PROSECUTOR TRAINING PROGRAM

A Collaborative Effort of

The United States Attorney's Office
for the District of Columbia

and

The Institute for Law and Social Research
Washington, D.C.

1974

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

FOREWORD

The training program for Assistant United States Attorneys is part of a comprehensive training program prepared for the Superior Court Division of the District of Columbia United States Attorney's Office. The other major parts of the program consist of a management training program for management and supervisory personnel and another for secretarial and administrative personnel in the Division. These programs are being prepared under a subgrant to the Institute for Law and Social Research from the District of Columbia's Office of Criminal Justice Plans and Analysis.

The training materials contained herein, as is the case with the other training programs, are the result of an extensive, in-depth training needs analysis and design effort addressing the specific needs of the Superior Court Division. In addition to a study of documentation describing the Division, the functions and duties of its personnel, and existing training materials, structured interviews and meetings were conducted with personnel throughout the United States Attorney's Office, and agencies and departments interacting with it. These latter included District Court and Superior Court judges, Metropolitan Police for the District of Columbia, private attorneys, United States Department of Justice personnel, and social services employees. Views and documentation related to the training of prosecutors were also obtained from selected individuals involved in training prosecutors throughout the United States.

The data obtained through these studies were systematically collated and analyzed as a basis for determining the specific needs of the Superior Court Division. This comprehensive statement of needs was further used as the basis for designing the training programs best suited to the requirements and environment of the Division. The design served as a blueprint to the resource persons entrusted with the development of the training materials.

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Members of the United States Attorney's Office involved in the direction, guidance and update of this project included Mr. Harold H. Titus, Jr., United States Attorney for the District of Columbia; Mr. Earl J. Silbert, United States Attorney for the District of Columbia succeeding Mr. Titus; Mr. Charles R. Work, Chief, Superior Court Division during most of the grant; Mr. Robert A. Shuker, Deputy Chief, and later Chief, Superior Court Division and Project Director; Mr. Paul L. Friedman, Administrative Assistant United States Attorney; Mr. Robert E. L. Eaton, Jr., Deputy Chief, Misdemeanor Trial Section and later Chief, Grand Jury/Intake Section; Mr. Richard L. Cys, Deputy Chief of the Misdemeanor Trial Section.

A number of senior Assistant United States Attorneys worked on the substantive development of the training segments. They are as follows: Messrs. Roger M. Adelman, Raymond Banoun, Daniel J. Bernstein, William S. Block, C. Madison Brewer, John F. Evans, Henry F. Greene, Robert Alan Jones, W. R. King, John T. Kotelly, Barry L. Liebowitz, Joseph F. McSorley, Thomas H. Queen, John S. Ransom, Percy H. Russell, Michael G. Scheininger, Steven W. Snarr, Albert H. Turkus, and Jerome Wiener. Mr. John A. Bryson, a law clerk with the United States Attorney's Office, was also instrumental in the effort.

The overall management of the project for the Institute for Law and Social Research was provided by Mr. Anthony V. DiGioia. Mr. DiGioia also developed and applied the methodologies used in the training needs analysis, design, and development of the prosecutor training program. Ms. Elizabeth Zicherman provided primary assistance to Mr. DiGioia and coordinated all major efforts between the Institute and the United States Attorney's Office. Dr. Frank Cannavale, Mr. John L. Gizzarelli, Jr., and Mr. Dean C. Merrill, all with the Institute, developed the segments on the Prosecutor's Management Information System (PROMIS).

Mr. John E. Rogers, a former Assistant United States Attorney and presently a partner in the law firm of Rogers, Mirabelli, Berlanti and Holloway, acted as Technical Director. In this capacity, Mr. Rogers provided legal and prosecutive knowledge throughout every phase of the project, developed certain segments, and reviewed all material for technical accuracy. Mr. Paul D. Kamenar, a law clerk employed by the Institute, worked on the update of the training materials which was undertaken prior to their second printing.

* * *

The topics under Section I concentrate primarily upon the law, tactics, and Office policies and procedures. This category encompasses areas such as Search and Seizure, Discovery, and Bail and Pretrial Detention. Section II deals with skill areas related to trial, e.g., Jury Selection, Demonstrative Evidence and Exhibits, and Closing Argument.

The training materials contained herein consist of discussion notes for instructors and accompanying student worksheets on the various topics. These worksheets were developed to assist the trainee in following the material being presented in the training sessions and as a guide for future study. Copies of the discussion notes, to be distributed at the close of each session, will supplement the information already communicated during the presentations.

Since a large part of the training will consist of practicing these different trial skills, simulation exercises, workshops, and mock trials were developed to assist the trainee and instructor in the development and practice of these skills. In addition to other handouts, such as checklist/gouges, bibliographies have also been prepared to direct the trainee to other sources of knowedge on various topics.

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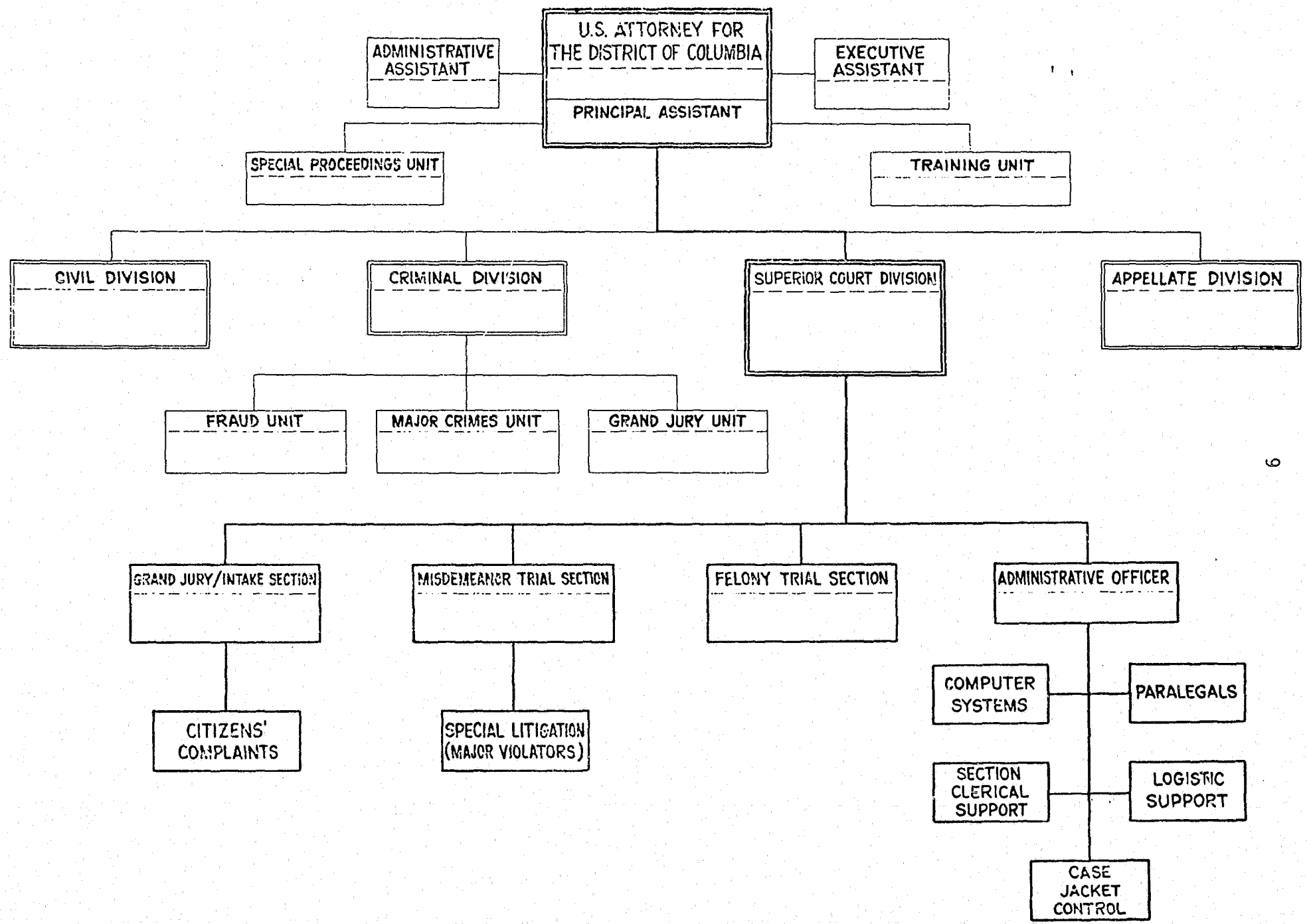
TOPIC I.A: The Prosecutive System: An Introduction

DURATION: 1 hour

This segment of the training program is intended to be an introductory segment to be given by the Chief of the Superior Court Division in conjunction with others.

The purpose of this lecture should be two-fold: to give the new Assistant an introduction to the prosecutive system generally and his professional and ethical responsibilities with regard to it; and to provide the Assistant with information concerning the structure and systems within which this United States Attorney's Office, particularly the Superior Court Division, operates.


U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA
PRINCIPAL ASSISTANT
ADMINISTRATIVE ASSISTANT
EXECUTIVE ASSISTANT
SPECIAL PROCEEDINGS UNIT
TRAINING UNIT
CIVIL DIVISION
CRIMINAL DIVISION
SUPERIOR COURT DIVISION
APPELLATE DIVISION
FRAUD UNIT
MAJOR CRIMES UNIT
GRAND JURY UNIT
GRAND JURY/INTAKE SECTION
MISDEMEANOR TRIAL SECTION
FELONY TRIAL SECTION
ADMINISTRATIVE OFFICER
CITIZENS' COMPLAINTS
SPECIAL LITIGATION (MAJOR VIOLATORS)
COMPUTER SYSTEMS
PARALEGALS
SECTION CLERICAL SUPPORT
LOGISTIC SUPPORT
CASE JACKET CONTROL

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I.B: Papering and Entries on Case Jackets

DURATION: 2 hours

During this discussion, the participant is expected to gain a better understanding of the purposes and procedures with respect to correct entries on case jackets and their related forms during the papering of a case. This lecture will include an explanation of the specific purposes of each type of entry and an explanation of the advantages of such entries for the prosecutor and clerical staff. Examples and case histories of correct and incorrect papering and case jacket entries will be discussed.

MATERIALS: Augment discussion with U.S. Attorney's Papering Manual.

OUTLINE OF PRESENTATION

I. Advantages inherent in properly made entries

A. Particular advantages with respect to misdemeanor branch collective calendaring system versus an individual calendaring system.

Example: Correct and complete entries on case jackets allow the trial assistant, who often must be prepared to present his case to the court and the jury within minutes after receiving the case jacket, to collect and correlate all of the necessary facts for trial.

Example: Correct and complete entries on case jackets allow the clerical staff in the control center to assure that each jacket is present at the correct time and place throughout the prosecution process.

B. Following cases through the prosecutorial system.

1. Advantages of correct papering and case jacket entries with respect to attorneys.

Example: The diverse uses of the entries made should be discussed including the relevancy of the entries made to such topics as the PROMIS system, plea discussions, case presentation and the correct order for calling witnesses, etc.

2. Advantages of correct papering and case jacket entries with respect to support staff.

Example: The proper filing and retrieval of case jackets for their presentation at the various stages of the court process along with the instant availability of jackets for assistants for such purposes as answering motions and giving discovery should be discussed.

3. Advantages of correct papering and case jacket entries with respect to paraprofessionals.

Example: The Courtroom 15 paraprofessional can assure the return of the jacket to Courtroom 15 at the proper time and can handle problems such as the availability of special witnesses wuch as doctors or experts accurately and efficiently, etc.

II. Particular purposes of individual entries

In this portion of the presentation the lecturer should be prepared to relate the purposes and functions of each of the entries in the following divisions (A-D) as they relate to the prosecution of each case, either felony or misdemeanor, as it passes through each stage of the system from presentment in Ct. Room 317 to sentencing.

A. Case jackets and their entries

Explanation: The first topic covered in the lecture should be the purpose of the jacket itself and each of the individual entries that can be made upon it. Note the distinction between U.S. Attorney's case jacket and the court jacket.

B. Case jacket forms and their entries

Explanation: The second topic covered should be the normal case jacket forms used in the papering of almost every case i.e., 163, No Paper Slips, Subpoenas, PROMIS forms, Police 140's, FBI rap sheets, Felony Screening Sheets, etc.

C. Special prosecutorial forms

Explanation: The third topic covered should be the special forms such as line-up orders, booking orders, blood sample orders, repeat offender papers, release offender papers, etc.

D. Miscellaneous forms

Explanation: The last topic covered whould be the miscellaneous forms rarely used at papering.

III. Procedures for making correct papering and case jacket entries

Example: The proper filing and retrieval of case jackets for their presentation at the various stages of the court process along with the instant availability of jackets for assistants for such purposes as answering motions and giving discovery should be discussed.

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D. Miscellaneous forms

Explanation: The last topic covered whould be the miscellaneous forms rarely used at papering.

III. Procedures for making correct papering and case jacket entries

During each of the following parts (A-D) the lecturer should be able to give numerous examples of correct entries for each entry space on the case jacket and each of the forms listed below.

A. Case jacket entries

Explanation: The first topic covered in the lecture should be the individual entries that can be made upon the jacket itself.

B. Case jacket forms and their entries

Explanation: The second topic covered should be the normal case jacket forms used in the papering of almost every case i.e., 163 No Paper Slips, Subpoenas, PROMIS forms, Police 140's, FBI rap sheets, Felony Screening Sheets, etc.

C. Special prosecutorial forms

Explanation: The third topic covered should be the special forms such as line-up orders, booking orders, blood sample orders, repeat offender papers, release offender papers, etc.

D. Miscellaneous forms

Explanation: The last topic covered should be the miscellaneous forms rarely used at papering.

IV. Problems created by omissions and incorrect entries

Examples: Incorrect entries into the PROMIS computer caused by incorrect entries at papering result in problems that occur if the defendant is rearrested during the pendancy of the first case.

V. Horror Stories

A. Problems caused to U.S. Attorney's Office due to foulups, e.g., the defendant kept in jail after case has been nolled.

B. Problems of a prosecutor in following and trying cases.

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WORKSHEET

TOPIC I.B: Papering and Entries on Case Jackets

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OUTLINE OF PRESENTATION NOTES

I. Advantages inherent in properly made entries

A. Particular advantages with respect to misdemeanor branch as it relates to collective calendaring system versus an individual calendaring system.

B. Following cases through the prosecutorial system

1. Advantages of correct papering and case jacket entries with respect to attorneys.

2. Advantages of correct papering and case jacket entries with respect to support staff.

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3. Advantages of correct papering and case jacket entries with respect to para-professionals.

II. Particular purposes of Individual entries

In this portion of the presentation the lecturer should be prepared to relate the purposes and functions of each of the entries in the following divisions (A-D) as they relate to the prosecution of each case, either felony or misdemeanor, as it passes through each stage of the system from pre-sentment in Ct. Room 317 to sentencing

A. Case jackets and their entries

B. Case jacket forms and their entries

C. Special prosecutorial forms

NOTES

D. Miscellaneous forms

III. Procedures for making correct papering and case jacket entries

During each of the following parts (A-D) the lecturer should be able to give examples of correct entries for each entry space on the jacket and each of the forms listed below.

A. Case jacket entries

B. Case jacket forms and their entries

C. Special prosecutorial forms

D. Miscellaneous forms

IV. Problems created by omissions and incorrect entries

V. Horror Stories

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Training for Assistant United States Attorneys

TOPIC I.B: Workshop - Papering & Entries on Case Jackets

The Assistants will participate in a papering workshop. The purpose of the workshop is to discuss and work with the various aspects and problems involved in the papering procedure.

1. Complete case jacket and forms

   A. Case Jacket and Forms with correct and complete entries

   B. Case Jacket and Forms with incorrect and incomplete entries

II. Role playing

Two or more Assistants will be chosen to retrieve and act in preset situations wherein their entire actions will be dictated by entries upon case jackets. It is expected that one Assistant will have a jacket with correct and complete entries and that the other Assistant(s) will have a jacket with either incomplete or incorrect entries.

Explanation: In the role playing situation a group of Assistants (one with correct and complete entries and the rest with incorrect and incomplete entries taken from actual case jackets) will appear before the lecturer who will act as a judge presiding over the different stages of the prosecution process. The lecturer/judge in response to requests of an imaginary defense attorney and through sua sponte requests will require the Assistants before him to provide the court with various pieces of information found in the papering entries.

