.[57] This lack of precision is especially true in rural areas where cell towers are farther apart.[58] At trial, this analysis will typically come in through an expert witness such as a member of the FBI's Cellular Analysis Survey Team (CAST), which is what occurred during the Murdaugh trial.

Law enforcement can obtain more specific location information from the wireless provider or the phone itself when the E911 system is activated.[59] The Federal Communications Commission's (FCC) E911 initiative requires cell phone providers to be able to pinpoint a user's location so that emergency responders can find the caller in a crisis.[60] Wireless providers use various processes to comply with this FCC initiative, with some utilizing GPS technology built into the phone and others estimating

---

50 *Id.* at 44–45.
51 *Id.* at 44.
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*; *see* United States v. Smith, No. 21-CR-30003, 2022 WL 17741100, at *5 (S.D. Ill. Dec. 16, 2022) (ordering that FBI CAST testimony about historical cell-site location was proper expert testimony).
58 O'Shea & Darnell, *supra* note 8, at 44.
59 *See* United States v. Sykes, No. 15-CR-00184-FL-5, 2016 WL 8291220, at *4 (E.D.N.C. Aug. 22, 2016), *report and recommendation adopted*, No. 15-CR-00184-FL-5, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016).
60 *Id.*

the location of the phone using signal data from cell towers. Typically, historical E911 data is not available from wireless providers, but it can be produced prospectively.

An examiner may also recover historical GPS information from a device. For example, an examiner may recover GPS location data from "an application that specifically tracks the individual phone using GPS location, such as the 'Find My iPhone' application, which determines a phone's location in realtime once requested by a person using the application. This method is activated by individual users, however, and is not recorded by service providers."[61] During the Murdaugh trial, an FBI CAST report showing the location of Paul Murdaugh's iPhone on the date of the murders presented GPS data to the jurors.

Other location-related information may be stored elsewhere on a mobile device. For example, photographs taken with some cell phones, such as an iPhone, may contain GPS location data stored within the image metadata.[62] Similarly, information about a phone's Wi-Fi and Bluetooth connections can provide valuable information about the phone's location at a particular time. This, too, was the case in the Murdaugh trial, as the jury heard evidence about the family members' Wi-Fi and Bluetooth connections on the day of the murder.

Third-party services may also have historical GPS information.[63] For example, if one searches for a restaurant using a mobile application like Google Maps, the application will use the GPS built into the phone and provide restaurant choices physically proximate to the phone.[64] This type of information may be on the phone in the Internet history, in the phone's application files, in the possession of the service provider that operates the device's operating system (for example, Google or Apple), or retained by applications that the phone's owner has downloaded and utilizes on the phone (for example, Facebook, Waze, or Uber).[65]

III. Admitting cell phone evidence

Once cell phone evidence is gathered, the prosecution team must prepare to admit that evidence at trial. This process will include considerations regarding the relevance and authenticity of the evidence as well as whether the evidence contains hearsay or implicates the Sixth Amendment's Confrontation Clause. This article focuses on two such issues: (1)

---

61 *Id.*
62 O'Shea & Darnell, *supra* note 8, at 45.
63 *See id.*
64 *Id.*
65 *Id.*

methods for authenticating cell phone evidence; and (2) avoiding Confrontation Clause issues while doing so.

This process should begin relatively early in the life of a case. Recent revisions to Federal Rule of Criminal Procedure 16(a)(1)(G) have triggered a sea change, requiring prosecutors and forensic analysts to connect and collaborate much earlier in the litigation process.[66] Now, the government must disclose—at a time set by the court—a signed statement by the forensic analyst containing a complete statement of all opinions that the government will elicit from the witness in its case-in-chief or during rebuttal, the bases and reasons for the opinions, a list of all publications authored in the previous 10 years, and a list of all other cases in the last four years where the witness has testified as an expert at trial or deposition.[67] As a result of the new rule, the prosecutor and forensic analyst will need to collaborate closer to the beginning of a case.

A. Authenticating cell phone evidence

Rules 901 of the Federal Rules of Evidence governs the process of evidentiary authentication.[68] Rule 901(a) provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[69] "Generally, a document is properly authenticated if a reasonable juror could find in favor of authenticity."[70] Thus, the bar is not set very high.[71]

---

66 An expert under Federal Rule of Evidence 702 has specialized knowledge, skills, or training to help the jury understand the evidence. Fed. R. Evid. 702. Courts analyzing whether non-experts can provide information from cell phone extractions—an issue that implicates whether Rule 16 notice is required—have come to different conclusions. *Compare* United States v. Daniels, No. 22-cr-2505, 2023 WL 1221017, at *2 (S.D. Cal. Jan. 23, 2023) (ruling that the government's lay witness could not testify as to the general use and purpose of Cellebrite or how it was used in the course of the investigation) *with* United States v. Chavez-Lopez, 767 F. App'x 431, 434 (4th Cir. 2019) (not precedential) ("Yerry did not give expert testimony. . . . His brief testimony concerned the actions he took to extract the data—hooking the phones up to a computer, following a few prompts, and saving data onto an external drive. Yerry's role as a witness is, therefore, best characterized as testifying about facts in his personal knowledge.").

67 Fed. R. Evid. 16(a)(1)(G).

68 Fed. R. Evid. 901.

69 *Id.*

70 United States v. Gagliardi, 506 F.3d 140, 151 (2d Cir. 2007).

71 *Id.*; *see also* United States v. Turner, 934 F.3d 794, 798 (8th Cir. 2019) (holding that the government satisfied its burden of producing evidence sufficient to support finding that text messages and photographs from defendant's phone were "what the government claimed they were"); United States v. Landji, No. 18-cr-601, 2022 WL 2334509, at *21 (S.D.N.Y. June 27, 2022) (holding that the government satisfied its

Federal Rule of Evidence 901(b) contains a non-exhaustive list of evidence that will satisfy the standard of proof for establishing authenticity, many of which are useful in cases involving cell phone evidence.[72] That list includes testimony from a witness with knowledge, comparison by trier or expert witness, circumstantial evidence, and evidence describing a process or system used to produce a reliable and dependable result—each of which is discussed below.[73] In addition, Judge Grimm's 2017 law review article "Authenticating Digital Evidence" provides an overview of various ways in which various types of digital evidence may be authenticated—including text messages and other evidence typically found on a cell phone—and is a helpful resource to consult before trial.[74]

Rule 901(b)(1) allows for authentication based on the "Testimony of a Witness with Knowledge . . . that an item is what it is claimed to be."[75] "In recognition of the proponent's light burden of proof in authenticating an exhibit the knowledge requirement of Rule 901(b)(1) is liberally construed. A witness may be appropriately knowledgeable through having participated in or observed the event reflected by the exhibit."[76] With respect to text messages or other communications stored on a cell phone, a witness could testify as to the authenticity of messages she sent or received, or a conversation she observed.[77]

Rule 901(b)(3) allows for authentication based on "a comparison with an authenticated specimen by an expert witness or the trier of fact."[78] As illustrated in *United States v. Safavian*, this method has a bootstrapping effect when used in conjunction with the other subsections of Rules 901. In *Safavian*, the court held that certain emails that were "not clearly identifiable on their own" could nevertheless be "authenticated under Rule 901(b)(3) . . . [through] comparison by the trier of fact (the jury) with 'specimens which have been [otherwise] authenticated'—in this case, those e-mails that already have been independently authenticated under

---

burden of offering evidence that the cell phone extractions are what they "purport to be" through testimony from an analyst at the U.S. Attorney's Office who did not himself perform the extractions).

72 Fed. R. Evid. 901(b).

73 Fed. R. Evid. 901(b)(1), (3), (4), (9).

74 Grimm et al., *supra* note 10, at 11–31.

75 Fed. R. Evid. 901(b)(1).

76 Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 545 (D. Md. 2007) (cleaned up).

77 *See* United States v. Lebowitz, 676 F.3d 1000, 1009 (11th Cir. 2012); United States v. Ramirez, 658 F. App'x 949, 952 (11th Cir. 2016) (not precedential); *see also Lorraine,* 241 F.R.D. at 545 (citing cases).

78 Fed. R. Evid. 901(b)(3).

Rule 901(b)(4)."[79]

Rule 901(b)(4) is "one of the most frequently used to authenticate e-mail and other electronic records."[80] It allows authentication on the basis of "Distinctive Characteristics and the Like," including the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."[81] Some courts have characterized Rule 901(b)(4)'s application as authentication by "circumstantial evidence."[82] *United States v. Kilpatrick* is illustrative.[83] In *Kilpatrick*, the district court highlighted a number of distinctive characteristics that established the authenticity of proposed text message exhibits, including device PIN numbers, the author's display name, the author's nickname, the author's auto signature, and distinctive language patterns.[84] Using Rule 901(b)(4), other courts have authenticated cell phones based on circumstantial evidence found within the device itself.[85] Further analysis of Rule 901(b)(4) in the context of cell phone evidence can be found in earlier issues of the *Department of Justice Journal of Federal Law and Practice*.[86]

Finally, Rule 901(b)(9) authorizes authentication by "[e]vidence describing a process or system and showing that it produces an accurate

---

79 United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) (second alteration in original).

80 *Lorraine*, 241 F.R.D. at 546.

81 Fed. R. Evid. 901(b)(4).

82 *Lorraine*, 241 F.R.D. at 546 (quoting Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 901.03 (Joseph M. McLaughlin ed., Matthew Bender and Co., Inc. 2d ed. 1997)); *cf.* United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012) (authenticating emails using circumstantial evidence); United States v. Lamm, 5 F.4th 942, 948 (8th Cir. 2021) (authenticating social media evidence using circumstantial evidence linking the defendant to the social media account).

83 United States v. Kilpatrick, No. 10-20403, 2012 WL 3236727, at *4 (E.D. Mich. Aug. 7, 2012); *see also* United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000) (authenticating emails through circumstantial evidence, including email address and nicknames).

84 *Kilpatrick*, 2012 WL 3236727, at *4 (No. 10-20403).

85 *See* United States v. Lewisbey, 843 F.3d 653, 658 (7th Cir. 2016) (authenticating cell phones under Rule 901(b)(4) based on where the phones were found, and that the electronic information on the phones related to the crime, identified the user and his associates, and included contact information for the user's former employer); United States v. Reed, 780 F.3d 260, 267–69 (4th Cir. 2015) (authenticating cellphone based on photos and text messages found within the device).

86 Timothy M. O'Shea, *Whole Device Authentication*, 67 DOJ J. Fed. L. & Prac., no. 1, 2019, at 97.

result."[87] Courts have recognized that it is "particularly useful in authenticating electronic evidence stored in or generated by computers."[88] In *Kilpatrick*, a records custodian verified that certain text messages had not been and could not be altered in any way because, when the messages were sent from the defendants' devices, they were automatically saved on the company's server with no capacity for editing.[89] Based on the custodian's sworn declaration, the court determined that the government had made a prima facie showing of authenticity under Rule 901(b)(9).[90] As set forth below, "any such record that could be authenticated under Rule 901(b)(9) can be made self authenticating by an appropriate certificate under Rule 902(13)."[91]

In addition to the non-exhaustive methods of authentication set forth above, Federal Rule of Evidence 902 identifies 14 ways in which documents can be authenticated without extrinsic evidence.[92] Three are relevant here. They include (1) certified records of a regularly conducted activity, (2) certified records generated by an electronic process or system, or (3) certified data from an electronic device, storage medium, or file.[93] While these methods are reviewed below, keep in mind that foundational testimony does more than just authenticate the evidence; it also explains what the evidence is and persuades the trier of fact that the evidence is reliable.

Rule 902(11) provides for the self-authentication of business records that are accompanied by a certification from a custodian or qualified person that the record meets the requirements of Rule 803(6)(A)–(C). As noted above, relevant cell phone-related evidence (for example, emails, toll records, and social media messages) may be located outside the device. To admit that evidence at trial, the proponent may seek to authenticate the documents as business records under Rule 902(11). For some such records, however, the content of the messages themselves may not qualify as business records because the content is supplied by a person outside the business with no duty to report that information accurately.[94] Thus, the scope of what can properly be authenticated under Rule 902(11) may

---

87 Fed. R. Evid. 901(b)(9).

88 *See, e.g.*, Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 549 (D. Md. 2007).

89 *Kilpatrick*, 2012 WL 3236727, at *3.

90 *Id.*

91 31 Charles A. Wright, Arthur R. Miller & Victor J. Gold, Federal Practice and Procedure: Authentication and Identification § 7114 (2d ed. 2021).

92 Fed. R. Evid. 902.

93 Fed. R. Evid. 902 (11), (13) & (14).

94 Grimm et al., *supra* note 10, at 23–24.

be limited to timestamps, metadata, and the like.[95]

Rule 902(13) and Rule 902(14) are part of the 2017 Amendments to the Federal Rules of Evidence and came into effect in December 2017. Similar to Rule 902(11), these (relatively new) rules provide for the self authentication of two categories of electronic evidence through certification: (1) records generated by an electronic process or system and (2) data copied from an electronic device, storage medium, or file.

As the Advisory Committee explained, "the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented."[96] Thus, the purpose of Rules 902(13) and (14) was to provide "a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly."[97]

Rule 902(13) provides for the self-authentication of "[a] record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."[98] Rule 902(14) provides for the self-authentication of "[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."[99] Notably, Rules 902(11), (13), and (14) all require that the proponent give the defendant "reasonable written notice" of the intent to offer a record under the Rules and to "make the record and certification available for inspection."[100] This requirement ensures that the defendant has a fair opportunity to challenge these materials.[101]

B. Anticipating Confrontation Clause issues

As observed in a prior issue of the *Department of Justice Journal of Federal Law and Practice*, Rule 902(13) and Rule 902(14) appear to be

---

95 *Id.*

96 Fed. R. Evid. 902(13), advisory committee note to 2017 amendment.

97 *Id.*

98 Fed. R. Evid. 902(13).

99 Fed. R. Evid. 902(14).

100 Fed. R. Evid. 902(11), (13) & (14); *cf.* United States v. Dunnican, 961 F.3d 859, 872 (6th Cir. 2020) (emphasizing defendant's failure to object to properly noticed method of authentication under Rules 902(11) and 902(14)).

101 Fed. R. Evid. 902(13), advisory committee note to 2017 amendment.

working as intended: encouraging parties to stipulate to the authenticity of electronic evidence.[102] Proponents, however, should be aware of potential Confrontation Clause issues that may arise regarding these two rules. While cell phone data itself is unlikely to implicate the Sixth Amendment, Confrontation Clause issues may arise based on how that evidence is introduced at trial.[103]

In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the government from introducing pretrial "testimonial statements" of an unavailable witness unless the defendant had a prior opportunity to cross examine the declarant.[104] In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that a state forensic analyst's lab report that was prepared for use in a criminal prosecution was the sort of "testimonial statement" subject to the demands of the Confrontation Clause.[105] In doing so, the Court acknowledged a "narrow exception" whereby a witness "could by affidavit *authenticate* or provide a copy of an otherwise admissible record."[106] Following this reasoning, courts regularly held that offering a business record certification from a record custodian under Rule 902(11) does not violate the Confrontation Clause.[107]

In *United States v. Hajbeh*, the defendant filed a successful motion in limine barring the government from using Rule 902(13) certifications that FBI agents authored to authenticate cell phone extractions in a child pornography case.[108] Granting the defendant's motion, the court held that the certifications were testimonial and implicated the concerns underlying the Confrontation Clause because the agents were "not mere record custodians."[109] In coming to this conclusion, the court highlighted that the affiants were "federal law enforcement agents tasked with investigating and preparing evidence against Defendant," that they used "sophisticated software (Cellebrite and GrayKey) to extract data from

---

102 Andrew Schupanitz and Jacklin Chou Lem, *Judges' Treatment of Federal Rules of Evidence 902(13) and 902(14)*, 68 DOJ J. Fed. L. & Prac., no. 3, 2020, at 109.

103 *See, e.g.*, United States v. Hill, No. 19-20251, 2023 WL 2596748, at *15 (5th Cir. Mar. 22, 2023) (holding that cell phone extraction reports were "nontestimonial, raw machine created data").

104 Crawford v. Washington, 541 U.S. 36, 68 (2004).

105 Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

106 *Id.* at 323–24.

107 Michael L. Levy & John M. Haried, *Practical Considerations When Using New Evidence Rule 902(13) to Self-Authenticate Electronically Generated Evidence in Criminal Cases*, 67 DOJ J. Fed. L. & Prac., no. 1, 2019, at 81, 91.

108 United States v. Hajbeh, 565 F. Supp. 3d 773, 776 (E.D. Va. 2021).

109 *Id.* at 776 (cleaned up).

Defendant's iPhones," and that the affidavits were "prepared by law enforcement agents for the explicit purpose of 'use at a later trial.'"[110] Moreover, the court noted that the Rule 902(13) certifications filled "an important evidentiary [] gap" because they would establish that the child pornography at issue was part of the content of the defendant's phones.[111]

Following *Hajbeh*, another district court rejected a Confrontation Clause challenge to the authentication of Cellebrite extraction reports through testimony from a U.S. Attorney's Office analyst where the analyst had not performed the extractions at issue.[112] The court distinguished *Hajbeh* as having rejected an effort to substitute a certification for live testimony, rather than a "witness with specialized knowledge concerning Cellebrite . . . ."[113]

Several takeaways may be gleaned from *Hajbeh* and *Landji*. First, there is strategic value in using Rule 902(13) and Rule 902(14) certifications to secure stipulations or early notice of objections to the admission of Cellebrite reports. Proponents, however, should be prepared to put on testimony through a witness with specialized knowledge to help the jury understand the evidence and its persuasive force. As alluded to above, live witnesses help the jury understand the evidence and its reliability. Second, any Rule 902(13) and 902(14) certifications prepared for these purposes should be limited to authenticating evidence (for example, that the Cellebrite extraction report was generated by an electronic process or system that produces an accurate result) and not used to establish any independent facts (for example, that the phone belonged to a particular person). Third, if used to authenticate, Rules 902(13) and 902(14) should only be used for authentication purposes and not offered to the jury as substantive evidence.

IV. Conclusion

With the widespread adoption of smart devices, cell phones are an increasingly important source of evidence in all types of criminal prosecutions. But relevant information may not always be where you expect it on a device—or even on the device at all. And once the relevant information has been collected, the prosecution team will need to create a gameplan for getting the digital evidence admitted.

---

110 *Id.*

111 *Id.* at 776, 778.

112 United States v. Landji, No. 18-cr-601, 2022 WL 2334509, at *17 (S.D.N.Y. June 27, 2022).

113 *Id.* at *23.

About the Authors

Edward J. Canter is an Assistant U.S. Attorney for the Northern District of Alabama where he serves as his office's Computer Hacking and Intellectual Property Coordinator. He is a 2014 graduate of the Emory University School of Law and Goizueta Business School and received his B.A. from Vanderbilt University in 2008.

K. Drew Moore is a Network Intrusion Forensics Analyst with the United States Secret Service Cyber Fraud Task Force. Before joining the Secret Service, he was a detective with the Mountain Brook Police Department in Mountain Brook, Alabama.

Twelve Rules for Presenting Accomplices

Howard J. Zlotnick
Former Managing Assistant U.S. Attorney (ret.)
Eastern District of Virginia

I. Introduction

Historically, prosecutors have used insiders, consisting of co-conspirators and accomplices, as witnesses, especially in conspiracies involving white-collar, drug trafficking, and violent crime enterprises. Accomplices are witnesses whose conduct is subject to being charged as an aider and abettor of the offense for which the defendant is charged.[1]

These witnesses testify in return for benefits such as favorable sentencing recommendations or the hope of a post-sentencing reduction.[2] They carry heavy baggage and create significant problems for the prosecution's case. This article will consider only accomplice witnesses, not informants.

Accomplices are the defendant's former friends and associates. They were previously called "stool pigeons." Today, the defense labels them "turncoats," "snitches," or "rats." Prosecutors designate them as insiders, accomplices, cooperators, or "flipped" co-defendants. Defense lawyers frequently paint their testimony as purchased and liken their betrayal of defendants to that of Judas Iscariot. They also argue that these turncoat witnesses fabricated their testimony to fit the prosecution's theory and secure lenient treatment. Jurors' reluctance to accept their testimony has resulted in acquittals.

Recognizing this reality, Judge Stephen Trott wrote an article detailing the pitfalls of calling criminals as witnesses and providing examples of the risks of using cooperators who receive consideration for their testimony.[3] The dangers described in Judge Trott's article are real and must be heeded by any prosecutor.

Judge Trott underscored the treacherousness and self-serving nature of

---

[1] United States v. Jones, 608 F.2d 1004, 1008 (4th Cir. 1979); United States v. Simmons, 503 F.2d 831, 836 (5th Cir. 1974).

[2] *See* Fed. R. Crim. P. 35(b); U.S. Sent'g Guidelines Manual § 5K1.1 (U.S. Sent'g Comm'n 2021).

[3] Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381 (1996).

such witnesses because they "are likely to say and do almost anything . . . to get out of trouble with the law."[4] Jurors are skeptical of these witnesses and are inclined to reject their testimony.[5] Sometimes the baggage that these witnesses carry "can [easily] backfire" in the government's case.[6] They are vulnerable to devastating cross-examinations that become the heart of the reasonable doubt closing argument. With these risks in mind, a prosecutor must always consider if the case is better without calling accomplice witnesses.[7]

Despite the difficulties, cooperating witnesses remain essential to prosecuting conspiracies across all criminal programs and especially in gang and organized crime cases.[8] In a perfect world, solid citizens or law enforcement witnesses make the best witnesses. Department prosecutors recognize that, in reality, such witnesses are unavailable so using criminals as witnesses becomes unavoidable. At trial, therefore, a prosecutor must educate the jury about the justifications for using these witnesses.

Traditionally, prosecutors argue that they need witnesses with firsthand knowledge of the crimes to dismantle criminal conspiracies. These witnesses are the conspirators themselves whom the defendant selected. He picked them as his partners and confederates in crime. Recognizing this reality, one court observed, "[w]e cannot expect that [the] witnesses will possess the credibility of people of the cloth such as rabbis, priests, and nuns; that is why one of the jury's roles is to decide the credibility of witnesses."[9]

Understandably, jurors dislike and distrust accomplices.[10] With this bias in mind, Judge Trott highlighted four key areas to consider when dealing with cooperators. First, watch out for situations where the accomplice's culpability is far greater than that of the defendant. For this reason, Judge Trott urges prosecutors to use "little fish to get big fish" because jurors understand this trade-off.[11] Second, ensure that the witness's guilty plea is appropriate to the crime for which the defendants are on trial.[12] Third, remember that, so long as the cooperator does not lie under oath about an important fact to the case, a jury will nonetheless convict

---

4 *Id.* at 1383.
5 *Id.* at 1385.
6 *Id.* at 1388.
7 *See id.* at 1391.
8 *Id.* at 1390.
9 United States v. Rovetuso, 768 F.2d 809, 818 (7th Cir. 1985).
10 Trott, *supra* note 3, at 1385.
11 *Id.* at 1391–92 (cleaned up).
12 Nathaniel H. Akerman, *Making Criminals Credible, in* Litigation Manual 1010, 1010 (John G. Koeltl ed., 1989).

many defendants based on the cooperator's testimony despite his diminished credibility.[13] In other words, cooperators can survive generalized attacks on their credibility even if traditional impeachment reveals that they are capable of lying or have lied in the past. Fourth, jurors expect corroboration of accomplice testimony, and prosecutors must deliver.[14]

Jurors must view accomplice testimony with caution.[15] Legally, the uncorroborated testimony of an accomplice is sufficient to convict if the jury believes the defendant's guilt beyond a reasonable doubt.[16] This rule's deferential standard protects the government prosecutor under Federal Rule of Criminal Procedure 29 and on appeal for the sufficiency of the evidence, "but it will cut little ice with jurors" at trial.[17] They will demand the common sense standards highlighted above and require independent corroboration to carry the day.

Effectively presenting accomplices requires understanding that they pose hazards to your case. The prosecutor must anticipate and blunt the cross-examination. This approach requires presenting witnesses without providing the defense with unnecessary avenues of attack or talking points for closing. Here are 12 rules designed to defuse destructive cross-examination tactics and lend support to the government's closing. These rules will not prevent damage but will allow for damage control and a balanced evidentiary record for the jury to weigh.

II. Twelve rules for presenting accomplice witnesses

A. Enter strong plea agreements

Some federal agents resist holding cooperators criminally responsible for their readily provable participation in the crimes under investigation. This attitude particularly grows when agents become enamored with cooperating witnesses and resist convictions and sentences adequately reflecting their criminal activity.

The enamored investigators assert that the accomplice's ongoing and

---

13 *See* Herbert J. Stern, Trying Cases to Win: Cross-Examination 321 (1993); Trott, *supra* note 3, at 1389.

14 Trott, *supra* note 3, at 1425.

15 Kevin F. O'Malley, Jay E. Grenig & William C. Lee, 1A Federal Jury Practice and Instructions § 15.04 (6th ed. 2023); United States v. Savage, 885 F.3d 212, 223 (4th Cir. 2018).

16 United States v. Wilson, 115 F.3d 1185, 1189–90 (4th Cir. 1997); United States v. Millender, 970 F.3d 523, 529 (4th Cir. 2020).

17 Trott, *supra* note 3, at 1407.

anticipated future cooperation justifies leniency. This approach misses the mark because forbearing significant charges—resulting in a low sentence at the beginning of the prosecution—significantly diminishes the cooperator's value as a witness.

Ideally, cooperating defendants should plead guilty to felonies, including statutory mandatory minimums that accurately reflect their criminal conduct. Overlooking criminal activity between the cooperator and the purported defendant damages the cooperator's believability as a witness. Jurors expect the cooperator's guilty plea to hold him responsible for his crimes. Likewise, jurors also understand that, in return for admitting his crimes and truthfully providing testimony, the prosecution can recommend leniency.

For these reasons, experienced federal prosecutors, not case agents, must oversee plea agreements with cooperators. Draft these agreements knowing that the jury will scrutinize these documents during deliberations as they assess the witness's credibility. The felony charges and sentencing exposure, therefore, must be appropriate to the crime(s) and accurately set forth the cooperator's role relative to the defendant(s) against whom he is testifying.[18]

Plea agreements resulting in short sentencing exposure create an untenable situation in which the cooperator appears worse than the defendant whom he testifies against. In an extreme example, the Cleveland Strike Force allowed Jimmy "the Weasel" Frattiano to plead guilty to obstruction with a five-year maximum penalty despite his involvement in nine murders.[19] Such an agreement flies in the face of reality and justice. Remember that federal prosecutors' plea agreements and statements of facts are works of non-fiction, not fiction.

Prosecutors should sparingly enter non-prosecution agreements and full immunity.[20] Limit immunity to sympathetic small players with limited roles testifying against higher-level defendants.

The witness's benefits must be measured by the ends of justice; for instance, a drug dealer or money launderer cannot be allowed to keep his criminal proceeds. Failing to forfeit criminal proceeds provides defense attorneys fodder for arguments about benefits and bias.

Strong plea agreements prevent the jury from viewing the cooperator as more malevolent than the defendant.[21] Pleading to serious charges is one less benefit that the prosecution bestows on the cooperator and allows

---

[18] Akerman, *supra* note 12, at 1012.

[19] *Id.* at 1010–13.

[20] Trott, *supra* note 3, at 1392–93.

[21] Akerman, *supra* note 12, at 1013.

the jury to see the justice in case resolution.

B. Penalize false statements and underscore the importance of telling the truth

Truthful testimony drives the criminal justice system. To that end, plea and cooperation agreements detailing cooperating witnesses' obligations and responsibilities should contain identical language. In each situation, the agreement must require truthful testimony and impose serious consequences for cooperators who lie and thereby commit a new crime. The agreement motivates truthful testimony and penalizes falsity. The truthful witness may gain a lighter sentence while the false witness would lose any potential sentence reduction and face additional penalties. Therefore, cooperators who lie to agents or commit perjury in any legal proceedings breach their agreement and suffer the consequences.

A cooperator's false statements result in losing the plea agreement or immunity, and the government can then use his previously self-incriminating statements against him. Additionally, he is ineligible for any sentence reduction and faces prosecution for perjury or false statements. Thus, the witness's obligation to testify truthfully under his agreement provides "a strong motivation to tell the truth."[22] This exposure rebuts the argument that the cooperator is motivated solely to produce results for the government.[23]

Before trial, address false statements by federal witnesses with a false statement or perjury charge. This method is the only way to restore their credibility and mitigate the defense's argument that you are calling on liars to tell the truth.[24] It also sends a message that meaningful consequences exist for falsity.

Prosecutors and agents reinforce this message by emphasizing the requirement to tell the truth in *every meeting* with the cooperator. Always stress the importance of telling the truth without concern over whether it helps or hurts the government's case. This rule relaxes the witness, encourages disclosure, and is a safe harbor for cross-examination.[25]

Defense counsel often cross-examine cooperators on the number of meetings they had with the prosecutor. The purpose of this questioning

---

[22] United States v. Collins, 401 F.3d 212, 218 (4th Cir. 2005) (citing United States v. Bowie, 892 F.2d 1494, 1496 (10th Cir. 1990)).

[23] Akerman, *supra* note 12, at 1016.

[24] In United States v. Coleman, No. 4:15cr53 (E.D. Va. 2013), a witness who lied about retrieving the murder weapon in a gang murder pleaded guilty to a false statement charge and then testified to the grand jury.

[25] D. Shane Read, Winning at Trial 142 (2007).

is to argue that the prosecutor improperly shaped the witness's testimony. To put such meetings in context, you must explain to the witness that it is your job to discuss his testimony with him before trial and there is nothing improper about doing so.[26] The following redirect can counter this cross-examination:

> Q: You have been asked about the number of times you met with prosecutors and agents. Have there been a number of meetings?
>
> A: Yes.
>
> Q: And what is the one instruction you have been given at every meeting?
>
> A: To tell the truth.[27]

C. Ensure that the cooperator understands the plea or immunity agreement

Defense cross-examination underscores both the cooperator's motive to fabricate and his bias due to the prosecutor's control over his interests.[28] They highlight three areas of the cooperation agreement to parade the cooperator's potential interest and expectation of benefits in return for testifying. First, the cooperator serving or facing a severe sentence seeks to lessen his sentence.[29] Second, his motivation for testifying is the hope of sentence reduction for "substantial assistance." Third, the cooperator knows that the ability to obtain this sentence reduction depends upon the prosecutor's subjective assessment of the assistance rendered because only the prosecutor can file the sentence or post-sentence reduction motion to the court.[30]

To handle cross-examination, the cooperator must grasp the sentence reduction process. The witness's defense counsel can assist in explaining the process: Namely, the government assesses his cooperation and, upon determining that he was truthful and provided substantial assistance,

---

[26] *Id.* at 146.

[27] *See id.* at 175 (author paraphrase).

[28] *See* Stephen Saltzburg, Trial Tactics 159 (4th ed. 2019).

[29] Defense counsel often underscore this expectation by asking the age of the cooperator's children and juxtaposing that number against his sentence. He is then asked if there is anything more important to him than going home before his young children become adults.

[30] Cross-examination will point out that no one at the defense table gets to advise the court if the cooperator is telling the truth. The only opinion that matters is from the prosecution.

then files a motion to reduce the sentence. The government's motion is the mechanism that enables the court to reduce the sentence. The court, however, determines the ultimate sentence. That last point is critical for the jury to understand.

The false statement provisions of the plea agreement can offset the government's control of his sentence reduction if the cooperator realizes that, under the plea agreement, lying removes any opportunity for a sentence reduction, and he can be prosecuted for perjury. Likewise, if he testifies under immunity, lying means potential perjury prosecution and the loss of immunity for crimes to which he admitted.

The cooperator's realization that telling the truth serves his interest because all potential benefits arise from truthful testimony and detriments result from false testimony enables the following redirect:

> Q: Under your plea agreement, what is the one way to ensure that you do not get a Rule 35 reduction?
>
> A: To lie in court.
>
> Q: What else do you understand can happen to you if you lie?
>
> A: I can be prosecuted for perjury.
>
> Q: And what happens to your plea agreement?
>
> A: I can lose it all.

This redirect, together with the cooperation language in the plea agreement, allows the prosecutor to ask the jury in argument rhetorically: Is the accomplice better off if he lies or if he tells the truth? If he lies, the consequences for him are terrible—he loses his plea agreement and any chance for a sentence reduction, plus he faces additional prosecution for perjury.

D. The cooperator is not responsible for the outcome of the case

Cooperation agreements also provide that the ability to receive a sentence reduction does not depend upon the outcome of the case.[31] Ensure

---

[31] The cooperation language in the Eastern District of Virginia includes language that this plea agreement is not conditioned upon charges being brought against any other individual. The plea agreement is not conditioned upon any outcome in any pending investigation. The plea agreement is not conditioned upon any result in any future prosecution which may occur because of the defendant's cooperation. This plea agreement is not conditioned upon any result of any future grand jury presentation or trial involving charges resulting from this investigation. This plea agreement is conditioned upon the defendant providing full, complete, and truthful cooperation.

that cooperators realize that any sentence reduction depends exclusively on truth telling, not the government winning the case. Here again, the only road to a sentence reduction is truthful testimony, even if the defendant is found not guilty.

You must disabuse the cooperator that his sentence reduction eligibility depends upon winning the case; instead, he is one witness in a larger case called for a specific purpose.[32]

A good practice is to have the cooperator read this portion of the cooperation agreement and ask about his understanding of the language. Comprehending this provision relieves the witness of unnecessary pressure. It also enables him to answer the last question in the following series of cross-examination questions:

> Q: You know that by testifying you can get your sentence reduced?
>
> Q: You understand that the only person who can get you a sentence reduction is the prosecutor?
>
> Q: You want to make the prosecutor happy?

During the *Galleon* insider trading prosecution,[33] a cooperator handled this attack. The defense attorney asked the cooperator, "It's important that you testify in this court to make Mr. Streeter happy, correct?"[34] The witness responded, "Wrong." He stated that "he was testifying to 'uphold the law' and let the jury decide [if the defendant] should be convicted."[35]

E. Maintain formality and never meet alone with a cooperator

Proper preparation requires spending time with these witnesses but maintaining professional distance. Rebuff their attempts to ask you to predict their future sentence or obtain additional benefits. While conversing with them, stay polite, reserved, and never say anything that you would not want on the front page of the newspaper.[36] Likewise, refrain from making statements that you would not want to be repeated in open

---

32 *See* Read, *supra* note 25, at 142.

33 United States v. Rajaratnam, 802 F. Supp. 2d 491 (S.D.N.Y. 2011).

34 Michael Rothfeld & Susan Pulliam, *Defense Goes on the Attack*, Wall St. J. (Mar. 16, 2011).
https://www.wsj.com/articles/SB10001424052748704662604576202672612696238

35 *Id.*

36 Trott, *supra* note 3, at 1396.

court."[37] Direct them to address you formally and not by your first name.

A law enforcement agent *must attend* all meetings or conversations between prosecutors and cooperators. This rule even applies to phone calls with cooperators. It prevents the prosecutor from becoming a witness and the cooperator from misunderstanding or misrepresenting conversations. Ensure that the case agent is present at every meeting, properly documenting the interactions as appropriate and available to testify if needed.[38]

F. Review and index all statements

Before meeting a cooperator, review all his prior statements, including any FBI 302, ROI, or DEA 6 reports; rough notes; video or tape-recorded statements; and grand jury transcripts.

Ensure that all video or tape-recorded statements are transcribed and played in full. Transcripts are necessary for the parties' convenience and to refresh recollection in court. Preparation requires fully listening to the tape-recorded statements. Merely reading a transcript does not capture the nuances of an interview. Simultaneously hearing the interview while following the transcript allows you to fully absorb the interview including the witness's demeanor, voice, and inflections.

This article's author found it helpful to create a three-ring notebook on each cooperator. It chronologically contains all his statements and the important exhibits that he will identify. The notebook also includes his criminal record and any impeachment information. It provides easy access to review all statements, including grand jury transcripts.

As an attorney work product, organize and index the cooperator's statements by subject matter.[39] Create an index listing the topics that the cooperator will testify about, a summary of his version of the event in each statement, and the date of the statement. This compilation provides a roadmap of the cooperator's information on critical events, including all consistent and inconsistent statements, the plausibility of the cooperator's version of events, and deficiencies in earlier interviews, such as not determining the cooperator's basis of knowledge.[40] It will also help anticipate the defense's narrative on the way the cooperator's account was developed.[41] Organizing, reviewing, and indexing the witness's prior

---

[37] *Id.* at 1403.

[38] Even during trial preparation, if the cooperator discloses new information, the agent must immediately document it in a report.

[39] Herbert J. Stern, Trying Cases to Win: Cross-Examination 70–73 (1993).

[40] *See* Fed. R. Evid. 602.

[41] Michael E. Tigar, Nine Principles of Life and Litigation 126 (2009).

statements is essential for trial preparation.

This analysis will help the prosecutor deal with false statements, inconsistent statements, or both. Commonly, the cooperator's early statements—especially when first encountered by law enforcement—are false, omit key details, or both. The cooperator must admit all false statements, not minimize them, and always correct them.

Preparing the cooperator also requires knowing his criminal background. Rap sheets and Presentence Investigation Reports (PSRs) list his convictions and arrests. PSRs summarize the arrests and convictions from police reports. They also describe his drug and mental health history.[42] Finally, ask cooperators if there is additional detrimental information about them that the defendant will likely share with his defense lawyer.

Remember that the cooperator's credibility requires admitting his prior convictions, bad acts, and acknowledging that they were wrong.[43] If he does not confess his sins, he cannot be trusted to describe crimes that others committed.

G. Instruct the cooperator not to discuss the case with others

Instruct all cooperators—especially those in custody—not to discuss their testimony or cooperation with other inmates or over the telephone with associates. The defense will suggest that cooperating witnesses colluded with each other by comparing notes in violation of the sequestration order.[44] They also risk undermining their credibility by making damaging statements while in detention centers, during transportation, or waiting to testify. Defense counsel commonly subpoena tape-recorded jail calls between cooperators and their girlfriends discussing the case and overly optimistic views of when they will be released.

H. Use guideposts to develop a case chronology

A prosecutor is like a historian recreating past events through the primary sources of witnesses and evidence. In most cases, indisputable facts exist such as the date of the murder, robbery, or drug seizure. Through the prosecutor's questioning, the cooperator narrates the backstory and

---

[42] Reviewing the cooperator's PSRs provides information about acts of dishonesty under Fed. R. Evid. 608(b), as well as drug or mental health history. These reports are confidential, but you can disclose this information to the defense by letter as material under Giglio v. United States, 405 U.S. 150 (1972).

[43] Akerman, *supra* note 12, at 1015.

[44] Fed. R. Evid. 615 governs witness sequestration.

sequence of these crimes.

Cooperating witnesses, however, are often poor historians. They cannot remember the dates surrounding criminal events. This memory gap is especially true with historical transactions occurring years before the trial. To pinpoint dates, ask cooperators for guideposts like relating testimony to an important date in their lives such as a birthdate, the death of a friend, their release date from custody, or a major weather event. Also, look for corroborating information, such as toll records or emails, that can nail down a more exact timeline. Linking the chronology of events to meaningful dates in the witness's life confirms to the jury that he has a reason to remember them.[45]

I. Familiarize the cooperator with court procedure

Like all witnesses, cooperators must learn court procedures. Explain the order of examination and the differences between direct, cross, and redirect. Illustrate the differences between leading and non-leading questions. Tell him that the trial judge will rule on objections and what sustained and overruled means. Regarding hearsay, as a rule of thumb, he can always testify about any statements that the defendant or co-conspirators made to him.

During questioning, he should carefully listen to every question. If the question is clear, answer it; if the question is unclear, he should say so. Regardless, he should directly answer the question. This article's author often told witnesses that if they are asked the time of day, they should recite the *time*, not the size and make of their watch. If an uncomfortable question placing him in an unfavorable light is asked, answer the question, and do not deflect by attempting to change the subject. Finally, he should not argue with defense counsel nor admit to untrue things.

Familiarize the cooperator with his prior statements and records pertinent to his testimony. Show him the way these items can refresh his recollection.[46] Inform him that defense counsel will use these same items to contradict him on cross-examination.[47]

J. Corroborate the accomplice witness

Strong corroboration persuades the jury that the accomplice is telling the truth. Corroborate means to support with evidence and "make more certain."[48] This action means verifying the accomplice's testimony *impli-*

---

45 Read, *supra* note 25, at 188.

46 *See* Fed. R. Evid. 612.

47 *See*Fed. R. Evid. 613.

48 *Corroborate*, Black's Law Dictionary (11th ed. 2019).

cating the defendant by other reliable independent evidence.

Merely presenting evidence showing that the accomplice was truthful about an uncontested matter is insufficient if such evidence does not connect the defendant to the crime. For instance, proof that there was a light pole at the crime scene does not corroborate the accomplice's accusation that the defendant participated in committing the crime. Corroboration requires independent proof of some fact or circumstance implicating the defendant. On that front, there are many forms of corroboration.

Direct corroborative evidence includes opposing party statements[49] and comes from consensually recorded phone calls, hidden body cameras, and court-authorized interceptions evidencing the defendant's admissions to the accomplice.[50] Likewise, searches of computers or telephones may yield incriminating emails and text messages.

Circumstantial corroboration, however, is more common and includes electronic and telephone interactions, crime scene evidence, seizures from searches, and conduct evidencing consciousness of guilt.

In some cases, police body cameras capture the accomplice and defendant with firearms, contraband, and other confirming evidence. For instance, following an attempted murder in another city, police stopped a vehicle with several gang members possessing firearms, including one used in the shooting.[51] This stop-and-seizure in a different city than the shooting was not significant until years later when an accomplice pointed out the incident to investigators, who then located the body camera footage and the firearm.[52]

Likewise, crime scene surveillance videos can support accomplice testimony. Despite footage that obscures faces, an accomplice's testimony can confirm the number of participants, their positioning, and their actions. The accomplice can also identify the defendant and the other participants in the video.

In white-collar and public corruption cases, a strong paper trail exists to support the cooperator's testimony and includes financial records, correspondence, and electronic communication. Often, the cooperator can identify and testify about these records.[53] Seized clandestine records of illicit activity that conspirators created can corroborate accomplices.[54]

---

49 Fed. R. Evid. 801(d)(2).

50 Akerman, *supra* note 12, at 1013.

51 United States v. Hunt, No. 4:17cr52 (E.D. Va. Dec. 10, 2019).

52 *Id.*

53 Akerman, *supra* note 12, at 1014.

54 United States v. Orena, 32 F.3d 704, 715 (2d Cir. 1994) (loansharking records seized from the apartment admitted as co-conspirator statements).

Another form of corroboration is real-time statements during the crime or the aftermath. Such evidence created before the accomplice encountered law enforcement or pleaded guilty is extremely compelling. Incriminating text messages or social media posts occurring in real time are often clustered around criminal episodes.[55] Accomplices are also corroborated by statements against penal interest.[56] The accomplice's prior consistent statements to confidants before arrest or the plea agreement also support his testimony.[57] To prove a state of mind and intent, statements and actions "before they ever thought they would be caught" provide credible snapshots of their intent.[58]

This type of evidence, often implicating the accomplice himself, rebuts the defense's claim that the accomplice "jumped on the case," meaning his testimony is based on his review of discovery, not personal knowledge. Such real-time statements prove that the accomplice, a true insider, implicated himself and the defendant and provided the information well before the discovery was generated and the defendants were charged. Maintain skepticism for outsiders, not members of the conspiracy, seeking a sentence reduction in an unrelated case with uncorroborated knowledge about your case.

Telephone analysis is crucial to corroborating accomplice testimony. Investigators can obtain telephonic evidence capturing GPS and market information allowing them to sequentially map the movements and locations of an individual's telephone(s).[59] Telephone contact lists and call detail information provide association evidence between the accomplice, defendant(s), and conspirators. Expert or summary witnesses can vividly describe and summarize this supporting information.

Forensic evidence, especially physical evidence supporting the accomplice's testimony, is particularly persuasive. Always ask yourself if the crime scene supports the accomplice's information. For instance, ballistics evidence from spent cartridges, later recovered firearms, or both often confirms the accomplice's testimony. In some cases, the accomplice described the firearm(s) used before they were recovered and analyzed. This is a reason that investigators should not leak information about laboratory reports to the accomplice.

Finally, seek to confirm every aspect of the accomplice's testimony

---

55 *See* Fed. R. Evid. 803(1).

56 *See* Fed. R. Evid. 804(b)(3); United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995).

57 *See* Fed. R. Evid. 801(d)(1)(B).

58 Herbert J. Stern, Trying Cases to Win: Summation 347 (1995).

59 *See, e.g.*, United States v. Benson, 957 F.3d 218, 225 (4th Cir. 2020).

with confirmatory evidence. As Herbert Stern stated—

> If your witness says he was in Chicago on May 11, produce the canceled ticket, or the hotel bill. No matter that it is not a critical point. If you thought it important enough for him to swear to it, it is important enough for you to demonstrate to the jury that you have checked! It is also thereafter virtually Impossible to impeach your witness on that particular point.[60]

Upon assembling this evidence, footnote the accomplice's direct examination with unimpeachable corroborative evidence.[61] Integrate these exhibits into the direct examination, thereby making the testimony stronger. Bolster the accomplice with photographs of conspirators, key locations, and crime scene photographs. Corroboration is the armor plating protecting the accomplice witness and your case.

K. Direct examination must anticipate and defuse cross-examination on the plea agreement and other key points.

The rules of evidence allow prosecutors to anticipate cross-examination by bringing out matters affecting the accomplice's credibility[62] and, thus, deliberately removing the sting is a permissible technique to bolster the testimony of cooperating witnesses.[63] With these principles in mind, many federal circuits allow the direct examiner to bring out the terms of the plea or cooperation agreement, including the witness's obligations to testify truthfully.[64]

The organization of the cooperator's direct examination will cover both the witness's weaknesses and strengths.[65] Direct should anticipate and disclose the impeachment evidence against the cooperator such as his plea agreement, prior inconsistent statements, any false statements, and other discrediting evidence.[66] This maintains the prosecutors' ethos by first exposing the witness's blemishes to the jury.

Disclose the felony conviction, plea agreement, and cooperation provisions early in the cooperator's direct examination. Here is an example

---

60 Herbert J. Stern, Trying Cases to Win: Direct Examination 156 (1992).
61 Akerman, *supra* note 12, at 28.
62 *See* Fed. R. Evid. 607.
63 Saltzburg, *supra* note 28, at 119.
64 *See, e.g.*, United States v. Harlow, 444 F.3d 1255, 1262 (10th Cir. 2006); United States v. Martin, 815 F.2d 818 (1st Cir. 1987); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983).
65 Stern, *supra* note 60, at 195.
66 *Id.* at 196.

from the prosecution of an armed drug trafficker.[67] His testimony started with his federal felony conviction and guilty plea as follows:

> Q: Mr. Speller, are you currently in state or federal custody?
>
> A: Federal custody.
>
> Q: What sentence are you serving in federal custody?
>
> A: 120-month sentence, 10-year sentence.
>
> Q: Can you tell us what crimes you were convicted of in federal court?
>
> A: Distribution.
>
> Q: Of what drug?
>
> A: Crack cocaine.
>
> Q: Can you tell us whether you pleaded guilty, or went to trial?
>
> A: Pled guilty.[68]

This testimony showed that, unlike the defendant, this witness accepted responsibility and pleaded guilty. Normally, these prisoner witnesses are dressed in prison garb, and the jury now knows they are already serving or pending sentence.

The direct examination next presented his plea or cooperation agreement and that his sentence was enhanced because he had a prior conviction as follows:

> Q: I'd like to next show you what has been marked as Exhibit 37. Showing you Exhibit 37, what do you recognize it as?
>
> A: My plea agreement.
>
> Q: Now can you tell us; did you sign that plea agreement?
>
> A: Yes sir.
>
> Q: Did you initial every page?
>
> A: Yes sir.
>
> Q: Now this federal conviction that you are looking at, was this the first time you had ever been convicted of a felony drug crime, or had you been convicted of a felony drug crime earlier?

---

[67] Trial Transcript at 144, United States v. McCullers, 395 F. App'x 975 (4th Cir. 2010) (No. 9-4437) (not precedential).
[68] *Id.*

A: I have been convicted before.

Q: As a result of a previous drug conviction was your sentence raised or made longer in this federal case?

A: Yes

Q: Is that in the plea agreement as well?

A: Yes.

Q: Now does your plea agreement require you to cooperate?

A: Yes.

Q: What is your understanding of your obligation under your plea agreement to cooperate?

A: That I will tell the entire truth, to be a hundred percent honest.

Q: What do you expect? What are you hoping will happen as a result of cooperating?

A: It is possible I can get a sentence reduction.

Q: Now have any promises been made that you would get your sentence reduced?

A: No, sir.[69]

Here, the witness's relationship with the government and reason for testifying was established. He testified under a strong plea agreement that considered his prior drug conviction. He hoped to obtain a sentence reduction. The jury learned that no promises of a sentence reduction were made to the witness. Finally, the plea agreement contained all the promises made.

This questioning anticipated and prepared for a vigorous cross-examination of the plea agreement. It also facilitated a redirect—if needed—to cover the plea agreement further and argue the witness's incentive to tell the truth as described earlier.

L. Effectively using and bringing out the witnesses' criminal record and prior bad acts

Some impeachment material concerning the cooperator can be used against the defendant. This enables the prosecutor to place the material in context "by using it as affirmative rather than negative evidence."[70]

---

69 *Id.* at 145–46.

70 Stern, *supra* note 60, at 196.

Ralph Adam Fine states to "make the bad facts win for you."[71] For instance, if the cooperator told the defendant in a robbery case about the cooperator's prior robbery conviction, bring that out. This fact allows you to argue that the defendant recruited the cooperator because he knew his background. Likewise, subject to the rules of evidence, you can present drug use between the defendant and the cooperator where the defendant supplied or shared drugs.[72]

Other impeaching material cannot be placed in a favorable light. Normally place this material at the end of the direct so that it does not form the lens for the jury to hear the witness's testimony.[73] If the cooperator's conduct is uncharged, the jury must understand that he is protected by the immunity provisions of the plea agreement. Here is an example:

> Q: Now Mr. Speller, as part of your plea agreement, was it your understanding that other crimes that you admitted that were not violent, you would not be prosecuted for?
>
> A: Yes.
>
> Q: During 2006–2007 did you also engage in fraud?
>
> A: Yes.
>
> Q: What kind of fraud did you engage yourself in?
>
> A: Credit card fraud.[74]

This information was placed near the end of direct, not exposed for the first time by the defense's cross-examination. Disclosing this issue on direct examination softened the impact of cross-examination.

Reveal the cooperator's drug use history on direct examination. Significant drug use is an additional reason the court will instruct the jury to take the testimony with caution.[75] It also relates to the witness's competency and memory. Many cooperators have an extensive history of drug use—including marijuana—and they should be asked about the impact of marijuana on their memory and when they last used illegal drugs.

---

71 Ralph Adam Fine, The How-to-Win Trial Manual 57 (4th ed. 2008).

72 *See* Fed R. Evid. 404(b). File a motion in limine before offering prior bad acts.

73 Stern, *supra* note 60, at 196; Read, *supra* note 25, at 168.

74 Trial Transcript, *supra* note 67, at 211–12; United States v. McCullers, 395 F. App'x 975 (4th Cir. 2010) (not precedential).

75 Kevin F. O'Malley, Jay E. Grenig & William C. Lee, 1A Federal Jury Practice and Instructions § 15.05.

III. A final word of advice

Anton Myrer's novel *Once an Eagle* about army leadership in the 20th century began with this quote from Aeschylus: "So in the Libyan fable it is told [t]hat once an eagle, stricken with a dart, [s]aid when he saw the fashion of the shaft, [w]ith our own feathers, not by others' hands, [a]re we now smitten."[76] The meaning is clear that we should not provide our opponents with the means of our destruction. Your preparation of accomplices must anticipate the attack, parry it, and prevent the attack from mortally wounding your case. Following these rules will limit the damage and prevent you from becoming the eagle in the Libyan fable.

About the Author

Howard J. Zlotnick is a retired former Managing Assistant United States Attorney for the Newport News Division located in the Eastern District of Virginia. He served as an Assistant U.S. Attorney for over 35 years. Before joining the Eastern District of Virginia, he spent 17 years in the District of Nevada, where he was, at various times, the Criminal Chief, First Assistant, and interim United States Attorney. Earlier in his career, he worked as an Assistant District Attorney in Suffolk County, New York, and as a Navy JAGC officer. He is admitted to practice in Ohio, New York, and Nevada. He received two Executive Office for United States Attorneys Director's Awards in 1997 and 2017. Finally, he has taught as an adjunct at William & Mary Law School, the University of Virginia Law School, and George Washington Law School.

[76] Anton Myrer, Once an Eagle xiii (1968) (quoting Aeschylus).

Confrontation Clause Risks When Presenting Investigative Background

Paul J. Van de Graaf
Senior Litigation Counsel
District of Vermont

I. Introduction

Prosecutors, as good trial lawyers, want to tell a compelling story. Often, the most compelling narrative can be drawn from the course of the law enforcement investigation—how the investigation began, how the investigation proceeded, and how the crime was solved. We see this story line played out regularly on-screen in crime dramas. But this situation poses significant risks because courts may find that the story violates the defendant's constitutional right to confront the witnesses against her. The First Circuit put it this way:

> We recognize that prosecutors, in an effort to make the evidence of defendants' guilt more lively[,] and to captivate the jurors with the drama of the hunt for the solution to the crime, will often organize the presentation of the evidence of guilt in the form of a narrative of the investigation. We do not suggest that prosecutors are prohibited from organizing the legitimate evidence in a lively, appealing manner. But it does not follow that, by choosing a more seductive narrative structure for the presentation of the evidence of guilt, prosecutors expand the scope of the relevant legitimate evidence, so as to convert prejudicial and otherwise inadmissible evidence into admissible evidence.[1]

The case might be one involving the search of a defendant's residence, where the prosecutor asks the officer who obtained the warrant about the leadup to the warrant. It might involve an undercover drug deal, where the prosecutor asks the officer who handled the informant about targeting the defendant. In the past, it was relatively common for prosecutors

[1] United States v. Benitez-Avila, 570 F.3d 364, 369 (1st Cir. 2009).

to introduce such testimony "not for the truth of the matter" but for purposes of "investigative background." More recently, courts have become much more exacting about the introduction of potential hearsay statements implicating the defendant's guilt for the purported purpose of describing the course of the investigation.

This article counsels prosecutors to tailor carefully questions about the course of the investigation that include or suggest out-of-court statements by third parties who are not testifying. The article begins with a brief outline of the current reach of the Confrontation Clause. It then explores several courts of appeals decisions, many over the last decade, warning prosecutors about the risks in offering out of court statements to explain law enforcement actions. It argues that the current line between permissible evidence and constitutional violation cannot be drawn precisely, but the relevance of the investigation, and particularly the defense's challenge of that investigation, must be carefully considered and articulated. The article ends with recommendations to help prosecutors navigate these treacherous waters.

II. Scope of the Confrontation Clause

Twenty years ago, the Supreme Court altered the scope of the Confrontation Clause of the Sixth Amendment in *Crawford v. Washington.*[2] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] This right, however, had been interpreted against the backdrop of traditional rules allowing certain kinds of hearsay testimony in criminal cases. Before the 2004 *Crawford* decision, the Court had interpreted the Confrontation Clause to allow the admission of various out-of-court statements consistent with the evidentiary hearsay rules. In *Ohio v. Roberts,* the Court reviewed prior Confrontation Clause decisions, concluding that the Court "has sought to accommodate these competing interests" between the confrontation right and the long-held acceptance of various hearsay exceptions.[4] The *Roberts* Court held that when a witness is "unavailable," her out of court statements can be admitted without cross examination if they bear "indicia of reliability."[5] "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees

---

2 541 U.S. 36 (2004).
3 U.S. Const. amend. VI.
4 448 U.S. 56, 64–65 (1980).
5 *Id.* at 66.

of trustworthiness."[6] Under this flexible standard, courts often permitted prosecutors to offer evidence about the investigation as background or effect on the listener, as opposed to the truth of the matter asserted in the statements.

Crawford's redrawing of the scope of the confrontation right sought to apply a clearer line, disengaging the constitutional limitation from the hearsay rules. Examining the text of the Confrontation Clause, the Court held that the Constitution barred the introduction of "testimonial" hearsay evidence at trial without actual confrontation.[7] *Crawford* involved a relatively common practice in violent crime prosecutions. The defendant's wife provided a sworn, recorded statement to law enforcement after she witnessed her husband stab another man. The spousal privilege barred her trial testimony. To counter the defendant's self-defense claim, the state prosecutor offered her prior statement that the victim did not possess a knife. The trial court admitted the hearsay as a statement against penal interest, and the state courts held that the wife's statement was sufficiently reliable.

The Supreme Court found that the admission of the statement violated the defendant's constitutional right. If a statement is testimonial hearsay, the declarant must be confronted regardless of the statement's reliability. In summarizing this doctrinal change, the *Crawford* Court explained as follows:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.[8]

While the scope of the Confrontation Clause changed in 2004, several important evidentiary principles remained unchanged. As before, the confrontation right is satisfied if the declarant testifies at trial.[9] That is, if the declarant is cross-examined at trial, the prosecutor can offer the declarant's out-of-court statements within the strictures of the rules of evidence.

Moreover, *Crawford*'s testimonial restriction does not apply to out-of-court statements that do not qualify as hearsay. For example, the *Crawford* Court noted that "[t]he [Confrontation] Clause . . . does not bar the

---

6 *Id.*

7 *Crawford*, 541 U.S. at 51–53, 68.

8 *Id.* at 61.

9 *Id.* at 59 n.9; California v. Green, 399 U.S. 149, 157–58 (1970).

use of testimonial statements for purposes other than establishing the truth of the matter asserted."[10] Significantly, the same principle applies to out-of-court admissions by the defendant or his agents. A defendant's post-arrest admissions to law enforcement, when offered to prove the truth of the matter asserted, satisfy the *Crawford* Court's definition of a "testimonial" statement. Nevertheless, their use at trial does not run afoul of the defendant's confrontation rights because the statements are not hearsay. Indeed, the declarant—as the defendant—cannot cross-examine himself at trial.

Likewise, *Crawford* does not limit the prosecutor's use of co conspirator statements. To begin with, such statements are not hearsay under Federal Rule of Evidence 801(d).[11] In addition, such statements are not testimonial because they are not made to law enforcement officers investigating criminal activity but rather to associates to further the criminal conspiracy.

Finally, the confrontation right is a trial right. It limits the government's use of evidence at trial to convict. It has no bearing on other proceedings, such as grand jury proceedings,[12] detention hearings,[13] suppression hearings,[14] admissibility determinations by the court,[15] sentencings,[16] or supervised release revocations.[17]

Since *Crawford*, the Supreme Court and the lower courts have continued to define what hearsay is "testimonial." In *Crawford*, the Court offered several examples of testimonial hearsay.

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial ma-

---

10 *Crawford*, 541 U.S. at 59 n.9.

11 United States v. Brinson, 772 F.3d 1314, 1320–22 (10th Cir. 2014); Fed. R. Evid. 801(d).

12 United States v. Calandra, 414 U.S. 338, 343 (1974).

13 United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986).

14 United States v. Raddatz, 447 U.S. 667, 679 (1980); McCray v. Illinois, 386 U.S. 300, 313 (1967).

15 United States v. Matlock, 415 U.S. 164, 172–75 (1974).

16 *See, e.g.*, United States v. Berrios-Miranda, 919 F.3d 76, 80 (1st Cir. 2019); United States v. Powell, 650 F.3d 388, 392–93 (4th Cir. 2011).

17 *See, e.g.*, United States v. Henry, 852 F.3d 1204, 1206 (10th Cir. 2017); United States v. Aspinall, 389 F.3d 332, 342–43 (2d Cir. 2004).

> terials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[18]

"Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[19] Elsewhere, the Court stated: "Whatever else the term ['testimonial'] covers, it applies at a minimum . . . to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[20]

But of course, out-of-court statements, even to law enforcement, do not always fit neatly within these categories. In a pair of cases soon after *Crawford*, the Court approved the admission of a 911 call reporting domestic violence but rejected the admission of an interview with the domestic violence victim made to officers arriving on the scene.[21] The Court viewed the 911 call as non-testimonial because it was a call for help during an emergency,[22] while the interview fit squarely within the police investigation of a crime.[23]

Five years later, the Court revisited the definition of testimonial in the context of an interview of a man dying from a shooting. When the police arrived on the scene, they asked the victim about what had happened, who had shot him, and where the shooting occurred. The interview took place shortly before emergency personnel arrived on the scene. Building on *Davis*'s emergency distinction, the Court held that the statement was not testimonial because the officers were still dealing with an emergency, including the possibility of a gunman shooting other victims.[24] The Court wrote that a statement is testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[25] Thus, the current definition of testimonial turns on this "primary purpose" standard, which continues to be drawn in the lower courts, a debate beyond the scope of this article.[26]

---

18 Crawford v. Washington, 541 U.S. 36, 51–52 (2004) (citations omitted).
19 *Id.* at 52.
20 *Id.* at 68.
21 Davis v. Washington, 547 U.S. 813 (2006).
22 *Id.* at 827–28.
23 *Id.* at 829–30.
24 Michigan v. Bryant, 562 U.S. 344 (2011).
25 *Id.* at 356.
26 Also beyond the scope of this article is the application of the testimonial definition to the government's use of forensic evidence at trial, including Bullcoming v. New

III. Hearsay, confrontation, and investigative background

Rather than exploring the precise definition of testimonial hearsay, this article focuses on the intersection between obvious testimonial hearsay and statements offered for purposes other than the truth of the matter asserted. Prosecutors sometimes offer evidence with dual relevance, such as evidence of uncharged criminal conduct offered to prove identity or intent, or purposes other than propensity to commit a crime.[27] For present purposes, prosecutors sometimes offer out-of-court statements by nontestifying declarants that not only explain the course of the investigation but also directly implicate the defendant in the charged conduct. This Part explores the developing case law addressing situations where prosecutors have attempted to admit such statements.

As explained below, several decisions have criticized prosecutors offering such statements to prove the background of the investigation. These courts have questioned the relevance of the investigative background, sometimes reversing convictions because of the impact of the unconstitutional hearsay. This Part describes some of those cases, exploring the line between proper and improper, but concludes that such a line cannot be clearly discerned.

To begin with, in some cases courts have cursorily rejected defense challenges to out-of-court statements offered not to prove the truth of the statements, but for purposes of proving the course of the investigation. For example, in *United States v. Shaw*, the Seventh Circuit addressed admitting anonymous tips in a prison drug possession case.[28] There, the trial court allowed the prison witness to testify about two anonymous tips claiming that the defendant possessed heroin in prison.[29] The tips resulted in finding heroin on the defendant during a search. The court of appeals did not mention the Confrontation Clause. The Seventh Circuit held that the evidence could be admitted properly under two alternative, non-hearsay purposes: the effect on the listener or "the course of the investigation."[30] The court also noted that the defendant "suffered no prejudice," because "he had heroin on his person and presented no

---

Mexico, 564 U.S. 647 (2011) (holding that a forensic examination cannot be introduced through an expert who did not perform the analysis), and Williams v. Illinois, 567 U.S. 50 (2012) (fractured opinions allowing admission of DNA report performed by an out-of-court expert for comparison).

27 *See* Fed. R. Evid. 404(b).

28 824 F.3d 624 (7th Cir. 2016).

29 *Id.* at 629–30.

30 *Id.* at 630.

evidence that someone planted heroin on him."[31]

But in another case, the Seventh Circuit took a more antagonistic approach to this sort of evidence. In *United States v. Silva*, Judge Easterbrook leveled his critical eye on evidence admitted through the Drug Enforcement Administration (DEA) case agent about out-of-court conversations concerning a supplier named "Juan" and statements by an informant, who did not testify, that the defendant went by "Juan."[32] The trial judge admitted the statements over defense objections, instructing the jury that the statements "[were] 'not offered for the truth of the matter.'"[33] Noting that the court had "warned against the potential for abuse when police testify to the out-of-court statements of a confidential informant," Judge Easterbrook opined that "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far towards abrogating the defendant's rights under the sixth amendment and the hearsay rule."[34] The court reversed the conviction.[35]

Other courts of appeals have raised similar concerns. In *United States v. Ibarra-Diaz*, the Tenth Circuit considered the admission of several out-of-court statements by a confidential informant to the case agent handling the investigation.[36] The court found no constitutional issue with several instances of challenged testimony because the agent did not offer hearsay or because the evidence properly "was offered to explain the detective's conduct."[37] With the government's concession, the court reached a different conclusion about the admission of an accomplice's out-of-court statement to law enforcement, a statement that directly implicated the defendant.[38] The court affirmed under plain error review.[39]

Sometimes, courts focus on the hearsay issue rather than the con-

---

31 *Id.*; *see also* United States v. Gutierrez, 810 F. App'x 761, 766 (11th Cir. 2020) (not precedential) (finding agent testimony about cooperating source's out-of-court statements admissible as non-hearsay because it explained how the investigation began).

32 380 F.3d 1018 (7th Cir. 2004).

33 *Id.* at 1019.

34 *Id.* at 1020.

35 *Id.* at 1021.

36 805 F.3d 908 (10th Cir. 2015).

37 *Id.* at 925.

38 *Id.* at 926.

39 *Id.* at 928; *see also* United States v. Hinson, 585 F.3d 1328, 1337 (10th Cir. 2009) ("Where the government introduces evidence that bears on the ultimate issue in a case but that is not necessary to explain the background of a police investigation, the only reasonable conclusion we can reach is that the evidence was offered, not as background, but as support for the government's case against the defendant.").

frontation right. The First Circuit, in *United States v. Benitez Avila*, addressed the admission of an out-of-court statement from an informant identifying the robber as a "twin," when the defendant was a twin.[40] The court rejected the government's claim that the evidence was admissible for purposes of explaining the investigation because the defendant had not put the investigation "in issue."[41] "A prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence, or by asserting that it has a nonhearsay relevance to an issue that is itself not relevant."[42]

Indeed, courts have reversed convictions based on abuse of the hearsay rules before *Crawford* redrew the confrontation right. In *United States v. Reyes*, the court criticized the prosecutor's repeated use of the case agent to imply out-of-court statements by non testifying accomplices.[43] For example, at trial, the prosecutor asked the case agent whether he spoke with the accomplices and then asked:

> Q: As a result of your further conversations, did you come to a conclusion that there were other individuals involved in this criminal enterprise?
>
> A: Yes, I did.
>
> Q: And who were those other individuals?
>
> A: Rafael Reyes [testifying cooperator] and Jeffrey Stein [defendant].[44]

The government defended the testimony as background evidence, but the court disagreed, questioning the relevance of investigative background here. Citing Federal Rule of Evidence 403, the court held that the highly prejudicial nature of the admitted testimony outweighed its slight probative value.[45] The court also found that the trial court's limiting instruction was insufficient to avoid reversible error.[46]

The Fifth Circuit, however, has recently raised the loudest voices against investigative background evidence. In *United States v. Kizzee*, the court addressed a challenge to a series of questions from the prosecutor to the detective about his investigation leading up to a search warrant

---

40 570 F.3d 364 (1st Cir. 2009).
41 *Id.* at 368–69.
42 *Id.* at 369.
43 18 F.3d 65 (2d Cir. 1994).
44 *Id.* at 67.
45 *Id.* at 70–71.
46 *Id.* at 72.

that resulted in the defendant's arrest, though no drugs were found.[47] The detective testified that, before the search at 963 Trinity Cut Off, he saw a man named Brown leave the house. Officers soon stopped Brown and found crack on his person. He told officers that he had purchased the crack from Kizzee, but later refused to testify. At trial, the prosecutor was permitted to conduct the following direct:

> Q: Detective Schultz, did you ask Mr. Brown a series of questions after you arrived at the police department?
>
> A: Yes, sir, I did.
>
> Q. Did you ask Mr. Brown whether or not he obtained the narcotics that were discovered in his hat from Pereneal Kizzee?
>
> A: Yes, sir, I did.
>
> Q: Did you ask him if he obtained the narcotics that were discovered in his hat immediately prior to being stopped?
>
> A: Yes, sir.
>
> Q: Did you ask Mr. Brown whether or not he had seen any additional narcotics at 963 Trinity Cut Off?
>
> A: Yes.
>
> . . .
>
> Q: Did you ask him whether or not he obtained drugs from Mr. Kizzee on previous occasions?
>
> A: Yes, sir.
>
> Q: Based on your [investigation] . . . and your subsequent interview of Mr. Brown, what did you and Detective Lehman do?
>
> A: I was able to obtain a search warrant for 963 Trinity Cut Off.[48]

The court broke its Confrontation Clause analysis into three issues: (1) Were the out-of-court statements testimonial; (2) were the statements offered for their truth; and (3) did the declarant testify?[49] The court rejected the government's overly technical claim that it did not offer statements because the detective never reported what Brown said.[50] Prosecutors cannot duck confrontation issues by merely implying out-of-court

---

[47] 877 F.3d 650 (5th Cir. 2017).
[48] *Id.* at 655.
[49] *Id.* at 656.
[50] *Id.* at 657.

statements. The heart of the analysis must be the dual use of the testimony, both to explain the detective's action (not for truth) and the obvious inculpatory nature of the statements. The court held that the government could not defend the evidence to "explain Detective Schultz's actions."[51] "Admitting testimony regarding Brown's interrogation was not necessary to explain Detective Schultz's actions; there was minimal need for Detective Schultz to explain the details forming the basis of the search warrant."[52] Finally, the court rejected the government's argument that the defendant had the opportunity to cross-examine Brown by subpoenaing him as a witness.[53] Because the error was not harmless, the court reversed the conviction.[54]

Since *Kizzee*, the Fifth Circuit has reversed two other convictions based on violations of the defendant's confrontation rights. In *United States v. Jones*, the court reversed based on the arresting agent's testimony about statements from his confidential informant reporting that the defendant had a large quantity of methamphetamine.[55] Last year, in *United States v. Hamann*, the court found error with the government's direct examination of the case agent describing an undercover operation.[56] The agent testified that the informant, who did not testify, told him that "'Cali' was 'moving multiple ounces' of meth."[57] The agent was also allowed to testify about the informant's statements about events during the undercover purchase. The trial court allowed this testimony as explaining the investigation. Relying on its previous decisions addressing confrontation errors, the court had little problem finding a constitutional violation because the testimonial hearsay "specifically link[ed] a defendant to the crime."[58]

IV. When and how to offer investigative background evidence

This developing circuit case law exposes the risks of admitting out-of-court statements by informants or accomplices that directly implicate

---

51 *Id.* at 660.
52 *Id.*
53 *Id.* at 660–61.
54 *Id.* at 663.
55 930 F.3d 366, 376–78 (5th Cir. 2019).
56 33 F.4th 759 (5th Cir. 2022).
57 *Id.* at 764.
58 *Id.* at 770 (quoting *Jones* and *Kizzee*); *see also* United States v. Sharp, 6 F.4th 573, 582–83 (5th Cir. 2021) (confrontation violation from admission of tip does not lead to reversal because of plain error analysis).

the defendant, even with limiting instructions. Put simply, prosecutors should not rely on the general, limited relevance of explaining the investigation to admit these statements, either directly or impliedly. The case law, however, suggests some circumstances where such testimony should pass constitutional muster. Instead of viewing this line from the perspective of familiar Rule 403 balancing—that is, whether the probative value is substantially outweighed by unfair prejudice—this article recommends a more conservative approach. Based on the judicial concerns with investigative background, prosecutors should limit this potential hearsay to circumstances where the defense has challenged the investigation and the out-of-court statement helps rebut this defense challenge:

> The dividing line often will not be clear between what is true background to explain police conduct (and thus an exception to the hearsay rule and thus an exception to *Crawford*) and what is an attempt to evade *Crawford* and the normal restrictions on hearsay. But we are on firm ground in warning prosecutors of the risks they face in backdoor attempts to get statements by non-testifying confidential informants before a jury.[59]

The need for such evidence should be greater than providing the jury with background on the investigation. The prosecutor should "advance a specific reason why it needs to provide inculpatory 'context' for its investigation."[60] One such reason would be that the defense "challenge[d] the adequacy of [the] investigation."[61] Put another way, such evidence becomes more probative if "the defendant engaged in a tactic that justifiably opens the door to avoid prejudice to the Government."[62] "This type of evidence will be allowed into evidence to explain a police investigation . . . only when the propriety of the investigation is at issue in the trial."[63] For example, a detective properly testified about an out-of-court statement implicating the defendant "because the [defense's] cross-examination of [the detective] had suggested that there was something improper about the repeated interviews of the defendant."[64] Similarly, out-of-court statements allowed the prosecutor to respond properly to

---

59 United States v. Maher, 454 F.3d 13, 23 (1st Cir. 2006).

60 *Hamann*, 33 F.4th at 770.

61 United States v. Kizzee, 877 F.3d 650, 659 (5th Cir. 2017).

62 United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994).

63 United States v. Holmes, 620 F.3d 836, 841 (8th Cir. 2010).

64 United States v. Elysee, 993 F.3d 1309, 1340 (11th Cir. 2021) (alterations in original) (quoting United States v. Jiminez, 564 F.3d 1280, 1287 (11th Cir. 2009)).

pointed cross examination of officers about not pursuing other possible suspects.[65]

In these circumstances, if the government anticipates the need for such testimony, the prosecutor should brief the matter in a motion in limine. If successful in admitting the evidence, the prosecutor should seek a limiting instruction from the judge. Moreover, the prosecutor should handle such evidence carefully during closing argument, not using it for the disallowed purpose—that the statement is true—but only for the permitted purpose—responding to the defense challenge to the investigation.

This recommendation should not be read as a prohibition against offering evidence about the background of the investigation. Such evidence can be compelling, but the careful prosecutor should craft the direct to avoid testimony that recounts or implies out of-court statements by a non-testifying declarant that directly implicate the defendant in criminal conduct, especially the charged criminal conduct. Oftentimes, "the needed explanation of background or state of mind [can] be adequately communicated by other less prejudicial evidence."[66] Therefore, "[e]ven if there had been sufficient reason to explain to the jury why the agent investigated [the defendant], that explanation was amply provided by the fact that his address had been used by [accomplices] in renting the red van and appeared again on [an accomplice's] matchbook cover."[67] In short, prosecutors can and should set the stage and describe the investigation without risky out-of-court statements.

Finally, prosecutors can avoid confrontation issues by calling the declarant to testify. As noted above, the declarant's testimony allows for confrontation. To be sure, the accomplice or informant may be unavailable, but sometimes prosecutors resist calling such witnesses based not on unavailability but on credibility concerns. Prosecutors should consider whether the circumstances of the out of court statement adequately support the credibility of the testimony. For example, in a case where the agent testifies about obtaining a warrant on a particular day, the informant could describe her knowledge about the defendant and explain that she had spoken with the agent at a time before the agent got the warrant. If the warrant execution implicated the defendant, the circumstances provide corroboration of the informant's testimony.

In some cases, calling the declarant might allow the prosecutor to admit an out-of-court statement directly as a prior consistent statement under Federal Rule of Evidence 801(d)(1)(B)(i) or (ii). Prosecutors should

---

65 United States v. Cruz-Diaz, 550 F.3d 169, 178 (1st Cir. 2008).

66 *Reyes*, 18 F.3d at 70.

67 *Id.* at 71.

more regularly consider prior consistent statements.

Rule 801(d)(1)(B)(i), on the one hand, directs that prior consistent statements by a declarant-witness are not hearsay when "offered . . . to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying."[68] In some cases, the defense may contend that the declarant had an improper motive when providing the original out-of-court statement,[69] but in other circumstances the defense may impeach credibility with events between the time of the statement and the time of the testimony. For example, the informant may have been arrested and entered a cooperation agreement between the two events. If the defense impeaches based on this cooperation agreement, the prosecutor may be permitted to use the prior consistent statement.[70] Sometimes, the prior statement, especially in the context of other evidence, will be sufficient to override the witness's other credibility issues, such as drug use or prior criminal involvement.

Rule 801(d)(1)(B)(ii), on the other hand, defines as nonhearsay prior consistent statements by a witness "to rehabilitate the declarant's credibility as a witness" on grounds other than recent fabrication or improper influence.[71] This little used rule was expanded in 2014 and can be quite helpful to prosecutors. For example, if the defense challenges an informant based on an inability to recall because of drug use, the prosecutor might be permitted to introduce the prior consistent statement (not as substantive evidence but) to rebut the impeachment that the drug addict was forgetful.[72] In *United States v. Ledbetter*, the court described the first step in deciding admissibility under the new amendment to be determining precisely how the witness's credibility was attacked and then determining if the prior statement rebuts that attack.[73]

In sum, courts now turn a more cautious eye on prosecutorial narratives that are based on the course of the investigation, at least when

---

68 Fed. R. Evid. 801(d)(1)(B)(i).

69 In Tome v. United States, 513 U.S. 150 (1995), the Court held that the prior consistent statement must be made before the improper influence or motive.

70 *See* United States v. Ruiz, 249 F.3d 643, 647 (7th Cir. 2001); United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996); United States v. Forrester, 60 F.3d 52 (2d Cir. 1995).

71 Fed. R. Evid. 801(d)(1)(B)(ii).

72 *See, e.g.*, United States v. Camp Flores, 945 F.3d 687, 704–06 (2d Cir. 2019); United States v. Portillo, 969 F.3d 144, 175 (5th Cir. 2020); United States v. Cox, 871 F.3d 479, 487 (6th Cir. 2017).

73 184 F. Supp. 3d 594, 598–601 (S.D. Ohio 2016). Under this rule, a prior consistent statement can also be admitted to rebut impeachment based on a later, prior inconsistent statement.

they include out-of-court statements by non-testifying declarants. These courts have emphasized how such evidence conflicts with the defendant's confrontation rights. Prosecutors can and should still use this powerful narrative but should avoid relying on such evidence unless the defense attacks the investigation itself.

About the Author

Paul J. Van de Graaf is Senior Litigation Counsel for the United States Attorney's Office in the District of Vermont. He has served as an Assistant U.S. Attorney for 36 years, first in the United States Attorney's Office in the Eastern District of Pennsylvania. He has investigated and tried a wide variety of criminal cases, from complex fraud to murder. He served as Criminal Chief in Vermont for 16 years. He is a member of the American Law Institute.

Zoom, Confrontation, the Pandemic, and Best Practices or: How I Learned to Stop Worrying and Love Zoom Hearings

Stewart M. Young
Assistant U.S. Attorney
District of Utah

During the COVID-19 pandemic, prosecutors had to become increasingly comfortable with Zoom/teleconference/WebEx/remote court hearings. For those of us familiar with this technology (and who enjoyed wearing a suit top with shorts during hearings), this pivot was a godsend. Often working from home, possibly handling remote schooling for our kids, while also appearing at initial appearances, detention hearings, motions, and sentencings, the vast majority of Assistant U.S. Attorneys (AUSAs) became *much more* adept at remote hearings. My only personal regret, thus far, is that no defendant of mine agreed to a proposed Zoom bench trial so that I could finally try a case wearing shorts.

After two years of Zoom/remote hearings, we would like to think that we finally have a good handle on this type of litigation, especially as courts around the country begin to open up and begin in-person jury trials again. (Of course, your district's mileage may vary—you may have been dealing with in-person hearings the entire time.) The following article is a jaunty but hopefully useful journey: First, we will discuss confrontation issues with Zoom/remote hearings as well as the caselaw that has begun to develop. Then, we will hit some snapshots of interesting videoconferencing-related federal criminal litigation around the country, with some useful takeaways from those snapshot cases. And we will conclude with some final thoughts. Let's dive in!

I. The Confrontation Clause

First up is a quick primer on the Confrontation Clause. The Confrontation Clause states: "In all criminal prosecutions, the accused shall

enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] In *Crawford v. Washington*, the Supreme Court held that, under the Confrontation Clause, "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[2] Subsequently, in *Davis v. Washington*, the Supreme Court elaborated on which statements are testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[3]

During the pandemic, as courts transitioned to Zoom, teleconference, and videoconference, the right to confront witnesses reared its head. In a nationwide pandemic, how would the right to confront witnesses play out when such a right is generally required in "open" court? While all the answers have not yet materialized, certain court cases provide answers to *some*, but not all, the questions at this juncture.

II. Zoom jury selection, at least in a pandemic, is fine, especially if the defendant consents

While some courts did not go whole hog with Zoom jury trials, some of them determined the efficaciousness of jury selection via Zoom. For instance, the Superior Court in King County, Washington, conducted jury selection for all jury trials primarily using videoconference technology.[4] While some courts moved wholly online in late 2020, "many judges, defense lawyers and public defenders have been cool to the idea of holding virtual criminal jury trials because of concerns about whether the process would be fair to defendants."[5] Indeed, even *The Washington Post* touted

---

[1] U.S. Const. amend. VI.

[2] 541 U.S. 36, 59 (2004).

[3] 547 U.S. 813, 822 (2006).

[4] *See* Sup. Ct. of Wash., Order re: Modification of Jury Trial Proceedings, No. 25700-B-631.