It is expected that the obvious problems of all the Assistants save one shall provide the most convincing explanation of the purposes and relationships of correct and complete papering and case jacket entries to the prosecution function.

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DISCUSSION NOTES

TOPIC I.C: Plea Discussion

DURATION: 1 hour

The purpose of this lecture is to introduce the Assistant United States Attorney to the plea discussion process. Particular attention is directed to the necessity for plea discussion in the criminal justice system, the guidelines established by Court rules and decisions, the ethical considerations, the practical considerations, and the actual mechanics of reaching a plea agreement.

MATERIALS: Supplement discussion with Office Policy Manual.

OUTLINE OF PRESENTATION:

I. Background and Necessity for Plea Discussion

A. Plea discussion is a practical necessity.

1. Nationwide, 75-80% of criminal cases are disposed of by guilty pleas.

2. Criminal justice system resources are not sufficient to try all cases.

3. If the plea rate dropped to 50%, it would mean double the present trial load which already strains the system.

B. Supreme Court has tacitly approved plea discussion.

1. McMann v. Richardson, 397 U.S. 759 (1970).

2. Parker v. North Carolina, 397 U.S. 790 (1970).

3. North Carolina v. Alford, 400 U.S. 25 (1970).

C. ABA has issued suggested guidelines for plea discussion.

1. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to the Prosecution Function, Approved Draft (1971), Sections 4.1 - 4.4.

2. ABA Project on Minimum Standards for Criminal Justice, Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Approved Draft (1968), Section 3.1.

D. Benefits to Defendant

1. Certainty of Disposition

2. Right to trial is not right to perjury, i.e., if defendant is guilty, he cannot assert the contrary.

3. Defendant does not present a good image for sentencing by a Humphrey Bogart attitude ("I never plead guilty, copper!")

4. Plea can be first step to rehabilitation.

5. Most important: Defendants plea to get reduced charges or because evidence is so overwhelming they don't have a chance.

E. Benefits to Court

1. Only way to keep the system operating

2. Conserves scarce judicial resources

F. Benefits to Prosecutor

1. Disposing of most cases by plea permits concentration on really dangerous defendants and major offenders.

2. Number of prosecutors is totally inadequate to try all cases.

3. Only effective way to manage the docket

4. Concentration on trials may delay justice.

- Prolongs defendant's conflict with society represented by the trial phase

- Creates speedy trial problems

II. Considerations in Plea Discussion

A. Office Policy is set forth in guidelines issued periodically. Consult with your supervisor for a copy of them.

B. Strength of the case.

1. Weight of evidence

2. Arrest, search and seizure problems

3. Identity of defendant

a. Legal problems (e.g., lineup)

b. Factual problems

4. Witnesses

a. Number

b. Eyewitnesses

c. Credibility/reluctance

d. Dead or nonavailable

e. Relationship to defendant

5. Corroborating evidence

a. Fingerprints

b. Weapons

c. Seized property or evidence

6. Possibility of:

a. Entrapment

b. Ignorance

c. Mistake

C. Seriousness of offense.

1. Violence

a. Type and use of weapons

b. Injuries to victims

2. Sex or child molestation

3. Property offenses

a. Amount and type of property

b. Single or pattern (e.g., pickpocket) offense

c. Property recovered

d. Possibility of restitution

Note: Bad check and confidence-game cases frequently involve either repeat offenders or professional criminals.

D. Mitigating/Aggravating Circumstances.

1. Narcotics Addiction

2. Alcoholism

3. Defendant's attitude

a. At arrest

b. At arraignment

c. Ask police

4. Defendant's Background

a. Age

b. Prior record - arrests and convictions

c. Work History

d. Education

e. Activities since arrest

f. Relationship to victim/witnesses

g. Family stability

h. Time in area

E. Special Considerations

1. Victims

a. Keep them informed

b. People want to know what happens in "their" case.

(1) If victim is unreasonable you damn yourself by being furtive.

(2) If victim is adamantly against plea disposition, maybe he should have chance to address Court.

(3) Can be good idea to have them at plea

c. There's nothing that says a victim can't allocute.

2. Police.

a. Discuss what you are planning to do and why.

b. Explain why you think a plea is reasonable

c. Ask for their advice

(1) Keeps them informed

(2) They may be able to tell you why a plea shouldn't be taken.

d. A policeman wants to know what happens to "his" case and why.

e. General Rule: Don't make plea agreement without talking to police on the case first.

3. Multiple Defendants

a. Talk to all counsel, before making any agreement

b. Where one pleads and one goes to trial:

(1) Beware of splitting your case

(2) Beware of Bruton v. United States, 391 U.S. 123 (1968)

4. Defense Counsel.

a. Know your facts, especially strong points and weaknesses.

b. Consider whether to bring additional charges based on anything you discover in preparing case.

c. If you don't know/trust counsel, consider having someone else present.

d. Always ask what the defense is.

e. Furnish him with a strong general outline of case.

f. Talk to counsel, not the defendant.

g. If defendant has two attorneys, insist both are present.

F. Special Types of Cases

1. Property Cases

Try to get restitution as part of agreement. This may be only meaningful thing that happens in case.

2. Violent Crimes and Sex Cases.

a. Generally, charges should not be lessened. But if plea agreement is reached, make sure there is sufficient time available on charge the defendant does plead to.

b. Always talk to victims and witnesses.

(1) It is especially necessary to understand the details in sex cases

(2) It gives you a better understanding of the defendant's character

(3) Some simple assaults display a more depraved mind than many murders

c. Sex and child molestation cases.

(1) Need heavy sentence for adequate parole rehabilitation

(2) Bad disposition upsets victim and family greatly

G. Possible Sentence

1. Know what sentence is realistically involved

2. Know what important factors should be considered in sentencing

a. Prior offenses

b. Past violence

c. Nature of crime

d. Narcotics addiction

e. Youth

3. Know what will probably happen

a. Will most of sentence have to be served?

b. Will defendant be eligible for release immediately?

c. Will defendant get probation in any event?

4. Actual Charge Pled To By Defendant. Make sure it reflects what he did factually, otherwise his criminal record will be inaccurate.

III. Techniques of Plea Discussion.

A. Time of discussion

1. Pre-papering duscussions are very rare and should be done only with prior approval in a special case.

2. Post-arrest/pre-indictment

   a. Most fruitful

   b. Threat of indictment hangs over defendant's head

   c. "If he doesn't plead, we'll indict him."

3. Post-arraignment

   a. The usual situation

   b. SEEK OUT THE DEFENSE ATTORNEY

      (1) Phone

      (2) Write

      (3) Walk courthouse corridors

      (4) Proffer in open court of availability for informal discovery

B. The basic considerations

1. Plea discussion occurs only for practical reasons.

2. The Government is almost always the one who gives up the most.

3. You always have to resolve WHAT and WHY

   a. WHAT plea disposition the Government will take

      (1) Office policy

      (2) Considerations discussed above

      (3) Cooperation of defendant

      (4) Stage of prosecution

   b. WHY the defendant should agree to plea

      (1) Certainty

      (2) Peace of mind

      (3) Avoid possible harsh judge

(4) Avoid conviction for more serious crime

(5) Avoid humiliation

(a) Lost case to defense attorney

(b) Defendant's story will appear foolish to a jury in light of evidence

(6) Other advantages

(a) Start new life

(b) Show good rehabilitation image for sentencing

(c) Atone for crime

(d) Last chance under early plea policy (tomorrow the price goes up)

4. ALWAYS MAKE A FILE MEMO OR JACKET NOTE ON ANY PLEA DISCUSSION

IV. Requirements for Taking the Plea

A. Criminal Rule 11

1. Super. Ct. Crim. R. 11 is identical to Fed. R. Crim. P. 11.

2. Court must:

a. Personally address defendant

b. Determine plea is voluntarily made

c. Determine plea is made with full understanding of

(1) Nature of charge

(2) Consequence of plea

d. Determine there is a factual basis for the plea

(1) Should, but doesn't have to, be from mouth of defendant

(2) Can be from other information available to court, e.g., AUSA can outline Government's case for the record.

3. U.S. District Court for D.C. has adopted a standard procedure for taking pleas.

4. There is no standard procedure for taking pleas in Superior Court.

B. Court Decisions

1. McCarthy v. United States, 394 U.S. 459 (1969). Rule 11 means what it says

   a. "Personally" and "full understanding" mean just that.

   b. Representations of defense counsel are no substitute for compliance with the rule.

   c. Must be a "factual basis".

   d. Note: Applies only to Federal courts, but persuasive as to D.C. Super. Ct. because wording of rule is exactly the same.

2. North Carolina v. Alford, 400 U.S. 25 (1970).

   A defendant may voluntarily plead guilty to avoid trial and more serious sentence even while protesting innocence.

3. Giglio v. United States, 405 U.S. 150 (1972).

   A plea agreement made by an Assistant is binding on the Government even though the Assistant was not authorized.

4. Defendant does not need to be advised of collateral consequences of his plea.

   Deportation: United States v. Sambro, 147 U.S. App. D.C. 75, 454 F.2d 918 (1971).

   Discharge from military service: Redwine v. Zuchert, 115 U.S. App. D.C. 130, 317 F.2d 336 (1963).

C. Practical Requirements

1. Have defendant placed under oath

   a. Locks him into his plea

   b. Danger of perjury hangs over his head

   c. Forecloses him later changing story

2. "Factual basis".

   a. Have defendant admit facts if possible.

   b. If defendant will plead but not admit guilt (e.g., Alford plea), then Assistant can indicate to Court what Government would put on in way of evidence if case went to trial.

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WORKSHEET

TOPIC I.C: Plea Discussion

The purpose of this lecture is to introduce the Assistant to the plea discussion process. Particular attention is directed to the necessity for plea discussion in the criminal justice system, the ethical considerations and ABA guidelines, Court rules and decisions, the practical and policy considerations, and the actual mechanics of reaching a plea agreement.

OUTLINE OF PRESENTATION

I. Background and Necessity for Plea Discussion NOTES

A. Plea discussion is a practical necessity.

B. Supreme Court has tacitly approved plea discussion.

McMann v. Richardson, 397 U.S. 759 (1970).

Parker v. North Carolina, 397 U.S. 970 (1970).

North Carolina v. Alford, 400 U.S. 25 (1970).

C. ABA has issued suggested guidelines for plea discussion and plea agreements.

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D. Benefits to Defendant

E. Benefits to Court

F. Benefits to Prosecutor

II. Considerations in Plea Discussions

A. OFFICE POLICY

B. Strength of the case

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C. Seriousness of offense

D. Mitigating/aggravating circumstances

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E. Special Considerations

1. Victims

2. Police

3. Multiple defendants

4. Defense counsel

F. Special types of cases

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1. Property cases

2. Violent crimes and sex cases

G. Possible Sentence

H. Actual charge pled to by defendant

III. Techniques of Plea Discussion

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A. Time of discussion

B. The basic considerations

IV. Requirements for Taking the Plea

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A. Criminal Rule 11

B. Court decisions

1. McCarthy v. United States, 394 U.S. 459 (1969).

2. North Carolina v. Alford, 400 U.S. 25 (1970).

3. Giglio v. United States, 405 U.S. 150 (1972).

4. United States v. Sambro, 147 U.S. App. D.C. 75, 454 F.2d 918 (1971).

5. Redwine v. Zuchert, 115 U.S. App. D.C. 130, 137 F.2d 36 (1963).

CHECKLIST/GOUGE

Procedure For Plea Of Guilty

NOTE: This is the procedure adopted by unanimous resolution of the judges of the U.S. District Court for the District Columbia in Executive Session, June 24, 1969.

SEE: McCarthy v. United States, 394 U.S 459 (1969) (under Rule 11 of Fed. R. Crim. P., trial court must personally address defendant and determine plea is voluntarily, with full understanding of charge, pled to. The Court must be satisfied there is a factual basis for the plea. Super. Ct. Crim. R. 11 is identical to Fed. R. Crim. P. 11.)

Note: The "factual basis" does not have to be gotten from defendant; e.g., AUSA can outline Government's case for the record.

SEE: North Carolina v. Alford, 400 U.S. 25 (1970). A defendant may voluntarily plead guilty even though protesting his innocence.

Procedure For Acceptance of Plea of Guilty

In all cases in which a defendant enters a plea of guilty, the defendant is to be interrogated by the Court to establish the following:

1. I advise you and I want you to understand that you have Constitutional Rights as follows:

   a) To a speedy trial by jury with the aid of counsel;

   b) Against compulsory self-incrimination; and

   c) To face your accusers;

   and that if you plead guilty to the (lesser included) offense charged, that you will waive each and all of these 3 rights. Do you understand?

2. I advise you that you will have the assistance of counsel at the time of sentence, if your plea of guilty is accepted. Do you understand this?

3. I advise you that you are charged with the crimes of _____, _____, and _____, and that the crime of _____ is a lesser included offense of the crime of _____.

Do you understand that the charge which your counsel states you wish to plead guilty of is _____?

4. The elements of the crime which your counsel states you wish to plead guilty of are as follows:

   a) _____;

   b) _____;

   c) _____; etc.

   Do you understand these elements of the crime of _____? Did you in fact do or commit each of these elements of the crime of _____ with the intent which I have just recited as an element of the offense?

5. What did you do? (If necessary, question about the location of the crime, type of weapon, etc.)

6. Has your guilty plea been induced by any promises or representations by anyone as to what sentence will be imposed by the Court?

7. Has anyone threatened or coerced you into making a guilty plea?

8. Has any promise of any kind been made to induce your plea of guilty (except that the other counts of the indictment will be dismissed at the time of sentence if your plea is accepted)?

9. Do you understand that as a result of your plea of guilty you may be sentenced to a prison term for as much as ____ years (Youth Correction) and a fine of $_____?

10. Are you entering this plea voluntarily of your own free will because you are guilty and for no other reason?

11. Have you discussed the entry of this plea fully with your attorney?

12. Are you completely satisfied with the service of your attorney in this case?
Note: If the defendant was sent to the Court for trial, advise him that since the case has been sent for trial and since it is ready for trial with the witnesses waiting, if the defendant's plea is accepted, he will not be allowed later to withdraw his plea of guilty prior to sentence even if he desires to do so.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES AND WORKSHEET

TOPIC I.D: Arrest, Search, Seizure And The Supression Hearing

OUTLINE OF PRESENTATION:

I. Arrest

A. Definition Of Arrest. A person is under "arrest" at the point where a law enforcement officer has effectively restrained him and the person is cognizant of the restraint -- not necessarily when the officer formally proclaims that he is in custody. United States v. Washington, 249 F. Supp. 40 (1965), aff'd, 130 U.S. App. D.C. 374, 401 F.2d 915 (1968); Campbell v. United States, 273 A.2d 252 (D.C. Ct. App. 1971); Hicks v. United States, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

B. Examples Of Conduct Not Amounting To An Arrest.

1. An interrogation of the defendant and a passenger during a routine traffic investigation to determine whether the defendant, the driver, had a valid driver's permit, did not constitute an arrest. Williams v. United States, 263 A.2d 659, 661 (D.C. Ct. App. 1970). Cf. Bowling v. United States, 122 U.S. App. D.C. 25, 26, 350 F.2d 1002, 1003 (1965).

2. The action of one police officer in remaining behind the open door of a police car with his pistol drawn and pointed downward as another officer approached the driver's side of a parked vehicle which matched the description of an automobile reported to be occupied by gun-carrying narcotics users, for the purpose of "covering" his partner, did not constitute an arrest. Green v. United States, 275 A.2d 555 (D.C. Ct. App. 1971). But see McGee v. United States, 270 A.2d 348 (D.C. Ct. App. 1970); Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

3. The action of a police officer in placing his hand on the defendant's arm and asking to speak with him was not an arrest after the officer had observed the defendant nervously remove his hand from his pocket, glance repeatedly at the officer, and finally walk away at the officer's approach. United States v. Burrell, 286 A.2d 845, reh r'g denied, 288 A.2d 248 (D.C. Ct. App. 1972).

4. Summoning the defendant to appear at the police station for a line-up after the victim had identified the defendant from photographs was not an arrest. Even though probable cause to arrest the defendant did not exist, the action of the police, less than an arrest, was a reasonable intrusion on liberty and hence constitutionally permitted. Wise v. Murphy, 275 A.2d 205 (D.C. Ct. App. 1971).