[5] *See* Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat – and Finally a Verdict*, Wash. Post (Aug. 12, 2020).

that technical issues arose during jury selection in a small Austin, Texas, misdemeanor proceeding, as "[f]ive potential jurors or jurors had to be dismissed for technical issues during jury selection and the trial. Audio and video feeds occasionally froze."[6] The judge had to chastise jurors for looking at other screens during the proceedings, and the biggest concern was that "jurors might be distracted by email, children or something else in their homes."[7]

The Civil Jury Project at New York University School of Law discussed certain concerns relating to "Jury trial by Zoom," noting that "no authority exists—in the federal Constitution or most state analogues—prohibiting this . . . ."[8] While a defendant has a right to be present at all critical stages of trial, there is a question as to whether "Zoom presence" is truly presence. And yet courts had to figure out how to proceed—while, at a minimum, online jury voir dire appears to be copacetic.

In March 2020, Richard Kiner assaulted his girlfriend, for which he was then prosecuted. The State of Washington experimented with Zoom voir dire and argued that the results validated their decision. They pointed to *United States v. Knight* to validate their experiment, noting that the Ninth Circuit upheld that prosecution with "all seated jurors [] present in person for the full trial," as well as the *Knight* panel's finding "that the remote participation of potential jurors for voir dire is not reversible error absent some specific showing of prejudice."[9] Several federal courts joined the Ninth Circuit, discussing how certain techniques of voir dire—such as being masked up—failed to create a constitutional conundrum.[10]

The State of Washington argued in *Kiner*, however, that "common experience demonstrates that most of these things can be readily observed on a screen. In fact, remote voir dire offers certain advantages in this regard, as '[a] screen brings the jurors' face much closer . . . than is possible in person,' therefore allowing 'greater scrutiny of . . . facial

---

6 *Id.*

7 *Id.*

8 Michael Pressman & Michael Shammas, *Memorandum: The Permissibility & Constitutionality of Jury Trial by Videoconference* (N.Y.U. Sch. L./Civ. Jury Project, New York, N.Y.) May 4, 2020.

9 Brief of Respondent at *53, Washington v. Kiner, No. 83593-9-I (Wash. Ct. App. 2023), 2023 WL 2072215.

10 *See, e.g.*, United States v. James, No. CR-19-08019-001, 2020 WL 6081501, at *1, *3 (D. Ariz. Oct. 15, 2020) (holding that the use of masks that obstruct observation of potential jurors' noses and mouths during voir dire did not violate a defendant's right to an impartial jury); United States v. Crittenden, No. 4:20-CR-7, 2020 WL 4917733, at *1, *8 (M.D. Ga. Aug 21, 2020) (holding that the use of masks, which obstruct portions of witnesses' expressions from the view of jurors, did not violate a defendant's constitutional rights).

expressions . . . .'"[11] And the *Kiner* prosecutors further noted that "the use of videoconference technology allows for better observation of jurors' facial expressions than face masks which are still required to be worn in all superior court courtrooms in King County in order to prevent the spread of Covid-19."[12]

Washington State's argument in *Kiner* makes sense, as the defendant arguably could not establish that the result of his trial would have been different if the district court held jury selection in person.[13] The prosecution argued that the defendant could not point to anything in the record, other than his own speculative beliefs, that his counsel was unable to effectively question and evaluate potential jurors.[14] At various points, of course, some jurors had moments of frozen Zoom or failed to unmute themselves temporarily. Yet the defendant and his counsel could still evaluate their demeanor and responses to questions.[15] Thus, according to the prosecution, the defendant could not point to how remote jury selection seated "any biased juror" and any error he claimed would be harmless.[16] Interestingly, the *Kiner* prosecutors actually emphasized that "[t]his Court should find that rather than prejudicing Kiner's right to a fair trial, the procedures adopted by the trial court enhanced that right."[17]

Takeaways

The *Kiner* arguments (and other cases) demonstrate that Zoom voir dire generally appears constitutional. Unless a defendant can show some structural problems with the remote voir dire process, such as technological issues, inability to see the individual jurors, difficulty understanding their answers, etc., the courts should bless Zoom voir dire going forward.

---

[11] Brief of Respondent, *supra* note 9, at *54 (alteration in original) (quoting Kimberly Henrickson, *COVID-19 & the Courts: The Pandemic's Impact on the Practice of Litigation and Considerations for Future Remote Proceedings*, 40 Rev. Litig. 305, 323 (2021)).

[12] *Id.* at *54–55.

[13] *See id.* at *56.

[14] *Id.*

[15] *See id.* at *56–57.

[16] *Id.* at *57.

[17] *Id.*

III. Zoom jury participation is also fine if the defendant consents

Sparks, Nevada, is a town of about 100,000 residents and about ten minutes from Reno. (Essentially, it appears to be one of the biggest little suburbs of Reno.) In July 2019, two stores were robbed in that town, and a federal jury convicted Edward Knight for those robberies after a six-day trial.[18] Knight appealed, complaining about structural error in his conviction because the district court allowed a juror to participate remotely for the first two days of trial.[19]

After jury selection, which was conducted in person, a juror notified the court on the next day that his wife felt ill. Concerned about COVID, the district court discussed with the parties about how they should proceed.[20] Three options lay before them: 1) Allow the juror to participate by Zoom and allow him to join deliberations if his wife were "clear" (and if not, then dismiss him, as they had already picked two alternates); 2) dismiss the juror and seat the alternate immediately; or 3) delay trial until the juror could return to normal activities.[21] The prosecutors favored dismissal of the juror, while the defendant preferred the first option.[22] The court engaged in the following colloquy with the defendant:

> THE COURT: Mr. Knight, if—you can insist that all the jurors participate at the trial in person. But if you agree to have [the juror] watch the trial via Zoom—and of course he would have to participate with deliberations in person, but, for now, he could watch the trial via Zoom. If you consent to it, I will take that approach. Do you agree?
>
> DEFENDANT KNIGHT: Yes, ma'am. I agree.
>
> THE COURT: Have you had a chance to talk to your attorney about that option before consenting?
>
> DEFENDANT KNIGHT: Yes, ma'am.
>
> THE COURT: I want to make sure you understand that you have the option of electing not to proceed with that option. If you object to proceeding with that option, I will not proceed with that option. Do you understand that?

---

18 United States v. Knight, 56 F.4th 1231, 1233 (9th Cir. 2023).
19 *Id.*
20 *Id.*
21 *Id.* at 1233–34.
22 *Id.* at 1234.

> DEFENDANT KNIGHT: Yes, ma'am.
>
> THE COURT: Knowing that, is it still your decision to consent to have [the juror] participate and view the trial via Zoom?
>
> DEFENDANT KNIGHT: Yes, ma'am.
>
> THE COURT: All right. I find that Mr. Knight understands that he has the right to insist that [the juror] participate in the trial in person, and he's waived that right and consents to have [the juror] view the trial via Zoom for now.[23]

Based on that colloquy with the court, the defendant clearly agreed to allow the juror to watch proceedings via Zoom and then participate in the deliberations in person.[24] Helpfully, "[a]t the end of the day, the district court noted for the record that she and her clerk could see [the juror] on their computer screens and that the clerk and [the juror] had established a procedure for him to notify the clerk if he were not able to hear or see what was going on in the courtroom."[25]

After the government noted further concerns at the end of the first day of trial, the court engaged in another colloquy with the defendant about his rights.[26]

> THE COURT: Mr. Knight, let me ask you again. You've heard some exchange now. I want to make sure that you know you have a right to insist that [the juror] participate at this trial in person. Do you understand that?
>
> DEFENDANT KNIGHT: Yeah. I understand what's going on.
>
> THE COURT: And this morning you've had a chance to talk to your attorney about waiving that right and allowing [the juror] to participate by video, is that right?
>
> DEFENDANT KNIGHT: Yes, ma'am.
>
> THE COURT: Having conferred with your attorney, is it your decision to consent to have [the juror] . . . participate and view this trial by video?
>
> DEFENDANT KNIGHT: Yes, ma'am.

---

23 *Id.* at 1234.
24 *See id.*
25 *Id.*
26 *Id.* at 1235.

> THE COURT: All right. I still find that Mr. Knight understands his right, and that his consent is knowing and voluntary and I will accept his consent.[27]

Mr. Knight was convicted and received a sentence of 169 months.[28] As is likely to happen after conviction and a large sentence, he decided that permitting a juror to participate remotely "violated his Fifth and Sixth Amendment rights" and argued that the error was structural, which cannot be waived.[29] The Ninth Circuit panel analyzed the defendant's claims of structural error, noting that certain types of errors are, in fact, structural.[30]

Knight's best argument was that allowing a juror to participate in a criminal trial via Zoom deprived him of his right to a fair and impartial jury.[31] While he claimed that remote participation interfered with the functioning of the jury, the *Knight* panel noted that "allowing remote juror participation does not impact the entire framework of the trial in ways that cannot be accurately measured on review."[32] While the panel noted that there is "room for . . . types of problems and errors . . . such as difficulties in seeing exhibits, hearing testimony, and/or viewing witnesses[,]" there is no presumption "that the remote participation of a juror will always render a trial unfair and the judgment unreliable . . . ."[33] Thus, if there were error, the *Knight* panel found it to be non-structural, which is waivable.[34] Ultimately, the Ninth Circuit panel held that the district court's procedure "used in this case to confirm that the waiver was knowing, voluntary, and intelligent was sufficient."[35] Because the district court repeatedly advised the defendant about his options and discussed all potential issues with the parties, there could be no error when the defendant appropriately waived his rights.[36] Accordingly, because the district court carefully advised Knight about his rights, the

---

27 *Id.*

28 *Id.* at 1233.

29 *Id.* at 1235.

30 *Id.* at 1235–36 (These include, inter alia, a biased trial judge, denial of counsel, denial of self-representation, race discrimination in grand jury selection, directing entry of judgment in favor of the prosecution, defective reasonable doubt instructions, and failure to give oral instructions to the jury).

31 *Id.* at 1236.

32 *Id.*

33 *Id.*

34 *Id.* (citing United States v. Olano, 507 U.S. 725, 731 (1993) (noting that a constitutional right may be forfeited in criminal cases)).

35 *Id.* at 1237.

36 *Id.*

Knight panel upheld his conviction.

Takeaways

The *Knight* case demonstrates that, in certain circumstances, a juror may be able to participate remotely. At least one, and possibly two, colloquies with the defendant will likely ensure that the appellate court blesses remote juror participation (even in the Ninth Circuit!). Your mileage may vary, but make sure that your district court engages in a useful colloquy and establishes a good record before feeling comfortable proceeding in this manner.

IV. Zoom trial testimony with a defendant's consent is fine too

Thus far, not many courts have tried out full and complete Zoom trial testimony. But several courts have dealt with calling certain trial witnesses who are favorable to the defendant. Indeed, if a defendant can call a witness for himself, then he can clearly choose to waive his Confrontation Clause rights as well for that witness. In *Boykin v. Alabama*, for example, the Supreme Court recognized that a defendant might waive his Confrontation Clause rights, and that defendants commonly do so when they decide to plead guilty.[37] The Tenth Circuit has explicitly noted that a defendant can waive his Confrontation Clause right a trial, "at least where there is an explicit waiver."[38] "A Confrontation Clause violation does not occur when a defendant calls a non-hostile witness telephonically or via videoconference."[39] And in some districts, when a defendant calls his own witnesses, the court will require the defendant to execute a written waiver of his Confrontation Clause rights to be filed with the court.[40]

Often, a defendant will open the door himself by his actions when it comes to calling a witness. In *Lopez-Medina*, the government accused

---

[37] 395 U.S. 238, 270 (1969).

[38] United States v. Lopez-Medina, 596 F.3d 716, 730–43 (10th Cir. 2010) ("Prior to *Crawford*, we held there was 'no doubt' a defendant could waive his rights under the Confrontation Clause." (quoting Hawkins v. Hannigan, 185 F.3d 1146, 1154 (10th Cir. 1999))); s*ee also* Earhart v. Konteh, 589 F.3d 337, 344 (6th Cir. 2009) (recognizing that such a waiver can be permissible in the context of the prosecution admitting one of its witness's videotaped depositions).

[39] United States v. DeLeon, 418 F. Supp. 3d 682, 749 (D.N.M. 2019).

[40] *E.g.*, United States v. Ganadonegro, No. CR 09-0312, 2012 WL 400727, at *1, *16 (D.N.M. Jan. 23, 2012).

the defendant of drug distribution in a small town in Utah.[41] During the investigation, agents met with a confidential informant, who told the agents that they had missed evidence during the search of a residence.[42] The informant told agents about a particular pickup truck that would have 15 pounds of methamphetamine in it. An agent obtained a search warrant for the truck and located methamphetamine after the search. During trial, defense counsel explored the agent's information that the confidential informant provided, but then complained about his right to confrontation being violated when the court admitted hearsay statements from the confidential informant on redirect.[43] While the court found that the informant statements were "clearly testimonial," it also found that the hearsay statements were properly admitted because the defendant's counsel opened the door during cross-examination.[44] In one of the best transcripts that this Author has ever seen, during cross, the government asked for a sidebar. At that sidebar, defense counsel explained, "I think, Your Honor, [the government is] worried that I am going to bring in the confidential informant information. That's my full intention. I don't care what door we open. If I open up a door, please feel free to drive into it. But I am going to explore the entire case."[45]

Ultimately, the *Lopez-Medina* panel found that the defendant had waived his Confrontation Clause right when his counsel purposefully and explicitly opened the door, "'so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy.'"[46]

Much more recently, in Idaho, the defendants expected their trial to begin in June 2021 on a series of wire fraud, mail fraud, money laundering, and counterfeit-goods trafficking charges.[47] During the investigation, defense counsel traveled to Brazil to interview seven witnesses about these

---

41 596 F.3d at 721.

42 *Id.* at 722.

43 *Id.* at 730.

44 *Id.* 730–31.

45 *Id.* at 731 (alteration in original).

46 *Id.* (quoting United States v. Aptt, 354 F.3d 1269, 1282 (10th Cir. 2004)); *see also* United States v. Dazey, 403 F.3d 1147, 1169 (10th Cir. 2005) ("Defense counsel's stipulation to admission of evidence effectively waives the defendant's confrontation rights unless the defendant can show that the waiver constituted ineffective assistance of counsel.").

47 United States v. Babichenko, No. 1:18-CR-00258, 2021 WL 1759851, at *1 (D. Idaho May 4, 2021).

charges.[48] The defendants, seeking to allow live videoconference testimony, asserted that all seven witnesses were "willing to testify and will provide exculpatory testimony that is material to their defense."[49]

The district court analyzed Federal Rule of Criminal Procedure 26 and *Maryland v. Craig*[50]. to help decide whether to allow this testimony. Such testimony is upheld "when it is necessary to further an important policy and where the reliability of the testimony is otherwise assured."[51] Applying the principles of *Craig* (and noting that no Confrontation Clause concern existed), the district court found that "permitting live videoconference testimony of the defense witnesses promotes both the interest of justice and provides the indicia of reliability sufficient to satisfy *Craig*."[52] It noted the difficulties of travel from Brazil, especially given the lack of COVID-19 vaccination opportunities in that country.[53] Overall, given Brazil's legal system and its "robust diplomatic relations, particularly with respect to mutual legal assistance in criminal matters," the district court believed that proceeding with live videoconference trial testimony was appropriate.[54]

All these developments are great for prosecutors. But COVID-19 fails to provide a blanket allowance for videoconference testimony at trial. Recently, the Nevada Supreme Court concluded that a trial court violated a defendant's right to confrontation by allowing two witnesses to testify remotely at a murder trial.[55] In *Newson v. State*, the state prosecutors moved to have two of their witnesses testify via an in-court, live videoconference call.[56] One of the witnesses "worked almost every day, could not afford to appear for trial other than by video, and lived in Phoenix, Arizona."[57] The other witness had started a new job and now lived in California.[58] But the State did not proffer any COVID-19-related concerns for their witnesses.[59] In granting the motion, the district court failed to make any findings as to why remote witness participation was

---

48 *Id.*
49 *Id.*
50 497 U.S. 836 (1990)
51 *Babichenko*, 2021 WL 1759851, at *1 (cleaned up) (quoting United States v. Carter, 907 F.3d 1199, 1206–08 (9th Cir. 2018)).
52 *Id.* at *1.
53 *Id.* at *2.
54 *Id.*
55 Newson v. State, 2023 WL 2718469 (Nev. 2023).
56 *Id.* at *1.
57 *Id.*
58 *Id.*
59 *Id.*

necessary, and the witnesses both testified remotely.[60] Ultimately, the Nevada Supreme Court held that the remote witness participation violated the defendant's confrontation rights due to a lack of case-specific findings for such activities.[61] These case-specific findings could include a witness having a particular susceptibility to COVID-19 or the state of the pandemic at the trial court's locale at the time of trial.[62] Despite holding that the trial court violated the defendant's confrontation rights, the Nevada Supreme Court still deemed the error harmless beyond a reasonable doubt, as it did not contribute to the verdict obtained.[63] Accordingly, the court did not overturn Newson's conviction.

Takeaways

Lopez-Medina, *Babichenko*, *Aptt*, *Dazey*, and *DeLeon* demonstrate that videoconference witness testimony can occur, but only in certain circumstances. The first (and best) circumstance is when the defendant consents to it (with a knowing waiver). The second circumstance is when the defendant himself calls the witnesses, as there is no Confrontation Clause right to non-hostile witnesses. The third circumstance, which dovetails with the first circumstance, is when the defendant's counsel opens the door, and the defendant does not object to defense counsel's tactics (so long as the court can identify a legitimate tactic or prudent trial strategy). This third instance should concern prosecutors, however, so they should try to avoid it unless they believe that they are on *very* solid grounds. Be wary of cases like *Newson*, however, where the district court only makes generalized findings for why remote testimony should occur. Fact-specific findings are always the prosecutor's friend.

Thus far, we have covered Confrontation Clause issues relating to jurors and testimony. Let us delve into some more basic concerns relating to videoconference hearings. And let us look at how the courts have viewed and resolved a number of these concerns.

---

60 *Id.* at *2.

61 *Id.* at *3–4.

62 *Id.* at *3 (citing C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 65–66 (Mo. 2022); People v. Hernandez, 488 P.3d 1055, 1058 (Colo. 2021)).

63 *Id.* at *5.

V. When a party or witness has COVID (or exposure), there is great utility in Zoom/remote hearings

One cannot help but remark on how, when parties have fallen sick with COVID or other maladies, videoconference hearings have become very useful for the court, court staff, and attorneys. For instance, in *United States v. Young*, a defendant awaited sentencing after pleading guilty to conspiracy to distribute heroin, cocaine, cocaine base, and fentanyl.[64] After arrest in December 2017, the magistrate judge had ordered the defendant detained in January 2018.[65] As the COVID-19 pandemic mounted in April 2020, the defendant filed an expedited motion to revoke detention due to the ongoing pandemic.[66] The district court denied that first motion without prejudice but left open the door for the defendant "to renew it upon a change of conditions at his place of confinement or a change in his health."[67]

The defendant filed two motions for reconsideration based on increasing COVID numbers in his jail, as well as the jail's inability to prevent the spread of the virus. The district court held a hearing on the defendant's renewed motion on March 3, 2021.[68] The district court noted two important developments: "Unfortunately, Mr. Young contracted the virus after filing his latest motion. He was present at the Zoom hearing and does not appear to be suffering from any major symptoms at this time."[69]

Takeaways

The *Young* case demonstrated how a Zoom remote hearing option for the District of Massachusetts allowed the court system to administer justice and hold its hearing for the defendant, despite the defendant himself contracting COVID (and presumably still being potentially infectious). Indeed, the Zoom hearing potentially saved resources by conducting the hearing remotely, helping to protect court staff, attorneys, and even the general public—not to mention the deputy U.S. marshals who would transport the defendant—from COVID exposure from the defendant). While remote hearings are often discussed in terms of saving

64 United States v. Young, 525 F. Supp. 3d 203, 203 (D. Mass. 2021).
65 *Id.* at 203–04.
66 *Id.* at 204.
67 *Id.*
68 *Id.* (The opinion states that the hearing occurred on "Match 3, 2021," but clearly no hearing occurred during that made-up month!).
69 *Id.*

resources and time for the parties, we often forget that they are also useful in dampening "the curve" for potential infections.

VI. When seeking to admit Zoom/remote testimony at an in-person hearing, submit your request early with good reasons

In the fall of 2022, in *United States v. Chen*, the defendant filed a motion to dismiss her case due to pre-indictment delay as well as an amended motion on the same grounds.[70] The magistrate judge set an in-person hearing on these motions, and as part of setting the hearing, the judge ordered the defendant to file an amended notice of witnesses.[71]

As part of that amended witness list, the defendant requested that a witness, who was a private investigator, "be permitted to appear via video."[72] In response, the government took the "position [] that [Defendant's] witness should appear in-person for the hearing."[73] That same day, the defendant filed a request for the witness to appear remotely for the motion hearing and outlined several reasons in support:

- The investigator was from San Francisco, California, and should be permitted to testify via Zoom "[g]iven that Zoom hearings are authorized for health and safety reasons, as well as time and efficiency reasons."[74]
- The investigator, "and, in turn, [Defendant], would need to spend considerable money and time to appear in person at this hearing."[75]
- "There is an increased risk of COVID infection for those traveling through busy airports."[76]

Based on the defendant's proffered reasons, the magistrate judge denied the defendant's request for the investigator to appear remotely via Zoom.[77] It gave several reasons for this denial. First, the magistrate judge

---

[70] United States v. Chen, No. 21-CR-250, 2022 WL 4244990, at *1 (D. Minn. Sept. 15, 2022).
[71] *Id.*
[72] *Id.*
[73] *Id.* (alteration in original).
[74] *Id.* (alteration in original).
[75] *Id.* (alteration in original).
[76] *Id.* (cleaned up).
[77] *Id.*

expressed dismay that the defendant waited to file the specific request outlining the reasons for a remote appearance until five days before the hearing.[78] Second, the magistrate judge noted that spending considerable time and money is generally typical for out-of-town witnesses, and the defendant had not explained "specifically how it would cause her undue burden or expense."[79] Third, although the magistrate judge noted that it was likely that traveling through busy airports might result in an increased risk of COVID infection, he reasoned that the defendant failed to explain how this situation would cause the investigator, specifically, any undue burden.[80] Finally, the magistrate judge noted that this motion was the defendant's, rather than the government's, and seemed to indicate that the result might be different if this request (or motion) had been the government's.[81]

Takeaways

The *Chen* case provides several lessons to glean from. When trying to have a witness appear remotely for a hearing before a district court or a magistrate judge, timing and reasons seem to be among the most important considerations. The moment a hearing is set, and one believes that one might need to secure a remote appearance, prudence requires filing the motion as quickly as possible. And prudence also requires outlining one's reasons in that motion with some evidence backing up the request, rather than just blithely throwing out the request at the end of another document. The more (and more serious) reasons that one provides to the district court or magistrate judge, the more likely one's request will be reviewed thoroughly. Of course, securing opposing counsel's agreement (or at least non-opposition) to the request will hopefully go a long way in an AUSA's argument to the court. But if that cannot or does not happen, a timely request and sound reasons for it may convince the court to rule in your favor.

78 *Id.*
79 *Id.*
80 *Id.*
81 *See id.*

VII. A defendant agreeing to a Zoom hearing–especially for arguments, such as a motion to suppress–is useful

On July 31, 2020, in *United States v. Miles*, the district court proceeded via a Zoom hearing on a defendant's motion to suppress.[82] After the parties fully briefed the motion, the court held that Zoom hearing. "Prior to that hearing, Defendant agreed, on the record, to proceed with a zoom hearing rather than an in-person hearing."[83] The parties apparently did not need to take live witness testimony, as the suppression motion pertained mostly to the affidavit for a search of a residence and the issue of a curtilage search of a vehicle on that residence. (For those keeping score, the government prevailed, and the district court ordered the defendant's motion to suppress denied.).[84]

Takeaways

A defendant agreeing on the record to proceed via a Zoom hearing is incredibly useful.

VIII. Yet, a defendant's objection to suppression hearing testimony conducted via Zoom is not necessarily fatal

As noted above, a defendant clearly has a right to confront witnesses against him. That right does not necessarily extend to the right to "in-person" cross-examination of witnesses at pretrial hearings, however. The Supreme Court "has suggested that the Confrontation Clause does not apply to pretrial hearings, repeatedly explaining that '[t]he right to confrontation is basically a trial right.'"[85] In the Tenth Circuit, for example, panels have "intimated that the right to confrontation is unlikely to ap-

---

[82] United States v. Miles, No. CR 19-20720, 2020 WL 4726939, at *1 (E.D. Mich. Aug. 14, 2020).
[83] *Id.* at *1.
[84] *Id.* at *8.
[85] United States v. Rosenschein, 474 F. Supp. 3d 1203, 1207–08 (D.N.M. 2020) (alteration in original) (quoting Barber v. Page, 390 U.S. 719, 725 (1968)).

ply at suppression hearings."[86] The same appears to be true for other pre-trial hearings, such as *Daubert* hearings.[87]

In *Rosenschein*, soon after the pandemic began, the district court stated in an April 2020 telephone conference that it would conduct an upcoming suppression hearing using Zoom.[88] The defendant objected. While he had been in custody for 1,350 days (since November 2016), the defendant agreed to waive his speedy trial rights and continue pre-trial detention indefinitely until the district court could hold an in-person hearing.[89] The government, of course, objected to the defendant's objection.

The defendant objected under both Federal Rule of Criminal Procedure 43 (when a defendant's presence is required) and under the Confrontation Clause. He also argued about his right to effective assistance of counsel.[90] The district court noted that Rule 43 did not require his personal presence, as this was not an initial appearance, arraignment, a plea, any trial stage, or sentencing.[91] Furthermore, the district court noted that the weight of authority (discussed above) buttressed against a Zoom suppression hearing violating a defendant's confrontation rights.[92] Finally, the district court noted that the defendant would have assistance

---

86 *See id.* at 1208; United States v. Garcia, 324 F. App'x 705, 708 (10th Cir. 2009) (not precedential) ("There is no binding precedent from the Supreme Court or this court concerning whether *Crawford* applies to pretrial suppression hearings. To the extent that we can divine clues from our case law concerning the resolution of this issue, they do not benefit [the defendant]."); *see also* United States v. Robinson, 663 F. App'x 215, 218 (3d Cir. 2016) (not precedential) ("The Supreme Court has never suggested . . . that the Confrontation Clause applies during a pre-trial suppression hearing."); Ebert v. Gaetz, 610 F.3d 404, 414 (7th Cir. 2010) (the Confrontation Clause is "not implicated" at a suppression hearing); United States v. Burke, 345 F.3d 416 (6th Cir. 2003) (holding that Federal Rule of Criminal Procedure 43 and the Confrontation Clause were both not violated with the use of videoconferencing at a suppression hearing, where only the presiding judge appeared by video, while the parties and witnesses were together in a courtroom); United States v. Lattimore, 525 F. Supp. 3d 142, 147 (D.D.C. 2021) ("More recently, a number of federal Courts of Appeals have endorsed, at least tepidly, the view that the Confrontation Clause is a trial right and therefore does not apply at a suppression hearing.").

87 *See* United States v. Nelson, No. 17-CR-00533, 2020 WL 3791588, at *1 (N.D. Cal. July 7, 2020) (not precedential) ("neither Rule 43 nor the Constitution mandates a defendant to be physically present" for a *Daubert* hearing); United States v. Karmue, 841 F.3d 24, 28 (1st Cir. 2016) (holding it was not clear error under Rule 43 for the district court to conduct the second day of the *Daubert* hearing without the defendant's physical presence).

88 *Rosenschein*, 474 F. Supp. 3d at 1206.

89 *Id.*

90 *Id.*

91 *Id.* at 1206–07.

92 *Id.* at 1208–09.

of counsel at the suppression hearing and that the defendant failed to demonstrate any support for his argument that his counsel would not be effective via videoconference.[93]

The U.S. District Court for the District of Columbia more recently discussed remote versus in-person hearings for a motion to suppress.[94] In April 2020, the defendant was arrested and charged with several narcotics and firearms offenses.[95] After filing a motion to suppress, the district court noted that it would conduct remote hearings, but that it had not previously conducted one "in the absence of a defendant's consent."[96] The defendant argued that cross-examination was of critical importance during a suppression hearing, that cross-examination by videoconference "would greatly reduce his counsel's effectiveness," and that a videoconference hearing "would mean that the defendant and counsel could not consult at any point, including on the decision of whether to testify."[97] The government filed a "nominal[]" brief and opposed a remote hearing because of the defendant's objection.[98]

The district court analyzed the defendant's claims under Rule 43, the Confrontation Clause, effective assistance of counsel, and due process.[99] Akin to other court decisions already discussed, the district court observed that for Rule 43, "[o]n its face, the rule does not mandate a defendant's presence at a hearing on any pretrial motions, including a motion to suppress."[100] (The advisory committee notes also explicitly bear this principle out.[101]) As to the Confrontation Clause, the district court noted some colorable arguments in favor of its application at pre-trial hearings, as "a suppression hearing is undoubtably a critical part of a criminal prosecution."[102] Since the "outcome often determines the ultimate result at trial or alternatively dictates whether a defendant accepts a plea deal . . . there is certainly a rationale for applying that right to a suppression hearing, which occurs long after a modern prosecution has begun."[103] The district court ultimately decided that "even if the Confrontation Clause applied to a pre-trial suppression hearing, it is not clear that a videocon-

93 *Id.* at 1208.
94 United States v. Lattimore, 525 F. Supp. 3d 142, 145–48 (D.D.C. 2021).
95 *Id.* at 144.
96 *Id.*
97 *Id.* at 144–45.
98 *Id.* at 145.
99 *Id.* at 145–151.
100 *Id.* at 146.
101 *See* Fed. R. Crim. P. 43 advisory committee's note.
102 *Lattimore*, 525 F. Supp. 3d at 148.
103 *Id.*

ference would violate a defendant's right to confrontation."[104] Because the defendant was able to communicate with counsel, the presiding judge, and hearing witnesses, and because his counsel could fully participate in the proceeding, the videoconference option was sufficient.[105] Finally, the district court noted that the defendant could effectively work with his counsel (through breakout rooms) and that virtual communication would not render the proceeding fundamentally unfair to deprive him of due process.[106] The *Lattimore* court held that, "In sum, the Constitution does not mandate that a suppression hearing be conducted in-person and conducting a hearing by remote video conference does not infringe on the defendant's rights."[107]

Takeaways

The *Rosenschein* and *Lattimore* cases hold that a defendant does not necessarily have the right to in-person testimony in a pretrial hearing. This holding is true so long as the defendant is not excluded from the hearing; can see and hear the witnesses, counsel, and the court; and (in this case) is in the same room as his attorney, with an ability to consult with counsel akin to an in-person hearing. And even a defendant's objection to a Zoom hearing with testimony is not fatal. With these caveats, a district court can generally conduct pretrial testimony via Zoom.

IX. A defendant's failure to agree to Zoom/remote hearings may hinder the opportunity for expedient justice

In *United States v. Thomas*, a defendant filed a number of pretrial motions that a magistrate judge heard in October 2021.[108] On the morning of the hearing, the defendant requested a continuance "on the basis that his counsel was 'in quarantine due to close contact with an individual who tested positive for Covid-19.'"[109] The defendant knew that "his counsel was in quarantine and could not attend an in person hearing" on that day.[110] The defendant filed his motion to continue on this ba-

---

104 *Id.* at 149.
105 *Id.*
106 *Id.* at 150.
107 *Id.* at 151.
108 United States v. Thomas, No. 21-CR-93, 2021 WL 4902157, at *1 (D. Minn. Oct. 21, 2021).
109 *Id.*
110 *Id.*

sis, but also wrote that he did not want it to "affect my right to speedy trial, and [if] I have the right to in person hearing we should be good."[111] This somewhat contradictory statement rightly concerned the magistrate judge, who extensively discussed the District of Minnesota's General Order 30, which "continues to encourage the use of videoconferencing in criminal proceedings and states that, with the defendant's consent, criminal proceedings will be conducted by videoconferencing, or telephone conferencing if videoconferencing is not reasonably available."[112] Indeed, while the defendant wanted his speedy trial, the magistrate judge also noted the unavailability of his counsel due to COVID concerns. Thus, the defendant's unwillingness to consent to remote hearings doomed his chance for a speedier pretrial hearing. The magistrate further rescheduled the pretrial motions and requested the parties to set a new trial date (while excluding time under the Speedy Trial Act calculations).[113]

Takeaways

A defendant not agreeing to proceed via Zoom or remote hearing may have to wait longer for the wheels of justice to turn.

X. When conducting a Zoom/remote hearing, make sure everyone is looking at the same thing

The Yosemite magistrate court appears to have been active during the COVID-19 pandemic. In *United States v. Penny*, a defendant sought to suppress statements that he made to a park ranger while intoxicated as well as threats directed at campers in the Camp 4 tent campground.[114] The defendant sought park ranger body camera footage, which apparently was not available ("it may have been lost" or "some video recordings had been deleted when a new video recording system was implemented").[115] Later on, the government provided updated information to the court, so "it appeared that the email shared by the government just before the [suppression] hearing had painted an inaccurate picture of certain facts."[116]

---

111 *Id.*
112 *Id.* (citing General Order No. 30, D. Minn.).
113 *Id.* at *1–3.
114 United States v. Penny, No. 6:19-MJ-00068, 2021 WL 124522, at *1 (E.D. Cal. Jan. 13, 2021).
115 *Id.*
116 *Id.*

The defendant moved to strike the park ranger's testimony, "arguing that defendant had been denied an opportunity to cross-examine [the park ranger] effectively because [he] had used a copy of his arrest report while testifying."[117] The magistrate judge offered the defendant an opportunity to re-examine the park ranger based on the email communications that had been disclosed.[118] They ultimately held a hearing, during which the government and defendant cross-examined the park ranger about the lack of body camera evidence and the emails.[119]

One of the defendant's main concerns was that, due to the remote nature of the proceedings, the park ranger had access to the defendant's arrest report during his testimony.[120] The magistrate judge noted that "defense counsel knew at the time of cross-examination that [the park ranger] had at least some degree of access to his arrest report during his testimony, and defense counsel could have questioned him about it."[121] During the first hearing, the park ranger had been allowed to consult the arrest report to refresh his recollection about which campsite he encountered the defendant.[122] "Defense counsel objected and requested confirmation 'that we're all looking at the same document.'"[123] The magistrate judge ultimately concluded that "[t]he fact that the witness consulted his own hard copy of the arrest report during the Zoom hearing, subject to confirmation that everyone was looking at the same document—instead of the government using Zoom's screenshare function to display the report to everyone—is perhaps a minor, COVID-driven departure from usual practice, but it is not a 'clear injustice.'"[124] The magistrate judge further noted that the park ranger's testimony appeared to be from memory and "did not merely recite his report."[125] "Any 'isolated instances' in which [the park ranger] might have glanced at his report . . . do not provide a basis for striking his testimony."[126] For those keeping score, the magistrate judge denied the defendant's motion to strike the testimony and the motion to suppress his prior statements.

---

117 *Id.* at *2.
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at *3.
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*

Takeaways

The takeaway from the *Penny* case—besides avoiding intoxication in national park campsites—is that the Zoom screenshare function is your friend when showing documents for any purpose to a witness (refreshing recollection, moving to admit a document, etc.). Especially when refreshing recollection, after sharing the screen the prosecutor should take the document down and not have the witness later be accused of using the report to testify remotely. Although this process ultimately worked out for the prosecutor, removing this as an issue for complaint would be useful.

XI. When conducting a trial via Zoom/remote hearing, make sure that ALL participants are muted unless actively engaging/questioning

This next case is slightly tantalizing but not altogether unsurprising. In my district in Utah, one of our district judges desired to hold a trial in May 2021. During the trial, the defendant decided to exercise his right to testify and took the stand in his defense.[127] According to the district judge, the following occurred:

> During what the Defendant views to be his most pivotal and important testimony during the jury trial, the word "liar" was broadcast throughout the courtroom's speaker system. Defendant moved for a mistrial at that time and said motion was denied. However, late on May 13, 2021, Assistant United States Attorney, [], in a Zoom hearing in this matter, disclosed that it was an employee of the United States Attorney's Office who made the declaration while electronically viewing the proceedings in St. George and that it was picked up on a microphone in the employee's office and broadcast over the court system.[128]

The transcript of the testimony memorializes the occurrence as well:

> Q. And in my interpretation of this document, under 3(a), is that they added Count 3 and that you pled to a different added count; is that correct?

---

[127] United States v. Mack, No. 4:18-CR-00054, 2021 WL 3036851, at *1 (D. Utah July 19, 2021).
[128] *Id.* at *1.

A. Yes, sir.

Q. Did you understand that plea to be to a felony at that time?

A. No, sir.

UNIDENTIFIED SPEAKER: Liar.

Q. (BY [DEFENSE COUNSEL]) I am going to – Your Honor, can we go back to –

[AUSA]: Your Honor, I just heard a noise on the record. I think we need an instruction to disregard anything that came across –

THE COURT: Disregard anything that came across. [Clerk], is that muted, the external listening?

CLERK: Yes. Yes, Your Honor.

THE COURT: Okay. I heard a word. I didn't understand it, but that's not part of the record.

[DEFENSE COUNSEL]: Your Honor, I understand it's not part of the record. I don't know what was said, who heard, or I don't know what was stated, but can I just receive an instruction that it should be disregarded if anybody was – did or – hear that.

THE COURT: If you heard anything from that faint sound and could understand it, it is not part of the record here. It's not under oath. It should be disregarded.[129]

As noted, the word "liar" was heard, and the district court gave an immediate curative instruction. Of course, anyone listening by Zoom.gov "w[as] muted involuntarily and had no ability to unmute their audio."[130]

The defendant moved for a mistrial based on this word being uttered during his testimony. He further asked the district court for a "new trial based upon the newly discovered evidence that it was [a] governmental actor under [the United States'] employ which prejudiced the Defendant."[131]

Luckily, the incident occurred during the last day of trial, and occurred while the defendant was "testifying about his awareness of his status as a felon."[132] The district court noted that the "evidence of his status as a

---

129 *Id.* at *1.
130 *Id.*
131 *Id.*
132 *Id.* at *2.

felon, as well as his knowledge of his status, was strong."[133] Because of these facts and the jury's finding the defendant guilty of all four charged counts, the district court also found that the "timing of the word's broadcast did not bear on the other counts."[134] (It also noted, grimly, "Nor did Defendant's testimony bear significantly on those counts.") "Therefore, the timing of the word's broadcast was not, as Defendant asserts, at the 'most pivotal and important testimony during the jury trial.'"[135]

The district court further discussed the opportunity of the jury to hear the remark, as well as the jury's reaction:

> The jury had no opportunity or reason to perceive that the word "liar" was spoken by a government representative. The attribution of the statement came out a day later after the verdict was rendered and the jury excused. And as Defendant concedes, there is no evidence suggesting that the word's broadcast was intentional or in bad faith.
>
> Additionally, the government indicated that "none of the members of the jury reacted to or acknowledged the accidental broadcast during or after trial." No one observed a reaction by any juror at the time the word was broadcast. The prosecution team spoke with multiple jurors after trial and "none mentioned the noise" but "discussed the amount of evidence against [D]efendant and his inconsistent and uncredible testimony." Defendant has presented no evidence that any jury heard the word, or that it had any effect on the jurors' deliberations.[136]

Ultimately, besides the other reasons given, the district court denied defendant's motion for a mistrial because a curative instruction was immediately given.[137] The district court later sentenced Shane Lee Mack, Jr., to 84 months' imprisonment on his 4 counts.

Takeaways

Ensure that no employees (whether AUSAs or staff) talk on an open Zoom line during a hearing or trial. And you certainly must ensure that none of you (or your staff) call the defendant a "liar" during the defendant's own testimony!

---

133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* (alteration in original).
137 *Id.* at *3.

XII. If planning a Zoom/remote hearing, make sure the writ is filed correctly

In *United States v. Arias*, a defendant sought to have an admission hearing for a pending supervised release violation.[138] The district court held a supervised release hearing via Zoom.[139] The defendant was incarcerated at a state facility in California, and the government challenged the district court's jurisdiction to hold the violation hearing in the first place.[140] The district court provisionally accepted the defendant's admissions (and his denial of one allegation) and took up briefing on the jurisdictional issue.[141]

Ultimately, the district court agreed with the government, especially given that the state facility provided a declaration by its case records manager.[142] That case records manager explained that a "court order is necessary for an inmate in California state prison to attend a court hearing" and that its staff "mistakenly believed defendant's motion seeking an admit/deny hearing on the violation petition . . . was instead a court order."[143] The defendant had argued that this "mistake did allow [defendant] to appear, so this Court had jurisdiction even if by accident."[144] But the district court made it clear that "accidental jurisdiction" had no basis in law, especially because the "Defendant cites no authority in support of this 'accidental jurisdiction' argument and the court is aware of none."[145]

The government took defense counsel to task, and the district court admonished defense counsel for their actions

> Finally, the government asserts it was defense counsel who provided the videoconferencing link for the January 10 hearing to [Defendant's] state custodians in requesting that [Defendant] be produced, "a request [defense counsel] was not entitled to make." In its reply the government notes the defense has again unilaterally requested that the state arrange for [Defendant] to appear by videoconference on February 7,

---

138 United States v. Arias, No. 2:17-CR-00083, 2022 WL 347603, at *1 (E.D. Cal. Feb. 4, 2022).
139 *Id.* at *1.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.* (alteration in original).
145 *Id.*

> 2022. The government asks the court to admonish the defense to cease "manufactur[ing] *de facto* writs." On this record, and given that the court is just now resolving the jurisdictional question raised on January 10, the court will not formally admonish defense counsel. Counsel is cautioned however to refrain in the future from unilaterally seeking to secure the appearance of a client in the custody of another sovereign, without a court order granting a writ.[146]

The district court vacated the admission and denial for the supervised release petition.[147]

Takeaway

One should make sure that there is an appropriate writ signed and filed before the hearing takes place provided that one does not want the hearing to take place.

XIII. During your Zoom/remote hearing, act as if you are still in federal court (in other words, make sure you don't show your firearm to the judge)

It is axiomatic that one should always ensure not to brandish any of your firearms to a judge during a court hearing. It is possible that might be someone's new mantra. *United States v. Wright* is a fascinating case of poor choices.[148] The defendant was a physician operating a medical practice out of a building in Illinois, who "became embroiled in a heated conflict [with the building owner] . . . because Defendant fell behind on rent payments."[149] He ended up in bankruptcy proceedings in the Northern District of Illinois.[150] In July 2021, the bankruptcy court held a hearing over Zoom in which the bankruptcy judge explained the consequences of an eviction order (secured by the landlord) and the inability of the bankruptcy court to overturn that order.[151] The judge then allowed the defendant to speak:

---

146 *Id.* at *2 (third and fifth alterations in original) (internal citations omitted).
147 Id. at *3.
148 *See generally* United States v. Wright, No. 21-CR-690, 2022 WL 4291178 (N.D. Ill. Sept. 15, 2022).
149 *Id.* at *1.
150 *Id.*
151 *Id.*

> As explained by [the bankruptcy judge], Defendant proceeded to "describe what he alleged was wrongful or criminal conduct on the part of the [l]andlord, explaining that the [l]andlord had threatened him, among other things." Defendant "then showed his concealed carry permit and his gun, indicating that, as a result of the [l]andlord's behavior, he carried the weapon with him at all times." When Defendant displayed his previously-concealed firearm, [the bankruptcy judge] "immediately" cut Defendant off and "admonished him—telling him that he was not allowed to have a weapon in a court of law" before continuing with the hearing. When afforded an opportunity to respond, Defendant apologized for displaying the firearm.[152]

The bankruptcy judge held a hearing and argument from counsel for both the landlord and the defendant and found that the defendant's conduct at the hearing constituted criminal contempt.[153] The judge referred the matter to the district court for further review.[154] In its order, the district court explicitly noted that "many courts, including this one, continue to conduct hearings by remote means, and parties attending those hearings are still required to conduct themselves as though they were physically present in a courtroom."[155] Ultimately, the district court denied the defendant's motion to dismiss the show-cause order relating to his criminal contempt charge, as it felt that the record had not yet been fully developed.[156]

Takeaways

Act like you are physically present in federal court at all times. And do not show your firearm to the judge!

---

[152] *Id.* (second, third, and fourth alterations in original) (internal citations omitted).
[153] *Id.* at *2.
[154] *Id.*
[155] *Id.* at *4.
[156] *Id.* at *5.

XIV. Finally, if you ask for a Zoom/remote hearing, make sure you actually show up

United States v. Rodriguez is another example of using remote hearings when a party has (or has been exposed to) COVID.[157] In that case, a defendant charged with assault by way of complaint had a final status conference set for July 2022 in Yosemite, California. On the morning of the pretrial conference, "the Court's Courtroom Deputy received an email from [defense counsel's] office requesting the Court to hold the status conference by Zoom due to her need to isolate."[158] The Court agreed to switch the in-person hearing to a Zoom hearing, but, alas, defense counsel failed to appear.[159] The magistrate judge issued an order to show cause as to why it should not impose sanctions on defense counsel for failing to appear (this was the second order to show cause—apparently, defense counsel had issues with complying with the court's local rules and appearing at court proceedings).[160] Ultimately, the magistrate judge ordered defense counsel to pay the Clerk of Court $50 per day until she filed a response to the order to show cause.[161] No further filing indicates how much she had to pay.

Takeaways

If you ask for a Zoom hearing, make sure you show up for it!

XV. A summary of the takeaways (one more time for those of you who skip to the end of articles!)

A. Confrontation Clause issues

- Zoom jury selection generally does not cause problems with the Confrontation Clause so long as the defendant gives a knowing waiver.
  - *Washington v. Kiner*

---

157 *See generally* United States v. Rodriguez, No. 1:21-MJ-00021, 2022 WL 6207824, (E.D. Cal. Oct. 7, 2022).
158 *Id.* at *1.
159 *Id.*
160 *Id.*
161 *Id.* at 2.

- Zoom jury participation (not deliberations) does not cause problems with the Confrontation Clause so long as the defendant gives a knowing waiver.
  - *United States v. Knight*
- A defendant's knowing waiver eliminates a Zoom hearing Confrontation Clause issue.
  - *United States v. DeLeon*,
  - *United States v. Lopez-Medina*,
  - *United States v. Babichenko*,
  - *United States v. Dazey*,
  - *United States v. Aptt*,
  - *United States v. Ganadonegro*
- A trial court should make very fact-specific findings when dealing with Zoom and the Confrontation Clause
  - *Newson v. Nevada*
- But a defendant does not have a right to in-person witness testimony in pretrial hearings.
  - *United States v. Rosenschein*,
  - *United States v. Lattimore*

B. General issues relating to Zoom hearings

- A Zoom/remote hearing might help your case move along quicker.
  - *United States v. Young*
- Conversely, not agreeing to a Zoom/remote hearing might prolong your case.
  - *United States v. Thomas*
- If you want a witness to appear remotely, let the court know quickly and have good reasons.
  - *United States v. Chen*
- If you have a Zoom/remote hearing or trial, make sure that your AUSAs and staff are muted during relevant portions and that no one calls the defendant a "liar," especially while the defendant is testifying.

  - *United States v. Mack*

- If you are showing witnesses documents for refreshing recollection or other purposes, use the Zoom screenshare application and then remove the document so that your witness cannot be accused of relying on the document for their testimony.

  - *United States v. Penny*

- If defense counsel asks for a Zoom/remote hearing, make sure the district court or magistrate judge has appropriate jurisdiction and control over the body (usually via a writ).

  - *United States v. Arias*

- In a Zoom/remote hearing, act appropriately as you would in a federal courtroom (and do not show your firearms to the judge!).

  - *United States v. Wright*

- Finally, if you ask for a Zoom/remote hearing, make sure that you show up.

  - *United States v. Rodriguez*

About the Author

Stewart M. Young is an Assistant U.S. Attorney in the District of Utah. He joined the U.S. Attorney's Office in Utah in 2012. For several years, Young served on the Department's Joint Task Force Vulcan, which targeted MS-13 leadership around the country and internationally. Before his time in Utah, Young served as a tenure-track law professor at the University of Wyoming College of Law. He previously served as an AUSA in the Southern District of California from 2006 to 2010. Before joining the Department, Young clerked on the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Utah. He earned a J.D. from Stanford Law School, an M.A. in International Relations from Waseda University in Tokyo, Japan, and an A.B. from Princeton University.

Page Intentionally Left Blank

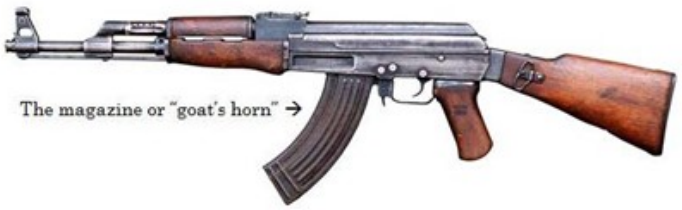
The Power of the Visual: Incorporating Images into Briefs

Gaines H. Cleveland
Assistant U.S. Attorney
Southern District of Mississippi

Some venerable lawyers will remember when briefs were prepared by typing pools. Only with the advent of word processing—allowing for the insertion of images directly into the text—have lawyers produced briefs and other filings that permit judges to *see* what lawyers are referring to with the immediacy of having the images appear next to the accompanying text.[1] This article addresses (1) why using visual images is effective, (2) when best to incorporate visuals, and (3) how to make use of graphics in briefs and other court submissions.

I. Why visuals have power

In our digital world, information consumers are accustomed to receiving knowledge graphically with its attendant visual impact.[2] Judges are no different in their receptivity to such images. Indeed, judicial opinions increasingly feature graphics. For example, one judge chose to display an image of an AK-47 in discussing whether a gun's magazine was a "component" of the weapon. *See* Example 1.[3]



Example 1: Image of Possible "Component"

[1] Robert Dubose, Presentation at the 26th Annual Conference on State and Federal Appeals: Briefing Visually (June 9–10, 2016).

[2] Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 Yale J.L. & Humans. 1 (1998) ("Maxims that urge the power of images are cultural commonplaces with which we are all too familiar: 'a picture's worth a thousand words,' 'seeing is believing,' and so forth.").

[3] United States v. Gonzalez, 792 F.3d 534, 535–36 (5th Cir. 2015).

Visuals are effective because they provide a welcome break from the tedium of the text that judges ordinarily confront and, more importantly, convey information succinctly and memorably.[4] As one judge has explained: "The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case . . . ."[5] Thus, "[w]ords may be a lawyer's primary tool, but they're not the only tool."[6]

II. When best to incorporate visuals

Graphic images can illustrate and explain information in court submissions. Visuals can take various forms, including (a) tables; (b) timelines; (c) charts and diagrams; (d) maps; and (e) digital evidence.

A. Tables

Information can be presented in tabular form when it can be separated into columns and rows. This format is useful in various contexts. In a multiple-defendant case, a table listing the defendants, their charges, and the trial result orients the reader to the charges and provides a ready reference for the court. *See* Example 2.[7]

---

[4] Elizabeth G. Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687, 1694 (2014) ("Images are efficient, accessible, and memorable."); *see also* Dubose, *supra* note 1, at 3 ("Images grab [y]our attention."). Despite these benefits, many lawyers shun visuals. *See* Richard A. Posner, Reflections on Judging 143 (2013) ("[S]ome lawyers think a word is worth a thousand pictures").

[5] Ross Guberman, *Judges Speaking Softly: What They Long for When They Read*, 44 Litig. 48, 49 (2018) (reporting results of survey of judges).

[6] Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. Legal Educ. 70, 70 (2013).

[7] Brief of Appellee at 4, United States v. Kennedy, No. 11-60431, 2012 WL 2374304 (5th Cir. June 18, 2012).

Table 1: **TABLE OF CHARGES AND RESULTS**

Count	Appellants	Charge	Statute	Result
1	Mark Calhoun Both Kennedys	Conspiracy to commit mail and wire fraud	18 U.S.C. § 1349	Guilty
2-4, 6-16	Mark Calhoun Both Kennedys	Wire fraud	18 U.S.C. § 1343	Guilty
5	Mark Calhoun	Wire fraud	18 U.S.C. §1343	Not guilty
	Both Kennedys	Wire fraud	18 U.S.C. §1343	Guilty
17, 22*	Mark Calhoun Both Kennedys	Money-laundering conspiracy	18 U.S.C. §1956(h)	Guilty
18-20, 23-34	Mark Calhoun Both Kennedys	Money laundering	18 USC 1956(a)(1)(A)(I)	Guilty
21	Mark Calhoun	Money laundering	18 USC 1956(a)(1)(A)(I)	Not guilty
	Both Kennedys	Money laundering	18 USC 1956(a)(1)(A)(I)	Guilty
38	Mark Calhoun	Engaging in monetary transaction	18 U.S.C. §1957	Guilty

* Count 22 was later dismissed. *See* C.110-37, 336-34; C.R.E.3 & 4; Tr. 3152-58; Sent. 904.

Example 2: Table Listing Charges

Tables are particularly helpful in conveying sentencing information. A table can identify the source of narcotics included in a drug calculation and can explain how drug amounts were converted for the purpose of applying the Sentencing Guidelines. *See* Example 3.[8]

[8] Brief of Appellee at 32, United States v. Arayatanon, No. 19-60233, 2020 U.S. Dist. LEXIS 2226 (5th Cir. Feb. 7, 2020).

Table 3: **DRUG AMOUNT CALCULATION**
Based on ROA.851-52 (PSR ¶ 87)

Drug amount	Quantity	Converted Weight	Total KG Converted	PSR Reference
❶ Amounts seized 11/29/17				
Meth "ice"	882g	17,640,000g	17,640KG	ROA.851
Marijuana	451.2g	451.2g	0.4512KG	(PSR ¶¶ 84-85)
❷ Other amounts shipped via Fed Ex				
Meth "ice"	9lbs = 4,082.4g	81,648,000g	81,648KG	ROA.846-51
Marijuana	1lb = 453.6g	453.6g	0.4536KG	(PSR ¶¶ 52-86)
❸ Total amounts (per ROA.851-52 (PSR ¶ 87)				
Meth "ice"	4,904.330g	98,086,600g	98,086.600KG	ROA.851-52
Marijuana	904.792g	904.792g	0.904792KG	(PSR ¶ 87)

Total converted weight (per PSR): 98,087.504KG

Example 3: Table Displaying Sentencing Guidelines

Another use for tables is to offer side-by-side comparisons. One such comparison was recently featured in a Fifth Circuit opinion comparing how two certificate of appealability (COA) issues were framed. *See* Example 4.[9]

Gonzalez v. Thaler	*United States v. Castro*
"whether the habeas application was timely filed"	"whether the district court erred by denying Castro's § 2255 motion as untimely"

Example 4: Side-by-Side Comparison

Tables can help marshal information about record facts that support a proposition. For example, when the Supreme Court altered the knowledge requirement for controlled substance analogue offenses, the Court offered examples of how prosecutors can establish knowledge through various forms of circumstantial evidence.[10] A table provided a practical way to

[9] United States v. Castro, 4 F.4th 345, 349 (5th Cir. 2021), *opinion withdrawn and superseded on denial of reh'g*, 30 F.4th 240 (5th Cir. 2022), *cert. denied*, 214 L. Ed. 2d 65, 143 S. Ct. 187 (2022).
[10] *See* McFadden v. United States, 576 U.S. 186, 192 n.1 (2015).

demonstrate the ample proof of each example of circumstantial evidence that the Court offered in *McFadden*. *See* Example 5.[11]

***Table B*: CIRCUMSTANTIAL PROOF OF KNOWLEDGE**
(Examples mentioned in *McFadden v. United States*, 135 S.Ct. 2298, 2304 n.1 (2015)

Concealment of activities ✓	• USA Research Chemical website promises its "packaging is discrete." ROA.2643 (GX 56)
	• Muhammad tells Young to "get a new phone every month." ROA.3306 (GX 48H)
	• Muhammad directs Young to "burn every letter I sent." ROA.3332 (GX 48K)
Evasive behavior toward law enforcement ✓	• Muhammad warns "the Feds are in New Haven, Stamford, and Bridgeport." ROA.3306 (GX 48H)
	• Muhammad says to buy "police scanners just to stay tuned to what's going on." ROA.3318 (GX 48I)
Awareness that substance produces a high similar to a controlled substance* ✓	• 4/16/13 Muhammad email: a-PVP "designed to replace" MDMA; mix a-PVP and 4-MEC for "the same effect" as MDMA. ROA.3113 (GX 37A). *See* Fig. 2 *supra*.
	• 6/6/13 Muhammad email: a-PVP "is better than 4mec but not as good as MDAI." ROA.3074 (GX 37A)

*For MDMA and MDAI as controlled substances, *see* Gov't Br. 10 n.6 & 12 n.7

Example 5: Marshaling Record Evidence

B. Timelines

Describing a sequence of events with words alone deprives the reader of one of the most valuable graphic devices that a lawyer can offer the court: a timeline.[12] "Unlike written dates, a timeline helps the reader to see the duration between events, and to compare short durations to longer ones."[13] Timelines are particularly helpful in addressing speedy trial and statute of limitations questions that can be illustrated graphically. Timelines also can serve to demonstrate how different versions of events compare. *See* Example 6.[14]

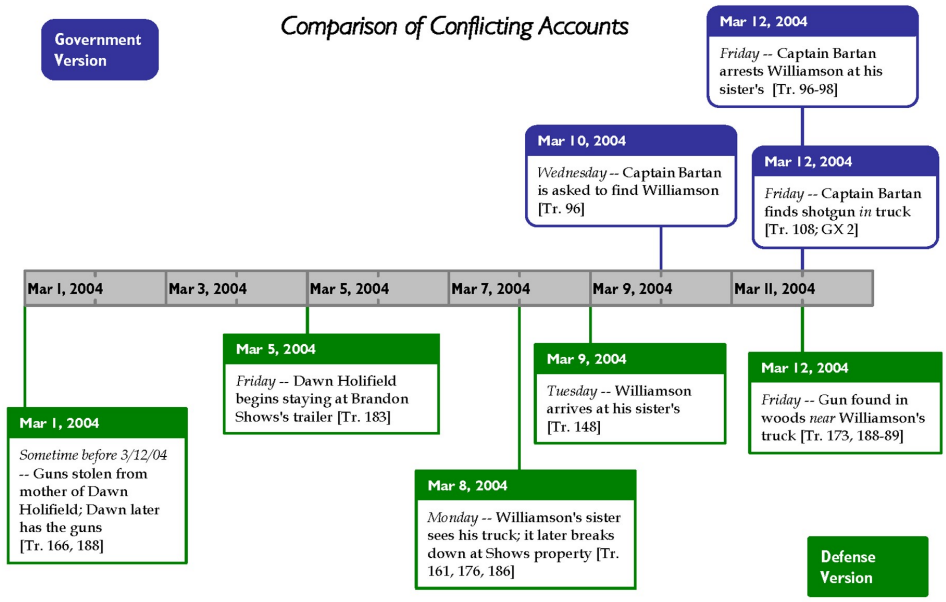
---

[11] Supplemental Brief of Appellee at 14, United States v. Muhammad, No. 15-60300 (5th Cir. Jan. 19, 2021).

[12] Dubose, *supra* note 1, at 11.

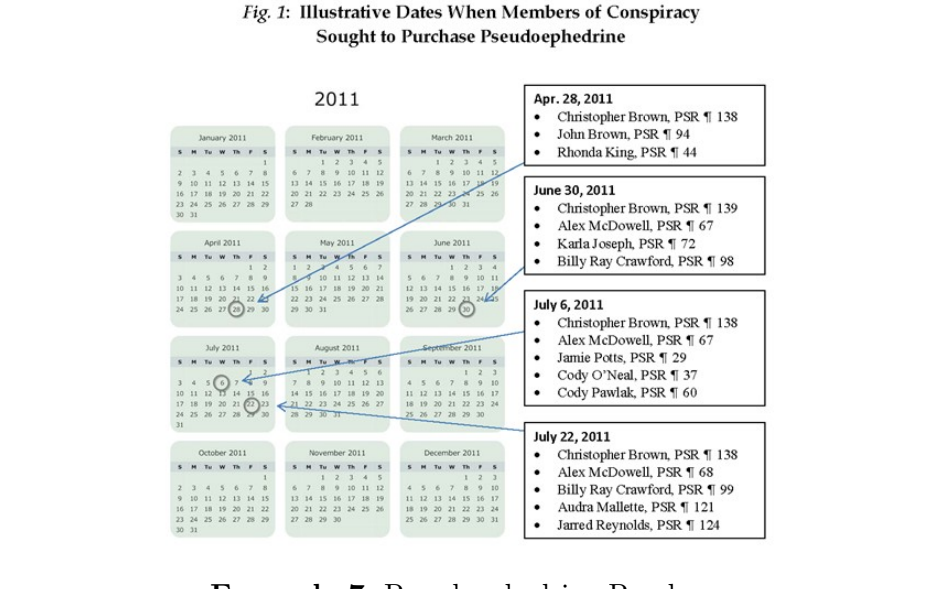
[13] *Id.* at 12; *see also* Wayne Shiess, G*raphics in Briefs: Why Not*?, 92 ADVOC. 8, 13 (2020) (providing examples of timelines).

[14] Add. to Brief of Appellee at 6, United States v. Williamson, No. 05-60193 (5th Cir. 2005), ECF No. 29.



Example 6: Comparing Versions of Events

Timelines can also show a patten of activity, as in Example 7.[15]



Example 7: Pseudoephedrine Purchases

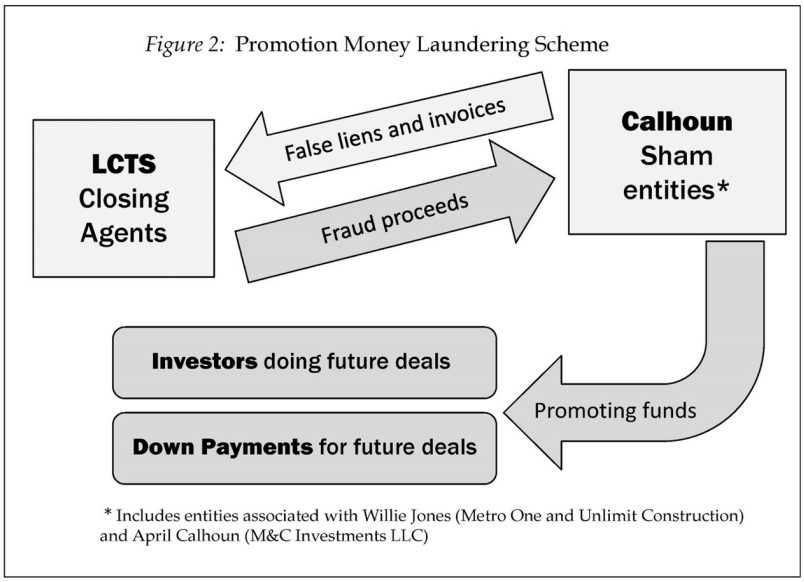
[15] Brief of Appellee at 8, United States v. Brown, No. 13-60730, 2014 U.S. App. LEXIS 135 (5th Cir. Jan. 16, 2014) (showing pattern of purchases of meth precursor).

C. Charts and Diagrams

Just as summation charts can help illustrate closing arguments at trial, so too can such charts play an explanatory role in written submissions. For example, a chart may be developed to show the flow of money laundering proceeds to illustrate how the ill-gotten gains were funneled back into the scheme. *See* Example 8.[16]

Another way of depicting the flow of money is to combine a table with an overlay showing the direction of the funds. *See* Example 9.[17]

Diagrams of a statute can help the court understand the elements of a crime, for example, in determining whether a prior conviction qualifies as a predicate offense. *See* Example 10.[18]



Example 8: Diagram Showing Money Laundering Scheme

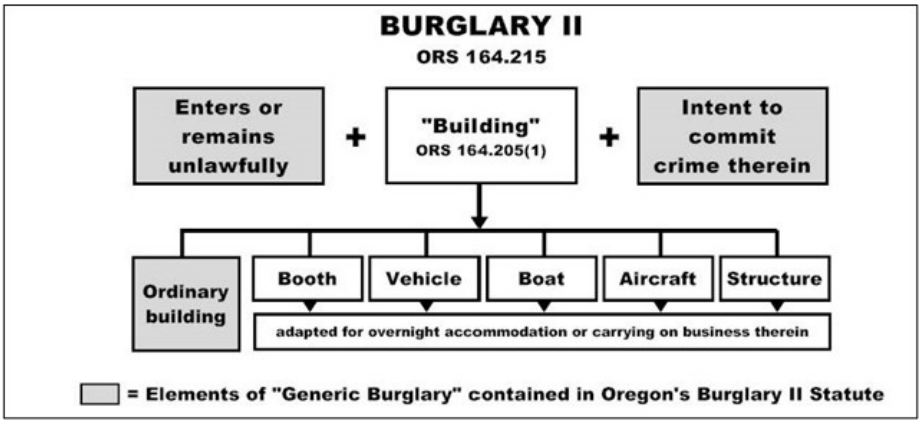
[16] Brief of Appellee at 19, United States v. Kennedy, No. 11-60431 (5th Cir. 2012), ECF No. 210.

[17] Brief of Appellee at 111, United States v. Reagan, No. 10-10211, 2012 U.S. App. LEXIS 763 (5th Cir. Sept. 28, 2012).

[18] First Brief on Cross Appeal at 12, United States v. Snyder, No. 14-30085, 2014 U.S. App. LEXIS 351 (9th Cir. Sept. 22, 2014).

Slovacek's deposits of the Arbor Woods payments into RON-SLO account[20]	Slovacek's transfers from RON-SLO account to MLD account[21]	Slovacek's payments from MLD Account to Farrington & Associates or The LKC[22]	Percentage of the Arbor Woods payments transferred to Farrington & Associates/ The LKC
$54,630 (3/2/05)	$16,603.18 (3/3/05)	$5,500 (3/11/05)	10%
$181,890 (3/30/05)	$51,676.71 (3/31/05)	$18,000 (3/31/05)	10%

Example 9: Chart Showing Flow of Funds



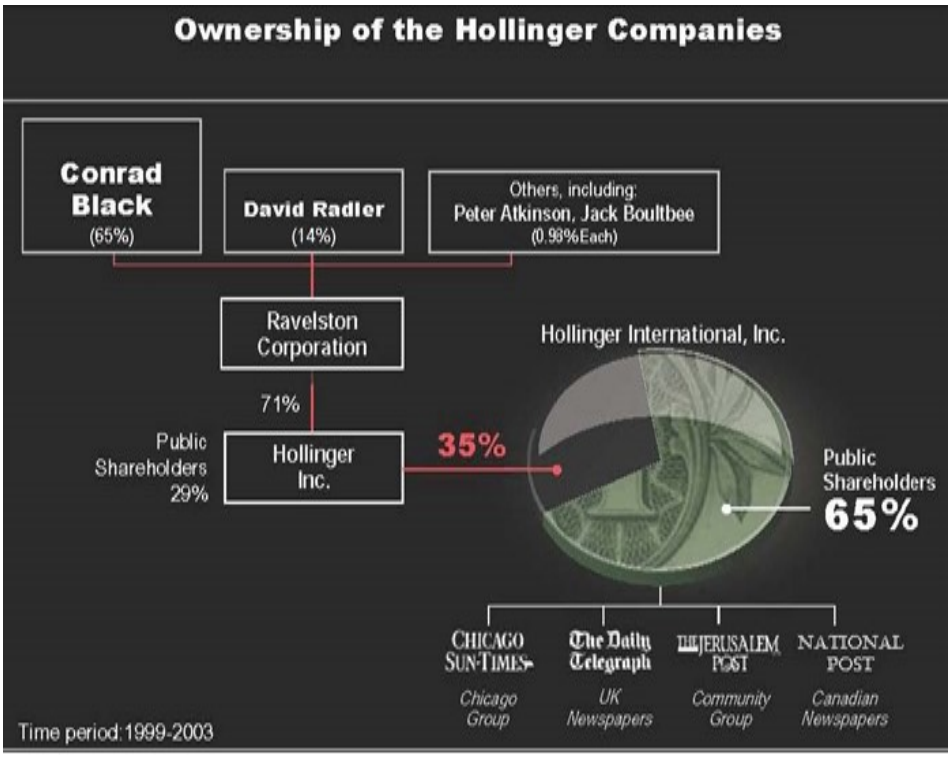
Example 10: Diagram of Elements of an Offense

Charts diagraming relationships are particularly helpful[19] and can include depictions of ownership shares. *See* Example 11.[20]

---

[19] *See* Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 235 (2006) ("[O]ne can talk about information channels in a corporate complex hierarchy, but a box-and-line chart showing who communicated with whom can make instantly intelligible the paths of information and influence").

[20] Brief of Appellee at 5, United States v. Black, No. 07-4080 (7th Cir. May 1, 2008).



Example 11: Comparison of Shares

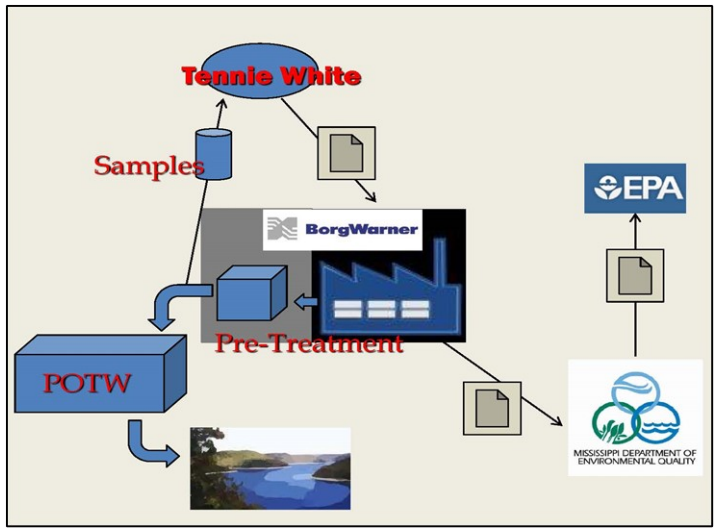
Example 12 presents an illustration of the relationship of various entities.[21] There, the defendant (Tennie White) was hired by an automotive company (BorgWarner) to provide environmental compliance services based on samples taken from industrial waste that was treated before being discharged to a publicly owned treatment works (POTW). Instead, White produced false discharge monitoring reports that were submitted to a state department of environmental quality, which in turn provided the results to the Environmental Protection Agency (EPA). A schematic illustrated this process. *See* Example 12.

Another visual may simply be a reproduction of a summation chart. *See* Example 13.[22]

---

[21] Response of United States to Motion to Dismiss at Ex. B, United States v. White, No. 12-cr-126 (S.D. Miss. Mar. 20, 2013), ECF No. 17.

[22] Brief of Appellee at 17, United States v. Kiel, No. 14-60747, 2016 WL 1243083 (5th Cir. Mar. 28, 2016) (summation chart showing pattern of bank robberies).



Example 12: Submission of Monitoring Reports

SUMMATION CHART (*Fig. 1*)

	Regions Bank Ocean Springs, MS 4-Mar-08	First Federal Gautier, MS 13-May-08	Regions Bank Biloxi, MS 19-Jun-08	M&M Moss Point, MS 13-Dec-12	Wells Fargo Pensacola, FL 28-Jan-13	Hancock Bank Gulfport, MS 20-Mar-13	BancorpSouth Greenville, AL 2-May-13	Hancock Bank Moss Point, MS 17-May-13
Mask(s)	✓	✓	✓	✓	✓	✓	✓	✓
Gloves	✓	✓	✓	✓	✓	✓	✓	✓
Gun	✓	✓	✓	✓	✓	✓	✓	✓
Stolen AL Drop Vehicle	✓	✓	✓	✓	✓	✓	✓	✓
(White pickup truck)	✓		✓	✓		✓	✓	✓
9:30 am - 11:35 am	✓	✓	✓	✓	✓	✓	✓	✓
< 95 second duration	(N/A)	✓	✓	✓	✓	✓	✓	✓
Cash Drawers Only	✓	✓	✓	✓	✓	✓	✓	✓
Coats/Long-sleeves	✓	✓	✓	✓	✓	✓	✓	✓
Approx. 1 Hour from Mobile	✓	✓	✓	✓	✓	✓	(1.45 hours)	✓
Two Men in Bank	✓	✓		✓	✓	✓	✓	✓
Counter Vaulted/Passed	✓	✓		✓	✓	✓	✓	✓

Example 13: Common Elements of Bank Robberies

D. Maps

Maps offered at trial are fair game for briefs and post-trial submissions. With today's technology, it is also possible to generate a map based on the record evidence. In *United States v. Johnson*, 880 F.3d 226 (5th Cir. 2018), the trial testimony sufficiently identified the route of a high-speed chase to reproduce it on a map for appeal. *See* Example 14.[23]

[23] Brief of Appellee at 8 & n.3, United States v. Johnson, No. 16-60574 (5th Cir. 2017) (citing authority for judicial notice).

A map also can help identify locations that are referred to in the brief. *See* Example 15.[24]

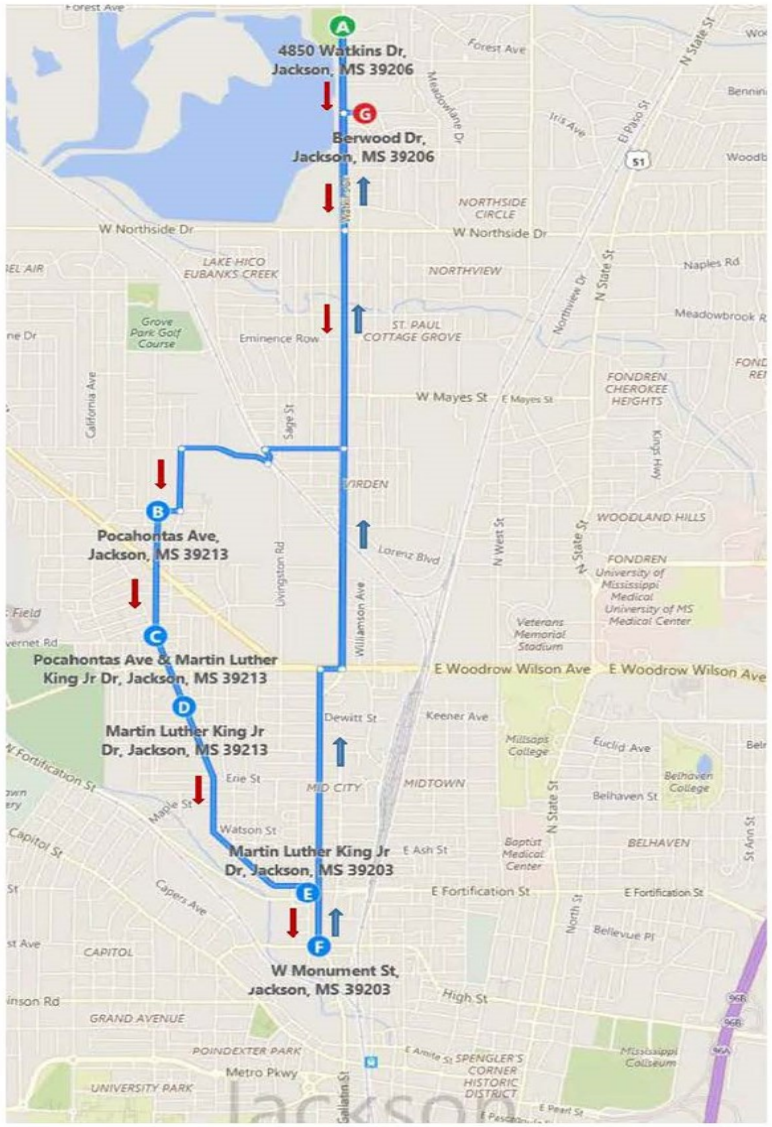


***Figure 1** (Route of travel):* Ⓐ (ROA.186) → Ⓑ (ROA.194) → Ⓒ (ROA.194) → Ⓓ (ROA.195) → Ⓔ (ROA.195) → Ⓕ (ROA.195-96, 226-27) → Ⓖ (ROA.231)

Example 14: Route of High-Speed Chase

[24] Consolidated Answering Brief of Appellee at 9, United States v. Shields, No. 14-10561, 2016 WL 1426119 (9th Cir. Apr. 8, 2016).

Example 15: Locations of Scheme

E. Digital Evidence

Digital evidence in the form of documents or photographs can help enliven a brief and enlighten the reader. "By using pictures as well as words, lawyers can present their cases in ways that interact more effectively with their audiences' diverse styles of learning."[25]

Documents introduced at trial can be a compelling source of proof, offering direct access to the words of a defendant. Reproducing exchanges of key text messages can bring the reader directly into the communications at issue. *See* Example 16.[26]

As another example of digital evidence, in a case involving controlled substance analogues, emails from the defendant showed his involvement in marketing analogues and his awareness of their euphoric effects. *See* Examples 17 and 18.[27]

A website from the same case showed the defendant's active marketing of controlled substance analogues.[28]

---

[25] Sherwin et al., *supra* note 19, at 235.

[26] Brief of Appellee at 20, United States v. Gilbertson, No. 18-3745, 2019 WL 1865656 (8th Cir. Apr. 17, 2019).

[27] Supplemental Brief of Appellee at 5, United States v. Muhammad, No. 15-60300 (5th Cir. 2000); *id.* at 15.

[28] *Id.* at 15.

Example 16: Exchange of Texts

Figure 2: 5/16/13 MUHAMMAD E-MAIL

From: daggafire75@gmail.com, Rasheed Muhammad
Sent: Thursday, May 16, 2013 04:45:02 PM UTC
To: jordan.golladay@gmail.com, Jordan Golladay
CC:
Subject: Re: Sample
Attachments:

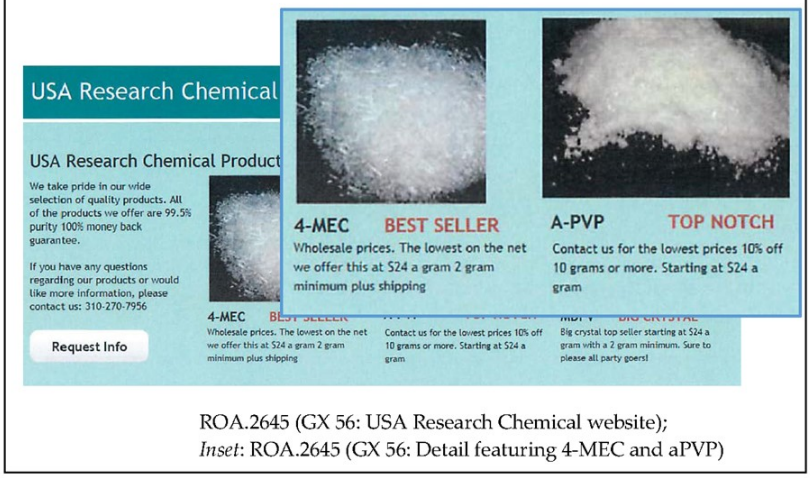
Message

At this time we have 4mec a-pvp methylone and a few others that were designed to rep mdma. I believe the 4-mec will replicate it the most. Some customers mix the a-pvp an for the same effect as the mdma.

ROA.3113 (GX 37A) (highlighting in original)

Example 17: Email

Figure 5: USA RESEARCH CHEMICAL WEBSITE: 4-MEC and aPVP



ROA.2645 (GX 56: USA Research Chemical website);
Inset: ROA.2645 (GX 56: Detail featuring 4-MEC and aPVP)

Example 18: Website Excerpt

In addition, photographs are particularly valuable in illustrating a point. "Unlike the linear communication of words, which must be taken in sequentially, much of a still picture's meaning can be grasped all at once."[29] Pictures often can convey what lengthy text cannot.[30]

An example of an effective use of a photograph in a brief illustrated the lane closures at issue in the so-called "Bridgegate" case. A trial exhibit showing the entrance to the George Washington Bridge was highlighted to indicate the lanes of traffic dedicated to motorists entering from Ft. Lee, New Jersey. *See* Example 19.[31]

[29] Sherwin et al., *supra* note 19, at 243; *see* Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3, 38 (2013) ("Seeing a case makes it come alive to judges.").

[30] Michael A. Blasie, *A Picture Is Worth a Thousand Words: Enhancing Your Brief with Visual Aids*, 48 COLO. LAW., no. 9, 2019, at 12.

[31] Consolidated Brief for Appellee at 7, United States v. Baroni, No. 17-1817 (3d Cir. Dec. 28, 2017).

JA906 (highlighting added). Tens of thousands of commuters, not just Fort

Example 19: Highlighting Showing Lanes Dedicated to Motorists Entering George Washington Bridge from Ft. Lee, New Jersey

Photographs can be used in combination to illustrate a point. Key images from photo exhibits at trial can be enlarged to appear as insets, properly labeled with reference to the record. A pair of photos can be inserted in a brief for ready comparison. For example, in *United States v. Betton*, it was important to demonstrate that the sentencing judge had a sufficient basis to conclude that the defendant was aware of a weapon found in his motel room. 820 F. App'x 297 (5th Cir. 2020) (not precedential). A set of photographs from the sentencing hearing illustrated this point:

A comparison of two photographs of the weapon showed the gun's lower receiver extension clearly visible, leaning against a couch in the motel room. *See* Example 20.[32]

[32] Brief of Appellee at 17, United States v. Betton, No. 20-60062, 2020 WL 3406745 (5th Cir. June 12, 2020).