5. Mere stopping and questioning of man dressed in soiled clothing and carrying a new suitcase by police officers in course of routine investigation was not an arrest. Wright v. United States, 242 A.2d 833 (D.C. Ct. App. 1968).

6. Passenger was not under arrest when officer ordered driver of car to follow him to stationhouse. Contee v. United States, 212 A.2d 343 (D.C. Ct. App. 1965).

7. Where police officer encountered defendant on the stairs in a hotel noted for its high incidence of crime, and ordered him to "hold it," defendant was not yet under arrest, but merely stopped for investigation. United States v. Coates, D.C. Cir. No. 73-1403, decided Mar. 12, 1974.

C. Arrest Without A Warrant. A warrant is almost always unnecessary for a valid arrest. Unlike search warrants, there is no requirement that an arrest warrant be sought if practicable to do so. Ford v. United States, 122 U.S. App. D.C. 259, 352 F.2d 927 (1965). See 23 D.C. Code §581. The one exception is warrantless entry into a home to arrest. See I(C)(2), infra.

POLICY: Obtain warrant whenever practicable to do so.

1. Statutory Authority. A warrantless arrest is permissible:

   a. When a law enforcement officer has probable cause to believe that a particular person has committed or is committing a felony. 23 D.C. Code §581 (a) (1) (A).

   b. When a law enforcement officer has probable cause to believe that a particular person has committed or is committing an offense in his presence. 23 D.C. Code §581 (a) (1) (B). See Curtis v. United States, 222 A.2d 840 (D.C. Ct. App. 1966).

      "In his presence" does not mean that the officer must actually observe all elements of the offense. Rather, he may utilize all his senses and draw upon what, to him, is common knowledge under the circumstances. Thus the officer is able to use his experience in deciding whether an "offense" took place "in his presence." Taylor v. United States, 259 A.2d 835 (D.C. Ct. App. 1969); Thomas v. United States, 134 U.S. App. D.C. 48, 412 F.2d 1095 (1969).

   c. When a law enforcement officer has probable cause to believe that a particular person has committed or is about to commit one of the misdemeanors listed in 23 D.C. Code §581 (a) (2) (A) and (B) and that unless immediately arrested, the person may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence, he may arrest without a warrant. The offenses referred to are: assault (22 D.C. Code §504), petit larceny (22 D.C. Code §2202),

receiving stolen goods (22 D.C. Code §2205), unlawful entry (22 D.C. Code §3102), attempted burglary (22 D.C. Code §1801), attempted grand larceny (22 D.C. Code §2201), and attempted unauthorized use of vehicle (22 D.C. Code §2204).

2. A warrantless entry into a home for the purpose of arrest requires greater justification than a "hot pursuit" based on probable cause. There are six criteria -- (1) offense is grave, (2) suspect believed to be armed, (3) there is more than a minimum of probable cause, (4) strong reason to believe suspect in premises, (5) likelihood of escape, (6) entry to effect arrest be peaceable. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385 (1970) (en banc); United States v. Harris, 140 U.S. App. D.C. 270, 435 F.2d 74 (1970); Chappell v. United States, 119 U.S. App. D.C. 356, 342 F.2d 935 (1965). See Dunston v. United States, D.C. Ct. App. No. 7115, decided Feb. 13, 1974 (search upheld; suspect not armed).

D. Probable Cause Requirement. An arrest, whether made with a warrant or not, must be based on probable cause.

1. Probable cause for an arrest exists where facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant belief by a man of reasonable caution that an offense has been or is being committed. Draper v. United States, 358 U.S. 307 (1959). See Beck v. Ohio, 39 U.S. 89 (1964).

2. Probable cause to arrest does not become stale but delay may present other problems, e.g., due process claim that delay interfered with presenting adequate defense; claim that delay was sham in order to arrest defendant in a place where evidence could be seized.

3. An arrest is legal if probable cause exists to support arrest for any offense, even though it is not the offense named by the officer as the reason for arrest. United States v. Joyner, D.C. Cir. No. 73-1421, decided Feb. 11, 1974, slip. op. at 3.

4. When the source of the officer's knowledge is other than his first hand observation, the reliability and credibility of this source must be established as well as the validity of the source's conclusion that arrestee has committed a crime.

a. Informers.

(1) When the source is an informant from the criminal milieu, the credibility of his information must be shown, i.e., that his means of gathering the information is dependable, such as first hand observation. United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Carter, D.C. Cir. No. 73-2179, decided June 7, 1974; Townsley v. United States, 215 A.2d 482 (D.C. Ct. App. 1965); United States v. Ketterman, 276 A.2d 243 (D.C. Ct. App. 1971).

(2) If reliability of information is not immediately apparent, the credibility of the information may be established if subsequent police observation largely corroborates the information. Spinelli v. United States, 393 U.S. 410 (1969). For example, if the suspect's arrival time on a train and his description, provided by the informant, are verified by police, the officer then has probable cause to believe that the remaining piece of information, that the suspect is carrying heroin, is also correct. Draper v. United States, 358 U.S. 307 (1959); See United States v. James, 151 U.S. App. D.C. 304, 466 F.2d 475 (1972); United States v. Thornton, 147 U.S. App. D.C. 114, 454 F.2d 957 (1971); Smith v. United States, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966); Jones v. United States, 106 U.S. App. D.C. 228, 271 F.2d 494 (1959).

(3) Informant's reliability as a previously dependable source of information must be established. Spinelli v. United States, supra; McCray v. Illinois, 386 U.S. 300 (1967); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Thornton, supra; Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964).

(4) If a recitation of the officer's previous experience with the informant is not made, reliability may apparently be established by other means. In United States v. Carter, D.C. Cir. No. 73-2179, decided June 7, 1974, the informant, arrested the previous day, was cooperating with police with expectation of leniency. He met the police at the scene of the arrest and his earlier description of drug pusher and paper cup containing drugs was corroborated by police at the scene. These factors, taken together, established his reliability. In United States v. Harris, 403 U.S. 573 (1971), four members of the majority felt that a statement by an informant against his penal interest supported his reliability. Corroboration of the informant's information has also been used to support his reliability. United States v. James, 151 U.S. App. D.C. 304, 466 F.2d 475 (1972); United States v. Thornton, 147 U.S. App. D.C. 114, 454 F.2d 957 (1971). See Smith v. United States, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966).

b. Accomplice. An accomplice is presumed to be reliable and credible. United States v. Long, 449 F.2d 288 (8th Cir. 1971).

c. Victim or Witness. An officer may rely on the information of a citizen who is a victim or a witness to a crime to establish probable cause. United States v. Patterson, D.C. Cir. No. 71-1791, Decided Jan. 17, 1974; United States v. Williams, 147 U.S. App. D.C. 173, 454 F.2d 1016 (1972); Brown v. United States, 274 A.2d 683 (D.C. Ct. App. 1971); Daniels v. United States, 129 U.S. App. D.C. 250, 393 F.2d 359 (1968); Brown v. United States, 125 U.S. App. D.C. 43, 365 F.2d 976 (1966);

Matthews v. United States, 267 A.2d 826 (D.C. Ct. App. 1970); Gaskins v. United States, 262 A.2d 810 (D.C. Ct. App. 1970); United States v. Williams, 147 U.S. App. D.C. 173, 454 F.2d 1016 (1972) (victim's on the scene identification); United States v. Walker, 294 A.2d 376 (D.C. Ct. App. 1972) (citizen's information justified frisk); United States v. Dowling, 271 A.2d 406 (D.C. Ct. App. 1970). But see United States v. McSurely, 154 U.S. App. D.C. 141, 473 F.2d 1178 (1972) ("reputable citizen's" opinion on "seditious" material insufficient).

d. Fellow Officers. An officer may rely on information from fellow officers, so long as it, in turn, is reliable and credible. United States v. Ventresca, 380 U.S. 102 (1965); Smith v. United States, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966).

e. Radio Reports. An officer may rely on reports relayed by radio, teletype or computer. Daniels v. United States, 129 U.S. App. D.C. 250, 393 F.2d 359 (1968); Brown v. United States; 125 U.S. App. D.C. 43, 365 F.2d 976 (1966); Patterson v. United States, 301 A.2d 67 (D.C. Ct. App. 1973); Clemm v. United States, 260 A.2d 687 (D.C. Ct. App. 1970); Cox v. United States, 256 A.2d 917 (D.C. Ct. App. 1969); Clarke v. United States, 256 A.2d 782 (D.C. Ct. App. 1969); Carter v. United States, 244 A.2d 483 (D.C. Ct. App. 1968).

But if the information underlying that report does not support probable cause, the arrest or search will not be valid. Whitely v. Warden, 401 U.S. 560 (1971) (underlying warrant invalid under Spinelli); United States v. Williams, 459 F.2d 44 (9th Cir. 1972) (underlying informant's tip was unsupported); Gilchrist v. United States, 300 A.2d 453 (D.C. Ct. App. 1973).

A reasonable mistake in the information, however, will not vitiate the arrest. Patterson v. United States, supra, (failure to delete report of stolen car after its recovery; car was stopped the same day).

5. Officer's Independent Information. If the officer's information is reliable, the existence of probable cause then depends on whether that knowledge is sufficient "to warrant belief by a man of reasonable caution that an offense has been or is being committed." Draper v. United States, supra. Some factors that are relevant in this evaluation are illustrated in the cases which follow.

a. Experience and expertise of officers. The experience and expertise of police officers can give probable cause where a layman would not have probable cause. Davis v. United States, 133 U.S. App. D.C. 172, 409 F.2d 458 (1969) (officer's experience enabled him to spot two pickpockets in action); Cox v. United States, 256 A.2d 917 (D.C. Ct. App. 1969).

b. Police knowledge of criminal background. A police officer's observation of the defendant carrying a television within 50 yards of the scene of a reported burglary, coupled with the officer's knowledge of the defendant's previous record for housebreaking, provided probable cause. Clemm v. United States, 260 A.2d 687 (D.C. Ct. App. 1970); See Dixon v. United States, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961).

c. Defendant's answers to pre-arrest inquiries. Evasive answers of the defendant when questioned provided a factor supporting the existence of probable cause. Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, cert. denied, 358 U.S. 885 (1958); Wright v. United States, 242 A.2d 833 (D.C. Ct. App. 1968).

d. Flight of defendant. When officers responded to a radio alert for a robbery, they learned that a speeding green car had left the scene. Following its route, they quickly came upon the defendant and others walking away from an abandoned green car; probable cause was found. Lewis v. United States, 135 U.S. App. D.C. 187, 417 F.2d 755 (1969).

The defendant's proximity to the scene of a robbery, his resemblance to a description of one of the robbers, and his efforts to leave the scene and to avoid being overtaken and questioned, added up to probable cause. Herring v. United States, 273 A.2d 835 (D.C. Ct. App. 1971).

e. Stolen or unlawful goods in the possession of the defendant. Where an officer questioning persons near the scene of a theft minutes after its occurrence observed the recently stolen articles near the defendant, probable cause existed. Thompkins v. United States, 251 A.2d 636 (D.C. App. 1969).

f. Nervous or unusual behavior of defendant.

(1) Where the defendant was hiding in the rear of an automobile 100 yards from the scene of a bank robbery and made no response to inquiries, a police officer had probable cause to arrest him. Marshall v. United States, 141 U.S. App. D.C. 1, 436 F.2d 155 (1970).

(2) Where the defendant was crouching in a basement stairwell in the vicinity of a robbery, and told an approaching officer before even being questioned that he was not "one of those hold-up men", the police had probable cause for arrest. United States v. Thurman, 141 U.S. App. D.C. 126, 436 F.2d 280 (1970).

(3) Where running defendants entered an alley to discard their trench coats at 3:00 a.m., and police officers who questioned them after they emerged noticed one defendant attempt to dispose of a wallet and another with a paring knife protruding from his pocket, probable cause to arrest existed. Liles v. United States, 129 U.S. App. D.C. 268 393 F.2d 669 (1967). See Johnson v. United States, 125 U.S. App. D.C. 243, 370 F.2d 489 (1966).

(4) When a man in soiled clothes carrying a new suitcase in proximity of the airlines terminal acted evasively on spotting the police, temporarily abandoned the bag, responded unsatisfactorily to police questions, and finally said "if you're going to bust me, do it now," probable cause existed. Wright v. United States, 242 A.2d 833 (D.C. Ct. App. 1968).

(5) At 1:00 a.m., officer observed the defendants four different times within 20 minutes. On the last occasion, one defendant carried an object resembling a tape deck which was partially visible. In response to an inquiry, one suspect uncovered the object, a car radio with wires twisted around it; the other suspect then denied knowing the first suspect. Held, probable cause to arrest although officer had no report of crime. Wray v. United States, D.C. App. No. 7367, decided Feb. 26, 1974.

g. Observation of criminally suspicious activity.

(1) Where police officers on a routine patrol at 3:30 a.m. observed the defendant drive away from a storefront and continue for two blocks without lights and, upon stopping them, the inquiring officer saw 40 cartons of cigarettes on the rear seat and received an unconvincing reply as to their source, circumstances matured into probable cause to arrest when the defendant, ordered out of the car, reached under his seat as if for a weapon. Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, cert. denied, 352 U.S. 885 (1958).

(2) Where the arresting officer saw a co-defendant take coats from a display rack in a store and place them on the floor, and the defendant approached with a large shopping bag into which the co-defendant and the defendant stuffed the coats, probable cause existed. Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969).

(3) In a high crime area late at night police observed defendant ransacking the back seat of a car which he admitted was not his; held probable cause to arrest. Smith v. United States, 247 A.2d 293 (D.C. Ct. App. 1968).

h. Narcotics street arrests. In these situations, the fact that the arrest took place in a high narcotics area supports probable cause. Davis v. United States, 147 U.S. App. D.C. 400, 458 F.2d 819 (1972); Dorsey v. United States, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); Freeman v. United States, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963); Munn v. United States, 283 A.2d 28 (D.C. Ct. App. 1971); Peterkin v. United States, 281 A.2d 567 (D.C. Ct. App. 1971).

(1) A police officer observed defendant and another, in high narcotics area, alternately occupy a telephone booth

without using the telephone. When the officer observed defendant's eyes were glassy and that a cream-colored envelope of a type often used in narcotics traffic was protruding from defendant's pocket, he had probable cause to arrest. United States v. Brown, 150 U.S. App. D.C. 113, 463 F.2d 949 (1972).

(2) Where police officer, in "high narcotics area" observed transaction of cash for something from a vial (type commonly used to carry narcotics in officer's experience), probable cause existed for arrest. Peterkin v. United States, 281 A.2d 567 (D.C. Ct. App. 1971).

(3) Where police officer, travelling by car in a high narcotics area saw tin foil packs, similar to ones used in narcotics trade, passed between two individuals, probable cause existed to arrest and search. Munn v. United States, 283 A.2d 28 (D.C. Ct. App. 1971).

(4) Cf. Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964) (seeing defendant, a suspected narcotics possessor, exchange something with a known addict, did not, by itself, constitute probable cause for arrest).

i. Smells indicating the presence of unlawful goods.

(1) An officer qualified to know the distinctive odor of forbidden substance may obtain support for probable cause when he perceives such a smell. United States v. Ventresca, 380 U.S. 102 (1965); Johnson v. United States, 333 U.S. 10 (1948) (dictum).

(2) "An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance." Bell v. United States, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86 (1958) (dictum; facts of case involved theft of items from store at night).

j. "Daugherty-Campbell" Problem: Arrest where insufficient probable cause to believe crime has been committed.

(1) Daugherty v. United States, 272 A.2d 675 (D.C. Ct. App. 1971) -- Where officer saw the defendant, whom he had known for a year, carrying a television set in a high burglary area, and the defendant explained that a friend had asked him to take it to his girl friend's house and sell it to her for $20, and the officer had no prior knowledge of the set being taken in a burglary, the seizure of the television was invalid since the officer lacked probable cause to arrest the defendant at that time.

(2) Campbell v. United States, 273 A.2d 252 (D.C. Ct. App. 1971) -- Where police officers observed the defendant carrying a screwdriver and his companion carrying a television set, and the defendant dropped the screwdriver and denied ownership, and the officers had not been expressly advised of the commission of any particular crime; the seizure of the T.V. and subsequent arrest of the defendant became illegal, after the officers left the defendants in an unlocked room in the police station for one and one-half hours and neglected to tell them whether they were under arrest or free to leave.

(3) Daugherty-Campbell Distinguished. United States v. Wallace, 283 A.2d 32 (D.C. Ct. App. 1971) -- Officer, who observed a Department of Public Health sticker on typewriter in pawnshop, had probable cause to arrest the defendant who had brought the typewriter to the pawnshop. Referring to the fact that the officer had not received any report of a theft, the Court distinguished Daugherty and Campbell stating that: "Had there been labels, tags, or stickers on those particular television sets stating that the sets were owned by some person for whom the possessors did not profess to be acting, we could scarcely have characterized as improbable an arresting officer's inference that the items were stolen."

(4) Jones v. United States, 286 A.2d 861 (D.C. Ct. App. 1972) -- Police officers stopped defendants who were carrying a torn shopping bag which contained a tape deck and one defendant was seen carrying a bent screwdriver in his back pocket. The officers had earlier been apprised of the theft of a tape deck from an automobile parked nearby, and noted defendants matched the descriptions of the suspects in the earlier theft. The Court upheld the seizure of the tape deck and the subsequent arrest of the defendants, distinguishing Daugherty and Campbell by way of above facts.

(5) Officer had probable cause to detain a juvenile found at 4:00 a.m. carrying a disassembled bicycle and a pair of pliers at a location 15 blocks from home despite fact that officer had no knowledge of report of stolen bicycle. In re E.F.B., D.C. Ct. App. No. 7722, decided May 22, 1974.

II. Search and Seizure

A. Probable Cause Requirement. A search and seizure must be based on probable cause. The rules on probable cause to arrest, Section I(D) supra, apply in evaluating probable cause to search although now the information must show reasonable grounds to believe that a crime has been committed and that specified items related to the crime are located in the place to be searched.

However, probable cause to search, unlike probable cause to arrest, must be based on fresh information; the longer the delay, the less the reason to believe the evidence is still in the place to be searched. See Underdown v. District of Columbia, 217 A.2d 659 (D.C. Ct. App. 1966).

1. Exceptions to the probable cause requirement.

a. Consent. A police officer need not have probable cause to believe that the person asked to consent has property or evidence. The burden of proof is on the Government to show that consent was voluntary (except in Federal habeas corpus petitions). Bumper v. North Carolina, 391 U.S. 543 (1968).

(1) Voluntariness of a party's consent is to be determined from the totality of the circumstances and whether or not party knew he could refuse to consent is only one factor to be considered. Schneckloth v. Bustamonte, supra, 412 U.S. 218 (1973).

(2) Consent must be unequivocally, freely and intelligently given, yet the party need not be warned of his right under the Fourth Amendment to refuse. Schneckloth v. Bustamonte, supra; United States v. Sheard, 154 U.S. App. D.C. 9, 473 F.2d 139 (1972), cert. denied, 412 U.S. 943 (1973); Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649 (1951).

(3) Where consent is given after police have falsely claimed to possess a warrant, consent is vitiated. Bumper v. North Carolina, supra.

(4) Deception may vitiate a party's consent to a search; however, deception used to gain entry onto premises may not invalidate the entry (plain view may then come into play). See 23 D.C. Code §591(e) -- entry obtained by trick or strategem is excluded from the definition of "breaking and entry" which must be preceded by announcement of identity and purpose.

(5) Authority to give consent.

(a) "Search and seizure is not based on property concepts but on a defendant's reasonable expectation of privacy. Fourth Amendment protects people not property. Defendant, by sharing an apartment with the woman, ran the risk that she would consent to a search." Villine v. United States, 297 A.2d 785 (D.C. Ct. App. 1972). But co-tenants can only consent to search of items or premises they share, not to sole possession of other tenant. Frazier v. Cupp, 394 U.S. 731 (1969).

(b) Host may consent to search of room but not to search of closed recesses or seizure of guest's personal property. Dupont v. United States, 259 A.2d 355 (D.C. Ct. App. 1969).

(c) In the case of spousal consent, government must argue spouse has a possessory interest in the property, even if only a constructive one.

(d) A hotel desk clerk cannot consent. Stoner v. California, 376 U.S. 483 (1964); United States v. Costa, 356 F. Supp. 606 (D.D.C.), aff'd 479 F.2d 921 (1973). Neither can a landlord. Chapman v. United States, 365 U.S. 610 (1961).

b. Abandoned property. Doctrine rests on actual or presumed intent to abandon property. Where property has been so abandoned, it no longer falls within sphere of Fourth Amendment, and hence, no probable cause is needed.

(1) "One who abandons property prior to search cannot object to illegal seizure of such property and whether complete abandonment exists in strict property right sense is not material". Smith v. United States, 292 A.2d 150 (D.C. Ct. App. 1972) (police saw defendant throw gun away as they chased defendant); United States v. Hayes, 271 A.2d 701 (D.C. Ct. App. 1971); Brown v. United States, 261 A.2d 834 (D.C. Ct. App. 1969).

(2) Known gambler recognized gambling squad officer, placed briefcase on sidewalk and walked several feet away. When officer asked him about briefcase, he denied having any knowledgeof it. Held, briefcase abandoned and officer's finding gambling records in briefcase gave probable cause to arrest. Keiningham v. United States 113 U.S. App. D.C. 295, 307 F.2d 632 (1962).

(3) Abandonment of an apartment justified entry by the police even though the police were unaware of the abandonment at the time. Parman v. United States 130 U.S. App. D.C. 188, 399 F.2d 559, cert. denied, 393 U.S. 858 (1968).

2. Searches by private individuals. The Fourth Amendment does not protect searches by private individuals, i.e., not agents of the government. Burdeau v. McDowell, 256 U.S. 465 (1921).

B. Warrant Requirement. As an additional requirement to probable cause (excluding the exceptions noted above), searches and seizures must be conducted with a warrant, with certain narrowly drawn exceptions, Coolidge v. New Hampshire, 403 U.S. 433 (1971). Warrants have strategic advantages as well. In a borderline case, a warrant will weigh in favor of finding probable cause, since there has already been review by a neutral magistrate prior to the arrest or search. United

States v. Ventresca, 380 U.S. 102 (1965); United States v. Patterson, D.C. Cir. No. 71-1791, decided Jan. 17, 1974; United States v. Thornton, 147 U.S. App. D.C. 114, 454 F.2d 957 (1971). Also, defendant is prohibited from going beyond the four corners of an affidavit to challenge the truth of facts asserted therein. United States v. Ketterman, 276 A.2d 243 (D.C. Ct. App. 1971).

1. Exceptions to the warrant requirement.

a. Search incident to lawful arrest. When an arrest has been made, a warrantless search may be conducted of the individual and the area within his immediate control to prevent the destruction of evidence and to protect the officers. Chimel v. California, 395 U.S. 752 (1969). The right to make such a search is not affected by the nature of the offense. Robinson v. United States, 414 U.S. 218 (1973). The court refused to limit the search to a frisk in the case of a traffic offense (driving after permit revocation) where the defendant could be taken into custody. The D.C. Court of Appeals agrees with this holding. United States v. Simmons, 302 A.2d 728 (D.C. Ct. App. 1973); Spencer v. United States, D.C. Ct. App. No. 6798, decided Feb. 11, 1974. In United States v. Edwards, ___ U.S. ___, 42 U.S.L.W. 4463 (March 26, 1974), the court applied the custody rationale to permit the warrantless seizure of the prisoner's clothing on the morning after a late night arrest.

If the offense is one for which collateral may be posted, the U.S. Court of Appeals has held that the person must be informed of his right to post collateral and given a reasonable opportunity to do so. United States v. Mills, 153 U.S. App. D.C. 156, 472 F.2d 1231 (1972). But this holding may be undermined by the subsequent Supreme Court decision in Robinson, supra.

In Burroughs v. United States, 236 A.2d 319 (D.C. Ct. App. 1967), the prisoner was unable to post collateral, and the full search, which uncovered marihuana, was justified as reasonable prior to incarceration and as incident to arrest.

(1) Timing of Arrest -- A search incident to arrest may slightly precede the arrest if probable cause for arrest existed at the time the search was initiated. United States v. Brown (Reginald), 150 U.S. App. D.C. 113, 463 F.2d 949 (1972); Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

(2) Scope of Search -- the area that can be searched for weapons or evidence to prevent their being destroyed or concealed is limited to the area "within his immediate control", i.e., area within which defendant may reach.

(a) Police entered room, placed two men in custody and then looked under mattress in the same room to seize

gun -- justified as incident to arrest. United States v. Williams, 147 U.S. App. D.C. 173, 454 F.2d 1016 (1972).

(b) Not unreasonable for officers arresting defendant to seize and search purse at defendant's feet, even though police could have moved defendant from area to access to purse. Bailey v. United States, 279 A.2d 508 (D.C. Ct. App. 1971).

(c) When a defendant, arrested in his home, needed clothes, officers were justified in searching closet for weapons. Walker v. United States, D.C. Ct. App. No. 7529, decided April 23, 1974.

(d) A search of the car in which defendant was arrested has been justified as incident to that arrest when officer saw movement indicating an attempt to conceal something. McGee v. United States, 270 A.2d 348 (D.C. Ct. App. 1970). See United States v. Green, 151 U.S. App. D.C. 35, 465 F.2d 620 (1972); Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

b. Exigent circumstances. If the police are in "hot pursuit" or must act quickly to protect themselves or preserve evidence and there is not time to obtain a warrant, the requirement is excused. Warden v. Hayden, 387 U.S. 294 (1967).

Where policeman got reliable information early in morning that a large supply of heroin was to be transported from a certain location to an uncertain location for processing and no magistrate was available -- officers were justified in effecting entry without warrant. Hailes v. United States, 267 A.2d 363 (D.C. Ct. App. 1970).

c. Seizure of items in plain view. "Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure" without a warrant. Harris v. United States, 390 U.S. 234 (1968). "That the policeman may have to crane his neck, or bend over, or squat does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby." Wright, supra; United States v. James, 135 U.S. App. D.C. 314, 418 F.2d 1150 (1969).

(1) However, there must be probable cause to seize that which falls into plain view. In Christmas v. United States, 314 A.2d 473 (D.C. Ct. App. 1974), the officer had probable cause to stop the defendants and look into the car, but no probable cause to believe the medicine vial on the seat contained contraband or to seize it.

(2) In United States v. Wright, 146 U.S. App. D.C. 126, 449 F.2d 1355 (1971), cert. denied, 405 U.S. 947 (1972), the court held that an officer was entitled to peer through an eight inch crack in a garage door and use his flashlight to "take a closer look at a challenging situation" and that the stolen items were seen in "plain view;" also, that the officer was justified in leaving the scene and returning within a reasonable time to make the seizure. Use of a flashlight was also upheld in Dorsey v. United States, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967). Officer entitled to look through crack or hole in a hotel room door. This "plain view" revealed a person taking narcotics and provided probable cause to arrest. Borum v. United States, D.C. App. No. 7260, decided Apr. 18, 1974.

(3) After traffic stop. During a routine spot check, officers were properly in a position to observe a pistol in plain view. Palmore v. United States, 290 A.2d 573 (1972); Williams v. United States, 263 A.2d 659 (D.C. App. 1970); Jones v. United States, 299 A.2d 538 (D.C. Ct. App. 1973); Holley v. United States, 286 A.2d 222 (D.C. Ct. App. 1972).

After a stop for making a U-turn, gambling paraphernalia fell out of the glove compartment, held in plain view. Washington v. United States, 130 U.S. App. D.C. 374, 401 F.2d 915 (1968).

Police found car in alley which they had chased at high speed following traffic violation. Police justified in opening door to look for driver and pistol was in plain view. Mosley v. United States, 209 A.2d 796 (D.C. Ct. App. 1965).

(4) Investigative stop after radio run. Where officers approached defendant's vehicle pursuant to radio run for man with a gun, they were justified in asking defendant to step out and in seizing pistol when it came into plain view. Davis v. United States, 284 A.2d 459 (D.C. Ct. App. 1971); Crawley v. United States, D.C. Ct. App. No. 7512, decided June 4, 1974. After a stop on report of stolen car, a search of glove compartment for evidence of ownership disclosed gun in plain view. Patterson v. United States, 301 A.2d 67 (D.C. Ct. App. 1973).

(5) During execution of search warrant. Items within scope of warrant but not enumerated are seizable as being in plain view. United States v. Maude, 156 U.S. App. D.C. 378, 481 F.2d 1082 (1973); Hawkins v. United States, D.C. Ct. App. No. 7341, decided May 9, 1974.

(6) During a warrantless but justified entry into home to locate suspect, evidence found in a closet where suspect may have been hiding is in plain view. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385 (1970) (en banc). Items that turn up in search incident to arrest are in plain view and seizable. Walker v. United States, D.C. Ct. App. No. 7529, decided Apr. 23, 1974.

(7) Coolidge v. New Hampshire, 403 U.S. 443 (1971), is thought by some to limit plain view seizures to items which unexpectedly turn up (known as the doctrine of "inadvertance"). It may be argued, however, that language of Coolidge is meant to imply that the plain view doctrine will not justify a seizure which occurs when the officers are improperly in the place at which the seizure occurs. In United States v. Bowles, 304 A.2 277 (D.C. Ct. App. 1973) court expressed view that much of Coolidge is dicta.

d. Warrantless vehicle searches.

(1) Autos and other conveyances may be searched without a warrant in circumstances which would not justify the search without a warrant of a house or office, provided there is probable cause to believe that the automobile contains articles which the officers are entitled to seize. Chambers v. Maroney, 399 U.S. 42 (1970). See United States v. Bowles, 304 A.2d 277 (D.C. Ct. App. 1973); United States v. Free, 141 U.S. App. D.C. 198, 437 F.2d 631 (1970).

(a) In Coolidge v. New Hampshire, 403 U.S. 443 (1971), four members of the majority interpreted Chambers as excusing the warrant requirement only in exigent circumstances. The court in United States v. Bowles, 304 A.2d 277 (D.C. Ct. App. 1973), doubted this holding since only a plurality subscribed to it.

(b) In Bowles, the police, after midnight, impounded and searched a car found on the street after a view through the window disclosed evidence linking it to a recent crime. The court held Coolidge did not apply and that the circumstances required prompt action.

(c) The court recently held that the seizure of a car and the examination of its exterior (paint scrapings and tire prints) were not unreasonable. Cardwell v. Lewis, ____ U.S. ____, 42 U.S.L.W. 4928 (June 17, 1974).

(d) After an arrest, the police impounded the car and searched it at the stationhouse. The court held

the police had probable cause to search and did not need to obtain a warrant. The impoundment was justified in light of the hostile crowd which had gathered at the scene. Terrell v. United States, 294 A.2d 860 (D.C. Ct. App. 1972).

(e) When a search of defendant, incarcerated on two traffic charges, revealed ammunition, probable cause existed to search car for a gun. Warrant was not required since the car, parked on street outside of station, could have been driven away any time. Hurley v. United States, 273 A.2d 840 (D.C. Ct. App. 1971). Cf. Backstrom v. United States, 252 A.2d 909 (D.C. Ct. App. 1969), where discovery of unlabeled bottle of pills during search of arrestee prior to his lock-up for traffic violation did not create probable cause to search cigarette case found to contain marihuana in the suspect's car.

(2) When an arrest is made of a suspect in a car, a warrantless search of the car may be justified as a search incident to the arrest. United States v. James, 147 U.S. App. D.C. 43, 452 F.2d 1375 (1971). In Adams v. United States, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), this doctrine was held to permit a search of the trunk. However, this case pre-dates Chimel v. California, 395 U.S. 752 (1969), when the scope of search incident to arrest was limited to the area within the defendant's control. See II (B)(1) supra. A limited search may also be conducted for the protection of the officer. See III(C) infra.

(3) Inventory of an automobile. An inventory is valid only if police have lawfully obtained custody of the auto in the first place. United States v. Pannell, 256 A.2d 925 (D.C. Ct. App. 1969). In Cooper v. California, 386 U.S. 58 (1967), the car had been impounded as a preliminary to forfeiture proceedings. In Cady v. Dombrowski, 413 U.S. 433 (1973), a car belonging to a policeman had been towed away after an accident and the police were permitted to search in order to prevent the possible loss of his revolver. Without such justification, such searches are generally frowned upon. See Mayfield v. United States, 276 A.2d 123 (D.C. Ct. App. 1971); Pigford v. United States, 273 A.2d 837 (D.C. Ct. App. 1971). Generally, a search of the car stopped for traffic offense is not justified.