Figures 1 & 2: PHOTOGRAPHS OF AR PISTOL FOUND AT MOTEL
ROA.150 (PSR ¶ 32o); ROA.103-04; ROA.254-55

Fig. 1: GX 1 (ROA.120) showing AR pistol with buffer tube (lower receiver extension) leaning against couch in motel room (highlighting in red added for comparison).

Fig. 2: GX 2 (ROA.122) showing AR pistol displayed on couch in motel room (buffer tube highlighted in red for comparison).

ROA.150 (PSR ¶ 32(o)); ROA.182 *See* https://diamondbackfirearms.com

Example 20: Comparison of Photos of Weapon

F. Other Ways to Categorize Visuals

One commentator has pointed to scholarship identifying categories of visuals in briefs: (1) *organizational visuals*, such as bullet lists, timelines, and tables; (2) *interpretative visuals*, such as flow charts, pie charts, and diagrams; and (3) *representative visuals*, such as photographic images and maps.[33] These categories highlight what may help enhance a brief.

III. How to use graphics

The federal rules offer little to guide or restrict the use of graphics in briefs. "Only one federal procedural rule contemplates use of images in legal briefs—Federal Rule of Appellate Procedure 32—and the relevant

[33] Shiess, *supra* note 13, at 10.

portion of that rule has not been subject to even a single recorded case of judicial interpretation."[34] The federal rule governing the use of graphics in briefs tells the practitioner that "[p]hotographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy."[35] Thus, the question of how best to employ graphics is left to the practitioner's good judgment.

A few practice pointers may be worth keeping in mind:

- In presenting diagrams to the trial court, be prepared to offer testimony supporting what is depicted. *See* Example 12, *supra* (illustration of submission of discharge monitoring reports for expert witness to explain at trial).
- When including graphics based on an appellate record, cite the record. *See* Example 3, *supra* (citing presentence report (PSR) by paragraph number and record on appeal (ROA) by page number).
- A map based on trial testimony should clearly label the source of the information for what is shown. *See* Example 14, *supra* (route of high-speed chase based on trial testimony).

---

[34] Porter, *supra* note 4, at 1695. The Ninth Circuit has recently addressed the use of visual images in briefs, prescribing how such images may be incorporated and how they affect the word count. *See* Ninth Cir. Ct. of Appeals, Circuit Rule 32-1. Length and Form of Briefs, Certificate of Compliance (2022), https://cdn.ca9.uscourts.gov/datastore/ general/2022/09/20/Final-Rules-as-Adopted.pdf. Individual judges and panels have expressed approval for incorporating visual images. *See* Howard T. Markey, Chief Judge, U.S. Ct. of App. for the Fed. Cir., Remarks on Advocacy Before the Federal Circuit, AIPLA Bull. 207 (Dec. 1990) ("Why not a chart? Bar chart or diagram? . . . I know of no rule against that sort of thing, and if it helps communicate, that's the purpose."); Paul R. Michel, Judge, U.S. Ct. of App. for the Fed. Cir., Remarks at the Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 193 F.R.D. 263, 288 (1999) ("I just want to put in a plug for diagrams, photographs, charts, and other graphic ways of communicating. Everything doesn't have to be communicated with long sentence."); Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. App. Prac. & Process 401, 421 (2010) (quoting the same); *see also* United States v. Palmer, 796 F. App'x 573, 575 n.1 (11th Cir. 2019) (not precedential) (appellant's "brief provides helpful visuals to demonstrate the differences between the two methods of calculation"); United States v. Suba, 132 F.3d 662, 666 n.7 (11th Cir. 1998) (diagram was "helpful in understanding the factual background of this case"). Courts are not as receptive when parties incorporate material that the record does not support or when they manipulate record images. *See, e.g.*, Ernst v. Methodist Hosp. Sys., 1 F.4th 333, 338 n.3 (5th Cir. 2021) (image in brief of signature on document "is not in the record"); Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1103 n.6 (7th Cir. 2017) (criticizing modified images).

[35] Fed. R. App. P. 32(a)(1)(C).

- Where appropriate, cite the court's authority to take judicial notice of map evidence. *Id.*
- Indicate where text is highlighted in the original of a document excerpted in a brief. *See* Example 17, *supra* (pointing out that highlighting was in the original).
- For documents and other exhibits containing text requiring special attention, consider including an inset enlarging the selected portion.*See* Example 18, *supra* (inset featuring detail about controlled substance analogues for sale on defendant's website).
- Especially for digital evidence, consider including a border around the picture or document to separate it from the text of the brief. This function can be accomplished very readily by inserting a text box and then uploading the graphic file into the text box, which can be resized to suit your purpose. The text box will provide a rectangle around your image that you then can label and refer to in your text. *See* Example 1, *supra.*
- For photographs, there is no reason that aspects of the images cannot be highlighted, so long as this alteration is described in the caption.[36] *See* Example 20, *supra* (explaining that the purpose of red boxes around items in the images was for comparison purposes).

A final suggestion is to include a list of tables and figures in your table of authorities. This insert will preview for the court what you intend to provide while offering an easily accessible way to locate the tables and figures in the brief. *See* Example 21.[37]

Including visuals in briefs is still a relatively new phenomenon.[38] Members of the primary audience for briefs—judges—evidently appreciate the selective use of pictures, maps, and diagrams that offer welcome relief from otherwise dry text and help judges focus on key evidence.[39] But it is important to maintain credibility and dignity when doing so.

---

[36] Sherwin et al., *supra* note 19, at 240 ("[C]aptions guide the interpretation of pictures").

[37] Brief of Appellee at ix, United States v. Betton, No. 20-60062, 2020 WL 3406745 (5th Cir. June 12, 2020).

[38] The field of scholarship on this subject also is relatively new. One law review article from 2014 described itself as "the first comprehensive scholarly treatment of imagedriven written advocacy." Porter, *supra* note 4, at 1698.

[39] *See* Guberman, *supra* note 5, at 49–50; *see also* note 34, *supra* (citing comments from judges and opinions).

TABLE OF AUTHORITIES *(Continued)*

Other PAGE

Tables and Figures

Example 21: List of Tables and Figures in Table of Authorities

Insert visuals in briefs sparingly. One way to imagine using graphics is to consider how they appear in scientific journals and history books where the materials enhance, but not detract, from the text that they accompany. As one observer aptly stated, "Image-driven written persuasion is here."[40] With such a potent weapon in our arsenal, we should learn to deploy it effectively.

About the Author

Gaines H. Cleveland is Chief of Appeals and Senior Litigation Counsel for the Criminal Division of the United States Attorney's Office for the Southern District of Mississippi and is based in its Gulfport branch office. Before returning to Mississippi, Gaines was an Assistant United States Attorney for the Southern District of New York. He served as a law clerk for Judge Ellsworth Van Graafeiland of the United States Court of Appeals for the Second Circuit and practiced law at Covington & Burling in Washington, D.C.

40 *See* Porter, *supra* note 4, at 1723.

Page Intentionally Left Blank

Navigating Juvenile Transfers: Investigation, Discovery, and Strategy

Benjamin D. Traster
Assistant U.S. Attorney
Eastern District of Oklahoma

Joshua Satter
Assistant U.S. Attorney
Eastern District of Oklahoma

I. Introduction

The purpose of the Juvenile Justice and Delinquency Prevention Act[1] (the Act) is to "remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[2] The Act, however, presumes that not every juvenile offender may be rehabilitated or treated. Implicit in the Act's structure is the idea that there are two categories of juvenile offenders: (1) those who commit youthful offenses due to their immaturity and (2) those who commit adult-like criminal acts based on fundamentally adult-like reasoning.[3] For the former category, the Act creates a separate, non-criminal adjudication process that seeks to rehabilitate and treat the juvenile. For the latter category, the government may seek to transfer the juvenile for adult prosecution in district court. When the government moves to transfer the juvenile, the Act creates a decisional framework for

---

[1] Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 18 U.S.C. §§ 5031–5042 (2009)).

[2] *See, e.g.*, United States v. Doe, 58 F.4th 1148, 1156 (10th Cir. 2023);

United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994). For overviews of the Act, see David Jaffe & Darcie McElwee, *Federally Prosecuting Juvenile Gang Members*, 68 DOJ J. Fed. L. & Prac., no. 5, 2020, at 15; Charles Doyle, Cong. Rsch. Serv., RL30822, Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters (2018).

[3] The Supreme Court's holding in Graham v. Florida, 560 U.S. 48, 68 (2010), relying on the reasoning in Roper v. Simmons, 543 U.S. 551, 573 (2005), generally acknowledges the difference between these two categories of offenders: The crimes of some juvenile offenders reflect "unfortunate yet transient immaturity," while there is the "rare juvenile offender whose crime reflects irreparable corruption."

a court to differentiate between these two types of offenders with the goal of determining the appropriate forum for their prosecution.

Specifically, section 5032 of the Act requires a district court to decide whether a transfer of the juvenile for adult prosecution is in the "interest of justice."[4] In particular, the court must weigh six factors enumerated in the Act that assess a variety of matters regarding the juvenile's past and present circumstances.[5] The Act gives the district court broad discretion to assess the six enumerated factors and thereby distinguish between immature juveniles and juveniles in age only. As discussed throughout this article, the amorphousness of the Act's transfer framework and the broad latitude given to district courts does not encourage or lead to predictable results.[6]

McGirt v. Oklahoma dramatically changed the criminal justice landscape in eastern Oklahoma seemingly overnight,[7] creating the development of a practice in prosecuting juveniles for especially violent crime. Along with this development has come a need for greater practical expertise, more consistency, and increased predictability with respect to juvenile prosecutions. As a result, new strategies to successfully transfer juveniles have been identified as transfer motions and transfer hearings have become more common.[8] Recurring problems and issues have also emerged. Overall, this article will set out some of the lessons learned from the burgeoning juvenile prosecution practice in the Eastern District of Oklahoma.

II. Background on section 5032

Before any proceeding against a juvenile may begin in federal court, whether for prosecution as an adult or adjudication as a juvenile delin-

---

[4] *See* United States v. Juvenile Male #1, 86 F.3d 1314, 1322 (4th Cir. 1996) ("the question of whether the interest of justice is served by the transfer of a juvenile for adult prosecution is a decision within the broad discretion of the district court" (citations omitted)).

[5] *See* 18 U.S.C. § 5032.

[6] A district court's decision with respect to transfer will be reviewed for abuse of discretion. *See Doe*, 58 F.4th at 1156 (citing United States v. McQuade Q., 403 F.3d 717, 719 (10th Cir. 2005)); *One Juvenile Male*, 40 F.3d at 845 (collecting cases).

[7] McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020) held that Congress never disestablished Indian reservations located in eastern and northeastern Oklahoma. As a consequence, the State of Oklahoma has no jurisdiction to prosecute Indians for crimes committed on Indian reservations where *McGirt*'s reasoning applies.

[8] The authors know of at least nine motions to transfer for murders committed by juvenile offenders in the Eastern District of Oklahoma since early 2021.

quent, a United States Attorney must certify[9] that: (1) a state does not have or refuses to assume jurisdiction over the juvenile; (2) a state does not have programs or services adequate for the needs of the juvenile; or (3) the offense meets certain criteria, including where an offense is a felony crime of violence, and the United States Attorney agrees that there is a substantial federal interest in the case.[10] The Act seemingly takes pains to shift the prosecution of juveniles to authorities other than the United States.

For acts of juvenile delinquency, the Act sets forth maximum periods for which a juvenile may face detention as part of the juvenile's treatment and rehabilitation. Generally, a juvenile may not be placed in detention for more than five years.[11] For many violent crimes, these periods for treatment and rehabilitation are not sufficient and are grossly disproportionate to the sentence an adult age 18 years or older would face.[12]

In the wake of *McGirt*, the discretionary transfer of juveniles for adult prosecution is often necessary to hold violent juveniles accountable for their offenses. Not only does the state government lack the jurisdiction to prosecute an Indian juvenile for a crime committed on an Indian reservation, but also the tribal court may be an inadequate forum for cases involving particularly violent or heinous crimes, such as murder or rape.[13] This reality is amplified by the fact that the entire Eastern District of Oklahoma now sits on five Indian reservations where Indians are subject to the exclusive criminal jurisdiction of the United States or the tribes.[14]

III. The interest of justice and section 5032 factors

Once a motion to transfer the juvenile for adult prosecution has been filed, the Act requires the district court to determine, "after hearing,

---

[9] The Act requires Attorney General certification. The authority to certify a juvenile for federal prosecution, however, was delegated to United States Attorneys. *See* 28 C.F.R. § 0.57; Justice Manual 9-8.110.

[10] *See* 18 U.S.C. § 5032.

[11] *See* 18 U.S.C. § 5037(c)(2)(A)(i); United States v. J.A.S., 862 F.3d 543, 544 (6th Cir. 2017).

[12] *See, e.g.*, J.A.S., 862 F.3d at 544 (noting that the juvenile defendant could have been sentenced to life imprisonment if he had been prosecuted as an adult).

[13] *See* 25 U.S.C. § 1302(b) ("A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense . . . .").

[14] Press Release, U.S. Dep't of Just., Eastern District of Oklahoma Federal Grand Jury Hands Down Record Number of Indictments (Apr. 22, 2021).

[whether] such transfer would be in the interest of justice."[15] To make this assessment, a district court must consider evidence and make findings in the record regarding the following six enumerated factors:

(1) the age and social background of the juvenile;

(2) the nature of the alleged offense;

(3) the extent and nature of the juvenile's prior delinquency record;

(4) the juvenile's present intellectual development and psychological maturity;

(5) the nature of past treatment efforts and the juvenile's response to such efforts; and

(6) the availability of programs designed to treat the juvenile's behavioral problems.[16]

Instead of depending on evidence narrowly tailored to the burden of proof in a criminal case, the six section 5032 factors require a searching inquiry into the background of the juvenile defendant that is not always connected to the charged offense. The inquiry includes the following questions:

- Who is the juvenile?
- How did the juvenile grow up?
- Does the juvenile have a history of delinquency?
- Has the juvenile been treated for mental health issues and how did the juvenile respond to treatment?
- What is the juvenile's present mental and intellectual state?
- Can the juvenile be rehabilitated and by whom?

The inquiry is broad and the resulting conclusion the court must draw—whether the government has proved by a preponderance of the evidence that the transfer of the juvenile is in the interest of justice[17] —is not well-defined.

---

[15] 18 U.S.C. § 5032. A district court may refer the evidentiary hearing on a motion to transfer to the magistrate judge for a report and recommendation pursuant to Fed. R. Crim. P. 59 and 28 U.S.C. § 636. For simplicity, however, this article will assume that a district court is conducting the transfer hearing and deciding the motion to transfer.

[16] United States v. Leon, D.M., 132 F.3d 583, 589 (10th Cir. 1997); *see also* 18 U.S.C. § 5032.

[17] United States v. Doe, 58 F.4th 1148, 1156 (10th Cir. 2023); United States v. Doe, 49 F.3d 859, 868 (2d Cir. 1995); United States v. Under Seal, 819 F.3d 715, 718 (4th Cir. 2016); United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992).

The Act provides no guidance about what this inquiry entails nor how a court should determine whether transfer is in the interest of justice.[18] Courts of appeals have attempted to provide some direction to district courts—based on the purpose of the Act to encourage treatment and rehabilitation—by further elucidating the meaning of the interest of justice. For example, in *United States v. One Juvenile Male*, the Sixth Circuit held that "a motion to transfer is properly granted where a court determines that the risk of harm to society posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation."[19] Rephrasing the inquiry, the Tenth Circuit defined the interest of justice as balancing the purpose of the Act to encourage treatment and rehabilitation "against the need to protect the public from 'violent and dangerous individuals and providing sanctions for antisocial acts.'"[20]

No matter how courts have interpreted the meaning of "interest of justice," Congress has made clear that judges must weigh the six factors set forth in section 5032 and make factual findings in the record. In addition, courts have held that juvenile adjudication is presumed appropriate unless the government establishes by a preponderance of the evidence that a transfer to adult status is warranted in the interest of justice.[21]

IV. The discretionary transfer hearing

The unique requirements for a transfer hearing raise numerous practical questions for any prosecutor attempting to transfer a juvenile for adult prosecution, including questions about the following: (1) the investigation of the offense and the section 5032 factors, (2) the proper scope of discovery, and (3) overall strategy. The relative dearth of case law on these practicalities makes the process for transferring a juvenile uncertain and unpredictable. Ultimately, in a quasi-criminal context, the prosecutor who has moved for transfer must present a picture of the ju-

---

18 *See* United States v. TLW, 925 F. Supp. 1398, 1400–01 (C.D. Ill. 1996) ("The term 'in the interest of justice' does not lend itself to concise definition").

19 United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994).

20 *Leon, D.M.*, 132 F.3d at 588–89 (quoting *One Juvenile Male*, 40 F.3d at 844). Courts in other circuits reframe the "interest of justice" as balancing rehabilitation against dangerousness. *See, e.g.*, United States v. Juvenile Male #2, 761 F. Supp. 2d 27, 29 (E.D.N.Y. 2011) (the Act "recognizes that, under certain circumstances, the rehabilitative focus of the juvenile justice system must yield to the compelling need to protect the public from the dangerous threat to society posed by the alleged criminal activity of a juvenile").

21 *Doe*, 58 F.4th at 1156; United States v. Ramirez, 297 F.3d 185, 192 (2d Cir. 2002); United States v. A.R., 38 F.3d 699, 703 (3d Cir. 1994).

venile defendant that gives the district court a compelling factual basis for transfer.[22]

A. Investigation

Obtaining evidence and preparing a case with respect to the six factors present practical and strategic questions. A felony prosecution for juvenile delinquency proceeds by juvenile information.[23] A motion to transfer, which is typically filed simultaneously with the juvenile information, suspends adjudication proceedings and tolls the Act's speedy trial time limits,[24] permitting the United States and the defense to collect evidence for the transfer hearing.[25]

The process of criminally prosecuting a juvenile as an adult does not begin until the court finds that transfer is in the interest of justice and orders the juvenile to be transferred for adult prosecution. This posture leads to a unique set of questions about what tools are available to investigate an act of juvenile delinquency that may ultimately become the subject of an adult prosecution.

1. The (lack of a) grand jury

Because there is no adult prosecution before transfer and because there may never be an adult criminal investigation, using a grand jury to obtain evidence and information related to the six factors may not be advisable for the government before a transfer order for adult prosecution.[26] The rationale here is that juvenile adjudications and transfer proceedings are civil in nature, whereas the grand jury is strictly focused on investigating adult criminal offenses. As a result, this reasoning would lead a prosecutor to eschew using the grand jury to investigate the offense

---

[22] Courts recognize that an adjudication for juvenile delinquency is civil in nature. *See* United States v. Juvenile, 347 F.3d 778, 785 (9th Cir. 2003) ("A successful prosecution under the Act results in a civil adjudication of status, not a criminal conviction"); *A.R.*, 38 F.3d at 703 (noting that an adjudication results in a decision on the status of an individual). The transfer proceeding is akin to a purgatory between adjudication and criminal prosecution, but involves an evaluation of numerous factors, including the nature of the offense, which adds a criminal dimension to the proceeding.

[23] 18 U.S.C. § 5032.

[24] Waiting to file a motion to transfer allows the speedy trial clock to begin and may also permit a defendant to plead guilty to the juvenile information, foreclosing a later transfer for adult prosecution. Under most circumstances, a motion to transfer should be filed along with the juvenile information.

[25] *See* United States v. David A., 436 F.3d 1201, 1207 (10th Cir. 2006) (collecting cases).

[26] *See* Jaffe & McElwee, *supra* note 2, at 16 (discussing how prosecutors cannot use the grand jury to investigate a juvenile crime after an information is filed).

or the section 5032 factors before a final transfer order.

There is, however, precedent supporting the use of the grand jury in a transfer context.[27] The rationale for this opposing view is that a juvenile's "age-based status—being subject to adult certification—is not absolute."[28] If transferred for adult prosecution, an offender falls within the ambit of an indictment by a grand jury under the Fifth Amendment. "The government and the grand jury have a legitimate interest in the investigation and prosecution of an act which may be a felony."[29] Moreover, a juvenile "might have also had an adult accomplice—a person fully susceptible to the power of a grand jury"[30] —which is a very real scenario in the Eastern District of Oklahoma as well.[31] Nonetheless, this reasoning likely only supports the use of the grand jury to gather evidence relevant to the purported crime and not for gathering information pertaining to the section 5032 factors.[32] Segregating evidence related to the crime from information pertaining to the transfer proceeding, which includes assessing the nature of the alleged offense, will be challenging.

The inability to use the grand jury to compel the production of evidence that is strictly related to the transfer hearing, such as evidence from health providers, schools, detention facilities, and child welfare and human services departments, means that the government must use trial subpoenas to obtain this information. This mechanism is sufficient to investigate the factors relevant to the transfer process, but it does not have the same advantages of a grand jury subpoena. For example, trial subpoenas are not secretive and may be more burdensome.

In the Eastern District of Oklahoma, prosecutors undergo a multi step process when attempting to obtain records relevant to the transfer determination. First, prosecutors must seek to obtain records from third parties by consent. If that fails, prosecutors then request trial subpoenas from the district court by motion.[33] Investigators may also interview friends,

---

27 *See In re* Green Grand Jury Proceedings, 371 F. Supp. 2d 1055, 1057 (D. Minn. 2005).

28 *Id.*

29 *Id.*

30 *Id.*

31 *See, e.g.*, Complaint, United States v. Voyles, No. 21-MJ-173 (E.D. Okla. Apr. 21, 2021), ECF No. 1.

32 *See* In re *Green Grand Jury Proceedings*, 371 F. Supp. 2d at 1057.

33 *See* Gen. Order No. 21-13, U.S. Dist. Ct. for the E. Dist. of Okla. (June 2, 2021), https://www.oked.uscourts.gov/sites/oked/files/general-ordes/GO_21-13.pdf (listing five requirements for motions for a subpoena duces tecum, which ultimately leaves the ability to obtain information to the discretion of the court; contrast that process with the relatively seamless issuance of a grand jury subpoena).

family, and health providers about the juvenile's background, social history, and past treatment of any kind. This process is time-consuming and may occur after the prosecutor decides whether to seek transfer, adding ambiguity at the outset.

It is also often difficult or impossible to obtain the breadth of information known or accessible by the defense, including access to the juvenile's family members and friends, who may be uncooperative. Accordingly, a prosecutor must be prepared to initiate and litigate a transfer motion with incomplete information along the way. The lack of any compulsion power through the grand jury makes the task of developing a full picture of the juvenile exceedingly difficult and should be considered at the outset of any transfer process.

2. Search warrants

Using search warrants in this area is equally unhelpful. As a general matter, prosecutors are permitted to utilize search warrants when investigating crimes, so long as the warrant is supported by probable cause to believe that the search would uncover evidence of criminal activity.[34] It follows that search warrants cannot be used for the primary purpose of learning about the majority of the section 5032 factors, such as the juvenile's social background, psychological maturity, or intellectual development, which are not likely or obviously related to evidence of criminal activity. A search warrant, sufficiently supported by probable cause, may reveal evidence about both suspected criminal activity and, by consequence, the nature of the alleged offense element in section 5032. Once the government has searched the item or place at issue, the search may also unintentionally reveal evidence pertaining to the other five section 5032 factors.

The prosecution may stumble upon evidence relevant to and admissible in the transfer proceeding by virtue of a warrant supported by probable cause. Yet the government should not directly use search warrants to learn about the civil-in-nature section 5032 factors for the same reasons that the grand jury is unavailable to compel juvenile transfer-specific evidence. Once again, this may leave the prosecution in the dark with respect to a wealth of information about a juvenile's social background and other relevant information, particularly on the juvenile's electronic devices or social media accounts.

Nonetheless, despite these practical difficulties, there are still records and documents that may shed light on the juvenile for purposes of trans-

---

[34] *See* United States v. Danhauer, 229 F.3d 1002, 1005–06 (10th Cir. 2000) (discussing probable cause generally).

fer. Academic records, delinquency and custodial disciplinary records, health and mental health treatment records, and other records related to the juvenile's social, psychological, and intellectual background may still be obtained from third parties by trial subpoena or consent. Additionally, the above-mentioned hurdles may provide support for moving the district court to provide early and more expansive discovery from the defendant than would be ordered in an adult criminal prosecution.

3. Compelling psychological evaluations

Pursuant to section 5032, the court must make findings regarding the juvenile's present intellectual development and psychological maturity in making its transfer decision. This factor imposes particular burdens and difficulties on the government. To assist the court in making findings about this factor, the government may want to employ a forensic psychologist experienced in evaluating juveniles. There is no requirement to utilize a psychologist to present this evidence,[35] but the absence of a trained expert will make it harder for the court to assess this factor with any forensic reliability.[36]

Information about the juvenile obtained by trial subpoenas or reciprocal discovery will provide a basis for a forensic psychologist to evaluate the juvenile, albeit from afar. Some of those records may even contain prior psychological and intellectual evaluations. But the government would be at an obvious disadvantage compared to the defense who can provide a forensic psychologist with access to the juvenile. Such access would permit a defense expert to conduct contemporaneous psychological testing for the purpose of a psychological evaluation. In the absence of any reciprocal discovery order, the defense could choose to use a positive report or withhold an adverse report without the district court or government having an opportunity to assess the report.

In this context, there is precedent for compelling a juvenile to undergo a psychological evaluation by a government psychologist to assist

---

35 *See* United States v. Leon, D.M., 132 F.3d 583, 591 (10th Cir. 1997) ("§ 5032 does not require a psychological evaluation before the district court may decide a transfer motion"); *accord* United States v. J.J., 704 F.3d 1219, 1223 (9th Cir. 2013) ("§ 5032 does not require a psychological evaluation before the district court may decide a transfer motion"); *cf.* United States v. Doe, 49 F.3d 859, 868 (2d Cir. 1995) (discounting a court-appointed psychologist's evaluation that the juvenile was immature because, among other things, the juvenile lived independently of his family with a dangerous gang).

36 Still, there may be drawbacks to using a forensic psychologist where a juvenile's leadership, maturity, or intellect is obvious in the context of the offense. In fact, a clinical assessment may undermine the court's lay observations, which it is permitted to make.

the district court in making its transfer decision.[37] Specifically, in *United States v. Leon, D.M.*, the Tenth Circuit, while emphasizing the considerable discretion vested in the district court and the ambiguity of this particular factor, stated that "a psychological evaluation of [the juvenile] may have been helpful in deciding its motion to transfer."[38] The court also noted that it is the government's burden to prove that a transfer is warranted. During the transfer proceedings in *Leon*, however, "the government did not seek a psychological evaluation until after the conclusion of the evidentiary hearing on its motion and the issuance of the district court's ruling."[39] The delay in the government's request for an evaluation led the circuit court to uphold the district court's transfer order based solely on the district court's evaluation of the evidence in the record.[40] Nevertheless, the Tenth Circuit never ruled out that a district court could order a juvenile to undergo a psychological evaluation at the government's request and with a government psychologist.[41]

Additionally, the Act itself supports the notion that the government can compel a juvenile to undergo a forensic psychological examination by a psychologist of its choosing. For starters, the Act and its six factors require the court to contextualize the offense and obtain a full picture of the juvenile. A full psychological evaluation of the juvenile, including a clinical interview with an assessment of the juvenile's remorsefulness and perception of the nature of the offense, would provide the court with insight into the juvenile's risk of violence, mental state, maturity, and amenability to treatment. Moreover, section 5032 explicitly limits the use of statements made by the juvenile in the context of the transfer hearing: "Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions."[42] This provision in the Act ensures that statements made during a compelled psychological examination will not be used at a subsequent criminal prosecution.[43] In the Eastern District of Oklahoma, the district

---

[37] At least one court has ordered a full inpatient psychological evaluation prompted by the government's request for a psychiatric evaluation and the juvenile's request for a full inpatient psychological evaluation. United States v. TLW, 925 F. Supp. 1398, 1400 (C.D. Ill. 1996). The court ultimately used the psychological evaluation to support its decision to transfer. *Id.* at 1404.

[38] *Leon, D.M.*, 132 F.3d at 591.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 18 U.S.C. § 5032; *see also* United States v. A.R., 38 F.3d 699, 703 n.5 (3d Cir. 1994).

[43] It is, nonetheless, an open question whether a juvenile's statements made prior

court followed the considerations set forth in *Leon, D.M.* and the reasoning underpinning the limitation on self-incrimination. The district court has compelled juveniles to undergo psychological evaluations by government psychologists when the United States has requested them.[44]

B. Discovery

The breadth of relevant evidence that may be useful for a transfer hearing, the practical difficulties involved in obtaining relevant evidence for the transfer hearing, and the statute's explicit limitation on self-incrimination prior to and during the transfer hearing (and the reasoning for that limitation) suggest that a court should encourage the government and the defense to provide discovery broadly and early with respect to the section 5032 factors.[45]

As a general matter, it is doubtful that Rule 16 of the Federal Rules of Criminal Procedure applies to a juvenile transfer hearing.[46] Rather, because of the informal nature of the hearing, a district court has more latitude to order discovery that is consistent with the purpose of the statute. The district court should therefore order discovery that minimizes the defense's ability to manipulate information relevant to the transfer inquiry by restricting access to the information. Imagine, for instance, a case where a juvenile might have a documented history of being obsessed with or fascinated by mass murders with firearms. The court would surely want to know about this history in making its decision on transfer, but a juvenile may attempt or choose to shield this information from the court even if this documentation is in defense custody. Such a scenario clearly runs counter to the court's "interest of justice" inquiry.

The statute and scope of the transfer inquiry protects the juvenile from future adverse consequences stemming from the production of evidence. Much of the evidence that is relevant to the court's "interest of

---

to or during the transfer proceedings may be used to impeach them during cross-examination, along the lines of a suppressed statement by a defendant.

44 Because juvenile prosecutions and transfer proceedings are sealed, the authors are unable to provide the specific authoritative support for this proposition.

45 *See* United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir. 1999) (discussing how the court's transfer decision cannot be made through "simple mathematical formulas"); United States v. Doe, 58 F.4th 1148, 1159 (10th Cir. 2023) (reviewing the lower court's "extensive findings" at the transfer hearing stage).

46 Kent v. United States, 383 U.S. 541, 555, 562 (1966), and its juvenile transfer progeny, discuss the due process implications related to the transfer hearing phase. In all, these cases note that the transfer hearing is an informal "civil in nature" proceeding, whereby the court is directed to evaluate the nature of the *alleged* offense. Accordingly, the Federal Rules of Criminal Procedure are inapplicable here. *See also* Fed. R. Crim. P. 16.

justice" determination is unlikely to be useful at a subsequent criminal prosecution.[47] The one category of evidence that may impact a future adult prosecution is evidence pertaining to the nature of the alleged offense. But the district court may assume the truth of the government's allegations regarding the offense when evaluating the transfer motion.[48] This makes logical sense because the transfer inquiry is not narrowly focused on guilt or innocence, leaving the district court with discretion to determine the significance of the nature of the offense in a larger context. Furthermore, permitting a district court to assume the truth of the government's allegations regarding the nature of the offense avoids mini trials about factual allegations, thereby overshadowing the other section 5032 factors and the broader inquiry.[49] Ultimately, the statute encourages a court to order both parties to produce information and discourages the juvenile from contesting or testing the strength of the government's evidence.

Overall, discovery is one of the rare aspects of the juvenile transfer process that may benefit from a lack of clear statutory direction. Consistent with section 5032, prosecutors should request broad and reciprocal discovery for the reasons described above. Courts need not default to Rule 16 and should equally consider ordering expansive discovery that will ensure the transfer decision is supported by the most information possible.

---

[47] This assumes that the prosecution even has a legal basis to use such evidence if relevant, bearing in mind the statute's protections against self incrimination. *See* 18 U.S.C. § 5032.

[48] United States v. A.R., 38 F.3d 699, 703 (3d Cir. 1994) (holding that a district court "is entitled to assume that the juvenile committed the offense charged for the purpose of the transfer hearing" because of the "civil in nature" status of transfer proceedings); *see also* United States v. Leon, D.M., 132 F.3d 583, 589–90 (10th Cir. 1997) ("[I]n making the transfer decision, the court may assume the truth of the government's allegations regarding the defendant's commission of [the] charged crime."); United States v. Doe, 871 F.2d 1248, 1250 n.1 (5th Cir. 1989) ("For purposes of a transfer hearing, the district court may assume the truth of the offense as alleged."); *Anthony Y.*, 172 F.3d at 1251 n.1; *cf. Kent,* 383 U.S. at 562 (finding generally that a juvenile is entitled to a hearing that "measure[s] up to the essentials of due process and fair treatment" while noting that the hearing need not "conform with all of the requirements of a criminal trial").

[49] United States v. Nelson, 68 F.3d 583, 589 (2d Cir. 1995) (discussing how the district court undertook an "unwarranted examination" of the strength of the government's evidence, and that it is better practice for the court to simply assume the nature of the offense). Given that the court may not want to delve into this factor, it may also make sense to refrain from permitting a juvenile from raising potential affirmative defenses, such as self-defense, which are more relevant to a subsequent criminal prosecution.

C. Strategy

Once the universe of available information—acquired through investigatory tools and discovery—has been defined, the transfer hearing presents strategic challenges and opportunities for persuading the court that transfer is in the interest of justice.

First, the prosecution must make strategic decisions about choosing witnesses for the transfer hearing. Numerous potential witnesses may be called to testify and present information about the juvenile's background; the seriousness of the offense; and the juvenile's psychological maturity and intellectual development, including law enforcement agents, school officials, family members, friends, experts, and detention and prison officials. These witnesses may present a wide range of fact and opinion evidence. While summary witnesses may be useful with respect to some factors,[50] calling witnesses with firsthand knowledge of the juvenile may carry more weight or have more impact than summary witnesses or even experts who clinically evaluated the juvenile.

Second, the prosecution must be equally strategic about the documentary evidence adduced at the transfer hearing. Given the size and scope of evidence that may be utilized, it may be tempting to introduce every piece of information obtained during the investigation. The resulting presentation, however, may depict a muddled and unfocused understanding of the juvenile. As in a criminal trial, the transfer hearing should focus on the controversies at issue and should permit the court to draw specific conclusions about the juvenile and the section 5032 factors. Managing the presentation and presenting a coherent portrait of the juvenile that is consistent with adult maturity is a laudable goal. That said, a narrowly focused and coherent portrait may be wishful thinking where so many broad and often competing factors are part of the transfer inquiry.

The prosecution must engage with questions about the relative strategic importance and role of each of the six section 5032 factors. While each of these factors are important to the transfer analysis, some of the factors call for less interpretation and thus less strategic planning. Factors such as the extent and nature of the juvenile's prior delinquency record, the nature of past treatment efforts and the juvenile's response to such efforts, and the availability of treatment, come to mind. Courts have already grappled with the narrow definition of prior acts of delinquency.[51]

---

[50] *See A.R.*, 38 F.3d at 703 ("[W]hile the evidence introduced at the hearing must be consistent with the concepts of due process and fundamental fairness, it need not be in compliance with the Federal Rules of Evidence.") (citing *Doe*, 871 F.2d at 1255).

[51] *See* United States v. Male Juvenile E.L.C., 396 F.3d 458, 462–63 (1st Cir. 2005) (affirming the district court's consideration of subsequent criminal activity as part of

While the nature of past treatment and the accessibility of treatment programs may be disputed, conclusions regarding these factors are likely constrained by documentary evidence or a lack thereof. In short, these three factors are less susceptible to mixed interpretation, and they call for a more straightforward presentation. Any room for interpretation may be subsumed by the other factors.

Conversely, there are three factors that warrant special attention. The first is the nature of the offense. While the court may assume the truth of the government's allegations about the offense, this factor may nonetheless play a decisive role in the government's motivation for seeking transfer. As a result, where applicable, the prosecution must persuade the court that special weight should be given to the nature of the alleged offense.

Additionally, the juvenile's age and social background, along with his or her psychological maturity and intellectual development, present unique challenges. For example, evidence supporting these factors is more ambiguous and may be interpreted by courts in a multitude of ways. Moreover, these factors require prosecutors to go beyond their legal training and venture into areas and topics (such as psychology, sociology, rehabilitation, treatment, etc.) that are unfamiliar and complex. What follows are considerations about how prosecutors might approach this unfamiliar evidentiary terrain and, in turn, persuade the court that the interest of justice supports transfer.

1. The nature of the offense

While the district court must make factual findings in the record regarding all six section 5032 factors, the court may find that, above all, the nature of the alleged offense warrants a transfer in the interest of justice.[52] District courts are entitled to weigh the evidence as the court sees fit, and the court does not need to indicate what weight any factor is given.[53] As

---

either the social background or present intellectual development and psychological maturity factors); *see also* United States v. C.F., 225 F. Supp. 3d 175, 194–95 (S.D.N.Y. 2016) (discussing the split in authority regarding how unadjudicated conduct may play into a court's analysis of the section 5032 factors).

[52] *See, e.g.*, United States v. Juvenile Male, 844 F. Supp. 2d 333, 335 (E.D.N.Y. 2012) (finding that the nature of the alleged offense is entitled to special weight); *Nelson*, 68 F.3d at 590 ("when a crime is particularly serious, the district court is justified in weighing this factor more heavily than the other statutory factors"); United States v. A.W.J., 804 F.2d 492, 493 (8th Cir. 1986) (finding that the heinous nature of the crime is a factor entitled to special weight).

[53] *Nelson*, 68 F.3d at 588 (noting that the court may balance the section 5032 factors in any way that seems appropriate); United States v. A.R., 203 F.3d 955, 961 (6th Cir. 2000) (discussing how the district court has broad discretion in how it balances and weighs the importance of the section 5032 factors).

a result, a court could find that the nature of the offense outweighs the remaining five factors.[54] This may be the case with particularly violent offenses that are premeditated or planned. Premeditated murder or any other planned offense shows psychological and intellectual independence, as well as a more defined and possibly less mutable personality.[55] Specific intent crimes may require a deliberate purpose that reveals psychological maturity, intellectual development, or both. In this vein, when a juvenile plans and executes a crime, a court may ask:

(1) How might such a juvenile be rehabilitated?

(2) What treatment is there that does not risk further danger to society from that individual?

(3) Does expert testimony advocating that a juvenile is amenable to treatment overcome the nature of the offense?

(4) Would that expert testimony be credible?

Accordingly, even though the nature of the alleged offense may be assumed, the prosecution should present evidence that raises these specific considerations to ensure that the district court fully grasps the severity of the underlying crime and the details that bear on other factors.

2. Age and social background

Where the nature of the offense is less singular, evidence regarding the other factors becomes more vital. The remaining two factors—age and social background, as well as psychological maturity and intellectual development—often take more central roles in the interest of justice inquiry. As discussed above, the evidence that is relevant to these two factors may be expansive and may often support dueling interpretations, particularly within the context of rehabilitation and treatment. Consequently, a court may draw especially wide-ranging conclusions about information presented here.

To begin, the court will assess the juvenile's age to determine whether transfer is in the interest of justice.[56] As a juvenile advances closer to 18 years old, a court may find more permanence to personality traits developed in an adverse environment. The court may find that a juvenile's advanced age weighs in favor of transfer because he or she may be less

---

[54] *See, e.g.*, United States v. One Juvenile Male, 40 F.3d 841, 846 (6th Cir. 1994) (affirming the district court's determination that the heinous nature of the offense outweighed any other factor that supported trying defendant as a juvenile).

[55] *See, e.g.*, United States v. Alexander, 695 F.2d 398, 401 (9th Cir. 1982) (doubting the potential for rehabilitation where the juvenile committed first-degree murder).

[56] *See* 18 U.S.C. § 5032.

amenable or open to treatment.[57] Conversely, a court may be less inclined to transfer a younger juvenile whose personality traits may be less permanent and thus more amenable to treatment and rehabilitation.[58] Of course, the analysis can always get more complicated and ultimately more muddled.[59]

Next, the court will turn to the juvenile's social background.[60] An evaluation of the juvenile's social background permits a court to assess the juvenile's social circumstances before committing the offense. A court may find that transfer is inappropriate when a juvenile has had a particularly dysfunctional or adverse childhood.[61] However, an adverse childhood with less family and structural support may also make treatment more difficult, weighing in favor of transfer.[62] Moreover, other social history factors, such as the possibility of substance abuse, may make treatment more difficult and less effective and rehabilitation less likely.[63]

Overall, prosecutors need to strategically consider how to present this evidence effectively[64] while keeping the portrait of the juvenile coherent and focused for the court's consideration. If not already apparent, the evidence regarding age and social background—combined with evidence

---

57 *See, e.g.*, *Nelson,* 68 F.3d at 589 ("Indeed, the more mature a juvenile becomes, the harder it becomes to reform the juvenile's value and behavior") (citations omitted); *A.R.*, 203 F.3d at 961 (noting that the closer a defendant is to 18 years old, the greater the presumption that he be treated as an adult).

58 18 U.S.C. § 5032 permits transfer of juveniles who are 15 years old or older in most circumstances. For certain violent crimes such as murder, rape, aggravated assault, kidnapping, or violent crimes committed with firearms, however, the age minimum for transfer is 13.

59 Take, for instance, a younger juvenile who grew up with family support, education, and social opportunities that would lead him or her to know right from wrong. Where might this juvenile fall?

60 *See* 18 U.S.C. § 5032.

61 *See, e.g.*, United States v. C.F., 225 F. Supp. 3d 175, 191 (S.D.N.Y. 2016) (discussing how the juvenile's social background, which included a troubled childhood and dysfunctional home, weighed against transfer).

62 *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1254 (10th Cir. 1999) (finding that the juvenile's social background, which was "unstable and unsupportive," supported transfer because being raised in such an environment might make future rehabilitation more difficult); United States v. Juvenile No. 1., 118 F.3d 298, 308 (5th Cir. 1997) (affirming district court's determination that the "absence of a strong family environment would make rehabilitation prospects for the juvenile unlikely").

63 *See, e.g.*, United States v. C.P.A., 572 F. Supp. 2d 1122, 1127 (D.N.D. 2008) (finding that there was a "slim" chance the juvenile would be rehabilitated considering, among other things, the juvenile's alcohol and drug use).

64 The government may contemplate utilizing a psychologist to provide expertise on how the juvenile's age and social background will affect the rehabilitation process.

about the other section 5032 factors—is susceptible to an ever-widening scope and, by consequence, a muddled presentation for the court to analyze. Simultaneously, as the court's lens broadens in scope, the outcome of the transfer hearing will become increasingly unpredictable.

3. Psychological maturity and intellectual development

Similar considerations apply to the factor pertaining to the juvenile's psychological maturity and intellectual development. A psychologist may evaluate the juvenile and conclude, from a clinical perspective, that he or she is psychologically immature or intellectually less developed.[65] While such a clinical assessment may present one portrait of the juvenile and ostensibly weigh against transfer, contrary evidence embedded in the nature of the offense or the juvenile's social history may lead the court to disregard a sterilized, clinical assessment and draw its own conclusion.[66]

In this vein, a juvenile who exhibits or self-consciously demonstrates independence may counterbalance a clinical assessment of immaturity and may demonstrate maturity in a variety of ways, including through sexual relationships, leadership, or holding oneself out as capable of independence (perhaps by running away from home or financially supporting oneself). A juvenile's self-perception or self conscious independence may impact the court's assessment of the juvenile's prospects for rehabilitation and amenability to treatment.

In a case involving a juvenile offender (Doe) who was 16 and 17 years old at the time of the offenses (gang-related robbery and extortion), the juvenile literally presented himself to pretrial services as 20- or 21-year-old adult.[67] Later, after adult arraignment and detention hearings, it became apparent that the defendant was a juvenile and entitled to juvenile status under the Act.[68] Eventually, after a transfer hearing, the Second Circuit summarized the district court's finding that Doe was "able to function effectively in an organized gang and to live independent of his family in a very dangerous organization."[69] The district court held that Doe's "repeated criminal acts set forth in the juvenile information coupled with an

---

65 *See* United States v. Leon, D.M., 132 F.3d 583, 591 (10th Cir. 1997) (discussing how a psychological evaluation of the juvenile may have been helpful in deciding the motion to transfer).

66 United States v. Brandon P., 387 F.3d 969, 977 (9th Cir. 2004) (declining to hold that a district court must accept an expert's opinion regarding a juvenile's chances for rehabilitation).

67 United States v. Doe, 49 F.3d 859, 861–62 (2d Cir. 1995).

68 *Id.*

69 *Id.* at 868.

above average intelligence, suggest[] in my analysis a streetwise individual who is not a likely candidate for rehabilitation."[70]

By contrast, in *Leon D.M.*, the juvenile dropped out of high school at 15 years of age, met a 25-year-old woman, and moved in with her and her three children soon after they met.[71] The woman and Leon had a child together when he was 17 years old. Sometime later, when he was still 17, Leon murdered the woman's youngest child. The district court found that the 17-year-old juvenile was "thrust . . . into an adult role that he did not understand and for which he was inadequately prepared."[72] The district court did not transfer Leon because the offense was impulsive and Leon lacked the preparation to handle the adult like situation in which he found himself.[73] Nonetheless, had Leon committed a different, less impulsive act, his decisions and demonstration of independence may have weighed differently.[74] Given the above discussion, it is clearly difficult to predict how a district court will assess a juvenile's psychological maturity and intellectual development. The court's assessment of this factor will largely depend on its subjective interpretation of the facts and evidence at hand. Context will be crucial, and the prosecution should be versed in how courts may interpret this factor. It is easy to get lost in psychological and intellectual tests and the conclusions that may be drawn from this evidence. Strategically, at almost every step and with respect to every factor, it is worth simplifying the inquiry and asking whether the juvenile behaved maturely or rashly, and whether the juvenile was equipped to know right and wrong in context.

V. Conclusion

The decision to transfer a juvenile for adult prosecution is the court's to make. The court must hear evidence and make findings in the record–findings that will be reviewed on appeal for clear error. Courts of appeal

---

70 *Id.* (alteration in original).

71 United States v. Leon, D.M., 132 F.3d 583, 585 (10th Cir. 1997).

72 *Id.* at 586.

73 *Id.* at 585 (citing the forensic pathologist who opined that the abuse suffered by the victim "could be committed by individuals lacking sufficient parenting skills who are overwhelmed by their family responsibilities").

74 The Tenth Circuit upheld the denial of transfer because the district court's interpretations of the six factors was not unreasonable. At the same time, the Tenth Circuit specifically noted that a court has "considerable discretion . . . to decide, based on the evidence presented to it, whether a particular behavior (e.g., dropping out of school and beginning a sexual relationship with an older woman, as Leon did) reflects intellectual development and psychological maturity or a lack of these characteristics." *Id.* at 591.

review the district court's weighing of the six factors and final decision on transfer for abuse of discretion. Given the ambiguity of many of the section 5032 factors, the court's decision may lack predictability. It is not entirely clear what evidence may persuade a court or what factors it will find determinative. What the district court's analysis lacks in predictability, however, is made up for in finality. There are examples of transfer decisions by district courts being overturned on appeal for legal error.[75] But with respect to factual findings where the court must be clearly erroneous, a district court would need to ignore one of the six factors that must be evaluated, consider facts that were never introduced into evidence, or improperly analyze facts that have no logical connection to a section 5032 factor. There are few examples of district courts doing so and consequently being overturned for abuse of discretion.[76] Nevertheless, to convince the district court to use its discretion to transfer a juvenile for adult prosecution, it should be apparent that context matters, which means that investigation, discovery, and strategy matter.

Juvenile transfer proceedings are rare. They are rare for the court and the litigants, which means that few lawyers are experienced in juvenile transfer proceedings. In addition, the inquiry itself into the six factors and whether transfer is in the interest of justice poses unfamiliar litigation terrain for new lawyers. The lack of institutional knowledge in this area of the law, however, presents an opportunity to be creative with one's

---

75 *See, e.g.*, United States v. D.D.B., 903 F.3d 684, 692–93 (7th Cir. 2018) (concluding that attempted robbery in Indiana is not a crime of violence and thus not a predicate for transfer); United States v. C.A.M., 251 F. App'x 194, 195 (4th Cir. 2007) (not precedential) (remanding the case where the United States did not charge the juvenile with a predicate crime subject to transfer); United States v. Sealed Appellant 1, 591 F.3d 812, 818–19 (5th Cir. 2009) (reversing the transfer order, in part, for a 14-year-old juvenile who was not charged with an enumerated offense), *abrogated on other grounds by* United States v. Davis, 139 S. Ct. 2319 (2019); United States v. Juvenile Male, 819 F.2d 468, 471–72 (4th Cir. 1987) (holding that a change in the statute authorizing prosecution of juveniles was not retroactive).

76 *See, e.g.*, United States v. Juvenile Male, 492 F.3d 1046, 1049 (9th Cir. 2007) (finding clear error where the court made a comparison that evidence in the record did not support); United States v. Juvenile LWO, 160 F.3d 1179, 1184 (8th Cir. 1998) (remanding the case because the district court considered evidence of uncharged crimes in assessing the nature of the offense while nonetheless holding that district courts could consider uncharged crimes with respect to other factors); United States v. Nelson, 68 F.3d 583, 589–91 (2d Cir. 1995) (finding that the district court did not properly evaluate or consider facts presented to the district court for assessing the six section 5032 factors); United States v. Romulus, 949 F.2d 713, 715–16 (4th Cir. 1991) (remanding where the district court did not make findings with respect to two factors); *In re* Sealed Case (Juvenile Transfer), 893 F.2d 363, 364 (D.C. Cir. 1990) (remanding case to district court where the district court considered evidence of uncharged crimes in the nature of the alleged offense other than those charged).

litigation strategy. In the informal, civil-in-nature context, prosecutors may press the court for greater access to information. With the purpose of the statute in mind, coupled with the self-incrimination protections afforded to juveniles, courts should be willing to look beyond Rule 16 and standard criminal discovery.

With this greater flexibility, federal prosecutors must realize that, should they advocate for and then gain greater access to information, they may get to know the juvenile defendant better than they would know an adult defendant. There may be strategic avenues to persuade the court that a juvenile is mature and independent and should be treated as an adult. However, federal prosecutors will have a higher responsibility to present a full and fair portrait of the juvenile without manipulating the information received. In this sense, the prosecution must not undermine the statute's purpose to rehabilitate and treat as a first resort.

Overall, if it is not already clear, juvenile transfers raise many questions. We do not claim to have very many answers about a statute whose provisions we have described as amorphous, uncertain, unpredictable, ambiguous, and not well-defined. That said, the purpose of this article is to raise issues or questions that may arise in future juvenile transfer proceedings. The often-confusing nature of the transfer statute, the gaps in the statute, and the broad scope of the inquiry may seem daunting. The Eastern District of Oklahoma continues to develop ways to make the practice involved in juvenile transfer hearings more uniform and consistent, even if these proceedings are still quite different from a typical criminal prosecution. The hope is that this effort demystifies navigating juvenile transfers by highlighting one district's experience remaking this practice in the wake of the *McGirt* earthquake.

About the Authors

Benjamin D. Traster is an Assistant U.S. Attorney at the USAO for the Eastern District of Oklahoma, primarily prosecuting violent crime in Indian Country. From 2013 to 2020, he served as a Trial Attorney with the Electronic Surveillance Unit in the Office of Enforcement Operations in the Criminal Division. From 2015 to 2016, he served as an Attorney Advisor with the Office of Legislative Affairs. He began his career as an Assistant Commonwealth's Attorney in Arlington, Virginia.

Joshua Satter is an Assistant U.S. Attorney at the USAO for the Eastern District of Oklahoma. From 2016 to 2019, he worked as an Assistant District Attorney in the Bronx District Attorney's Office. From 2019 to 2021, Josh worked in private practice in New York. Before joining the USAO, he was a law clerk in the Southern District of Florida.

De Mal a Peor: Immigrant Hostage Taking at the United States–Mexico Border[0]

Matthew Ramírez
Assistant U.S. Attorney
District of New Mexico

René Robles
Special Agent
Homeland Security Investigations

I. Introduction

At the United States–Mexico border, in the twilight of the great pass and the three crosses, organized crime is a force that subjugates life; and life is surrendered to the timeless specter of war and violence that paints the vast Chihuahuan desert red.[1] Kidnapping, hostage taking, and slavery are three steps in the same dance of death. In this dance, victims are taken by force and held for ransom. A hostage or slave's freedom is for sale, and a hostage or slave may be liberated only by full compliance with the hostage taker's ransom demand.[2] Historically, whether a victim of kidnapping was ransomed or enslaved turned on the victim's wealth and social status.[3] In practice, wealthy victims or victims with high social status would be held

---

[0] The views expressed are those of the authors and do not reflect the official policy or position of the Department of Justice (DOJ), Department of Homeland Security (DHS), or the U.S. Government. Neither DOJ nor DHS can attest to the substantive or technical accuracy of the information.

[1] *See* Ed Calderon, Manifesto Radio Network, *Ep. 10/Pt. 1 - Guest: Julian Leyzaola*, YouTube (Mar. 19, 2023), https://www.youtube.com/ watch?v=r2LnLRp1pnc; Amalendu Mirsa, Towards a Philosophy of Narco Violence in Mexico 14 (2018); Cormac McCarthy, Blood Meridian, or, The Evening Redness in the Sky 248 (1985) ("It makes no difference what men think of war, said the judge. War endures. As well ask men what they think of stone. War was always here. Before man was, war waited for him. The ultimate trade awaiting its ultimate practitioner. That is the way it was and will be. That way and not some other way.").

[2] Richard P. Wright, Kidnap for Ransom: Resolving the Unthinkable 2 (2009).

[3] *Id.*

for a ransom, while victims with little wealth and low social status (to include "soldiers, tradesmen, women, and children") were sold as slaves.[4] Examples of this practice throughout history are commonplace. In the Biblical story of Joseph, Joseph's brothers kidnapped and sold him into slavery in Egypt.[5] The kidnapping of Helen of Troy caused the Trojan War, resulting in the fall of the great empire of Troy.[6]

In the Muslim tradition, kidnapping for ransom and hostage taking was a well-recognized practice for dealing with non-believers: "When you encounter those who disbelieve, strike at their necks. Then, when you have routed them, bind them firmly. Then, either release them by grace, or by ransom, until war lays down its burdens."[7] In the Americas, the Incas were known to have taken the children of royal families of subjugated tribes and held these children as hostages or guarantors against rebellion by the subjugated tribes.[8] Certain tribes engaged in the capture of members of other tribes during events of conflict and ransoming these individuals back to their tribes.[9]

During the Spanish conquest of the Americas, Hernan Cortes and Francisco Pizarro seized and held hostage the Aztec Emperor Montezuma and Inca Emperor Atahualpa.[10] Ransoms were demanded of the Aztec and Inca people for the release of their leaders.[11] Likewise, in the age of the African slave trade, millions of men, women, and children were kidnapped from their homes and sold into servitude in the West.[12]

In the United States, during the early nineteenth century, a market existed for kidnapping free Blacks in the northern states and selling them in the slave markets of the southern states.[13] Similarly, during the American Civil War, President Abraham Lincoln and Generals Ulysses S. Grant and Robert E. Lee used the tactic of ordering soldiers to capture civilian hostages to ensure arrests of perceived war criminals or as capital to use to trade for captured members of the rival militaries.[14]

During the Second World War, the Nazis in Germany used kidnap-

---

4 *Id.*
5 *Id.* at 3; *Genesis* 37:18–36 (English Standard Version).
6 Wright, *supra* note 2, at 3–4; Homer, The Iliad.
7 Wright, *supra* note 2, at 5; Quran, *Muhammad* 47:4.
8 Wright, *supra* note 2, at 8.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 10.
13 *Id.* at 12.
14 *Id.* at 13.

ping as part of the Final Solution.[15] Beyond utilizing kidnapping to further eradicate individuals the Nazi regime deemed undesirable, the Nazis would ransom certain Jews as a means to obtain capital to finance the regime.[16] In the United States during the 1950s and 1960s, additional high-profile kidnappings for ransom occurred, including the Greenlease case in Kansas, in which a six year old boy was kidnapped and murdered.[17] Moreover, in 1963, Frank Sinatra, Jr. was kidnapped and held for ransom by his captors.[18] In the 1970s, the Colombian revolutionary groups known as M-19 and the Fuerzas Armadas Revolucion de Colombia (FARC) committed thousands of kidnappings for ransom, and the victims' families were made to pay "war taxes" to secure the release of these victims.[19]

In Mexico in the 1980s, revolutionary groups commenced a series of high-profile kidnappings for ransom and hostage takings with the purpose of raising funds to further the groups' political activities.[20] As common criminal groups became aware of how easy it was to extort money from hostages, Mexico ascended to become one of the kidnapping capitals of the word in the 1980s and 1990s.[21] The 1990s saw the rapid rise of kidnappings being committed by criminal groups and members or organized crime—the vast majority of which went unreported.[22] During these years, Mexican criminal groups specialized in the art and science of kidnapping, including how to conduct in-depth study into and sophisticated surveillance of kidnapping targets.[23] According to Wright:

> Kidnapping is a worldwide phenomenon. For every difference that one can detect there are significant similarities. Kidnappers in Mexico use the tactic of cutting off ears or fingers to pressure families and organizations to pay. In Colombia, the bodies of dead hostages are ransomed back to their families for proper burial. In Iraq, Muslim terrorists have taped the beheading of kidnap victims and posted videos on the Internet. In the former Soviet Union where universal dental care was provided by the state, kidnappers would extract a tooth

15 *Id.* at 16.
16 *Id.*
17 *Id.*
18 *Id.* at 17.
19 *Id.* at 23.
20 *Id.* at 24.
21 *Id.*
22 *Id.*
23 *Id.*

> with pliers and send it to the family as proof of life or demonstration of possession of the victim. The evil men do may vary slightly, but, in the end, individuals are forcibly deprived of their freedom through no fault of their own and their families or organizations are forced to pay a substantial sum to (hopefully) ensure their safe return.[24]

Today, authorities find out about hostage takings and kidnappings of immigrants by criminal organizations only when someone reports it. It usually takes the immigrants or their family members to report these incidents for law enforcement authorities to find out about them. Oftentimes, immigrants do not report hostage-takings, kidnappings, or both due to fear of the possible repercussions. These repercussions can include threats by the captors, being deported, encountering corrupt public officials, lack of knowledge of the laws or reporting procedures in a country foreign to them, and other reasons. Because of this dilemma, authorities understand that it is highly likely that immigrants are held hostage and kidnapped more often than authorities know.

Kidnappings of immigrants in transit through Mexico is nothing new. For at least the past 15 years, there have been several studies documenting kidnappings or hostage-takings, and, in some cases, murders of immigrants in Mexico. There have been several reports by the Comición Nacional de Derechos Humanos (CNDH, Mexico's National Human Rights Commission) documenting such incidents. On August 22, 2010, the remains of 72 deceased immigrants, most of them from Central and South America, were found in San Fernando, Tamaulipas, Mexico after the Los Zetas Cartel kidnapped them while they were transiting through Mexico.[25] On May 13, 2012, the remains of 49 deceased bodies were found in Cadereyta, Nuevo Leon after having been decapitated and mutilated.[26] At least 11 of the victims were identified to be from Honduras, 2 from Nicaragua, and 1 from Guatemala.[27]

---

[24] *Id.* at 28–29.

[25] *Masacre de San Fernando, amaulipas Masacre de los 72 Migrantes*, Comisión Nacional de los Derechos Humanos,https://www.cndh.org.mx/noticia/masacre-de-san-fernando-tamaulipas-masacre-de-los-72-migrantes-0-#:~:text=Los%2072%20ejecutados%20%E2%80%9358%20hombres,la%20frontera%20con%20Estados%20Unidos (last visited Mar. 27, 2023).

[26] *Tiran en Cadereyta Restos de 49 Cuerpos*, Periodico El Universal (May 14, 2012), https://archivo.eluniversal.com.mx/primera/39455.html.

[27] *A 10 Anos de la Masacre de Cadereyta Persiste la Impunidada y Opacidad en el Caso*, Proceso (May 13, 2022), https://www.proceso.com.mx/nacional/2022/5/13/10-anos-de-la-masacre-de-cadereyta-persiste-la-impunidad-opacidad-en-el-caso-285899.html.

As reported by the CNDH in a special report on June 15, 2009, the CNDH had knowledge of 198 cases involving the kidnapping of 9,758 immigrants in transit through Mexico during a six-month span.[28] This equated an average of 54 immigrants kidnapped per day in Mexico at the time. In the six-month period, CNDH reported the kidnappings to have generated an estimated revenue of approximately 25 million dollars.[29]

This number grew in the following two years. In 2011, CNDH released a special report regarding the kidnapping of immigrants in Mexico. In this report, CNDH reported that in a period of six months, between April and September 2010, there were 11,333 immigrant victims of kidnapping and identified the Mexican states of Veracruz, Tabasco, Tamaulipas, San Luis Potosi, and Chiapas as the states with the most reported incidents.[30]

Testimony obtained by the CNDH in 2011 documents the highly similar extortion tactics by the hostage takers and kidnappers operating in Mexico as the tactics authorities have seen organizations employ in the United States. These include descriptive mutilation narratives to the family members and the use of "tablasos" (strikes with wooden boards). Criminal organizations kidnapping immigrants in Mexico would extort their family members in both their home countries and in the United States.[31]

The statistics referenced here are several years old. The number of immigrants seeking to reach the United States has increased exponentially in recent years. It is impossible to estimate the number of immigrants who fall victim to hostage takers or kidnappers in the United States. Mexican authorities, however, continue to see alarming numbers of immigrants being kidnapped in Mexico to this day. In addition, authorities have seen a significant increase in cases involving the hostage-taking and kidnapping of immigrants in the United States in recent years along the Southwest border states.

It is believed that criminal organizations have expanded their footprint in the United States. The human smuggling organizations' modus operandi during hostage-takings in the United States have reflected tac-

---

[28] Comisión Nacional de los Derechos Humanos, Informe Especial Sobre los Casos de Secuestro en Contra de Migrantes 12 (2009), https://www.cndh.org.mx/sites/all/doc/Informes/Especiales/2009_migra.pdf.

[29] *Considera Cndh Insuficientes Los Esfuerzos De Autoridades Para Abatir La Alta Incidencia De Secuestros Contra Personas Migrantes*, Dirección General de Comunicación, Comunicado de Prensa DGC/096/19 (Comisión Nacional de los Derechos Humanos, Mexico City, Mexico), Mar. 18, 2019, at 1.

[30] Raúl Plascensia Villanueva, Informe Especial Sobre Secuestro de Migrantes en Mexico, Comisión Nacional de los Derechos Humanos 26 (2011).

[31] *See id.* at 76, 82.

tics historically used by criminal organizations in Mexico. It is confirmed that human smuggling organizations and transnational criminal organizations—who are ultimately in alliance with or controlled by the cartels—have sent their members to set up operations in the United States and continue to carry out their organizations' missions. Case in point, human smuggling organization and transnational criminal organization members carrying out hostage takings in the United States often follow orders from organization leaders in Mexico, who, with the aid of technology, can coordinate vicious hostage-taking and kidnapping events from hundreds of miles away.

Moreover, authorities, including the United States Border Patrol (USBP) and Homeland Security Investigations (HSI), have encountered several human smuggling or transnational criminal organization members illegally entering the United States. These individuals will sometimes enter the United States illegally as part of a group of immigrants, pretending to be immigrants being smuggled, when, in reality, they intend to come to the United States to carry out missions or establish operations for their respective organization. Other times, members will be in the United States legally, because they possess a visa or United States citizenship. Authorities have encountered individuals who are later identified to be enforcers, stash house operators, and transport drivers for human smuggling organizations or transnational criminal organizations associated to Mexican cartels. It is no secret, nor is it news, that Mexican cartels actively operate throughout the United States.

In recent years, the Drug Enforcement Administration (DEA) has reported the continued presence of the Sinaloa, Gulf, Juarez, Cartel Jalisco Nueva Generación, among other cartels, as actively operating in the United States.[32] For these reasons, one can make an educated inference that there is a correlation between the tactics used by transnational criminal organizations in Mexico and the tactics used in the United States during hostage-taking and kidnapping events of immigrants.

Human smuggling, which at times leads to hostage-takings and kidnappings of immigrants, are generally crimes committed for the commercial advantage or private financial gain of the people committing such crimes. Typically, they are not crimes committed to satisfy a mental or physical desire.

Cartels or other transnational criminal organizations have traditionally charged a "*plaza*" or tariff on migrants and human smuggling orga-

---

[32] U.S. Drug Enf't Admin., United States: Areas of Influence of Major Mexican Transnational Criminal Organizations (2015), https://www.dea.gov/sites/default/files/2018-07/dir06515.pdf.

nizations to transit through their territory or operate in certain border towns.[33] However, since mid-2019, some have taken a more active approach in human smuggling, increasing and diversifying sources of income with an activity they view as low risk.[34]

United States-bound human smuggling and related criminal activities are estimated by the Homeland Security Operational Analysis Center to produce revenues between $2 billion to $6 billion per year.[35]

Cartels, transnational criminal organizations, and human smuggling organizations take advantage of human smuggling to augment their profits. The smuggling of migrants into the United States comes down to the simple economic principle of supply and demand. There is what one could consider an unlimited supply of migrants seeking to reach the United States, coupled with an extremely high demand of smuggling services which is the driving force behind high smuggling fees criminal organizations impose. The fees charged to smuggle migrants differ substantially based on the point of origin, nationality, point of entry into the United States, method of entry (vehicular transportation versus on foot), final destination in the United States, etc. There is no standard price for a human smuggler's services. But experts agree that as the difficulty increases, so does the cost.[36]

There have been debates about the involvement of cartels in human smuggling versus drug smuggling. The reality is that cartels are now heavily involved in both. One of the advantages criminal organizations have when smuggling immigrants instead of drugs is that the organization does not have to purchase the product. The product (immigrants) come knocking on the door of the criminal organizations. Another advantage is that, unlike drug smuggling, where there is a one for-one transaction of money in exchange for the drugs, immigrants often pay for the smuggling services ahead of time. Members of the human smuggling organizations in Mexico or elsewhere outside the United States retain at least part of the smuggling fee regardless of whether the immigrant successfully arrives at his or

---

33 *Hearing on Unaccompanied Children and the Root Causes Before the H. Comm. on Homeland Sec.,* 117th Cong. 2 (2021) (statement of Patrick J. Lechleitner, Acting Executive Associate Director of Homeland Security Investigations, U.S. Immigration and Customs Enforcement).

34 *Id.*

35 *Hearing on DHS's Efforts to Disrupt Transnational Criminal Organizations in Central America Before the H. Comm. on Homeland Sec.*, 117th Cong. 2 (2021) (statement of John Condon, Acting Assistant Director of International Operations/Homeland Security Investigations, U.S. Immigration and Customs Enforcement).

36 Daniel González & Gustavo Solis, *A Human Smuggler, and the Wall That Will Make Him Rich*, USATODAY (Sept. 27, 2017), https://www.usatoday.com/border-wall/story/human-smuggling-crossing-border-illegally-methods/559784001/.

her destination. By the time the immigrants are in the United States at their final destination, a large portion—if not all—of the smuggling fees have already been collected by the criminal organizations. There is also potential for additional profit should the organization choose to take the immigrants hostage and extort them and their families. This, in concert with it being low risk for the smugglers, makes smuggling immigrants a lucrative business for criminal organizations.

Take, for example, a group of 10 immigrants from Central America being smuggled from the United States–Mexico border to the interior of the United States. Let's assume that the group has arranged to pay an average of $10,000 in smuggling fees. This would be on the lower to middle range of smuggling fees for Central Americans that authorities have seen in recent years. The load is therefore worth $100,000 upon arrival at the final destination(s). This particular load has cost the criminal organization pennies on the dollar, yielding a huge return on investment. Even if interdicted by law enforcement, the criminal organizations have already collected a large portion of the $100,000. Drivers, if arrested, are easily replaceable as recent advancements by Big Tech and accessibility to web-based social media platforms such as Snapchat, TikTok, Facebook, Messenger, and others, have facilitated the infinite recruitment of new members of the criminal organizations.

The purpose of this article is two-fold. First, for the public, the article aims to tell the story—perhaps for the first time—of human smuggling at the United States–Mexico border as it relates to the exploitation of immigrants by transnational criminal organizations and criminal cartels who possess vast networks of workers and soldiers on both sides of the border and profit by kidnapping, taking hostage, and extorting immigrants and their friends and families. Second, for the law enforcement community, the article serves as a guidance document for investigating and prosecuting these crimes in United States federal court. To this end, the article proceeds in three parts. Part II explores the characteristics and archetype of kidnappings for ransom and hostage taking. Part III provides a comprehensive history and analysis of the law of hostage taking and kidnappings for ransom. Part IV contains investigative and prosecutorial guidance for practitioners in the federal legal community that may be immediately deployed in hostage taking investigations with a nexus to the United States–Mexico border.

II. Hostage taking and kidnappings for ransom—a profile in violence

The social, scientific, and criminological research surrounding kidnappings for ransom and hostage taking teaches that three characteristics of a kidnapping or hostage taking event are key in predicting the likelihood that a hostage will be injured or killed by their captors. These characteristics include the coercion tactics used by the hostage takers, the characteristics of the hostage, and the organizational structure of the hostage taking group.

Kidnappings for ransom and hostage taking events invariably manifest in the use of distinct tactics of coercion against victims by kidnappers and hostage takers to achieve particular ends. In a study of 181 kidnapping for ransom, Evarand M. Phillips identified four categories of coercive practices utilized by kidnappers and hostage takers: (1) psychological manipulation; (2) reward tactics; (3) terror; and (4) pain.[37] According to Phillips, kidnappers and hostage takers who utilize psychological manipulation and reward tactics are primarily concerned with gaining compliance from their hostages.[38] In contrast, kidnappers and hostage takers who deal in the infliction of terror and pain upon their hostages are focused solely on hurting or punishing their hostages.[39]

In the context of kidnappers and hostage takers who use psychological manipulation as the central tactic of coercion against their hostages, Phillips identified common practices, which are listed in descending order by the frequency, to include:

- Binding and blindfolding (68% of cases)
- Hostage takers granted some form of release (38% of cases)
- Hostage was held in a cage (29% of cases)
- Psychological torture (20% of cases)
- Threats (17% of cases)
- Hostage watched by hostage takers (12% of cases)
- Interrogation (11% of cases)
- Intimidation (9% of cases)

---

[37] Everand M. Phillips, *The Social Organization of Violence Toward Hostages: Does Violence in Captivity Indicate Which Kidnappers Will Kill?*, 28 J. Interpersonal Violence no. 6, 2013, at 1318.
[38] *Id.*
[39] *Id.*

- Hostage was drugged (8% of cases)
- Hostage is made to witness mock execution (6% of cases)
- Hostage accused of being a spy (6% of cases)
- Threat to sell the hostage (4% of cases)
- Hostage is hung and beaten (1% of cases)[40]

Where the use of rewards was the central tactic used by the hostage takers, Phillips identified common practices to include:

- Hostage was treated well by hostage takers (10% of cases)
- Hostage is given changes of clothing (8% of cases)
- Hostage is given gifts (4% of cases)
- Hostage is given access to radio or television (3% of cases)
- Verbal abuse of hostage (3% of cases)
- Hostage taker offers hostage his/her drink (3% of cases)
- Hostage taker provides hostage medical aid (2% of cases).[41]

Where terror was the central tactic utilized by the hostage takers, Phillips identified common practices to include:

- Hostage was beaten by hostage takers (54% of cases)
- Some form deprivation was used by hostage takers (52% of cases)
- Physical torture used on hostage (31% of cases)
- Hostage takers inflict multiple wounds upon hostage (24% of cases)
- Hostage takers brandish or use knives to terrorize hostage (12% of cases)
- Hostage is slashed by hostage takers (7% of cases)
- Hostage takers inflict injury to ears and fingers of hostage (7% of cases)
- Hostage takers inflict a single wound upon the hostage (4% of cases).[42]

Where pain was the central tactic utilized by the hostage takers, Phillips identified common practices to include:

---

[40] *Id.* at 1319.
[41] *Id.*
[42] *Id.*

- Hostage is killed (31% of cases)
- Hostage is burned or electrocuted (11% of cases)
- Hostage is stripped of clothing (10% of cases)
- Hostage is raped (9% of cases)
- Hostage takers use stun gun on the hostage (2% of cases)
- Hostage is burned with gasoline (2% of cases).[43]

Hostage takers who employ psychological manipulation and reward tactics lack the intensity of violence associated with pain and terror tactics.[44] While it was common for hostage takers using psychological and reward tactics to bind, blindfold, and subject hostages to mock executions or actual torture of other hostages, these categories of hostage takers would also frequently provide their hostages with clean clothes, radios, and televisions.[45] In contrast, hostage takers dealing in terror and pain frequently used weapons to threaten and attack their hostages and engage in intense coercion through acts of burning hostages, engaging in sexual violence against hostages, and, in some cases, killing hostages.[46]

On the whole, abuse of hostages by means of pain and terror tactics, including torture, mutilation, and rape was the most predominant method of coercion employed by hostage takers, presenting in nearly a quarter of the studied cases.[47] In substantially fewer of the studied cases were psychological manipulation and reward tactics employed.[48] Based on this analysis, understanding what tactics of coercion are used by a hostage taker or group of hostage takers is key in predicting the likelihood their hostages will be injured and killed.

Another key factor in predicting the likelihood that hostages will be injured or killed during hostage taking events turns on the category of hostage takers involved in the event. Phillips distinguishes between hostage takers who are part of criminal groups and those involved in groups motivated by radical ideology.[49] Phillips further distinguishes between common criminal groups and organized criminal groups.[50]

Phillips posits that common criminal groups are composed of casually organized and small crews that work interdependently to commit "one

---

43 *Id.*
44 *Id.* at 1320–21.
45 *Id.* at 1319.
46 *Id.* at 1318–19.
47 *Id.* at 1324.
48 *Id.*
49 *Id.* at 1322.
50 *Id.*

off" kidnappings and spontaneous offenses.[51] Common criminal groups frequently take the form of loosely organized street gangs, drug dealers, and petty criminals.[52] In contrast, organized criminal groups dealing in kidnapping and hostage taking are identifiable by their ability to manage multiple kidnappings for ransom and by their large scale infrastructure and logistical foundation, which allows them to sustain hostage taking missions over long periods of time.[53] Organized hostage taking groups are also likely to operate under the umbrella of large scale criminal organizations that indulge in human smuggling and human and drug trafficking.[54] Organized hostage taking crews are also characterized by having specialized training in conducting kidnappings and hostage negotiation, where each member of the crew has a specific role in the offense.[55] Criminal groups, regardless of the level of sophistication, tend to engage in multitactical strategies when employing coercive tactics against hostages.[56]

The characteristics of the hostage also affect how the hostage is treated while in captivity. Phillips found that hostage takers were more likely to employ reward tactics when dealing with child hostages, while adult hostages were more likely to suffer multitactical coercion.[57] Additionally, while male and female hostages were equally likely to suffer multitactical coercion by hostage takers, hostage takers were more likely to use pain tactics characterized by sexual violence when holding female hostages.[58] Likewise, in the context of criminal groups, organized criminal groups were less likely to vary the range of coercive tactics on the basis of gender, whereas common criminal groups were more likely to subject female hostages to pain tactics and sexual violence.[59]

Phillips also analyzed the frequency with which common and organized criminal groups killed hostages when viewed through the lens of

---

51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* Additionally, and on the other end of the spectrum, radical groups (whose existence is primarily founded upon an ideological or political agenda) include political, separatist, or religious groups. While these groups do engage in kidnapping and hostage taking to achieve money ransoms, they are distinct in that many kidnappings they conduct are based around political or social objectives. *Id.* at 1322–23. In the discussion that follows, we do not consider radical groups in detail as the activity of kidnapping and hostage taking of immigrants are unlikely to be perpetrated by radical groups.
56 *Id.* at 1324.
57 *Id.* at 1325.
58 *Id.* at 1326.
59 *Id.*

the category of coercive tactics utilized by the group. In the context of hostage taking events committed by common criminal groups, a hostage was killed 81.8% of the time where the hostage takers used pain tactics.[60] A hostage was killed 31.2% of the time when the hostage takers used terror tactics.[61] A hostage was killed 27.8% of the time when the hostage takers used multitactical techniques.[62] When either psychological or reward tactics were used, hostages were never killed by their hostage takers.[63]

In the context of organized criminal groups, a hostage was killed 100% of the time when pain tactics were used.[64] A hostage was killed by the hostage takers 16.7% of the time when terror tactics were used.[65] When multitactical techniques were used by the hostage takers, a hostage was killed 10.5% of the time. When either psychological or reward tactics were used, hostages were never killed by their hostage takers.[66]

The structure of a criminal group is also significant in predicting whether a hostage will be injured or killed by hostage takers. On the one hand, criminal groups with an egalitarian structure (that is, common criminal groups) are more likely to engage in ill treatment of hostages on a spontaneous basis and at the whim of the discretion of individual hostage takers who are in charge of a hostage.[67] On the other hand, groups with rigid hierarchical structures (that is, organized criminal groups) are more likely to treat hostages with varied forms of coercion, and that violence perpetrated against hostages among these groups is largely dictated by the disposition of the group's ringleader.[68]

In sum, the analysis above shows that regardless of the type or structure of the group holding a hostage, the principal determining factor of whether a hostage will be killed is the manner in which the hostage is treated while in captivity.[69] Specifically, a hostage's likelihood of survival turns on the intensity of violence exercised against the hostage.[70] As such,

---

60 *Id.* at 1329.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.* at 1331.
68 *Id.*
69 *Id.* at 1332.
70 *Id.* at 1332, 1334. For additional resources on the modus operandi and history of hostage taking and kidnapping for ransom, see Diana M. Concannon, Kidnapping: An Investigator's Guide (2d ed. 2013); Brian John Heard, Kidnapping and

investigators reacting to potential hostage taking events should account for these variables in enforcement operations and in efforts to combat, prevent, and dismantle criminal groups that engage in kidnappings for ransom and hostage taking.

III. The law of hostage taking

From a legal perspective, kidnapping and hostage taking have been considered grave crimes across time and culture. Pursuant to the Code of Ur-Nammu—the law of Sumeria—"[i]f a man commits a kidnapping, he is to be imprisoned and pay 15 shekels of silver."[71] Babylonian law provides that "[i]f a man steals a man's son, who is a minor, he shall be put to death."[72] Jewish law provides that "[w]hoever steals a man and sells him, and anyone found in the possession of him, shall be put to death."[73] Chinese dynastic law provides that in cases of abduction or "abducting and selling people as slaves, the sentence is strangulation."[74] Modern laws concerning kidnapping and hostage taking carry similarly significant consequences. What follows is a summary and analysis of international and United States law governing hostage taking.

A. Treaty law and legislation governing hostage taking

On December 17, 1979, the United Nations adopted a counterterrorism treaty titled the International Convention Against the Taking of Hostages[75] (Hostage Taking Convention). At its core, the Hostage Taking

---

Abduction: Minimizing the Threat and Lessons in Survival (2015); Glen P. McGovern, Targeted Violence: A Statistical Analysis of Assassinations, Contract Killings, and Kidnappings (2010); Michael Newton, The Encyclopedia of Kidnappings (2002); Carol E. Baumann, The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism (1973).

71 Code of Ur-Nammu § 3 (2100 B.C.E.).

72 Code of Hammurabi § 14 (1792 B.C.E.).

73 *Exodus* 21:16 (English Standard Version).

74 Tang Code § 12 (653 C.E.).

75 G.A. Res 34/146, annex, International Convention against the Taking of Hostages (Dec. 17, 1979) [hereinafter Hostage Taking Convention]. The Hostage Taking Convention was largely modeled after G.A. Res. 31/66, annex, Convention on the Protection and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, (Dec. 14, 1973) (Diplomatic Protection Convention); *see also* Robert Rosenstock, *International Convention against the Taking of Hostages: Another International Community Step against Terrorism*, 9 Denv. J. Int'l L. & Pol'y 169 (1980) (discussing the historical context in which Germany, having experienced a number of high-profile kidnappings for ransom during the 1970s, included on the agenda of the United Nations General Assembly the problem of hostage taking); Ben Saul, U.N.

Convention requires that signatory countries prosecute or extradite perpetrators of hostage taking that are apprehended in a signatory country.[76] To this end, the treaty obligates signatory countries to criminalize the act of hostage taking and to take internal measures to prevent hostage taking events.[77] During the debate over the treaty, one of the most contentious issues concerned whether abductions for ransom committed by members of national liberation movements or during war time should be excepted from the definition of "hostage taking."[78] Although states including Mexico, Tanzania, and Libyan Arab Jamahiriya argued for this exception,[79] the prevailing view was that the treaty should apply to all abductions for ransom since the degree of violence exemplified in these crimes is so significant that such acts are unjustifiable no matter how just or noble the cause.[80] As a result, the offense of "hostage taking" is defined in the Hostage Taking Convention as:

> 1. Any person who seized or detains and threatens to kill, injure or continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage. . . .
>
> 2. Any person who:
>
> > (a) Attempts to commit an act of hostage-taking, or
> >
> > (b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purpose of this Convention.[81]

The United States ratified the Hostage Taking Convention on Decem-

---

Audiovisual Library of Int'l Law, International Convention Against the Taking of Hostages 1 (2014), https://legal.un.org/avl/pdf/ha/icath/icath_e.pdf.