NOTE: General MPD Order 602, No. 1. Where police have custody of the automobile but it is classified as prisoner's property (almost all instances), no inventory whatsoever is to take place for at least 24 hours.

e. Searches of abandoned property and searches based on consent are also excused from the warrant requirement as well as the probable cause requirement. See II(A)(1)(a) and (b), supra.

2. Warrant Procedures.

a. Requirements for obtaining a warrant.

(1) Arrest Warrant.

(a) Federal Rule. Fed. R. Crim. P. 4 requires written sworn complaint setting forth essential facts constituting offense charged and showing probable cause.

(b) Local Rule. 23 D.C. Code §561.

(2) Search Warrant.

(a) Specificity in describing the place to be searched.

(b) Specificity as to property to be seized -- any item related to crime for which probable cause is established as long as probable cause exists to believe that the item is on premises to be searched. United States v. McSurely, 154 U.S. App. D.C. 141, 473 F.2d 1178 (1972) ("seditious materials" not specific). Rule 41(b) of Fed. R. Crim. P. authorizes warrant for seizure of mere evidence in accord with rule of Warden v. Hayden, 387 U.S. 294 (1967). See United States v. Thompson, D.C. Cir. No. 72-1390, decided March 27, 1974.

An affidavit attached to the warrant may be used to narrow an unacceptably broad warrant. United States v. Moore, 263 A.2d 653 (D.C. Ct. App. 1970), aff'd, 149 U.S. App. D.C. 150, 461 F.2d 1236 (1972). However, an affidavit which is broader than the warrant can not be used to expand the scope of the warrant. United States v. Kaye, 139 U.S. App. D.C. 214, 432 F.2d 647 (1970).

(c) For the requirements where the officer's information is based upon sources other then personal observation, see Section I(D)(4)(b), supra.

(3) Night Warrant.

(a) General Rule. Particularly positive affidavits are required when a warrant is to be executed at night.

(b) New Federal Rule. Although general rule was formerly the Federal Rule, new Federal Rule requires only that the issuing authority, for reasonable cause shown, authorize nighttime execution of the warrant. Fed. R. Crim. P. 41 (c). Fed. Rule defines daytime as from 6:00 a.m. to 10:00 p.m.

(c) Local Rule. 23 D.C. Code §522(c)(1). Affidavit for night warrant must set forth probable cause to believe it cannot be executed during hours of daylight, that the property sought is likely to be removed or destroyed if not seized forthwith, or that the property sought is not likely to be found except at certain times or certain circumstances. (Unclear if "hours of daylight" in D.C. Code can be interpreted to be from 6:00 a.m. to 10:00 p.m. or whether they are limited to literal meaning. A proposed local rule corresponding to new Federal Rule 41(h) is pending approval before D.C. Ct. Appeals. POLICY: Until issue is resolved, AUSA will interpret "daylight" to mean literally daylight and so advise police officers.)

(d) Narcotics Warrant. 21 U.S.C. 879(a) authorizes nighttime execution of warrants issued by a U.S. Magistrate for narcotics offenses. The statute was held to apply to such a warrant executed in the District of Columbia by Metropolitan Police and construed to require only probable cause to search. Gooding v. United States, ____ U.S. ____, 42 U.S.L.W. 4617 (April 29, 1974). Accord, United States v. Thomas, 294 A.2d 164 (D.C. Ct. App. 1972), cert. denied, 409 U.S. 992 (1973).

b. Execution of warrants.

(1) Timeliness. Search Warrant: 10 days under Fed. R. Crim. P. 41(c) and 23 D.C. Code §523. Arrest Warrant: misdemeanors, one year/felonies, no limit. Absent showing of prejudice from delay, execution of search warrant eight days after issuance was upheld. United States v. Graves, D.C. Ct. App. No. 7295, decided Feb. 18, 1974.

(2) Return of Warrant. 23 D.C. Code §521(d) requires return of warrant on next court day after execution. AUSA authorizing warrant should advise police officer of the "next court day" requirement. But failure to comply should not lead to suppression of evidence seized. United States v. Yates, 279 A.2d 516 (D.C. Ct. App. 1971).

(3) Territorial Limits of 23 D.C. Code §563. A warrant to arrest (including bench warrant) for an offense punishable by imprisonment for more than one year may be served at any place within the jurisdiction of the U.S. For an offense punishable by not more than one year, or by a fine, the warrant (including bench warrant) may be served at any place within the District of Columbia but may not be executed more than one year after the date of issuance. A person arrested outside D.C. on a warrant issued by the Superior Court shall be taken before a judge, magistrate,

or commissioner and held to answer in Superior Court pursuant to the Fed. R. Crim. P. as if warrant had been issued by the U.S. District Court. 23 D.C. Code §563.

(4) Authority to Break and Enter. Any officer authorized by law to make arrests, or to execute search warrants, may break and enter any premises, any outer or inner door or window of a dwelling house or other building, or any part thereof, any vehicle, or any thing within such dwelling house, building, or vehicle, or otherwise enter to execute search or arrest warrants, to make an arrest where authorized by law without a warrant, or where necessary to liberate himself in the execution of such warrant or in making such arrest. 23 D.C. Code §591(a). "Break and enter" does not include entry gained by trick or strategem. 23 D.C. Code §591(e).

(a) Requirement of announcement of purpose and identity. Breaking and entering shall not be effected until after the arresting officer makes an announcement of his identity and purpose and the officer reasonably believes that admittance to the premises is being denied or unreasonably delayed. 23 D.C. Code §591(b). Breaking and entering to execute a narcotics warrant requires the same announcement. 33 D.C. Code §414(g). 18 U.S.C. §3109 provides that an officer may break into a house to execute a search warrant if, after notice of his authority and purpose, he is refused admittance. The Supreme Court has held this statute applicable to arrest situations as well. Miller v. United States, 357 U.S. 301 (1958). The court has since broadly construed the statute as proscribing an "unannounced intrusion" (i.e., either a search or an arrest). Sabbath v. United States, 391 U.S. 585, 590 (1968). Trespasser on property cannot invoke requirement that police announce identity and purpose. Brooks v. United States, 263 A.2d 45 (D.C. Ct. App. 1970).

(b) No-knock provision: 23 D.C. Code §591(c). An announcement of identity and purpose is not required prior to such breaking and entering when:

i. The warrant expressly authorizes breaking and entering without prior announcement;

ONLY the following may authorize no-knock warrants:

[a] U.S. Attorney

[b] Principal Assistant U.S. Attorney

[c] Chief, Major Crimes Unit

[d] Chief and Deputy Chief. Superior Court Division

[e] Chief, Superior Court Intake Section

ii. Circumstances known to the officer at the time of breaking and entry, but in the case of the execution of a warrant, unknown to the applicant when applying for such warrant, give the executing officer probable cause to believe that:

[a] Notice is likely to result in the destruction or disposal of the evidence subject to seizure. See United States v. Fair, 176 F. Supp. 571, 573 (D.C.C. 1959); Borum v. United States, D.C. Ct. App. No. 7260 (April 18, 1974); or

[b] Such notice is likely to endanger the life or safety of the executing officer or another person. See United States v. Harris, 140 U.S. App. D.C. 270, 276, 435 F.2d 74, 81 (1970); Wayne v. United States, 115 U.S. App. D.C. 234, 318, F.2d 205 (1963); or

[c] Such notice is likely to enable the party to be arrested to escape; or

[d] Such notice would be a useless gesture due to the executing officer's virtual certainty that the occupant already knows his purpose. See Miller v. United States, 357 U.S. 301, 310 (1959); Chappel v. United States, 119 U.S. App. D.C. 356, 359, 342 F.2d 935, 938 (1965); Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961). Cf. Bosley v. United States, 138 U.S. App. D.C. 263, 426 F.2d 1257 (1970) (door ajar; occupant asleep).

(5) What may be seized? Local Rule: 23 D.C. Code §§521(d), 524(e). Property not enumerated may be seized by a police officer if he has probable cause to believe that the property (1) is stolen or embezzled, (2) is contraband or otherwise illegally possessed, (3) has been used as the instrumentality of a crime, Johnson v. United States, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961) or (4) constitutes evidence of the commission of an offense or the identy of a person committing an offense. Property not enumerated may be seized if in plain view, United States v. Maude, 156

U.S. App. D.C. 378, 481 F.2d 1082 (1973), see II(B)(1)(c), supra, or if seized incident to arrest. Palmer v. United States, 92 U.S. App. D.C. 103, 203 F.2d 66 (1953). See II(B)(1)(a), supra.

(6) Search of a person on premises to be searched. 23 D.C. Code §524(g) specifically provides that an officer executing a warrant directing the search of premises or a vehicle may search any person therein to the extent necessary to protect himself or others from the use of a concealed weapon or to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person.

(a) United States v. Johnson, 154 U.S. App. D.C. 393, 475 F.2d 977 (1973) -- in execution of warrant for narcotics, search of a woman's purse was justified since she had less expectation of privacy in her purse than her person and narcotics could easily be concealed in it.

(b) Nicks v. United States, 273 A.2d 256 (D.C. Ct. App. 1971) -- search warrant for narcotics permitted search of clenched fist for protection of the officer and also within the scope of the warrant.

(c) Execution of warrant in delicatessen -- search of "customers" upheld on basis of small number, four or five, and informant's tip that the "customers" were engaged in gambling transactions. United States v. Graves, D.C. Ct. App. No. 7295, decided Feb 18, 1974. But if person arrives while search is underway, it is difficult to justify a full search of the person to find items enumerated in the warrant although, again, a frisk would seem justified. Cf. Nicks v. United States, supra.

III. Police Actions Based on Less Than Probable Cause

Police encounters with citizens which do not amount to an arrest or full search must still be judged by Fourth Amendment standards. The test is reasonableness, no warrant is required, and the scope of any intrusion must be set in light of its justification. Terry v. Ohio, 392 U.S. 1 (1968). Any of these encounters may lead to the establishment of probable cause to arrest. The objective conduct of police determine whether investigative stop amounts to an arrest, not the subjective belief of the police or person detained. United States v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973); Taylor v. State, 471 F.2d 848 (9th Cir. 1972). Officer's action in placing his hand on defendant's elbow and saying "Hold it sir, could I speak with you a second?" did not constitute an arrest or "seizure" under Terry. United States v. Burrell, 286 A.2d 845, reh'g denied, 288 A.2d 248 (1972). See Section I(B), supra for other examples

A. Authority To Stop.

1. "A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is not probable cause to make an arrest." Terry v. Ohio, supra.

2. Burden to justify a stop not as great as burden to justify a frisk. Young v. United States, 140 U.S. App. D.C. 333, 435 F.2d 405 (1970).

3. Association of known addicts in a high narcotics area will justify an investigatory stop. Dorsey v. United States, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); Freeman v. United States, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963).

4. Reliable information from an informer that two persons with narcotics would enter a taxicab justified stop of cab and request to step out. United States v. James, 147 U.S. App. D.C. 43, 452 F.2d 1375 (1971); Adams v. Williams, 407 U.S. 143 (1972) (tip that defendant had a gun; informant's reliability need not be as stringent for stop as for arrest). Information from citizen that defendant was carrying narcotics paraphernalia in wig justified a stop. United States v. Oliver, 297 A.2d 778 (D.C. Ct. App. 1972).

5. Unusual or suspicious behavior may justify a stop.

   a. Officer spied ammunition box on dashboard of car. Gordon v. United States, 305 A.2d 522 (D.C. Ct. App. 1973).

   b. Officer observed defendant look into car windows, enter the zoo, and come out with a paper bag. Defendant's companion fled at sight of police. The stop of defendant and request to put bag down was held reasonable. Smith v. United States, 295 A.2d 64 (D.C. Ct. App. 1972).

   c. Officer saw car hastily follow delivery truck from a bank and later learned the truck was overdue. Young v. United States, 140 U.S. App. D.C. 333, 435 F.2d 405 (1970).

   d. Officers saw defendants run into alley at 3 a.m. and throw away their trench coats. Liles v. United States, 129 U.S. App. D.C. 268, 393 F.2d 669 (1967).

   e. Officer saw a man run out of church and across the street. Johnson v. United States, 125 U.S. App. D.C. 243, 370 F.2d 489 (1966).

   f. Officers observed defendant peer into car windows and then borrow pliers from parking lot attendant. Jenkins v. United States, 284 A.2d 460 (D.C. Ct. App. 1971).

g. Officers observed defendants at 1:00 a.m. on four different times within 20 minutes. When defendant emerged from alley on last occasion with a partially covered object resembling a tape deck, officer justified in stopping to make inquiries. Wray v. United States, D.C. Ct. App. No. 7367, decided Feb. 26, 1974.

h. Where officer had no crime report nor previous knowledge of defendant and observed no criminal behavior, he had no authority to stop and question defendant. Robinson v. United States, 278 A.2d 458 (D.C. Ct. App. 1971).

i. Observation of money passing between defendants in a high narcotics area could not alone justify a stop. Gray v. United States, 292 A.2d 153 (D.C. Ct. App. 1972).

j. Presence near scene of crime may justify a stop. Thompkins v. United States, 251 A.2d 636 (1969). Defendant was in alley near scene of robbery. When he saw police coming he turned his back and started funbling with something. When officer asked what was in the bag defendant was holding, defendant gave bag to officer saying: "That's not my gun." Court in Williams v. United States, 287 A.2d 814 (D.C. Ct. App. 1972) held stop justified.

k. Under Terry, supra, the police may impound a car on belief that it contains evidence long enough to obtain a search warrant. See United States v. Patterson, D.C. Cir. No. 71-1791, decided Jan. 17, 1974.

B. Justification To Stop and Frisk.

1. Essential elements to justify under Terry; (1) observation of unusual activity leading to belief that criminal activity may be afoot; (2) reasonable belief that individual may be armed and dangerous; (3) initial inquiries do not dispel fear for safety; (4) limited search (frisk) of outer garments to attempt to discover weapons. See Adams v. Williams, 407 U.S. 143 (1972). Terry v. Ohio, supra. Belief that suspect is armed includes a belief that he is dangerous, Lyons v. United States, D.C. Ct. App. No. 7207, decided Feb. 18, 1974.

2. Officers must be able to point to "specific and articulable facts" to support belief that criminal activity is afoot.

a. Recent crime in area. Police knowledge of prior crime in area coupled with defendant running down street in early morning hour with false excuse and "bulge" in pocket justified stop and frisk. Stephenson v. United States, 296 A.2d 606 (D.C. Ct. App. 1972).

b. Police observation. Defendant looked in car windows and was seen to borrow pliers from parking attendant. When later

approached, he refused to remove hands from under coat. This justified frisk in Jenkins v. United States, supra.

c. Observation of bulge in pocket of person stopped on suspicion of being wanted on a bench warrant justified frisk. Lyons v. United States, supra.

d. While talking to suspect in a robbery investigation, officer observed bulge: held gun properly seized for safety of officer. United States v. Lee, 271 A.2d 566 (D.C. Ct. App. 1970). See United States v. Dowling, 271 A.2d 406 (D.C. Ct. App. 1970).

C. Stopping Vehicles.

1. In stopping cars, fear for the officer's safety may justify greater measures.

a. In the course of observation of defendant in the car before the stop, officer noticed movement as if to conceal something under the seat. A protective search was permitted in these circumstances. United States v. Green, 151 U.S. App. D.C. 35, 465 F.2d 620 (1972); United States v. Thomas, 314 A.2d 464 (D.C. Ct. App. 1974).

b. An order to get out of the car was justified when the suspect was reported to have a gun, Crawley v. United States, D.C. Ct. App. No. 7512, decided June 4, 1974; Davis v. United States, 284 A.2d 459 (D.C. Ct. App. 1971); United States v. Frye, 271 A.2d 788 (D.C. Ct. App. 1970).

c. When the officer responding to report that occupants of car using narcotics, it was after midnight, and officer outnumbered, justified to open door and ask occupants to get out. United States v. Mitchell, 299 A.2d 540 (D.C. Ct. App. 1973).

d. When there was no chase, no refusal to stop the car and defendant stepped out, locking the car, a search of the car could not be justified as for protection of the officer or on suspicion of criminal activity. Watts v. United States, 297 A.2d 790 (D.C. Ct. App. 1972). After stop for speeding, it was unreasonable to subject passenger to a frisk solely because of his ambiguous movements. United States v. Page, 298 A.2d 233 (D.C. Ct. App. 1972).