76 Hostage Taking Convention, *supra* note 75, at arts. 7–8.

77 *Id.* at arts. 2, 4–5, 7–8,

78 Rosenstock, *supra* note 75, at 177–78; Saul, *supra* note 75, at 2–3.

79 Rep. of the Ad Hoc Comm. on the Drafting of an Int'l Convention Against the Taking of Hostages, 20–21, 49, 51–52, U.N. Doc. A/32/39 supp. no. 39 (1977) (portions on Mexico).

80 *Id.* at 55; Rosenstock, *supra* note 75, at 177.

81 Hostage Taking Convention, *supra* note 75, at art. 1.

ber 7, 1984.[82] In accordance with the United States's obligations under the Hostage Taking Convention, Congress enacted the Act for the Prevention and Punishment of the Crime of Hostage Taking.[83]

In its current form, the hostage taking statute–18 U.S.C. § 1203–provides that:

> (a) Except as otherwise provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
>
> (b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—
>
> > (A) the offender or the person seized or detained is a national of the United States;
> >
> > (B) the offender is found in the United States; or
> >
> > (C) the governmental organization sought to be compelled is the Government of the United States
>
> (2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

---

[82] International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

[83] Added Pub. L. 98-473, Title II, § 2002(a), 98 Stat. 2186 (1984); amended Pub. L. 100-690, Title VII, § 7028, 102 Stat. 4397 (1988); Pub. L. 103-322, Title VI, § 60003(a)(10), 108 Stat. 1969 (1994) (inserted "and, if the death of any person results, shall be punished by death or life imprisonment"); Pub. L. 104-132, Title VII, § 723(a)(1), 110 Stat. 1300 (1996) (adding "or conspires" following the word "attempts"); *see also* United States v. Yunis, 681 F. Supp. 896, 904 (D. D.C. 1988) (stating that the Hostage Taking Act was enacted "to extend jurisdiction over extraterritorial crimes and satisfy the country's obligations as a party to various international conventions[,]" including the Hostage Taking Convention).

> (c) As used in this section the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).[84]

According to House of Representatives Conference Report No. 1159, "[t]he Hostage Taking Statute was meant to ensure the substantive and jurisdictional reach of the Kidnapping Statute to include the acts proscribed by the International Convention Against the Taking of Hostages."[85]

B. Constitutional foundations of the anti-hostage taking act

Section 1203 was enacted pursuant to the Necessary and Proper Clause of the United States Constitution.[86] The hostage taking statute has been upheld as constitutional despite Equal Protection and the Tenth Amendment challenges.[87] In *Ferriera*, the defendant challenged his hostage taking conviction on the basis that section 1203 violated his Equal Protection rights under the Fifth Amendment because it impermissibly discrimi-

---

[84] 18 U.S.C. § 1203. Note that 8 U.S.C. § 1101(a)(22) defines the term "national of the United States" to mean (1) "a citizen of the United States"; or (2) "a person who, though not a citizen of the United States, owes permanent allegiance to the United States"; *see also* United States v. Fei, Nos. 96-30237–40, 96-30261, CR-95-00732-01–04, 1998 WL 141743, at *3 (9th Cir. Mar. 30, 1998) (141 F.3d 1180 unpublished Table disposition) (concluding that "a 'national of the United States' does not include a person who illegally enters the United States and subjectively considers himself a person who owes permanent allegiance to this country"). Although it is possible for a jury to find that an individual is a "national of the United States" and not a "citizen" of the United States, at present, the distinction applies principally, if not exclusively, in the context of natives of American Samoa. United States v. Ortiz-Marquez, Nos. 91-50112, 91-50115, 1994 WL 265920, at *2 n.4 (9th Cir. 1994) (29 F.3d 636 unpublished Table disposition); *see* Hampton v. Mow Sun Wong, 426 U.S. 88, 91 n.1 (1976).

[85] United States v. Salad, 907 F. Supp. 2d 743 (E.D. Va. 2012); H.R. Conf. Rep. No. 98-1159, at 418 (1984), *reprinted in* 1984 U.S.C.C.A.N 3710, 3714. During congressional debate regarding the hostage taking bill, Congressman Hughes expressed concern that the conduct criminalized under the hostage taking bill was redundant with the federal kidnapping bill already in place. *Salad*, 907 F. Supp. 2d at 749–50 (citing *Terrorism Legislation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 36 (1984)). Congressman Daniel McGovern replied that "while we can reach many of the acts prohibited by [the Hostage Taking Convention,] we do not have the extraterritorial jurisdiction." *Id.* (citing the same). Congressman Hughes inquired as to whether that meant the hostage taking bill would "fill the gaps," to which Congressman McGovern responded in the affirmative. *Id.* (citing the same).

[86] U.S. Const. art. 1, § 8, cl. 18.

[87] United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001); United States v. Ni Fa Yi, 951 F. Supp. 42 (S.D.N.Y. 1997); United States v. Santos-Rivera, 183 F.3d 367 (5th Cir. 1999).

nated against non-citizens.[88] Observing that congressional classifications based on alienage are permissible, the Eleventh Circuit determined that rational basis review applied to the defendant's challenge.[89] Applying rational-basis review, the court held that section 1203 is related to a legitimate government interest, noting that the purpose of the Hostage Taking act is "to address a matter of grave concern to the international community: hostage taking as a manifestation of international terrorism[,]" and although "there are state laws designed to combat domestic terrorism, Congress enacted the [Hostage Taking] Act because it believed that kidnapping involving foreign nationals has serious international ramifications, which are Congress's unique responsibility."[90] As such, the court held:

> Congress rationally concluded that hostage taking within our jurisdiction involving a noncitizen is sufficiently likely to involve matters implicating foreign policy or immigration concerns as to warrant a federal criminal proscription. The connection between the act and its purpose is not so attenuated as to fail to meet the rational-basis standard.[91]

In *Ni Fa Yi*, the defendant invoked the Tenth Amendment to challenge the constitutionality of the Hostage Taking Act, asserting that the law is overbroad by reaching too broad of a range of kidnapping not directly related to domestic security or international policy, and that Congress intruded upon the police powers of the states.[92] Observing that the Hostage Taking Act was narrowly tailored to the purpose of implementing the Hostage Taking Convention, the court ruled that Congress acted in accordance with its powers under the Necessary and Proper Clause when it enacted section 1203.[93]

C. The offense of hostage taking

The Fifth and Ninth Circuits, as well as a district court in the Fourth, have adopted pattern jury instructions for the offense of hostage taking.[94]

---

88 *Ferreira*, 265 F.3d at 1025.

89 *Id.*

90 *Id.* at 1027.

91 *Id.* (quoting United States v. Lue, 134 F.3d 79, 87 (2d Cir. 1998)); *see also Santos-Rivera*, 183 F.3d at 372–74; United States v. Lopez-Flores, 63 F.3d 1468, 1475 (9th Cir. 1995).

92 *Ni Fa Yi*, 951 F. Supp. at 46.

93 *See id.*

94 Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 241–42 (2020); Fifth Circuit Criminal Pattern Jury Instructions § 2.55 (2019); Ninth

The essential elements of the crime of hostage taking are virtually identical in these circuits and provide that for a defendant to be found guilty of the offense, the government must prove each of the following elements beyond a reasonable doubt: (1) that the defendant seized or detained another person [or attempted or conspired to do so]; (2) that the defendant threatened to kill, injure, or to continue to detain that person; and (3) that the defendant did so with the purpose of compelling a third person or government organization to act in some way, either to do or abstain from doing any act as a condition for the release of the person detained.[95]

In the context of a conspiracy to take a hostage, each defendant may be held liable for all reasonably foreseeable offenses committed by co conspirators during and in furtherance of the conspiracy.[96] Where the government, however, alleges a conspiracy to take a hostage resulting in death, the foreseeability of the death is not an element of the offense.[97] Furthermore, as a general matter, because of the similarity between sections 1201 (kidnapping) and 1203 (hostage taking), the circuit courts have also approved the practice of judges and litigators looking to one statute for help in deciphering the other.[98]

D. The seizure or detention requirement

In *United States v. Carrion-Caliz*, the Fifth Circuit explored section 1203's requirement that the defendant "seized or detained" a person.[99] The court observed that to seize or detain another person, the hostage taker need not use or even threaten to use physical force or violence.[100] Non-physical restraint, including the use of fear or deception is sufficient.[101] The court also concluded that the seizure or detention of a

---

Circuit Criminal Pattern Jury Instructions § 8.12 (2022).

95 Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 241–42 (2020); Fifth Circuit Criminal Pattern Jury Instructions § 2.55 (2019); Ninth Circuit Criminal Pattern Jury Instructions § 8.12 (2022). If appropriate, add a fourth element "that the defendant's actions resulted in the death of any person." *See* Fifth Circuit Criminal Pattern Jury Instructions § 2.55 (2022).

96 United States v. Breal, 593 F. App'x 949 (11th Cir. 2014) (not precedential); *see* Pinkerton v. United States, 328 U.S. 640, 645–48 (1946).

97 United States v. Straker, 567 F. Supp. 2d 174 (D.D.C. 2008); *see* United States v. Clarke, 767 F. Supp. 2d 21 (D.D.C. 2011) (concluding that the evidence was sufficient to convict the defendant of conspiracy to take a hostage where the victim was diabetic, took medication to treat the condition, and being held hostage without access to medication for a week caused the victim's death).

98 *E.g.,* United States v. Carrion-Caliz, 944 F.2d 220, 223 (5th Cir. 1991).

99 *Id.* at 225.

100 *Id.*

101 *Id.*

hostage against their will does not need to be present from the inception of the event.[102] In other words, the court stated, "while the initial acquiescence of the victim may be relevant to determining whether she was ever held against her will, it is not dispositive of the question, and it does not preclude a conviction for hostage taking."[103] Additionally, to satisfy the "seized or detained" element of hostage taking, the court stated that victim must have been "held or confined against her will for an appreciable period of time."[104]

E. The threat requirement

The circuit courts have recognized that threats, including those not involving the use of physical force, may also satisfy section 1203's threat requirement provided that the threat is tailored toward inducing fear or deception in aid of the detention for ransom.[105] In *Carrion-Caliz*, the defendant entered into a smuggling agreement with the victims (three family members) to smuggle the victims from Guatemala into the United States in exchange for $2,000.[106] After collecting the initial smuggling fee from the victims and crossing them into the United States, the defendant made multiple demands to the victims' family members for additional payments.[107] In making these ransom demands, the defendant told the victims that if they tried to leave, immigration would capture and deport them.[108] The defendant also told the victims' families that if he did not receive additional money from them, the victims would disappear.[109] Noting that the defendant's representations to the victims and their family induced sufficient fear and deception to cause the victims to stay detained, the court held that the defendant's representations constituted

---

[102] *Id.*; *see* United States v. Ibarra-Zelaya, 465 F.3d 596 (5th Cir. 2006) (rejecting the defendant's argument that the evidence was insufficient to establish hostage taking where the government did not prove the defendant physically harmed or threatened the victim; all that is required is that the defendant had frightened or deceived the victims into staying with him when they would have preferred to join their families). United States v. Si Lu Tan, 339 F.3d 143 (2d Cir. 2003) (rejecting the defendant's sufficiency of evidence argument that the evidence showed the immigrants had been held in a manner contemplated by their respective smuggling agreements; an alteration in the smuggling agreement is not essential to prove seizure or detention).

[103] *Carrion-Caliz*, 944 F.2d at 226.

[104] *Id.* at 225.

[105] *Id.* at 225–26.

[106] *Id.* at 221.

[107] *Id.* at 221–22.

[108] *Id.* at 221.

[109] *Id.* at 221–22.

threats cognizable under section 1203.[110]

The courts have also recognized that it is unnecessary for a threat to be accompanied by a smuggler's demand for an increase in the fee owed by the victim and their family to be cognizable under section 1203.[111] Likewise, section 1203 does not require that a third party know the victim was being seized or detained at the time the third party makes payments to the smuggler.[112]

F. The intent to compel requirement

The intent requirement of section 1203 is satisfied by proof that the defendant abducted and threatened the victim with the *purpose* of compelling a third party to do or abstain from doing something.[113] While section 1203 contemplates purposeful conduct on the part of the defendant, a district court need not instruct the jury that the defendant acted *intentionally* with regard to each of the three elements of the offense for it to be legally sufficient.[114] By way of example, in *United States v. Calderon-Lopez*, the Fifth Circuit determined that evidence was sufficient to establish intent to compel a third person to act or abstain from acting where the hostage takers made phone calls to the victims' friends and family members demanding money to secure the victims' release.[115]

G. Defenses to hostage taking

The affirmative defenses codified under section 1203 (b)(1) and (2) are founded on the jurisdictional limitation that the Hostage Taking Act requires a foreign, international, or governmental nexus.[116] A nexus to terrorism is not required.[117] The first of the two affirmative defenses is the extra-territorial defense, which is codified at section 1203(b)(1). Pursuant

---

110 *See id.* at 221–22, 225–27.

111 *See* United States v. Sierra-Velasquez, 310 F.3d 1217, 1220–21 (9th Cir. 2002).

112 United States v. Perez-Arellanez, 640 F. App'x 674, 675–76 (9th Cir. 2016) (not precedential).

113 United States v. Fei Lin, 139 F.3d 1303, 1306 (9th Cir. 1998).

114 *See id.*; United States v. Yunis, 924 F.2d 1086, 1096 (D.C. Cir. 1991) ("The statutory language [of section 1203] suggests no intent requirement other than that the offender must act with the purpose of influencing some third person or government through the hostage taking.").

115 United States v. Calderon-Lopez, 268 F. App'x 279, 286–87 (5th Cir. 2008) (not precedential).

116 United States v. Corporan-Cuevas, 244 F.3d 199 (1st Cir. 2001); United States v. Pacheco, 902 F. Supp. 469 (S.D.N.Y. 1995); United States v. Carrion-Caliz, 944 F.2d 220 (5th Cir. 1991).

117 United States v. Mikhel, 889 F.3d 1003, 1021 (9th Cir. 2018).

to section 1203(b)(1), it is a complete defense to hostage taking if: (1) "the conduct required for the offense occurred outside the United States"; and (2) either "(a) that the offender or person seized or detained was not a national of the United States; (b) that the offender was not found in the United States; or (c) that the governmental organization sought to be compelled was not the Government of the United States."[118]

The second affirmative defense is the territorial defense, which is codified at section 1203(b)(2). Pursuant to section 1203(b)(1), it is a complete defense to hostage taking if: (1) "the conduct required for the offense occurred inside the United States"; (2) "each alleged offender and each person seized or detained was a national of the United States"; (3) "each alleged offender was found in the United States"; and (4) "the governmental organization sought to be compelled was not the government of the United States."[119]

Beyond the statutory affirmative defenses, the courts have rejected the claim that combat immunity, as contemplated by the Geneva Convention, may serve as a defense to hostage taking.[120] In *Pineda*, an indictment was filed charging the defendants, members of the FARC, with hostage taking and conspiracy to take a hostage.[121] The indictment alleged that the defendants took United States citizens hostage in Colombia with the purpose of compelling the Colombian government to turn over FARC prisoners and establish a demilitarized zone in exchange for the release of the United States citizens.[122] The court determined that the nature of the alleged conduct, which included holding individuals against their will and for ransom, did not comport the Geneva Convention, thereby foreclosing combat immunity as a colorable defense.[123]

H. Hostage taking as a crime of violence

Under current law, hostage taking is not a "crime of violence" within the meaning the 18 U.S.C. § 924(c)(3) and therefore may not serve as the predicate offense for gun charges brought pursuant to 18 U.S.C. § 924. Section 924(c)(1)(a) provides that "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in fur-

---

118 Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 242 (2020).
119 *Id.*
120 United States v. Yunis, 924 F.2d 1086, 1097–99 (D.C. Cir. 1991); United States v. Pineda, No. CR-04-232, 2006 WL 785287 (D.D.C. Mar. 28, 2006).
121 *Pineda*, No. CR-04-232, 2006 WL 785287, at *1.
122 *Id.*
123 *Id.* at *3–4.

therance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence" be sentenced to an additional term of imprisonment. This additional term of imprisonment can range from 5 to 25 years depending on the characteristics of the offense.[124]

"Crime of violence" is defined at section 924(c)(3). This definition has two subparts—the elements clause and the residual clause.[125] The elements clause provides that an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[126] Under the residual clause, an offense is a crime of violence if the offense, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[127]

Before 2019, cases in which there were section 924(c) crime of violence convictions predicated upon hostage taking offenses were regularly affirmed.[128] In 2019, the United States Supreme Court held in *United States v. Davis* that section 924(c)'s residual clause was unconstitutionally vague,[129] which dramatically limited the universe of offenses that may serve as the predicate for section 924(c) charges by mandating application of the categorical approach to the elements clause of section 924(c). In the unpublished Fifth Circuit case, *United States v. Picazo-Lucas*, the court took up whether hostage taking is a crime of violence in light of *Davis*.[130] Applying the categorical approach to the three elements of section 1203, the court first observed that section 1203's requirement that the defendant seized or detain another person did not require the use or even threat of violence, as the requirement could be met by a defendant leveraging fear or deception.[131] Second, the court posited that because section 1203's

---

124 18 U.S.C. § 924(c); *see also* 18 U.S.C. § 924(j) (providing that "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm[,] . . . if the killing is a murder[, shall] be punished by death or imprisonment for any term of years or for life").

125 18 U.S.C. § 924(c)(3)(A)–(B).

126 18 U.S.C. § 924(c)(3)(A).

127 18 U.S.C. § 924(c)(3)(B).

128 *See* United States v. Lue, 134 F.3d 79, 80–81 (2d Cir. 1998); United States v. Shibin, 722 F.3d 233, 247 (4th Cir. 2013); United States v. Torres-Espinoza, 78 F. App'x 563 (9th Cir. 2003) (not precedential); United States v. Chan, 66 F. Supp. 2d 490, 491 (S.D.N.Y. 1999); United States v. Zheng Zhong, No. 96-CR-175, 1998 WL 142340, at *1 (S.D.N.Y. Mar. 26, 1998); United States v. Lin, 881 F. Supp. 34, 36 (D.D.C. 1995).

129 United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).

130 United States v. Picazo-Lucas, 821 F. App'x 335, 338–39 (5th Cir. 2020) (not precedential).

131 *Id.* at 339.

threat requirement can be met by a threat to continue to detain, the element does not require a violent threat. Finally, the court found the intent to compel element of hostage taking only pertained to mens rea and was plainly irrelevant to crime of violence inquiry.[132] As a result, the court concluded that hostage taking is not a crime of violence and cannot serve as a predicate for a section 924(c) charge as a matter of law.[133]

The United States government has also conceded on at least two occasions since *Davis* that hostage taking fails to meet the definition of a crime of violence.[134] Based on these concessions, the Court of Appeals in the Eleventh Circuit summarily reversed defendants' section 924(c) crime of violence convictions.[135] In light of these decisions, section 924(c) can be expected to be inapplicable in hostage taking prosecutions with firearm features.

IV. Guidance on investigating and litigating hostage-taking events

Hostage-taking investigations and prosecutions are complex cases, the success of which is largely dependent on investigators and prosecutors making fast-paced decisions and accurate judgments with minimal information and time to react. From the investigator's perspective, the ability to make quick and accurate assessments regarding hostage taking situations may be the difference between a hostage being recovered dead or alive. From the prosecutor's perspective, the choice to charge hostage taking is a solemn one as a conviction under section 1203 carries with it the potential of life in prison. Given the high stakes surrounding these cases, the value of approaching these matters strategically cannot be underestimated. As such, the following analysis, which is derived from the investigatory and prosecutorial experience of multiple federal agents and prosecutors, attempts to provide guidance to agents and prosecutors in navigating the fundamental decisions that present in hostage taking cases.

---

132 *Id.*

133 *Id.*

134 Hernandez v. United States, 824 F. App'x 996, 997 (11th Cir. 2020) (not precedential) (government conceding that hostage taking may not serve as the predicate offense for a section 924(c) charge); Reyez v. United States, 794 F. App'x 925, 925–26 (11th Cir. 2020) (not precedential) (government conceding that hostage taking may not serve as the predicate offense for a section 924(c) charge).

135 *Hernandez*, 824 F. App'x at 997; *Reyez*, 794 F. App'x at 926.

A. Investigatory guidance

Oftentimes, especially along the Southwest border, investigative referrals related to hostage-taking cases stem from a state, local, or federal law enforcement agency such as the USBP. In such cases, the victims may express to law enforcement that they were held against their will by smugglers or stash house operators. Other times, tips may be called in to law enforcement by a reporting party in the United States, oftentimes far away from the Southwest border. Depending on the provider of the information, investigators need to react accordingly. Additionally, because of the transnational nature of immigrant kidnapping and hostage takings, effective investigation of these crimes requires familiarity with and the ability to quickly employ sophisticated legal process and law enforcement tools toward the end of saving lives. Finally, given that immigrant kidnappings and hostage takings are frequently connected to organized criminal organizations and involve multiple co-conspirators and witnesses in states and nations other than the state or nation where the hostage taking occurred, being able to efficiently obtain answers to pertinent questions in subject interviews cannot be underestimated in terms of importance. As such, what follows is a primer to leading and managing an immigrant hostage taking investigation for federal law enforcement agents.

1. Law enforcement contacts another investigative agency for assistance

As already stated, federal agents often find themselves reacting to contacts from other law enforcement agencies regarding possible hostage taking situations. Best practices in navigating these contacts are as follows. First, the case agent should instruct the reporting agency not to turn over any person, victims, or immigrants involved in the incident to USBP or Immigration and Customs Enforcement (ICE) Enforcement Removal Operations (ERO) or any suspect in custody to another law enforcement agency. Second, the case agent should instruct the reporting agency to separate suspected victims from smugglers or hostage takers. Third, the case agent should instruct the reporting agency to safeguard any potential evidence such as electronic devices, documents, vehicles, etc. Fourth, the case agent should instruct the reporting agency to place any mobile phones in "airplane mode." If the device is not able to be placed in airplane mode, ask the reporting agency to place the devices inside a Faraday bag. Aluminum foil can be used if a Faraday bag is not

readily available as long as the foil has no holes in it.[136] Finally, the case agent must remember that time is of the essence and that a prompt response to assist and investigate may be the difference between life and death of hostages.

2. Non-law enforcement reporting party contacts investigative agency

Similarly, federal law enforcement agents frequently receive reports of potential hostage taking situations from non-law enforcement parties reporting. Best practices in navigating these contacts are as follows. First, the case agent should obtain as much information as possible from the reporting party about the victim to include name, date of birth, nationality, phone number, point of contact in the United States, iCloud or Google Drive account login information (to track current or last known location of victim), and contact information of the reporting party. Second, the case agent should have the reporting party provide all evidence related to the threat to include text messages, phone numbers, pictures, receipts, and any other information about the hostage taker. Third, the case agent should instruct the reporting party to forward WhatsApp or information obtained from any other communication platform and to screenshot and forward any chats or communications with the hostage taker to ensure the content does not get deleted. Fourth, the case agent should conduct database queries to confirm the victim is not currently in USBP or ICE ERO custody or that the victim was not recently released from custody.[137] Fifth, the case agent should determine if exigency exists (threats of serious injury or death, minor victims involved, weapons present, immigrants not allowed to leave, deadlines to pay ransom, etc.). Sixth, the case agent should instruct the reporting party to answer any subsequent calls or communications with the captors. Finally, the case agent should instruct the reporting party to screenshot the captors or callers if possible and if video calls are received. Ask the reporting party to forward any communications to investigators (photos of receipts, screenshots of call log or chats, etc.).

The case agent should attempt to buy as much time as possible. Additionally, as early as possible, the case agent should contact the United States Attorney's Office (USAO) and apprise the Assistant United States Attorney (AUSA) of the information received and explain if exigent circum-

---

136 Tom Marlowe, *Can You Use Aluminum Foil as a Faraday Cage?*, Survival Sullivan (Mar. 4, 2023), https://www.survivalsullivan.com/using-aluminum-foil-for-faraday-cages/.

137 Interview with HSI Special Agent Deborah Rivero (Sept. 15, 2022).

stances exist. Time is of the essence. Act quickly.

3. Pre-recovery law enforcement operations

After determining that information regarding a potential hostage taking situation is credible, the case agent should turn to engaging in pre-recovery enforcement operations. To this end, the case agent should begin by identifying the service provider of the hostage-taker's phone and request an exigent circumstance "ping," which will provide location information for the hostage taker's phone.[138] If ping locations are precise, proceed to the device location and react accordingly through surveillance or knock and announce operation. The case agent should continue to consult with the AUSA about exigent circumstances requiring certain immediate actions by law enforcement such as accessing a property without a search warrant. If knock and announce operation fails, promptly follow up with a search warrant for the location.

If ping location information is not precise enough, consult with the AUSA about applying for a search warrant to deploy cell site simulating equipment (for example, a Stingray or Triggerfish device). If exigency exists, consult with the AUSA about proceeding with enforcement actions and filing any warrants (such as premises search warrants or cell site simulator warrants) not covered by exigency after the fact.

If a suspected hostage taker's phone number is an internet-only number, try tracking the IP address using an open-source IP look up website such as iplocation.com. If the hostage taker's IP location is in the United States, consider sending a follow-up subpoena to the organization listed in the IP locator. If the IP location is outside the United States, there may be no other leads to follow.[139] If device location is determined to be outside the United States, forward the information to the appropriate Attaché's office or foreign government.

---

[138] If the hostage taker is calling via WhatsApp from a foreign phone number, file a law enforcement request at https://www.whatsapp.com/records/login in an attempt to obtain additional information such as an IP address. Research the law enforcement assistance phone numbers through open searches or other means. The phone numbers to the major service providers' law enforcement assistance departments are the following: Verizon: 800-451-5242 (option 9); AT&T: 800-635-6840 (option 4); T-Mobile: 866-537-0911.

[139] During their travels, immigrants are held at numerous stash houses throughout Mexico where they are "catalogued" and photographed. HSI has encountered incidents where human smuggling organizations hold victims hostage in Mexico, extort their friends and family in the United States, and lie about the location of the victims by saying they have already been smuggled into the United States. *See* Interview with HSI Special Agent Deborah Rivero (Sept. 15, 2022).

4. Post-recovery law enforcement operations

Once hostage taking victims have been recovered by the law enforcement agency, photograph and thoroughly document the scene. Ensure that the search team protects evidence that may need to be sent for forensic analysis. Follow agency-specific evidence protocols. The law enforcement team should also identify victims, material witnesses, and suspects. In the District of New Mexico and the Western District of Texas, the USAO will require the victims and material witnesses to remain in the United States. Be prepared to process the victims and foreign material witnesses with a Deferred Action (DA) and Employment Authorization Document (EAD) to allow these individuals to remain in and work in the United States during the pendency of the prosecution of the hostage taker(s). If the responding or investigative agency is one other than HSI or USBP, the investigative agency may need to seek HSI or USBP assistance with processing and filing DA or EADs for the victims and material witnesses.

It is also crucial that the investigative team conduct follow-up interviews of the victims and any other material witnesses involved in the case as close as possible to the hostage taking event. Subject to be interviewed should include non-law enforcement reporting parties and anyone else who may have received threats and may have been extorted (that is, family members of the victims both in the United States and abroad).

The investigative team should also work to extract content of phones or devices of suspects, victims, material witnesses, and reporting parties either with consent or under the authority of a search warrant. The investigative team should manually record the content of web based communication applications such as WhatsApp to capture video and audio because most phone extraction applications extract WhatsApp content in "screenshot" form at best and fail to capture voice messages, videos, and links. Such manual recording of the WhatsApp or other web-based communication applications should be conducted as promptly as possible as the content of these applications can be wiped remotely by other participants in the chat. In addition, if WhatsApp or other web-based applications have updates in the future, the content may be lost entirely, even if the device is on airplane mode.

The case agent should consider filing geophone, historical, or both types of cell site warrants to assess or corroborate any allegations of multiple co conspirators that perhaps were not found on scene during enforcement actions. Likewise, the case agent should subpoena subscriber and tolls of suspects, victims, and reporting parties' phone numbers and cross-reference with phone extractions if unable to locate, seize, or access the hostage taker's phone.

Additionally, it is important for the case agent to obtain any 911 dispatch calls, recordings, and any other records of contact with victims and reporting parties. Since most hostage-taking events involve reporting parties in various cities throughout the United States and abroad, ransom payments made by friends and family of hostages frequently occur via money service business wire transfers such as Western Union or MoneyGram. As a result, collect any money transfer receipts and administratively subpoena any relevant money service businesses to obtain records of ransom payments made on behalf of the victim(s). The case agent should also administratively subpoena surveillance video footage of money remitter service establishments to capture evidence of the transmission and collection of ransom payments. If the hostage takers accepted ransom payments via bank to bank wires and agents can obtain the account information for the hostage taker's bank account, the case agent will need to obtain the banking records. Banking records may only be obtained through a grand jury subpoena.

In conducting interviews with victims, material witnesses, reporting parties, and friends and family members of hostages, the investigative team should prepare photo lineups of suspects to be used during follow-up interviews. Although many of the pertinent witnesses will not have been physically present during the hostage taking event, many communications between hostage takers and friends and family of hostages occur via Apple's FaceTime or a video call through another applications, allowing many of these types of witnesses to be able to make positive identifications.

Additionally, if possible, have voice samples available to play for reporting parties or family members of the victims during follow-up interviews as many communications regarding ransom payments occur via regular phone or voice calls or via messaging chats that include voice messages.

If additional co-conspirators exist outside the United States, consult with the USAO regarding the possibilities of an extradition packet or provisional arrest warrant. Finally, the case agent should consult with your agency's Victim Witness Coordinator for services available to the victim.

5. Sample victim, reporting party or material witness, and suspect or defendant interview questions

Effective interviews of victims, suspects, and reporting parties or material witnesses are pivotal to a successful hostage taking investigation and prosecution. As such, the following are model interview questions for these categories that are relevant subjects in a hostage taking inves-

tigation. These questions, of course, should be tailored to the facts and circumstances of a given investigation.

Sample victim interview questions

It is important to remember that these interviews are conducted with victims who have just undergone likely one of the most traumatic experiences of their lives. Taking time to build trust and allowing the victim to process what has happened will lead to more effective interviews.

- Who did you hire to smuggle you into the United States?
- Who made your smuggling arrangements?
- Are you aware of the smuggling arrangements?
- What were the terms of the smuggling agreement?
- How much of the smuggling fee was paid up front?
- Did the smugglers or captors increase your smuggling fee once you were at the stash house?
- How much money, if any, did you owe the original human smuggling organization when you arrived in the United States?
- Did you remain with one smuggler during the entirety of your journey, or did you get picked up by another human smuggling organization at some point?
- If picked up by another human smuggling organization, did the new human smuggling organization request an additional fee?
- Were any requests for a smuggling fee or additional money accompanied by a threat?
- Did the threat include a threat to kill, injure, or to continue to detain you?
- Were the threats accompanied by a demand for money in exchange for your release?
- Were you threatened with bodily harm, injury, or death if you attempted to leave the premises?
- Were any threats communicated to your friends or family members?
- Did you hear the captors threaten your family or friends with hurting you should the ransom not be paid?
- Who else heard the threats? (other co-conspirators, other immigrants, etc.)
- Were you allowed to leave the stash house?

- Were the premises locked?
- What did you understand would happen if you tried to escape?
- Were your cell phone, passport or other identification, money, or valuables taken away by the stash house operators or other members of the human smuggling organization?
- Were you allowed to use your phone?
- Were the captors or stash house operators armed?
- Where you verbally, sexually, or physically abused by any of the captors?
- How were the captors communicating with your family or friends to demand a ransom?
- Did you communicate with the captors or members of the human smuggling organization on your phone?
- Do you know if your family or friends paid the ransom for your release? If so, how was the ransom paid? (bank transaction, wire transfer such as Western Union or Money Gram, etc.)

Sample reporting party or material witness interview questions

In hostage taking investigations involving immigrants, reporting parties are frequently friends or family members of a hostage. The investigative agency does not have to establish alienage of the reporting party. Interview the reporting party as a witness.

- Did you make the smuggling arrangements, or were you aware of the smuggling arrangements?
- When did you first receive the calls from the smugglers or captors?
- Who contacted you?
- What was the conversation?
- Was anything requested from you to release the hostage(s)?
- Did you receive threats about the hostage being hurt, killed, or continued to be held?
- Did the captors demand a ransom?
- Did the ransom increase over time?
- Were you given a deadline to pay the ransom?
- Did the captors instruct you not to contact the police?

- Did the captors threaten to harm the hostages should you contact the police?
- Have you contacted other police departments? If yes, which department and when? (Note: Request 911 dispatch records from any other departments contacted by the reporting party.)
- Do you know where the hostage(s) are?
- Did the hostage(s) share their location with you via phone?
- Do you know how the captors obtained your phone number?
- Were you in communication with other members of the human smuggling organization?
- How were you contacted? (phone call, WhatsApp, other web applications or social media platform, etc.)
- If video call, did you see the captor or caller?
- Were you able to speak to the hostage(s) on the phone (or see them if video call)?
- What was the condition of the hostage(s)?
- What were the threats?
- Did you believe the threats?
- Did you believe the captors would hurt, injure, or kill the hostage(s)?
- Did you pay the ransom? If so, who did you pay? How much did you pay? How did you pay? (Western Union, Money Gram, cash, etc.) (Note: Ensure to collect or seize any wire transfer receipts.)

Sample suspect or defendant interview questions

While a confession does not make or break the prospect of prosecution, obtaining a confession or partial confession to hostage taking goes far toward escalating the investigation from an human smuggling case with bad facts to a hostage taking case.

- When did you get involved with human smuggling?
- Who were you and other stash house operators working for? What human smuggling organization?
- How long have you been working for the human smuggling organization?
- How many times have you transported or harbored immigrants?
- How much were you being paid for your involvement in harboring the immigrants?

- Who owns or pays for the stash house?
- Who was in charge at the stash house?
- Who has or had access to your phone besides you?
- How long have you had this phone and phone number?
- Were the immigrants that you were harboring allowed to use their phone?
- Were the immigrants free to leave the stash house?
- When would the immigrants be free to leave the stash house?
- Was the stash house locked in a way that the immigrants would not be able to leave?
- What would you have done if the immigrants attempted to escape the stash house?
- Were the immigrants threatened with bodily injury or death?
- Who threatened the immigrants?
- Did you or anyone else witness the threats made?
- Did you or anyone else reinforce the threats?
- Did you or another member of the human smuggling organization contact friends or family of the immigrants?
- Did the human smuggling organization make a ransom or any other demand to the friends or family of the immigrants?
- Did the human smuggling organization make any threats to the immigrants, their friends, or family in association with a demand for money?
- How did you react to the threats?
- Did you agree or disagree with the threats?
- How do you communicate with other members of the human smuggling organization? (phone, WhatsApp, other communication application or social media platform, etc.)
- How much were you going to earn for harboring the immigrants?
- Were you armed when harboring the immigrants?
- Did you display a weapon to the immigrants?
- How did the human smuggling organization demand and accept payments from immigrants' friends and family?
- Who decided the recipient of the payment from the immigrants' friends and family?

B. Prosecutorial guidance

Hostage taking cases along the Southwest border are commonly presented to federal prosecutors as reactive investigations stemming from USBP checkpoint encounters with vehicles occupied by released hostages, law enforcement or civilian encounters with escaped hostages, and information received by law enforcement from the family members of a person currently being held hostage. Because of the reactive nature of these cases, swift and strategic law enforcement investigations and operations are pivotal to building a strong case for prosecution. The discussion that follows will explore the gauntlet federal prosecutors confront in evaluating and litigating hostage taking cases on the border. The steps of a border hostage taking case generally occur as follows: (1) pre-charging decisions; (2) charging decisions; (3) pretrial litigation and cooperators; and (4) trial, sentencing, and appeals.

1. Pre-charging decisions

During the initial and reactive phase of a hostage taking investigation, the prosecutor is faced with overseeing two important aspects of the case: (i) acquisition and execution of search warrants, and (ii) identification and designation of victims as material witnesses.

Hostage search warrants

Upon receipt of credible information of a hostage taking, the first pre charging legal decision the prosecutor confronts is whether to advise agents to obtain a search warrant for the house posited as the location of the hostage taking or to authorize a search of the house without a warrant under a theory of exigency.

It is well recognized that exigent circumstances provide an exception to the requirement that law enforcement must obtain a search warrant before conducting a search of a home.[140] Exigent circumstances include the need to render emergency aid to another person or remove someone from danger.[141] Credible, corroborated information that hostage taking is occurring at a particular location will be upheld as exigent circumstances to justify a warrantless premises search for hostages.[142] Proceeding with-

---

140 Kentucky v. King, 563 U.S. 452, 459–60 (2011).

141 *Id.*; United States v. Cooks, 920 F.3d 735, 742 (11th Cir. 2019).

142 *Cooks*, 920 F.3d at 742–46; United States v. Ibarra-Zelaya, 465 F.3d 596, 605 (5th Cir. 2006) (determining that exigent circumstances supported warrantless premises search where agents received information that hostage were being held at the premises and officers could hear multiple people inside the premises); Satchell v. Cardwell, 653 F.2d 408, 411 (9th Cir. 1981) (same).

out a search warrant, however, increases the risk that other evidence of human smuggling and hostage taking located during the course of the search, including evidence found in garages, outbuildings, vehicles parked on the property, and on the person of individuals found on the property will be suppressed as going beyond the scope of the exigency. As a result, even in cases in which the call is made to search the stash house without a warrant, the best option is to secure the stash house after the initial clear and search for bodies, and then apply for a warrant to search for and seize evidence of human smuggling and hostage taking. This protocol will maximize the chance that any evidence seized from the stash house will survive a suppression motion.

In determining whether to authorize agents to search a stash house without a warrant, a key consideration is whether the information reported by witnesses and victims regarding the situation at the stash house indicates hostages are being actively held at the stash house and whether the hostage takers are subjecting hostages to coercive tactics. Such tactics at the extreme end of the spectrum include: Executions, physical and psychological torture, beatings, deprivation, caging, wounding, and the presence and brandishing of weapons.[143] As already discussed, when evaluating the dangerousness of a hostage taking situation, two important points of orientation are that hostage takers who employ pain tactics to coerce hostages are empirically the most likely to kill their hostages and that in the context of kidnappings for profit, the person held for ransom is killed in 53% of cases.[144]

Notwithstanding truly exigent circumstances, the best practice when a hostage taking stash house has been identified is to obtain a search warrant for the target premises before the search. Such search warrants should be tailored to the unique features of human smuggling turned hostage taking. These features principally include threats to kill, injure, or to continue to detain; ransom demands and payments; the use of vehicles and outbuildings in connection with the crime; and the show or use of physical or psychological force against hostages and their family members during the offense. Based on these features, it is crucial that search warrants include the request to search and seize the evidence including the following:

- Immigrants actively being smuggled or held hostage;
- Deceased persons who were smuggled by or held hostage in association with human smuggling;

---

143 *See* Phillips, *supra* note 37, at 1317–20.

144 Diana M. Concannon, Kidnapping: An Investigator's Guide 81–83 (2d ed. 2013); *see also* Phillips, *supra* note 37, at 1332–34.

- Valid and false travel immigration documents;
- Any and all computers, cell phones, and electronic communication or storage devices;
- Ledgers, notes, address and telephone books, calendars, and lists containing records concerning human smuggling and ransom demands;
- Financial records;
- Firearms and ammunition;
- Tactical equipment; and
- Recording and storage devices associated with home surveillance and security systems.

It is also crucial that hostage taking premises search warrants also include requests to search any garages, carports, outbuildings, vehicles, and persons located on the target premises or within the curtilage of the target premises at the time of the search. This is because human smugglers and hostage takers often use outbuildings and vehicles to further their alien smuggling and hostage taking activity. Human smugglers and hostage takers also often carry evidence, to include firearms, electronic devices, and documentation on their persons that is evidence of their human smuggling or hostage taking activity.

Finally, in nearly all cases, because of the lengthy and continuing nature of hostage taking investigations, the prosecutor and case agent should set forth an authorization request for agents to be able to execute the warrant at any time of day or night. "Good cause" may be shown by indication that a hostage taking event has occurred or that hostages or hostage takers may be currently located at the target premises.