2. Police may spot check for driver's license and registration. United States v. Weston, 151 U.S. App. D.C. 264, 466 F.2d 435 (1972); Williams v. United States, 263 A.2d 659 (D.C. Ct. App. 1970); Mincy v. District of Columbia, 218 A.2d 507 (D.C. Ct. App. 1966).

IV. Grand Jury Subpoena

Some physical evidence may be obtained on less than probable cause, but only by Grand Jury subpoena or court order. Wise v. Murphy, 275 A.2d 205

(D.C. Ct. App. 1971); United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973).

V. Exclusionary Hearings: Procedure and Tactics

A. Applicable Procedural Law.

1. General. In a criminal proceeding in the District of Columbia, the defendant must make a motion to suppress unproperly obtained evidence before trial, unless: (1) he does not then have an opportunity to make the motion, or (2) he is not then aware of the grounds of the motion. 23 D.C. Code §104(a)(2); Super. Ct. Crim. R. 12(b)(3), 41(g).

a. Absent showing of plain error, order denying motion to exclude evidence at trial upheld where defense failed to bring himself within any one of the two exceptions. Brown v. United States, 289 A.2d 891 (D.C. Ct. App. 1972); See Young v. United States, 284 A.2d 671 (D.C. Ct. App. 1971); cf. Jenkins v. United States, 284 A.2d 460, 464 (D.C. Ct. App. 1971).

b. Objection to admissibility of evidence is waived if not made at pretrial hearing or trial. Grennett v. United States, D.C. Ct. App. No. 7466, decided April 18, 1974, slip. op. at 2.

c. Only in U.S. District Court, may the court at its discretion entertain an untimely motion at the trial. Fed. R. Crim. P. 41(e).

d. A motion to suppress must be in writing unless the court permits it to be made orally, and it shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit. Fed. R. Crim. P. 47; Super. Ct. Crim. R. 47.

e. Government must respond in writing within 5 working days. Super. Ct. Crim. P. 47-I(c). However, prosecutor's failure to file opposing points and authorities memorandum pursuant to Super. Ct. Crim. R. 47-I(b) and (c) does not necessarily mean that prosecution concedes the motion nor is there abuse of trial judge's discretion not to treat the failure to file as conceded. Garris v. United States, 295 A.2d 510, 511 n.3 (D.C. Ct. App. 1972).

f. Right of Government to appeal suppression order. 23 D.C. Code §104. When government timely appeals suppression order, continuance of trial date is automatic since Super. Ct. Crim. R. III (governing continuances) becomes subordinate to statutory right to appeal, and order dismissing the information for want of prosecution is reversed. United States v. Oliver, 297 A.2d 778 (D.C. Ct. App. 1972).

2. Rules of Evidence.

a. Rules concerning testimony. The formal rules of evidence are somewhat relaxed at a hearing on a motion to suppress for two reasons. First, a lay jury, which could be misled by unreliable testimony, is not present. Second, the hearsay testimony given at an exclusionary hearing is not offered for proof of the facts alleged in the hearsay statement, but merely to show what was in the mind of the hearer of the statement. This reflects the court's concern with the central question at the hearing: knowing what the police officer knew at the time he procured the evidence. Order granting suppression reversed where motions judge failed to give prosecutor full opportunity to present evidence at hearing. United States v. Crickenberger, 275 A.2d 232 (D.C. Ct. App. 1970).

b. Burden of proof.

(1) Burden of proof is on the defendant to show that evidence was obtained in violation of his constitutional rights. Smith v. United States, 122 U.S. App. D.C. 339, 342 & n. 7, 353 F.2d 887, 890 & n.7 (1965); Nardone v. United States, 308 U.S. 338, 341 (1939); Wilson v. United States, 218 F.2d 754, 757 (10th Cir. 1955); Lotto v. United States, 157 F.2d 623, 626 (8th Cir. 1946). Order granting suppression of evidence reversed where movant (defendant) failed to lay a foundation for motion i.e., that property was illegally seized without a warrant, but erroneously relied on defect in information. United States v. Hobby, 275 A.2d 235 (D.C. Ct. App. 1971)

(2) However, some cases suggest that burden is on government to show validity of warrantless arrest. Rodgers v. United States, 137 U.S. App. D.C. 197, 421 F.2d 1132 (1969) (conviction reversed where evidence used at trial not shown at suppression hearing to have been obtained as a result of lawful arrest). See Commonwealth v. Andrews, 358 Mass. 721, 267 N.E. 2d 233 (1971). Counter these cases with Smith, supra and Mandone, supra.

(3) Stipulation that substance found on defendant was heroin does not relieve the government of burden of introducing the heroin into evidence at trial at which time defendant has opportunity to object on Fourth Amendment grounds. Pervis v. United States, 270 A.2d 501 (D.C. Ct. App. 1970).

c. Required discovery. Government must furnish at the hearing to defense, Jencks statements of any government witness who testifies at the hearing. Statements are to be turned over at the hearing, not before.

d. Court's ruling. Once a pretrial motion to suppress has been heard the court's decision becomes the law of the case, binding

on the trial court, Jenkins v. United States, 284 A.2d 460 (D.C. Ct. App. 1971). Only if new grounds, including new facts, are advanced -- facts of which defendant could not reasonably have been aware -- may a trial judge entertain a renewed motion to suppress at trial. Jenkins, supra; Wheeler v. United States, 300 A.2d 712 (D.C. Ct. App. 1973). If not filed pre-trial, motion should not be heard at trial absent a showing defense was not and could not have been aware of grounds and did not have opportunity to raise. Hearing at trial effectively forecloses government's right of appeal on the motion. Get court ruling at trial, before jeopardy attaches, that no motion was filed pre-trial in accordance with rules and issue has therefore been waived.

(1) Order granting motion to suppress evidence reversed and remanded where court made no findings upon which appellate court can base a judgment. United States v. Jones, 275 A.2d 541 (D.C. Ct. App. 1971).

(2) Order to suppress reversed and remanded where court at suppression hearing deferred ruling on some of the evidence until indictment handed down; court should have determined all of motion. United States v. Farmer, 297 A.2d 783 (D.C. Ct. App. 1972).

(3) Conviction reversed and new trial ordered where court reserved pre-trial motion to suppress when it was unclear whether court had so reserved because of its lack of credence in police officer's testimony or its disapproval of officer's conduct at suppression hearing. United States v. Kinard, 288 A.2d 233 (D.C. Ct. App. 1972).

(4) Order for suppression reversed and remanded for further proceedings to determine whether second written confession should have been suppressed as a product of earlier suppressed oral confession given under duress. Ruffin v. United States, 293 A.2d 477 (D.C. Ct. App. 1972).

B. Preparation for the Hearing.

1. Types of issues encountered at suppression hearing.

a. Lack of probable cause for search and seizure without warrant.

b. Insufficient information to support a search or arrest warrant.

c. Physical evidence should be suppressed as "fruits" of (a) and (b), supra.

d. Confession was obtained in violation of Miranda.

e. Identification of defendant violated Sixth Amendment rights.

(1) Denial of motion to suppress identification reflects court's resolution of any conflicting evidence in favor of the prosecution. United States v. Neverson, 150 U.S. App. D.C. 133, 141 n.9, 463 F.2d 1224, 1232 n.9 (1972).

(2) Grant of motion to suppress identification reversed as being clearly erroneous. United States v. McCoy, 154 U.S. App. D.C. 233, 475 F.2d 344 (1973).

2. Learn all relevant details. Make a complete list of all articulable elements of probable cause which the officers possessed at the time of their action, and go over the list with the officers. Be sure to note:

   a. Prior knowledge of officer concerning the defendant and his background.

   b. Experience and particular expertise of the officers involved.

   c. Neighborhood where police action occurred, "high crime," "narcotics area," etc.

   d. Imputation of collective police knowledge to the officer ordered to make an arrest or search.

3. Examine evidence seized. It will be the unusual case where evidence seized will be introduced at a suppression hearing. More often than not, it will not help the government's side. Occasionally, however, police credibility will be enhanced by the introduction of, e.g., an unusually large pistol where the officer is to testify about a "bulge."

4. Develop a legal theory or theories. The government's answer to defendant's motion to suppress will usually contain a legal theory. Scrutinize government's theory in light of your later interview with the officers.

5. Burden of going forward. Put the government's case on first, as an accomodation to the court to expedite the hearing, although defense has burden of going forward. This will enable the prosecutor to elicit from his witnesses a coherent description of what occurred and, correspondingly, to deny the defense an opportunity to begin the hearing by confusing the court. Technically at a hearing on a motion, the movant proceeds with his case first. However, since it is likely at an exclusionary hearing that the defense merely wishes to examine the government's witnesses, the defense will not normally object when the prosecutor simply begins the proceeding by asking the court's leave to examine its witnesses straightaway.

NOTE: In a case involving an arrest or search made on a warrant, the only real issue is the validity of the warrant and its affidavit. There is almost no reason for the prosecutor to put on live testimony, unless the defendant can show that the officer-affiant had had reason to believe that his informant was lying. The burden of proof is with the defendant; let him carry it.

6. Obtain a transcript for later impeachment. If there will be insufficient time to obtain a transcript of the exclusionary hearing before trial, direct a police officer whom you will probably not require for testimony at trial to listen to defense witnesses and take notes. His testimony from memory on what defense witnesses said may be used to impeach them at trial during government's rebuttal.

NOTE: The government may not introduce defendant's testimony on motion to suppress on issue of guilt at trial. Simmons v. United States, 390 U.S. 377 (1968). However, testimony of defendant at hearing is admissible for impeachment so long as it does not bear on main issue of guilt or innocence. Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

C. Disposition Of Suppression Orders On Appeal.

1. Denial of motion to suppress affirmed where police suspecting defendant of unauthorized use of motor vehicle (no driver's license or registration) searched car for evidence of that offense and seized two stolen driver's licenses. Botts v. United States, D.C. Ct. App. No. 6643, decided Oct. 2, 1973.

2. Order to suppress seized pistol reversed where pistol was in plain view even though not specified in search warrant. United States v. Yates, 279 A.2d 516 (D.C. Ct. App. 1971).

3. Order to suppress reversed an appeal as erroneous where limited search of car that revealed gun was reasonable. United States v. Thomas, 314 A.2d 464 (D.C. Ct. App. 1974).

4. Order suppressing heroin reversed where even though arrest may have been unlawful, capsules of heroin were abandoned property and therefore admissable. United States v. Hayes, 271 A.2d 701, (D.C. Ct. App. 1970).

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I.E: Bail and Pre-Trial Detention

DURATION: 1 hour

The purpose of this discussion is to prepare the Assistant to make the best possible determination of what the proper bond should be for a defendant at papering and in arraignment court. The discussion should also give assistance in how to present the Government's position in court.

OUTLINE OF PRESENTATION:

I. The Statute: 23 D.C. Code §§1321-1332

A. 23 D.C. Code §1321: Release in Noncapital Cases Prior to Trial.

1. 23 D.C. Code §1321(a): Conditions of Release.

a. Personal recognizance, or

b. Unsecured appearance bond in the amount specified by the judicial officer.

2. Should the judicial officer determine that neither of the above will reasonably assure the appearance of the defendant OR the safety of any other person or community, any condition or combination of the following conditions may be set in lieu of or in addition to above.

a. Third party custody.

b. Restrictions on travel, association and place of abode.

c. Percentage bond (10% maximum).

d. Curfew or work release.

e. Cash or surety bond.

NOTE: No money bond may be set as a condition to assure the safety of any person or the community.

3. 23 D.C. Code §1321(b): Factors to be considered in determining conditions of release.

a. Nature and circumstances of the offense charged.

b. The weight of the evidence against the defendant

c. The defendant's community ties

d. The defendant's character and mental conditions

e. The defendant's past conduct

f. The defendant's record of convictions

g. The defendant's record of fugitivity and appearance at court proceedings

4. 23 D.C. Code §§1327-28: Penalties for Bail Offenses

a. §1327: Failure to appeal incurs forfeiture of bail AND

(1) Fine of $5000 and imprisoned 1-5 years if felony;

(2) Fine equal to original misdemeanor fine and imprisoned 90 days to 1 year if misdemeanor charge

NOTE: Failure to appear is presumed willful

b. §1328: Offenses committed during release

(1) Felony offense incurs additional imprisonment of 1-5 years

(2) Misdemeanor offense incurs additional imprisonment of 90 days to 1 year.

B. 23 D.C. Code §1322: Pretrial Detention

1. 23 D.C. Code §1322(e): 5-Day Hold: Detention for any offense without bond for up to 5 days to permit appropriate authorities (parole officers, etc.) to take the defendant into custody

a. To whom it is applicable

(1) Parolees

(2) Probationers

(3) Persons on mandatory release pending completion of sentence for any prior offense under State or Federal law

(4) Must appear that above persons may flee or pose danger to a person or community.

b. POLICY - What type of cases are appropriate for the prosecutor to request the 5-Day Hold

NOTE: No formal hearing required for 5-Day Hold

(1) Defendant must be charged with felony, OR

(2) Defendant must be a heavy narcotics addict charged with a serious misdemeanor (e.g., assault or attempted burglary, but not SLIP or Sol Pros, etc.) AND have a significant criminal record

(3) Prosecutor should request 5-Day Hold provision before proceeding with other §1322 provisions

2. 23 D.C. Code §§1322(a)-(d): Pretrial detention after or in lieu of 5-Day Hold

a. To whom applicable

(1) Defendant charged with a "dangerous crime" as defined in 23 D.C. Code §1331(3) (e.g., robbery by force, rape, arson, burglary, unlawful sale of narcotics excluding marijuana) AND prosecutor certifies by motion that based on past and present conduct, and factors set out in §1321(b), "there is no condition or combination of conditions [of release] which will reasonably assure the safety of the community";

(2) Defendant charged with a "crime of violence" as defined in 23 D.C. Code §1331(4) (e.g., murder, kidnaping, assault with intent to commit any offense, etc.); AND (i) defendant convicted of a crime of violence within past ten years, or (ii) on pretrial release, probation, parole or mandatory release for a previous crime of violence; OR

(3) Defendant charged with ANY offense and such defendant, for purpose of obstructing justice, threatens, injures, intimidates or attempts to threaten, injure, or intimidate any prospective witness or juror. (Codification of United States v. Gilbert, 138 U.S. App. D.C. 59, 425 F.2d 490 (1969)).

b. Procedure Required: No person in above 3 categories can be ordered detained without a §1322(c) hearing.
EXCEPTION: If government or defendant is granted a continuance under §1322(c)(3).

3. 23 D.C. Code §1332(c): Pretrial Detention Hearing Procedures

a. After the defendant has been arrested or after a successful 5-Day Hold imposed at arraignment for misdemeanors or presentment for felonys, the U.S. Attorney may initiate by oral motion a pretrial detention hearing. Normally, the Preliminary Hearing is conducted first but may be incorporated with Pretrial Detention Hearing.

b. Hearing should be conducted in strict accordance with §1322(c) to ensure the defendant has been afforded all of his rights under law and to ensure that a proper record has been made.

c. §1332(c) entitles defendant to counsel, to present information, by proffer or otherwise to testify, and to present witnesses.

NOTE: Information need not be in compliance with rules of evidence; testimony by defendant CANNOT be admitted later on issue of guilt, but may be used to impeach.

d. Government's Evidence:

(1) Testimony of primary investigating officer should be under oath

(2) There should be certified copies of all of the defendant's prior convictions and cases for which he has been indicted ready for use as exhibits

(3) There should be copies of defendant's MPD record and FBI rap sheet available as exhibits

e. In order to be detained, the judicial officer must make an order accompanied by written findings of fact and reasons for its entry indicating

(1) Clear and convincing evidence that defendant falls into eligible category

(2) That no condition will reasonably assure safety of community; furthermore for persons charged with "dangerous crime", finding based on past and present conduct

f. If judicial officer orders pretrial detention

(1) Defendant has right to appeal under 23 D.C. Code §1324;

(2) Defendant's case is placed on expedited calendar;

(3) Defendant can be detained only for 60 days unless trial has begun; otherwise, defendant then treated under 23 D.C. Code §1321(a) as if it was his initial appearance. (See outline section I.A. 1, supra).