Identification of victims and material witnesses

Once the stash house has been cleared and ideally victims have been recovered, evidence seized, and suspects arrested, the prosecutor and agents should turn their focus to identifying and interviewing victims and designating them as material witnesses.[145] In the District of New Mexico, the prosecutor should authorize the case agent to commence the material witness program for identified victims. Section 3144 governs the material witness process and initiates a sequence of events by which material

---

[145] 18 U.S.C. § 3144 (stating that "[i]f it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions" of the Bail Reform Act, 18 U.S.C. § 3142).

witnesses present in federal court for initial appearance and then are generally released to the third party custody of a sponsor in the United States under the supervision of United States Probation and Pretrial Services or the investigative agency. Because, however, material witnesses in immigration cases are generally booked into jail pending their initial appearance in court based on their lack of ties to the United States and lack of legal immigration status in the United States, they may ultimately spend days or weeks in jail pending release to a third party custodian. Once the material witness is released, however, under the District of New Mexico's material witness program, the material witness or victim is eligible to obtain deferred action on removal and a work permit during the pendency of the individual's obligation as a material witness.[146]

Because such time in custody is likely to be particularly traumatic to victims who have just been recovered from a situation in which she or he was involuntarily detained by threat, the best practice in hostage cases is to authorize agents to book victims into a shelter for immigrants, asylum seekers, or refugees pending their initial appearance. The prosecutor should then coordinate with the case agent and lead law enforcement agency to have the victim released to the custody of the case agent pending location of a sponsor for the victim. This protocol operates to minimize trauma to the victim and maximize the victim's ability to access victim witness specialists, services, therapy, family members, and the investigative and prosecution team.[147]

2. Charging decisions

The second phase of the prosecution involves charging decisions. Specifically, considering the initial and evolving universe of evidence, the pros-

---

[146] In certain circumstances, a material witness or victim's status as having been a victim of a crime in the United States may qualify the victim to apply for a U-VISA.

[147] *See* 18 U.S.C. § 3771. Section 3771, the Crime Victims' Rights Act (CVRA) provides that victims possess the following rights: (1) "to be reasonably protected from the accused"; (2) "to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused"; (3) "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding"; (4) "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"; (5) "to confer with the attorney for the Government in the case"; (6) "to full and timely restitution as provided in law"; (7) "to proceedings free from unreasonable delay"; (8) "to be treated with fairness and with respect for the victim's dignity and privacy"; (9) "to be informed in a timely manner of any plea bargain or deferred prosecution agreement"; and (10) to be informed of the rights and services conferred upon victims under the CVRA. *Id.*

ecutor is confronted with the questions of (i) what to charge, (ii) whom to charge, and (iii) when to charge.

What to charge

The question of what to charge in a case involving human smuggling and kidnappings for ransom is a multidimensional inquiry and a critical strategic decision. Through little more than victim and witness admissions of alienage and statements detailing the suspects' involvement in a human smuggling organization, the prosecutor can confidently charge, in a criminal complaint, the offenses of harboring immigrants and conspiracy, in violation of 8 U.S.C. § 1324 while the hostage taking evidence continues to develop. Additionally, because the courts and defense attorneys who regularly practice in border districts are likely to be much more familiar with human smuggling charges, defendants are far less likely to demand a preliminary hearing and speedy indictment when the government opens a potential hostage taking case with human smuggling charges. This opening, of course, does not limit the government in exercising its discretion to ultimately charge the defendant by information or indictment with a more serious charge, like hostage taking, down the line.

Once the suspects (now defendants) are charged by complaint with human smuggling and the case agent works to complete the investigation, the prosecutor should begin to determine what charges will ultimately be pursued against the defendants in light of the developing landscape of evidence. Victim, witness, and defendant statements are a natural starting point for charging analysis. In this domain, key facts that are pertinent to charging decisions will be developed by obtaining answers to the following questions at the outset of the investigation:

Victim Questions—

- Whom did the victim hire to smuggle him or her into the United States?
- What were the terms of the smuggling agreement?
- How much of the smuggling fee did the victim pay up front?
- How much money, if any, did the victim owe the original smuggling organization upon arrival in the United States?
- Did the victim remain with one smuggler during the entirety of the journey, or did she or he get picked up by another smuggling organization at any point?
- If the victim was picked up by another smuggling organization, did the organization request an additional fee?

- Were any requests for a smuggling fee or additional money accompanied by a threat?
- Did the threat include a threat to kill, injure, or to continue to detain the victim?
- Were the threats accompanied by a demand for money?
- Were any threats communicated to the friends or family members of the victim?
- What did the victim understand would happen to him or her if she tried to escape?
- Was the victim abused? If so, how?

Defendant Questions—

- When did the defendant get involved in human smuggling?
- How many times has the defendant transported or harbored immigrants?
- Who was in charge at the stash house?
- Who were the stash house operators working for?
- How much were you being paid for your involvement in harboring the immigrants?
- Were the immigrants free to leave the stash house?
- When would the immigrants be free to leave the stash house?
- What would you have done if the immigrants attempted to escape the stash house?
- Were any threats made to the immigrants or their friends or family members in association with a demand for money?
- How did the smuggling organization demand and accept payments from immigrants' friends and family members?
- Who owns or pays for the stash house?

Prosecutors should conduct follow-up interviews with the victims in the case as soon as possible after the event to ensure that their statements are memorialized as close to the date of the offense as possible. This practice will also maximize the victims' likelihood of remembering faces and names for purposes of identifying witnesses, defendants, and co-conspirators. Prosecutors should also advise agents to conduct full interviews and obtain full phone dumps from the friends and family members of the victims who received ransom demands from the defendants.

Likewise, agents should be working to obtain an administrative or grand jury subpoena for any financial records from money service businesses that were utilized to transmit ransom payments on behalf of victims. Note should also be taken regarding whether there is evidence that the hostage takers physically or psychologically abused victims, and whether firearms, other weapons, or equipment used to torture victims were found on scene.

Once operating with an understanding of the key facts of the case, the prosecutor can begin to make informed charging decisions. The common charges explored in cases involving immigrants held against their will and for ransom include hostage taking,[148] kidnapping by inveiglement,[149] alien harboring placing in jeopardy the life of any person,[150] transmission of ransom or threatening communications,[151] and possession or use of a firearm in furtherance of a crime of violence.[152]

When there is corroborated evidence that the defendants detained and threatened an immigrant, and in so doing intended to compel a third person to pay a ransom for the release of the immigrant, hostage taking likely constitutes the most serious and readily provable offense and should be pursued in most cases. Federal prosecutors, however, have also historically viewed the Anti-Kidnapping Act[153] as an important charging tool in cases involving immigrants held against their will and for ransom by criminal organizations.[154] But, for reasons further described below, kidnapping charges in these cases present significant litigation risk and operate to confer upon prosecutors the burden of proving additional, complex aspects of kidnapping. As such, absent proof problems attendant to a potential hostage taking charge, it is not recommended that prosecutors charge kidnapping alongside hostage taking.

Kidnapping by Inveiglement—

The Anti-Kidnapping Act, 18 U.S.C. § 1201, provides that "whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof," or who attempts or conspires to

---

148 18 U.S.C. § 1203.
149 18 U.S.C. § 1201.
150 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(iii).
151 18 U.S.C. § 875.
152 18 U.S.C. § 924(c).
153 18 U.S.C. § 1201.
154 *See* Michael J. Gennaco, Thomas D. Warren & Steve Dettelbach, *International Kidnapping by Inveiglement and Hostage Taking: Potential Weapons in the Prosecutor's Arsenal*, 44 U.S. Att'y Bull., no. 6, Dec. 1996, at 37.

do so, is guilty of kidnapping. In the context of abductions with a nexus to human smuggling, prosecutors generally proceed under the theory of kidnapping by inveiglement. Kidnapping by inveiglement can be established either by proof that: (1) a kidnapper used misrepresentations to come into custody of the victim; or that (2) although the association between the kidnapper and victim began voluntarily, the kidnapper harbored an ulterior purpose to kidnap the victim.[155] As a result, kidnapping by inveiglement, "requires that the kidnapper use some means of force—actual or threatened, physical or mental—in each elemental stage of the crime, so that the victim is taken, held and transported against his or her will."[156] Additionally, the federal kidnapping statute does not reach "entirely voluntary act[s] of a victim crossing a state line even though it is induced by deception."[157]

---

[155] *See* United States v. Macklin, 671 F.2d 60, 66 (2d Cir. 1982) (stating that "inveigling or decoying . . . involve nonphysical takings by which the kidnapper, through deception or some other means, lures the victim into accompanying him"); United States v. Hughes, 716 F.2d 234, 239–41 (4th Cir. 1983) (concluding that the defendant kidnapped the victim by inveiglement where the defendant induced the victim to drive with him by lying to the victim about his name, not correcting the victim regarding his identity, misrepresenting that he and the victim had a mutual acquaintance, and by lying to the victim about the reason for making a detour before crossing state lines and taking the victim to a secluded location where he assaulted the victim); United States v. Wills, 234 F.3d 174 (4th Cir. 2000); United States v. Carrion-Caliz, 944 F.2d 220 (5th Cir. 1991); United States v. McInnis, 601 F.2d 1319 (5th Cir. 1979); United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990); United States v. Hoog, 504 F.2d 45 (8th Cir. 1974); United States v. Redmond, 803 F.2d 438 (9th Cir. 1986); United States v. Wesson, 779 F.2d 1443 (8th Cir. 1986); United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993); United States v. Boone, 959 F.2d 1550 (11th Cir. 1992). The pattern jury instructions for kidnapping by inveiglement in circuits that have adopted instructions governing the offense are materially the same and provide that to find the defendant guilty of the kidnapping, the government must prove beyond a reasonable doubt that: (1) "the defendant knowingly acting contrary to law, kidnapped the person described in the indictment by inveigling him as charged"; (2) "the defendant kidnapped the person for some purpose or benefit"; (3) "the defendant willfully transported the person kidnapped"; and (4) "the transportation was in interstate commerce . . . or used the mail or any means, facility, or instrumentality of interstate commerce in committing or in furtherance of the offense" *See e.g.*, Tenth Circuit Criminal Pattern Jury Instructions § 2.55 (2021).

[156] *Macklin*, 671 F.2d at 61–67 (determining that insufficient evidence supported the defendant's conviction for kidnapping where the defendant, a homeless adult man persuaded two juveniles (one of whom was a runaway) to accompany him in his travels across the United States where there was no evidence that the defendant used misrepresentations or physical or mental force to take or otherwise detain the juveniles); *see also* Chatwin v. United States, 326 U.S. 455, 464 (1946) (stating that it is "the involuntariness of seizure and detention[,] which is the very essence of the crime of kidnapping").

[157] *McInnis*, 601 F.2d at 1323–27; *see also id.* at 1326–27 (seemingly rejecting Eighth

Illustrating these principles in *Boone*, the defendant seduced the victim into traveling with him across state lines by telling the victim to go to a location where the defendant indicated there was a wild marijuana patch.[158] At the location of the purported wild marijuana patch, the defendant murdered the victim. The Eleventh Circuit stated that although the federal kidnapping statute does not itself prohibit inveigling or decoying someone to cross state lines, section 1201 reaches inveiglements that amount to kidnapping followed by transportation in interstate commerce.[159] In determining whether a kidnapping by inveiglement has happened before transportation, the court stated that the "fact finder must ascertain whether the alleged kidnapper had the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception failed."[160] The court reasoned that

> Where a kidnapper accompanies his inveigled victim, preserving the deception and intending to use physical or psychological force if necessary, the volition of the victim is undermined beyond mere inducement by deception. The victim is kept from acting in an entirely voluntary manner by the acts, presence, and intent of his inveigling kidnapper. He is ensnared within a net that his kidnapper's deception has prevented him from seeing. In such a situation, the victim's act of accompanying his kidnapper cannot be entirely voluntary and cannot amount to legally valid consent.[161]

Based on this rationale, the court held that a kidnapping by inveiglement has occurred where (1) the kidnapper inveigles or decoys the victim to accompany the defendant, (2) the kidnapper then transports the victim in interstate or foreign commerce, and (3) the kidnapper holds the victim "for ransom, reward, or otherwise."[162] Applying this test, the court determined that a kidnapping by inveiglement had occurred where the defendant, intending to take the victim to a place where he could rob

---

Circuit, for example, *Hoog,* 504 F.2d 45, precedent that recognized "the decoying or inveigling of a victim to accompany the defendant in interstate commerce" as a legally cognizable theory of federal kidnapping).

158 *Boone*, 959 F.2d at 1552–53.

159 *Id.* at 1555.

160 *Id.* at 1555–56.

161 *Id.* at 1557.

162 *Id.* at 1556; *see id.* ("[T]he mere fact that the kidnapper was not required to physically hold his victim prior to the crossing of state lines, thereby sparing himself the effort of using forcible action to accomplish the kidnapping, does not take his conduct outside the statute.").

and murder him, (1) inveigled the victim to go with him on a trip to a made up marijuana patch, (2) personally drove the victim across state lines, and (3) at all times remained in a position where he could use force to complete the kidnapping if the victim resisted.[163]

Additionally, in some circuits, including the Fifth Circuit, convictions for kidnapping and hostage taking violate double jeopardy because these courts have concluded that kidnapping is a lesser included offense of hostage taking.[164]

As shown by the case law, kidnapping by inveiglement was intended to cover a very specific category of conduct—that is, abductions where a kidnapper, intending to hold a victim for a particular purpose, deceives a victim into coming into the kidnapper's custody at which point the kidnapper accompanies the victim across state or international lines in association with the abduction. Proving these facts in the context of the prototypical abduction for ransom of an immigrant may be unfeasible and confusing to jurors as the victims in these cases generally cross the international border voluntarily and without deception only to later have a ransom demanded of them and their family members.

---

163 *Id.* at 1556–58; *see also id.* at 1557 ("[W]here a kidnapper accompanies his inveigled victim, preserving the deception and intending to use physical or psychological force if necessary, the volition of the victim is undermined beyond mere inducement by deception."); United States v. Eagle Thunder, 893 F.2d 950, 952–53 (8th Cir. 1990) (stating that the victim's alleged consent to accompany the defendant in his car did not prevent the completion of a kidnapping in light of the kidnapper's detention of the victim after the victim made multiple requests to be taken home); United States v. Wesson, 779 F.2d 1443, 1444 (9th Cir. 1986) (concluding that kidnapping occurred even though the victim's parents initially consented to the victim accompanying the defendant on a road trip where the victim later requested to go home and the defendant refused to release the victim); United States v. Redmond, 803 F.2d 438, 439 (9th Cir. 1986) (concluding that kidnapping occurred where although the defendant originally induced the victim to accompany him by offering the victim ice cream, the defendant subsequently confined the victim against her will). *But see* United States v. Wills, 234 F.3d 174, 175–79 (2000) ("The plain language of the Act does not require that the defendant accompany, physically transport, or provide for the physical transportation of the victim"; rather section 1201 only requires that the victim "is willfully transported."). The court further observed that requiring accompaniment would operate to reward "the kidnapper simply because he is ingenious enough to conceal his true motives from his victim." *Id.* (quoting United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1983).

164 United States v. Gibson, 820 F.2d 692 (5th Cir. 1987); United States v. Agofsky, 458 F.3d 369, 71–72 (5th Cir. 2006). *But see* United States v. Hairston, 64 F.3d 491, 496 (9th Cir. 1995) (holding that Congress may intend that jurisdictional elements operate to address "separate evils" and are relevant in *Blockburger* double jeopardy analysis); United States v. Angeles, 484 F. App'x 27, 32–34 (6th Cir. 2012) (not precedential) (kidnapping and hostage taking are not multiplicitous).

If the prosecutor still chooses to charge kidnapping by inveiglement alongside hostage taking, however, the prosecutor must be aware that the government will bear the burden of proving, with regard to the kidnapping, that: (1) the defendant(s) inveigled the victim(s) before detaining them; (2) if the detention resulted from deception, the defendant was willing to utilize force to keep the victim(s) detained; (3) after inveigling the victim(s), the defendant(s) accompanied the victim(s) across state or international lines; and (4) if the jury convicts the defendant(s) of both hostage taking and kidnapping, one of the two convictions may be vacated as violating of double jeopardy.[165]

Additional Charges Available —

There may be strategic reasons to charge hostage taking alongside other related offenses, including alien harboring, placing in jeopardy the life of any person,[166] transmission of ransom or threatening communications,[167] and possession or use of a firearm in furtherance of a crime of violence.[168] These ancillary charges each have distinctive features that may be applicable on a case-by-case basis.

Alien harboring placing in jeopardy the life of any person is an important tool available to prosecutors in hostage taking cases.[169] To prove alien harboring, the government must prove that the defendant engaged "in conduct that is intended to both substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also intended to help prevent the detection of the alien by authorities."[170] In addition, the government must also prove that the defendant's harboring placed in jeopardy the life of any person.[171] The pertinent features of this charge include that

---

165 *See also* 18 U.S.C. § 1202 (prohibiting a defendant's receipt of ransom money for provided for the release of a person who has been kidnapped within the meaning of 18 U.S.C. § 1201).

166 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(iii).

167 18 U.S.C. § 875.

168 18 U.S.C. § 924(c).

169 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(iii).

170 To prove alien harboring, the government must prove that the defendant engaged "in conduct that is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also is intended to help prevent the detection of the alien by authorities." United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013).

171 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(iii); Apprendi v. New Jersey, 530 U.S. 466 (2000).

it carries a 20-year maximum penalty,[172] broad forfeiture authority,[173] an expansive list of sentencing enhancement (including for immigrants being held against their will),[174] and it may serve as the predicate for Racketeer Influenced and Corrupt Organizations Act (RICO) charges.[175]

Interstate communication of a ransom demand or threat is a less utilized but powerful charge available in hostage taking prosecutions.[176] The typical hostage taking case will, with virtual certainty, satisfy the requirements of section 875(a), which prohibits engaging in the interstate communication of a ransom demand. A conviction under section 875(a) carries with it a maximum penalty of 20 years in prison and is governed by the sentencing guideline applicable to kidnapping and hostage taking.[177] In addition to subsection (a), section 875(c), which prohibits the communication in interstate commerce of a "threat to kidnap any person or any threat to injure the person of another."[178] While section 875(c) carries with it a maximum five-year custodial sentence, an interstate communication that violates section 875(c) constitutes a "crime of violence" and may serve as the predicate for a section 924(c) firearm charge.[179]

These ancillary charges each possess distinct features that may complement hostage taking charges depending on the facts of a given case. Regarding human smuggling, it is generally not advisable to charge both sections 1324 and 1203 in the same charging document due to the risk that a jury will mistakenly find that human smuggling is a lesser included offense of hostage taking and "split the baby" by convicting on human smuggling and acquitting on hostage taking. Alleging human smuggling (a racketeering offense), however, may be prudent in a hostage taking case where the hostage takers are members of a criminal organization in fact and the prosecutor intends to charge a RICO conspiracy. Additionally, because hostage taking no longer constitutes a "crime of violence"

---

172 8 U.S.C. § 1324(a)(1)(B)(iii).

173 8 U.S.C. § 1324(b)(1)–(3).

174 U.S. Sent'g Guidelines Manual § 2L1.1(b) (U.S. Sent'g Comm'n 2021) [hereinafter U.S.S.G.]. The alien smuggling sentencing guideline includes enhancements for the possession or use of firearms or dangerous weapons, reckless endangerment, injury or death to aliens, and for aliens being involuntarily detained. *Id.*

175 18 U.S.C. § 1961 (including alien smuggling offenses within the definition of "racketeering activity").

176 18 U.S.C. § 875.

177 18 U.S.C. § 875(a); U.S.S.G. § 2A4.2 (cross-referencing to U.S.S.G. § 2A4.1 where there is evidence an individual was involuntarily detained).

178 18 U.S.C. § 875(c); U.S.S.G. § 2A6.1.

179 United States v. Mjoness, No. 20-8029, 2021 WL 4078002 (10th Cir. July 13, 2021).

in light of *Davis*, it can no longer serve as a predicate for a section 924(c) charge. Because of this, it may be wise in cases in which hostage takers possessed, brandished, discharged, or caused the death of another person using a firearm, to charge interstate communication of a threat pursuant to section 875(c), which has stood the test of *Davis* and remains a valid section 924(c) predicate crime.

Whom to charge

Because hostage taking near the United States–Mexico border frequently occurs within a larger human smuggling conspiracy, clear information at the outset of the case regarding co-conspirators' roles in the offense is important to the decision of who to charge in a hostage taking case. There are two principles at the center of this inquiry. The first of these principles is that evidence that at least one person had been detained by co-conspirators against the person's will is sufficient to sustain convictions against all co-conspirators, including co conspirators who were not personally involved in the detention or seizure of another person.[180] In practical terms, this means that while the government will be able to prove hostage taking against all members of an human smuggling crew who knew that the immigrant had been taken hostage, members of the same smuggling crew—like foot guides,[181] drivers,[182] money receivers,[183] and caretakers[184] —who never acquired knowledge of the detention and ransom of the immigrant do not face exposure for hostage taking.

The second principle is that caretakers who are complicit in and contribute to the hostage taking, even if they exert no physical force over the hostage, may be convicted of hostage taking under a theory of aiding and abetting.[185]

---

[180] United States v. Si Lu Tian, 339 F.3d 143 (2d Cir. 2003) (concluding that the evidence showed that at least one alien had been detained by the conspirators in a manner not contemplated by his smuggling agreement, thereby supporting the defendant's conspiracy conviction, even assuming he could defeat a substantive hostage taking count by showing that he had not seized or detained another alleged victim).

[181] A foot guide is an human smuggler who specializes in guide groups of people through the desert and across the United States–Mexico border.

[182] A driver is an human smuggler who specializes in transporting groups of immigrants via motor vehicle from the border to stash houses or to locations north of the USBP checkpoints.

[183] A money receiver is an human smuggler who specializes in receiving smuggling fees from immigrants' family, friends, or sponsors and then distributing that money to other members of the crew and larger smuggling organization.

[184] A caretaker is a smuggler who specializes in providing necessities to immigrants during their stay at the smuggling organization's stash houses.

[185] *E.g.*, United States v. Lavandier, 14 F. Supp. 2d 169, 172–73 (D.P.R. 1998) (con-

When to charge

The importance of charging the proper crime at the proper stage of the case cannot be overlooked in hostage taking litigation. Because of the reactive and evolving nature of most hostage taking investigations, these cases are usually initiated by criminal complaint[186] and should be charged, consistent with the facts, as transporting or harboring illegal aliens and conspiracy in violation of section 1324. In drafting the criminal complaint, include the facts from the initial investigation that support hostage taking. These allegations will not only signal to defense counsel the seriousness of the charge, but they will also serve as crucial fodder at the defendants' subsequent detention hearings.[187]

Once the results of the post-arrest investigation come into focus, the prosecutor will be able to make a more informed decision on the particular charge or charges they intend to pursue in an information or indictment. If follow-up interviews with victims and witnesses, phone dumps, and analysis of physical and other electronic evidence do not corroborate initial evidence of detention, threats, and intent to compel a third party, the prosecutor should not escalate the charge from human smuggling to hostage taking. Conversely, if the initial information is corroborated before the government's deadline to indict, the prosecutor should pursue hostage taking.[188]

---

cluding the defendant was guilty of aiding and abetting hostage taking where the defendant confessed to being the "woman of the house," to receiving $12 in grocery money from the human smuggling organization to make food for the immigrants—and the defendant told one of the victims to not say anything, that she was one of the smugglers, and that she promised to let the victim go when it was all over); United States v. Pena-Lora, 225 F.3d 17, 28–29 (1st Cir. 2000) (evidence supported finding that the defendant had not been "merely present" at hostage scene at the time of the victim's rescue but had knowingly participated in the underlying hostage taking conspiracy); *see also* 18 U.S.C. § 2.

186 *See* Fed. R. Crim. P. 3.

187 On a case-by-case basis, such evidence tends to demonstrate the following pertinent factors to the question of detention or release pending trial under the Bail Reform Act: The government's evidence is strong, the defendant poses a significant danger to the community due to their violent and threatening conduct to the victim, the defendant faces sentencing enhancements and a lengthy sentence if convicted, and the defendant has ties to organized crime and a foreign country. 18 U.S.C. § 3142(f)–(g).

188 United States v. Santos-Rivera, 183 F.3d 367 (5th Cir. 1999) (stating that an indictment need not allege that the violator of the Hostage Taking Act satisfied the requisite international, foreign, or government nexus to be legally sufficient).

3. Pretrial litigation & cooperators

Once the defendants are in custody, the government has 48 hours to get the defendants set for an initial appearance.[189] Upon the defendants' initial appearance on a complaint, the court has 14 days to conduct a preliminary hearing, unless the defendants waive the hearing, or an indictment or information is filed with the court.[190] Due to the complexity of hostage taking cases, the best practice is to negotiate with the defendants to waive the preliminary hearing and agree to extend the time limit for the government to indict the case in exchange for pre-indictment benefits to potentially include discovery, pre-indictment plea negotiations, and a pre-indictment plea offer.[191] Additionally, in multidefendant conspiracies, consider designating the case complex.[192]

Assuming the defendants waive their preliminary hearing, the next hurdle is the detention hearing. At the detention hearing, the government has at least four persuasive arguments that are universal to a large cross-section of hostage taking cases with a nexus to human smuggling along the border. First, in narrating the facts of the case, the prosecutor should focus on the tactics the hostage takers used to subjugate the victims, the presence of aggravating factors like firearms or injury or death to a victim, and the defendant's specific role in the human smuggling organization. Placing focus on this angle of the case will set the board for the government to argue that the defendants are a danger and flight risk based on the propensity for violence and ties to organized crime and a foreign country.[193]

After the detention hearing, evaluate the case for potential defenses and cooperators. Regarding defenses and setting aside the statutory defenses,[194] many hostage taking defendants feign duress. This often takes the form of defendants claiming that, in fear for their own safety, they complied with a higher-level smuggler's instructions to detain and demand a ransom from the victim. Where the government has strong evidence of defendants' intent to compel a ransom, however, juries are likely to reject

---

189 Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991).

190 Fed. R. Crim. P. 5(a), (c); Fed. R. Crim. P. 5.1.

191 Toward the parties' mutual interest of just outcomes in serious federal criminal cases, such an agreement operates to give the defendant the maximum opportunity to evaluate the evidence against him, to make his case to the prosecutor regarding his culpability or lack thereof, and to determine whether to cooperate.

192 *See* 18 U.S.C. 3161(h)(7)(A), (B)(ii).

193 18 U.S.C. § 3142(f)–(g).

194 18 U.S.C. § 1203(b).

a defense theory of duress.[195] For example, in *United States v. Pestana*, the court denied co-conspirators' pretrial motions for a duress instruction to be given at trial in their prosecution for hostage taking.[196] At the hearing on the defendants' motions, the defendants, who were FARC members, testified that they were required to obey the orders of their superiors, and failing to follow orders would result in the convening of a war council and potentially the death penalty.[197] The defendants also testified that it was possible to escape the FARC, and they knew many FARC soldiers had escaped.[198] The defendants also testified that they were given orders to guard an American hostage, which they complied with in fear that disobeying the order would result in a war council and their death.[199] The court ruled that the evidence was legally insufficient to support the giving of a duress instruction at trial.[200] The court reasoned that the defendants proffered no evidence that the orders to guard the hostage were "accompanied by any specific, immediate threat of force."[201] The court also reasoned that the evidence gave no indication that the defendants had any well-founded fear of impending death or serious bodily injury.[202] Finally, the court reasoned that the evidence tended to show that the defendants had the opportunity, but chose not to escape from FARC control.[203] Accordingly, the court determined no duress instruction should be given at trial.[204]

In hostage taking cases, the testimony of a cooperator who was involved in the conspiracy is a powerful source of evidence. Defendants have a strong incentive to cooperate given the high penalties associated with the offense. As such, on a case-by-case basis, consider whether there is a

---

195 United States v. Fei Lin, 139 F.3d 1303, 1307–09 (9th Cir. 1998), supplemented by 141 F.3d 1180 (9th Cir. 1998) (affirming defendant's hostage-taking conviction in which jury rejected the defendant's duress theory); United States v. Ortega, 517 F.2d 1006, 1010 (3d Cir. 1975) (affirming defendant's conviction for making a ransom demand despite the defendant's claim that he lacked the requisite intent because he feared retribution from his boss if he did not demand the ransom from the hostage).

196 United States v. Pestana, 865 F. Supp. 2d 357, 360–61 (S.D.N.Y. 2011).

197 *Id.* at 362–63.

198 *Id.* at 363.

199 *Id.* at 363–65.

200 *Id.* at 366–67.

201 *Id.* at 367.

202 *Id.* at 367–69.

203 *Id.*

204 *Id.* at 369–70; *see also* Rengifo v. United States, No. 09-cr-109-JSR, 2015 WL 5711137 (S.D.N.Y. Sept. 28, 2015), *report and recommendation adopted in part sub nom.* Palacios-Rengifo v. United States, No. 09-cr-109-8 (JSR), 2016 WL 47519 (S.D.N.Y. Jan. 4, 2016).

candidate for cooperation among the co-conspirators. Given the violent nature of hostage taking, prosecutors should consider factors regarding the candidate for cooperation, including the following:

(1) the candidate's overall culpability in the conspiracy and relative culpability to other candidate;

(2) the candidate's role in the conspiracy;

(3) whether the candidate possessed, brandished, or used a weapon in the offense;

(4) whether the candidate engaged in violence against hostages;

(5) the truthfulness of the candidate's proffer; and

(6) the candidate's criminal history.

To this end, a strong candidate for cooperation should possess as many of the following attributes as possible:

(1) the candidate was physically present for the hostage taking and knew the terms of the hostage's original smuggling agreement and ransom;

(2) the candidate was an active member, but not the leader in the conspiracy and can identify the other members of the conspiracy;

(3) the candidate did not use a weapon and did not physically abuse the hostage; and

(4) the candidate has minimal or nonviolent criminal history and gave a truthful proffer consistent with the weight of the evidence.

Securing cooperators and disclosing to defense counsel the identity of a strong cooperator early in a conspiracy prosecution will maximize the likelihood of a successful prosecution.

4. Trial, sentencing, and sufficiency of the evidence

If the parties are unable to reach a pre-indictment plea deal, the case should be presented to the grand jury for indictment. As in any complex case where it is contemplated that the case agent will need to take the stand, a co-case agent should testify before the grand jury to avoid the unnecessary creation of a *Jenks*[205] statement. It is good practice to meet with the victims to advise them of the process moving toward trial and to conduct interviews with the family members or friends of the victims

[205] 18 U.S.C. § 3500.

who are anticipated to testify. In conjunction with witness meetings, develop the exhibit list and initiate the transcription and translation of any material recorded statements.

Depending on the facts of the case, consider whether to notice any pertinent experts. Experts in hostage taking cases with a nexus to human smuggling may include experts in human smuggling and human smuggling organizations, profiling in kidnapping, gangs, and trauma to hostages. Because of the violent nature of hostage taking cases, there are frequent opportunities for pretrial motion practice, including evidence of bad acts under Rule 404(b) in the form of co-conspirator statements or conduct of a violent nature that is not directly or inextricably intertwined with the conspiracy.[206] Where this evidence is present, notice and move pretrial to admit the evidence. There is also important case law on the issue of relevance in hostage-taking prosecutions. This case law stands for the proposition that witness testimony regarding the abuse that a hostage suffered at the hands of hostage takers while held for ransom is relevant, and not overly prejudicial, to providing the jury with a full narrative of what occurred during the hostage taking.[207]

At trial, leading with a victim is an effective practice to set the tone of the trial with a complete account of the victim's experience as a hostage. An alternative approach in a case in which there was a complex investigation culminating in the recovery of hostages is to put a charismatic agent on first to describe how the recovery and law enforcement operation developed. Relying on the tactic of "getting to guilty early" and then spending the remainder of the trial corroborating by putting on the least culpable or most articulate cooperator followed by the victims' friends and family and any additional cooperators is also a tried-and-true trial strategy in hostage taking cases.[208]

Once the government rests, it should prepare to cross-examine the defendant or any defense witnesses. Because of the violent and inherently anti-social nature of the crime of hostage taking, it is challenging to elicit a confession to hostage taking from a defendant even when the defendant has been granted partial or full immunity on the subject based

---

206 Fed. R. Evid. 404(b); United States v. Melchor-Zaragoza, 83 F. App'x 886 (9th Cir. 2003) (not precedential) (determining the district court did not err in admitting evidence of prior bad acts in the form of testimony from a victim that the victim overheard one of the hostage takers talking about killing an immigrant and shooting a security guard, which had been admitted for the purpose of showing intimidation of the hostages).

207 United States v. Garcia De Leon, 137 F. App'x 965 (9th Cir. 2005) (not precedential).

208 Interview with Luis A. Martinez, former Assistant U.S. Attorney (Feb. 15, 2023).

on an attempted debrief. As a result, an effective cross-examination tactic for hostage taking defendants is to get the defendants on the record regarding the import of the government's most important pieces of evidence. Utilizing this tactic will give the jury the opportunity to evaluate the defendants' demeanor relative to the government's witnesses to make credibility determinations.[209]

Sentencing of individuals convicted of hostage taking is governed by U.S.S.G. § 4A2.1. Section 4A2.1(a) provides for a base offense level of 32. Specific offense characteristics that enhance a hostage taker's advisory sentencing guidelines range include the following: a ransom was demanded;[210] infliction of injury, sexual exploitation, or death of a victim;[211] possession of a weapon;[212] extended periods of captivity;[213] and minor victims.[214] Defendants convicted of hostage taking also face enhancements pursuant to U.S.S.G. § 3A1.1 for the offense involving a vulnerable victim, that is, an alien.[215] Similarly, in cases in which the decision is made to charge alien smuggling in lieu of hostage taking, but there are facts showing that aliens were held against their will, U.S.S.G. § 2L1.1(b)(8) may likewise apply to enhance the defendant's sentence.[216]

On appeal, the quantum of evidence required to sustain a conviction for hostage taking is well-developed in the sufficiency of the evidence case law. The precedent is clear that when an human smuggling organization

---

209 *Id.*

210 United States v. Sierra-Velasquez, 310 F.3d 1217, 1220–21 (9th Cir. 2002) (concluding that the sentencing enhancement for the hostage taking involving a ransom demand, pursuant to U.S.S.G. § 2A4.1(b)(1), applies "anytime a defendant demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant."

211 U.S.S.G. § 2A4.1(b)(2), (5), (c).

212 United States v. Townley, 799 F. Supp. 646, 649–50 (W.D. La. 1992) (enhancement for possession of a weapon applied in kidnapping prosecution where the defendant consciously and voluntarily displayed a knife and gun to instill fear in his victim).

213 U.S.S.G. § 2A4.1(b)(4).

214 U.S.S.G. § 2A4.1(b)(6).

215 United States v. Sierra-Velasquez, 310 F.3d 1217, 1220 (9th Cir. 2002) (upholding U.S.S.G. § 3A1.1 enhancement for the offense involving a vulnerable victim where the victims were immigrants that had been held hostage while being smuggled into the United States by an human smuggling organization, noting that "aliens who want to enter this country illegally and are dependent on their smugglers for entry are more vulnerable than other categories of persons who may be held hostage for ransom").

216 U.S.S.G. § 2L1.1(b)(8)(A) provides that a defendant's offense level should be increased by 2 points, or to 18, "[i]f an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States."

increases the smuggling fee of a smuggled immigrant (who initially consented to paying a fee to be smuggled) and conditions release from the custody of the smugglers upon payment of the increased fee is sufficient to prove hostage taking.[217] The courts, however, have not required the government to show that the human smuggling organization increased the original smuggling fee to prove hostage taking. It is sufficient that, at any point during the smuggling arrangement, the smuggled immigrant was threatened and detained for ransom.[218]

V. Conclusion

U.S. law, like the law of antiquity, recognizes hostage taking as a crime of capital significance. Rooted in the traditions and culture of Mexican revolutionary groups and criminal cartels, human smugglers have adopted the tradecraft of hostage taking and deployed them in the domain of human smuggling. The result of this practice is hyperviolent and highly volatile events during which smugglers detain and hold immigrants for ransom. Immigrant victims in these situations are frequently subjected to terroristic, psychological, and pain-based treatment while held against their will by their smugglers. To combat this dark reality on the border, investigators and prosecutors must arm themselves with tools necessary to effectively investigate and prosecute these instances of crime.

From the investigator's perspective, it cannot be overemphasized that time is of the essence in responding to reports from other law enforcement and non-law enforcement reports of hostage-taking events. Additionally, based on the unique exigencies and dangers that these events present,

---

[217] United States v. De Jesus-Bartes, 410 F.3d 154 (5th Cir. 2005) (evidence was sufficient to sustain conviction for hostage taking where a human smuggling organization demanded $1,500 from the family members of immigrants, instead of the previously agreed upon smuggling fee of $1,200 or $1,300, and continued to detain the immigrants whose families could not pay the fee); United States v. Si Lu Tian, 339 F.3d 143 (2d Cir. 2003).

[218] United States v. Ibarra-Zelaya, 465 F.3d 596 (5th Cir. 2006) (evidence was sufficient to sustain conviction for hostage taking where human smugglers detained immigrants at an apartment under the threat of not releasing them until their smuggling fees had been paid); United States v. Zhang, Nos. 97-1450, 97-1546, 165 F.3d 16 (2d Cir. 1998) (holding sufficient evidence supported the defendant's hostage taking conviction where the evidence showed the defendant was involved in an human smuggling ring and then held immigrants for ransom at gunpoint under the threat of beatings until the fee charged for the human smuggling service was paid); United States v. Calderon-Lopez, 268 F. App'x 279 (5th Cir. 2008) (not precedential) (holding that testimony of immigrants that they were held captive in a warehouse and threatened with harm if they or their relatives could not secure a smuggling fee was paid was sufficient to support convictions for hostage taking and conspiracy to take a hostage).

investigators should also be prepared with blueprints for recovery and arrest operations. Finally, with an eye toward prosecution, investigators should be prepared to effectively communicate with and interview pertinent actors amidst the chaos of a hostage-taking response.

From the prosecutor's perspective, once victims have been recovered, it is crucial to provide decisive guidance to investigators that focuses on identifying defendants and obtaining evidence in an environment of a developing universe of facts. The facts and features of the case that ultimately come to light will dictate the contours of the decision tree that the prosecutor will confront in making pre-charging and charging, pre-trial litigation, and ultimately trial and appellate decisions.

Some things we cannot control, including the atrocities that human smuggling organizations will perpetrate against their victims. What is in our control, however, is how we approach the investigatory and prosecutorial challenges attendant to hostage-taking events. And while there can be no one-size-fits-all approach, we submit that strategically and decisively applying the principles and guidance outlined in this article can serve as a prototype to combatting immigrant hostage taking at the border, where the stakes are nothing other than life and death.

About the Authors

Matthew Ramírez was born and raised in Pueblo, Colorado. Matthew began his career as a teacher and investigative journalist and also studied at the University of New Mexico School of Law. After law school, Matthew served as a Judicial Law Clerk for the Honorable Michael E. Vigil on the New Mexico Court of Appeals and Supreme Court. Matthew joined the Department of Justice in 2019, where he serves as an Assistant U.S. Attorney in the Las Cruces Branch Office, District of New Mexico, and specializes in complex organized crime and gang investigations.

René Robles grew up in Chihuahua, Mexico and Deming, New Mexico and attended New Mexico State University. He started his federal government career in 2008 with the United States Border Patrol. René later transferred to Homeland Security Investigations where he has focused on human smuggling and hostage-taking investigations along the southwest border.

Note from the Editor-in-Chief

This issue of the *Department of Justice Journal of Federal Law and Practice* has articles on such diverse topics as the complicated categorical approach, cutting issues with cell phone forensics, Confrontation Clause tripwires, advice about presenting accomplice testimony, navigating federal juvenile law, and investigating and prosecuting immigrant hostage taking. And there's also a colorful (literally) piece on using visuals in briefs. In short, we examine emerging issues in criminal litigation, something we last covered in our January 2018 issue.

Special thanks to Rob Parker, Chief of the Criminal Appellate Section, for reviewing the articles of our subject-matter experts and writing the introduction. We have a small, but amazing, team here at the Office of Legal Education–Publications: Managing Editor Jan van der Kuijp and Associate Editor Kari Risher, as well as our University of South Carolina law clerks. The clerks who helped edit this issue have all moved on in their legal careers, and we wish them well.

Finally, thanks, as always to you, our readers. We trust that our work will assist you in your federal practice. Stay safe and well.

Chris Fisanick
Columbia, South Carolina
April 2023