4. 23 D.C. Code §1323: Detention of Suspected Narcotics Addict: 3-Day Hold

a. If person charged with "crime of violence" may be an addict under §1331(5), on motion by U.S. Attorney, defendant can be detained for 3 days to determine if person is an addict

b. After 3 days, judicial officer may do any one of the following:

(1) Apply bail provisions of §1321; OR upon motion of U.S. attorney:

(2) Hold §1322(c) pretrial detention hearing, or

(3) Hold §1323(c) hearing

5. Effect of requesting pretrial detention other than 5-Day Hold or 3-Day Hold for addicts

a. Cost in manhours

(1) Compare time involved with §1322(c) hearing with time of an ordinary bail determination

(2) If pretrial detention order, AUSA spends 4-7 hours preparing order

b. Great deal of incidental discovery is granted to the defendant as a result of pretrial detention hearing

II. The Role of the Papering Assistant in Bond Determinations

A. How the papering assistant should determine what bond to recommend

1. Relevant factors in determining danger to the community

a. Nature of the crime

b. Threats made by the defendant

c. The defendant's past history including convictions, arrests and other behavior both adult and juvenile

d. The defendant status at time of commission of the offense. Was he under a Civil Protcction Order to stay away from the complainant? Why did these restraints fail to protect the community?

2. Relevant factors in determining whether or not the defendant is most likely to promptly appear for all scheduled court appearances (Note: This encompasses more than danger of the defendant fleeing the jurisdiction of the court)

a. Prior No Shows for court

b. Prior Fugitive Warrants

c. Prior Record as Juvenile Absconder

d. Long Out-of-State Record

3. After arrest of the defendant but before the initial appearance, the Assistant may consider it necessary to increase the bond amount that is listed at MPD Headquarters for the particular offense suspect is charged with. In that case, the Assistant should call the judge on night duty, state the reasons for the increased bond, and request judge to call central cellblock with the increased determination.

4. The use of the documentary evidence and witnesses at papering to bring necessary information to light.

   a. The mechanics of the paper-work

      (1) check all criminal records thoroughly

      (2) check and crosscheck all information on police forms and in affidavits and statements to uncover useful bond information

   b. PROMIS as a crucial aid. The follow-up on a "hit".

      (1) notification of parole, probation and the court as necessary

      (2) if the defendant has a "live" case in the system transmitting the information about the new case to the appropriate section of the U.S. Attorney's Office. (Make sure it gets put into the case jacket)

B. How the Papering Assistant should make his recommendations

   1. The use of the new case jacket

      a. What information should be placed on the trial preparation work sheet (S-2).

         Fill out P-12 in every case and P-16 where appropriate giving a synopsis of the reasons for recommendation in the remarks section of P-12

      b. What information should be placed inside the jacket in other areas (i.e., informer, physical condition of complaining witness) and where and how should the courtroom assistant be directed to find that information

      c. Other remarks should be placed on S-5, The Continuation Worksheet, and there should be reflected in the remarks section of P-12, on the preparation worksheet, a direction to the courtroom assistant to look for further information on S-5.

   2. The use of the Bail Agency in verifying information and making recommendations

a. Call the Bail Agency in all serious felony cases where the defendant appears to be from out of town with no prior arrests in D.C.

b. Call the Bail Agency where the defendant has refused to cooperate in giving the MPD data about his community ties on where he has given clearly false information to the MPD. Try to get the correct data.

3. Notification of Parole and Probation of the arrest of a defendant with offender status

a. The parole or probation officer should be notified by the police officer whenever a defendant in this status is arrested.

b. If parole or probation officer have not been so notified, require that it be done at time of papering and xerox an extra copy of the PD-163 and place it in the jacket for the use of probation and parole authorities. It will be delivered by the Special Litigation Unit.

4. Notification of other sections of the U.S. Attorney's Office of the arrest of a defendant on bond

III. The Role of the Assistant in the Courtroom

A. Arraignment/Presentment Court

1. Use of the U.S. Attorney Case Jacket:

Scan the processing worksheet with its recommendations and reasons and the PD-163 then pursue the Bail Agency report

2. Use of the Bail Agency Report

Try to resolve in your own mind any inconsistencies in Bail Agency materials with those in the case jacket. Use the Bail Agency information with ours to achieve desired release conditions.

3. Discovery: The PD-163 and other documenting evidence

Do not turn over the PD-163 to either defense counsel or the court at a bail hearing. Where necessary you may summarize the government case. Do not turn over any documents, because if judge sees it, so does defense. Bouknight v. United States 305 A.2d 524 (D.C. Ct. App. 1973) held that copies of police reports furnished to the court without disclosure to defense counsel cannot constitute a basis for a pretrial bail decision.

4. Consistency in presenting the government's recommendations

a. One goal of Assistants in Arraignment/Presentment Court should be that all defendants similarly situated are recommended by our office to be detained or released under similar conditions.

b. Making inconsistent recommendations destroys our credibility with the Court.

5. Educating the Court

a. Remember the Judge may know far less about Bail Law than you do. Take the Code (Supplement) to court with you

b. Be prepared to suggest any and all of the conditions of release enumerated in the statute to the court

c. Point out where the conditions are mentioned in the code

B. The Pre-Trial Detention Hearing (see section I.A. 3., supra)

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I.E: Bail and Pretrial Detention

The purpose of this lecture is to prepare the Assistant to make the best possible determination of what the proper bond should be for a defendant at papering and in arraignment court. The lecture should also give assistance in how to present the Government's position in court.

OUTLINE OF PRESENTATION NOTES

1. The Statute: 23 D.C. Code §§1321-32

   A. 23 D.C. Code §1321: Release Prior to Trial

      1. Conditions of Release.

      2. 23 D.C. Code §1321(b): Factors to be considered in determining conditions of release.

      3. 23 D.C. Code §1327-28: Penalties for Bail Offenses

   B. 23 D.C. Code §1322: Pretrial Detention

NOTES

1. 23 D.C. Code §1322(e): The 5-Day Hold

   a. To whom it is applicable.

   b. OFFICE POLICY: What types of cases are appropriate for the prosecutor to request the 5-Day Hold

2. 23 D.C. Code §1322(a)-(d): Pretrial detention after or in lieu of 5-Day Hold

   a. To whom applicable

   b. Procedure Required

3. 23 D.C. §1322(c): Pretrial Detention Hearing Procedures

   a. When initiated

   b. How conducted

   c. Testimony

   d. Government's evidence

   e. Judicial order

4. 23 D.C. Code §1323: Detention of Suspected Narcotics Addict: 3-Day Hold

NOTES

a. To whom applicable

b. Alternatives

5. Effect of requesting pretrial detention

II. The Role of the Papering Assistant in Bond Determinations

A. How the Papering Assistant should determine what bond to recommend.

1. Relevant factors in determining danger to the community.

2. Relevant factors in determining whether or not the defendant is most likely to promptly appear for all scheduled court appearances.

3. Increasing amount of bail on MPD bail list

4. The use of the documentary evidence and witnesses at papering to bring necessary information to light.

NOTES

B. How the Papering Assistant should make his recommendations.

1. The use of the new case jacket.

2. The use of the Bail Agency in verifying information and making recommendations.

3. Notification of parole and probation of the arrest of a defendant with offender status.

4. Notification of other sections of the U.S. Attorney's Office of the arrest of a defendant on bond.

III. The Role of the Assistant in the Courtroom

A. Arraignment/Presentment Court

1. Use of the U.S. Attorney Case Jacket

2. Use of the Bail Agency Report

3. Discovery: The PD-163 and other documentary evidence. Bouknight v. United States, 305 A.2d 524 (D.C. Ct. App. 1973)

4. Consistency in presenting the Government's recommendations.

NOTES

5. Educating the court.

B. The Pretrial Detention Hearing (see section I.A. 3, supra)

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I.F: Preliminary Hearings

DURATION: 1 hour

The purpose of this lecture is to provide the Assistants with an understanding of the purpose of the Preliminary Hearing; the extent to which the Preliminary Hearing can be used as a defense discovery tool; and the mechanics of conducting Preliminary Hearings in the Superior Court.

OUTLINE OF PRESENTATION

I. Purpose

A. Overview.

1. The Court is to determine if probable cause exists that an offense was committed and that the defendant charged was the one who did it.

2. With a finding of probable cause the case is bound over for consideration by the Grand Jury. This safeguards the defendant from being detained or kept on bond for an offense awaiting Grand Jury action which may not be bona fide.

3. A Grand Jury indictment obviates the Preliminary Hearing requirement.

4. A finding of probable cause at a Preliminary Hearing or the lack of such a finding has no direct effect on whether or not an indictment may be returned.

5. Because the standard to be met is one of mere "probable cause", hearsay evidence is admissible at the Preliminary Hearing. However, the defense may subpoena any witness whose testimony adds "appreciable assistance" to determining the issue of probable cause.

6. In spite of Super.Ct.Crim.R. 5(c) which states "(t)he purpose of a preliminary examination is not for discovery", defense attorneys will seek to obtain as much information as they can about the Government's case and evidence at the Preliminary Hearing.

B. Statutes and Court Rules

1. 18 U.S.C. §3060 Federal Magistrates Act - Objective of a Preliminary Hearing is to determine whether there is probable cause to

believe that the accused has committed an offense. Accused is only entitled to such discovery as may be incidental to the inquiry into probable cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

2. Fed.R.Crim.P. 5.1.

3. Super.Crim.R.:

   a. Rule 5(b) - Defendant's right to Preliminary Hearing if felony charged.

   b. Rule 5(c)(1) - "The purpose of a preliminary examination is not for discovery."

   c. Rule 5(c)(2) - Preliminary Hearing must be held within 10 days after defendant's initial appearance if defendant is detained; within 20 days if defendant is not detained. Accord 18 U.S.C. §§3060(b)(1)-(2).

4. Preliminary Hearing for Misdemeanants.

   a. In Superior Court misdemeanants are not entitled to a Preliminary Hearing. United States v. Kelly, 285 A.2d 694 (D.C. Ct. App. 1972).

   b. However, in another jurisdiction, the court in Pugh v. Rainwater, 483 F.2d 778 (5th Cir.), cert. granted, Gerstein v. Pugh, 94 S. Ct. 567 (1973), held that a preliminary examination was constitutionally required for misdemeanants except those out on bond or charged with violating ordinances that carry no possibility of pretrial incarceration. In Sullivan v. Murphy, 156 U.S. App. D.C. 28, 478 F.2d 938, the Court citing Pugh suggested that mass arrests and pretrial detention for disorderly conduct initiated by Corporation Counsel without a preliminary hearing to determine probable cause raises constitutional problems. See also Freeman v. Smith, 301 A.2d 217 (D.C. Ct. App. 1973) which sets forth misdemeanant's right to a Preliminary Hearing where the defendant has been charged on the misdemeanor by way of complaint.

C. Case Law: Rights and Remedies.

1. Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944 (1965).

2. Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964) (Defendant's right to subpoena witness at a Preliminary Hearing).

3. Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F.2d 557 (1967) (See views expressed in statements regarding en banc consideration. Deals with defendant's right to subpoena witnesses and the scope of

discovery at the Preliminary Hearing.)

4. Coleman v. Burnett, 155 U.S. App. D.C. 302, 477 F.2d 1187 (1973) (Opinion deals with the scope of discovery in light of the recent Federal Magistrates Act. It describes defendant's right to subpoena witnesses to cure possible defects in relying on unverifiable hearsay from an unidentified source. Test is whether the witness would add appreciable assistance to the finding of probable cause. Also notes that the remedy for correcting Preliminary Hearing defects after indictment will be fashioned appropriately by the trial judge, but not by remanding for a new Preliminary Hearing. Right to Counsel at Preliminary Hearing necessarily implies that the defendant's Preliminary Hearing rights are more than merely those relating to being justifiably held for Grand Jury action.)

5. United States v. King, 157 U.S. App. 179, 482 F.2d 768 (1973) (Reaffirms the Ross, Washington, and Coleman rights to subpoena witnesses who would have appreciable effect on determining probable cause. Also indicates that the Coleman-type corrective measures should be resorted to rather than re-opening the Preliminary Hearing.)

6. Dancy v. United States, 124 U.S. App. D.C. 58, 361 F.2d 75(1966) (Construing Blue, the Court granted the defendant a new trial where the defendant was not advised of his right to counsel for the preliminary hearing. Such remedy was "just under the circumstances." 28 U.S.C. §2106).

7. United States v. Strickland, Super.Ct.Crim. No. 59559-73, decided December 20, 1973 (Ketcham, J.) held that although indictment ordinarily obviates the Preliminary Hearing, where delay of hearing after return of indictment was due to misconduct or misjudgement of the prosecution or the court, the appropriate remedy is a Court order requiring the government to provide a transcript of grand jury testimony of complaining witness to the defendant. Cf. United States v. Stroman, D.C. Super. Ct. No. 65217-73, decided December 20, 1973 (Ketcham, J.).

   NOTE: Strickland and Stroman are not binding on Superior Court since they are the opinions of trial judges but they may be persuasive law.

D. Other References

1. The Preliminary Hearing, E. Barrett Prettyman Fellows 1965-1966 (LLB Co. Inc. 1967).

2. Criminal Practice Institute Manual 1973 - Preliminary Hearings, page 83.

II. The Preliminary Hearing as a Defense Tool

A. Discovery. In spite of some earlier case law which indicated that one of the purposes of the Preliminary Hearing was defense discovery, the Federal Magistrates Act and Super. Ct. Crim. R. 5 (c)(1) have limited the scope of discovery. Nevertheless, defense attorneys will often attempt to discover information such as the following at the Preliminary Hearing:

1. Physical evidence.

   a. weapons recovered

   b. money recovered

   c. other physical evidence

2. Names and addresses of witnesses.

3. Defendant's statements.

4. Basis for other possible charges.

5. Facts relating to time and circumstances of arrest and search for later use at motion to suppress.

None of the above listed information needs to be disclosed unless some particular fact, piece of evidence, or other witness is relied on in the Government's case in establishing probable cause. Incidental discovery would result and some cross-examination directly related to such evidence is permissible.

B. Defense Subpoenas. The United States Court of Appeals of the District of Columbia Circuit has enunciated a right for a defendant to subpoena any witness to the Preliminary Hearing who might significantly affect the determination of probable cause. See King, Coleman, Ross, and Washington, supra. Where such witnesses are potential Government witnesses, excessive discovery may result, unless objections are made to either the appropriateness of the particular witness's testimony as it relates to probable cause, or to the actual questions and responses so as to limit the inquiry to the narrow issue of probable cause. If potential defense witnesses are called, or the defendant himself takes the stand, skillful cross-examination will lock in a witness' testimony and provide the Government with discovery and possible materials for later impeachment. This rarely occurs. See United States v. Wallace, Super. Ct. Crim. No. 40669-73, decided Feb. 21, 1974 (Goodrich, J.) (held that deprivation of defendant's right to subpoena Government witness who is material to probable cause and whose absence cannot be justified by "good cause" is best remedied by ordering Government to produce complainant's signed statement and grand jury testimony for the defendant).

III. Mechanics

A. Related papering problems.

1. When do you charge a misdemeanor by way of complaint?

2. Suggesting appropriate Preliminary Hearing dates.

3. One-day presentments (Preliminary Hearing is usually mooted by the return of an indictment).

   a. CPWL (felony).

   b. On-scene ID robberies.

   c. Others.

4. Subpoena one (and only one) police officer for Preliminary Hearing.

5. Prepare line-up orders, handwriting orders, blood sample orders, etc.

6. Assignments for further investigation to be completed by the Preliminary Hearing.

B. Pre-Preliminary Hearing Jacket Review.

1. Has complainant changed his mind?

2. What results on:

   a. Fingerprints (forgery, uttering, or pertaining to ID).

   b. Line-up results (robberies, rapes, etc.).

      (1) Number of witnesses identifying defendant?

      (2) What were actual words?

   c. Results on other investigative efforts (medical reports, autopsy, blood samples, etc.).

3. Re-evaluation of the case.

   a. Prepare informations on possible misdemeanor breakdowns whether for plea or trial.

4. Briefing new police officers on how to be a witness at a Preliminary Hearing.

   a. Hearsay admissible.

   b. Minimal discovery.

5. Note any Preliminary Hearings mooted by indictment

6. Consider possible Nolle and original presentment in rare or difficult case (Check with Grand Jury Section Chief).

C. The Preliminary Hearing.

1. Two Assistants assigned for alternating presentation and chasing cases and defense attorneys.

2. Negotiate possible waivers of Preliminary Hearing as trade-off for informal discovery.

3. Process cases and annotate calendar.

   a. Note whether the defendant is in jail.

   b. Send police officer to Room 112 (Control Room) for coding, then to the Grand Jury area in the Basement for setting the Grand Jury presentment date.

   c. Make sure that all cases have arrived at the Grand Jury at the end of the day.

4. Opportunity to cure problems.

   a. New line-up or handwriting orders.

   b. Breakdown cases for misdemeanor trial.

5. Be aware of 5-day hold matters coming into the Preliminary Hearing Courtroom.

CONTINUED

1 OF 5

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I.F: Preliminary Hearings

The purpose of this discussion is to provide the Assistant with an understanding of the purpose of the Preliminary Hearing; the extent to which the Preliminary Hearing can be used as a defense discovery tool; and the mechanics of conducting Preliminary Hearings in the Superior Court.

OUTLINE OF PRESENTATION: NOTES

I. Purpose

A. Overview.

1. The court is to determine if probable cause exists that an offense was committed and that the defendant charged was the one who did it.

2. With a finding of probable cause the case is bound over for consideration by the Grand Jury.

3. A Grand Jury indictment in the case prior to a Preliminary Hearing moots out the Preliminary Hearing.

4. A finding of probable cause at a Preliminary Hearing or the lack of such a finding has no direct effect on whether or not an indictment may be returned.

5. Because the standard to be met is one of mere "probable cause", hearsay evidence is admissible at the Preliminary Hearing. However, the defense may subpoena any witness whose testimony adds "appreciable assistance" to determining the issue of probable cause.

6. In spite of the rule which states "(t)he purpose of a preliminary examination is not for discovery", defense attorneys will seek to obtain as much information as they can about the Government's case and evidence at the Preliminary Hearing.

B. Statutes and Court Rules.

1. 18 U.S.C. §3060 Federal Magistrates Act - Objective of a Preliminary Hearing is to determine whether there is probable cause to believe that the accused has committed an offense. Accused is only entitled to such discovery as may be incidental to the inquiry into probable cause. The finding of probable cause may be based upon

hearsay evidence in whole or in part. NOTES

2. Fed. R. Crim. P. 5.1.

3. Superior Court Criminal Rules

a. Rule 5 (b) - Defendant's right to Preliminary Hearing ceases at time of indictment return.

b. Rule 5 (c) (1) - "The purpose of a preliminary examination is not for discovery."

c. Rule 5 (c) (2) - 10 day rule if defendant is detained, 20 day rules if defendant is not detained.

4. Preliminary Hearings for Misdemeanants.

C. Case Law

Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944 (1965).

Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964) (Defendant's right to subpoena witness at a Preliminary Hearing).

Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F.2d 557 (1967) (See views expressed in statements regarding en banc consideration. Deals with defendant's right to subpoena witnesses and the scope of discovery at the Preliminary Hearing.)

Coleman v. Burnett, 155 U.S. App. D.C. 302, 477 F.2d 1187 (1973) (Opinion deals with the scope of discovery in light of the recent Federal Magistrates Act.)

United States v. King, 157 U.S. App. D.C. 179, 482, F.2d 768 (1973) (Reaffirms the Ross, Washington, and Coleman rights to subpoena witnesses who would have an appreciable affect on determining probable cause. Also indicates that the Coleman-type corrective measures should be resorted to rather than re-opening the Preliminary Hearing.)

Freeman v. Smith, 301 A.2d 217 (D.C. Ct. App. 1973)(Sets forth a misdemeanant's right to a Preliminary Hearing where the defendant has been charged on the misdemeanor by way of complaint.)

D. Other References

1. The Preliminary Hearing, E. Barrett Prettyman Fellows 1965-1966 (LLB Co. Inc. 1967).

2. Criminal Practice Institute Manual 1973 - Preliminary Hearings page 83.

II. The Preliminary Hearing as a Defense Tool. NOTES

A. Discovery

In spite of some earlier case law which indicated that one of the purposes of the Preliminary Hearing was defense discovery, the Federal Magistrates Act and Superior Court Criminal Rule 5 (c) (1) have limited the scope of discovery. Nevertheless, defense attorneys will often attempt to discover information such as the following at the Preliminary Hearing:

1. Physical evidence
   a.weapons recovered.
   b.money recovered.
   c.other physical evidence.

2. Names and addresses of witnesses.

3. Defendant's statements.

4. Basis for other possible charges.

5. Facts relating to time and circumstances of arrest and search for later use at motion to suppress.

2. None of the above listed information needs to be disclosed unless some particular fact, piece of evidence, or other witness is relied on in the Government's case in establishing probable cause.

B. Defense Subpoenas

1. The United States Court of Appeals for the District of Columbia Circuit has enunciated a right for a defendant to subpoena any witness to the Preliminary Hearing who might appreciably affect the determination of probable cause. See King, Coleman, Ross, and Washington.

2. If potential defense witnesses are called, or the defendant himself takes the stand, skillful cross-examination will lock-in a witness' testimony and provide the Government with discovery and possible materials for later impeachment.

III. Mechanics

A. Related Papering Problems.

1. When to charge a misdemeanor by way of complaint NOTES

2. Suggesting appropriate Preliminary Hearing dates.

3. One-day presentments (Preliminary Hearing is usually mooted out by the return of an indictment)

   - CPWL (felony)

   - On-scene ID robberies

   - Others

4. Subpoena one (and only one) police officer for Preliminary Hearing.

5. Prepare line-up orders, handwriting orders, blood sample orders, etc.

6. Assignments for further investigation to be completed by the Preliminary Hearing.

B. Pre-Preliminary Hearing Jacket Review.

1. Has complainant changed his mind?

2. Results on:
   - Fingerprints (forgery, uttering, or pertaining to I.D.)

   - Line-up results (Robberies, rapes, etc.)
     - o Number of witnesses IDing defendant?
     - o What were actual words?
   - Results on other investigative efforts (Medical reports, autopsy, blood samples, etc.)

3. Re-evaluation of the case - Prepare informations on possible misdemeanor breakdowns whether for plea or trial.

4. Briefing new police officers on how to be a witness at a Preliminary Hearing.

   - Hearsay admissible.
   - Minimal discovery.

5. Note any Preliminary Hearings mooted by indictment.

6. Consider possible Nolle and original presentment in rare or difficult case (Check with Grand Jury Section Chief)

C. The Preliminary Hearing.

1. Two assistants assigned for alternating presentation and chasing cases and defense attorneys.

2. Negotiate possible waivers of Preliminary Hearing as trade-off for informal discovery.

NOTES

3. Process cases and annotate calendar.

- Note whether the defendant is in Jail.
- Send police officer to Room 112 (Control Room) for coding, then to the Grand Jury area in the Basement for setting the Grand Jury presentment date.
- Make sure that all cases have arrived at the Grand Jury at the end of the day.

4. Opportunity to cure problems

- New line-up or handwriting orders.
- Breakdown cases for misdemeanor trial.

5. Be aware of 5-day hold matters coming into the Preliminary Hearing Courtroom.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

TOPIC I.F: Workshop - Preliminary Hearings

INTRODUCTION: The Assistants will participate in a workshop discussion on Preliminary Hearings. The purpose of the workshop is to discuss the various aspects and problems associated with this topic. A senior trial Assistant will moderate the workshop and involve other special resource persons as necessary. Using the approach the participants will engage freely in the discussion.

I. How to deal with an investigating officer who has never seen the defendants and cannot personally identify them for the Court.

II. How to deal with the disclosure of names of witnesses.

A. Crucial witness in a murder case.

B. Witness who is afraid of possible harm if name is disclosed.

C. An eye-witness (not the complainant) who is your only source for identifying the defendant.

D. Other eye-witnesses not essential for probable cause.

III. How to deal with disclosure of evidence.

A. Weapons in an Armed Robbery.

B. Money recovered - Does the recovery aid in identifying the defendant?

C. Other clothing or physical evidence.

D. Fingerprints - Does the fingerprint link this defendant for ID purposes or is there separate and independent ID?

IV. Identification

A. Go directly to line-up ID in line-up cases.

B. Go directly to on-scene ID in case with on-scene ID.

C. Steer clear of initial defendant discriptions and details of photographic show-up.

V. Limiting the facts relating to time of arrest, probable cause to arrest, or basis for search.

VI. How to deal with defendant taking the stand.

VII. How to deal with Defense subpoenaed Government witnesses on the stand.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I.G: Identification: Law and Hearings

DURATION: 2 hours

The purpose of this lecture is to familiarize the Assistant with the various aspects, problems, policies and case law that pertain to Identification.

OUTLINE OF PRESENTATION:

I. Introduction

A. The Problem: Minimizing the Possibility of Mistaken Identification

B. Judicial Remedy: Ruling inadmissible identification evidence in two instances:

1. Absence of counsel (in certain instances)

2. Impermissibly suggestive identification - if the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" amounting to a violation of due process.

II. Basic Supreme Court Cases

A. The Wade-Gilbert Rule
United States v. Wade, 388 U.S. 218 (1967)
Gilbert v. California, 388 U.S. 263 (1967)

1. After a formal charge has been filed in court against the accused, the Sixth Amendment requires the presence of counsel at a lineup or show-up because such a viewing is considered a "critical stage" of the prosecution.

a. There is no right to counsel if the lineup or show-up is conducted prior to the filing of formal criminal charges, whether by complaint, information or indictment. Kirby v. Illinois, 406 U.S. 682 (1972).

b. There is no right to counsel at a showing of suspects' photographs, whether before or after the filing of formal charges, because the accused is not physically present and therefore the Sixth Amendment does not apply. United States v. Ash, 413 U.S. 300 (1973).

2. The unjustified absence of counsel requires that an out-of-court identification by a witness be excluded. Testimony about the

in-court identification must also be excluded unless it is established by "clear and convincing evidence" that there is an independent source, i.e., untainted by the viewing in the absence of counsel, for the in-court identification. A case need not be reversed on appeal if failure to apply the exclusionary rule is "harmless beyond a reasonable doubt."

3. Presence of counsel may prevent suggestive identification procedures, since counsel may suggest changes. But the primary purpose is to enable counsel to render effective assistance later in court by being able to reconstruct at trial or at a suppression hearing what occurred at the lineup. See Clemons v. United States, 133 U.S. App. D.C. 27, 31, 408 F.2d 1230, 1234 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

4. The Court in Wade noted that enactment of formal lineup regulations by police or legislature could transform lineup into "non-critical stage" no longer requiring counsel. There is a police regulation in District of Columbia. See MPD General Order 304, No. 7 (Dec. 1, 1974). Note - In District of Columbia, lineup photo, audio taperecordings and lineup sheet listing participants in line are available. Video taping of all lineups will soon go into effect, as well. Accordingly, USAO has argued that lineup may no longer be a critical stage requiring counsel. See United States v. Eley, 286 A.2d 239, 240-241 n.4,8 (D.C. Ct. App. 1972).

B. The Stovall Due Process Rule
Stovall v. Denno, 388 U.S. 293 (1967)
Neil v. Biggers, 409 U.S. 188 (1972)

1. Both lineups and photographic viewings are judged by the same due process standard. The Fifth Amendment requires suppression of both in-court and out-of-court identification if the confrontation or photographic showing was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law.

   However, the government may introduce in-court identification, despite impermissible suggestivity, if it can show by "clear and convincing evidence" that it is based upon an "independent source" and not the fruit of the improper identification. Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (en banc), cert. denied, 394 U.S. 964 (1969). A case need not be reversed on appeal if failure to apply the exclusionary rule is "harmless beyond a reasonable doubt."

2. Two sources of suggestivity

   a. The nature of the lineup or photopraphic array itself (e.g., lineup of six persons all of whom are black except the suspect; array of 12 photographs in which suspect's picture appears eight times).

b. The conduct of the police or prosecutor as it affects the viewer (e.g., police officer telling witness: "He is the third man from the left").

3. The following factors are relevant to determine whether the confrontation was in violation of due process. See United States v. O'Connor, 282 F. Supp. 963 (D.D.C. 1968):

a. Was the defendant the only individual who could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

b. Where did the confrontation take place?

c. Were there any reasons for a prompt confrontation which may have deprived the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?

d. Were any tangible objects related to the offense placed before the witness that would encourage identification?

e. Was the identification a product of mutual reinforcement of opinions among witnesses simultaneously viewing the defendant?

f. Was the emotional state of the witness such as to preclude objective identification?

g. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

h. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

C. Independent Source

1. If the trial court finds a constitutional violation, either absence of counsel or a due process violation, the government may elicit an in-court identification if it can show by "clear and convincing" evidence that the witness' in-court identification has an origin independent of the confrontation.

2. The following factors are relevant to a determination of independent source. See United States v. Telfaire, 152 U.S. App. D.C. 146, 469 F. 2d 552 (1972):

a. The witness' opportunity to observe the criminal acts and

the person committing them, including the length of the encounter, the distance between the various parties, the lighting conditions at the time, the witness' state of mind at the time of the offense, and other circumstances affecting the witness' opportunity to observe the person committing the offense.

b. Nature, detail and accuracy of any description given by the witness

c. Any subsequent identification, failure to identify or misidentification by the witness, the circumstances surrounding that identification, the certainty or lack of certainty expressed by the witness, the state of mind of the witness at the time, and other circumstances bearing on the reliability of the witness' identification.

d. Any other direct or circumstantial evidence which may identify the person who committed the offense charged or corroborate or negate the identification by the witness.

Note: It is important to develop these four factors in the pretrial identification suppression hearing before the Court. It is equally important fully to develop evidence relating to the first three of these factors before the jury in order to demonstrate strength of identification.

D. Admissibility v. Reliability

1. 18 U.S.C. §3502(a) provides that eyewitness identification testimony "shall be admissible" in evidence. Thus the trial court cannot suppress identification testimony, at least in the absence of a constitutional violation.

2. A weak pre-trail identification is not suppressed merely because it lacks reliability. Lack of reliability goes only to weight the jury should give to the identification, not to its admissibility.

3. If witness says only picture "looks like" the offender, the identification is admissible. Jury can look at photograph and compare with defendant on trial. United States v. Hines, 148 U.S. App. D.C. 441, 460 F.2d 949 (1972).

4. OFFICE POLICY - Absent unusual circumstances, Assistant should not seek to elicit in-court identification from a witness who has made a mistaken out-of-court identification.

III. The Pattern of Exclusionary Rules Under Wade-Gilbert-Stovall

A. Per Se Rule: No evidence can be admitted of any identification at a pre-trial confrontation in violation of defendant's rights.

1. Unjustified denial of counsel at lineup, or

2. In any lineup, show-up or photographic display, impermissibly suggestive procedures that constitute a violation of due process.

B. "Poisonous Fruit" Rule: Exclusion of courtroom identification only if the fruit of the pre-trial confrontation and if there is no "independent source" for identification.

For a good analysis of the two rules see Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

C. In-Court Identifications

1. Pre-trial identification can be admitted even though witness is unable to identify defendant at trial

2. Independent source finding by the trial court will be sustained if supported in the record, Coleman v. Alabama, 399 U.S. 1 (1970).

3. Reference in court to prior out-of-court identification, though technically hearsay, is permissible and proper to buttress in-court identification so jury can get full picture of identification process. Such testimony is more meaningful to a jury than more ritualized in-court identification. United States v. Hallman, 142 U.S. App. D.C. 93, 439 F.2d 603 (1971); United States v. Williams, 137 U.S. App. D.C. 231, 421 F.2d 1166 (1970); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (en banc), cert. denied, 394 U.S. 964 (1969)

IV. Photographic Showings

A. Sixth Amendment right to counsel does not apply to showing photographs of suspects at any time, whether pre-arrest, post-arrest, or after the filing of formal charges. United States v. Ash, 413 U.S. 300 (1973).

B. Suggestivity

1. The validity of the use of photograph identifications to apprehend offenders was recognized by the Supreme Court in Simmons v. United States, 390 U.S. 377 (1968).

2. Suspect's photograph should be grouped with a sufficient number of other photos. MPD General Order No 7 (Dec. 1, 1971) requires at least eight other photographs of the same general description - e.g., all black and whites, all Polaroids, etc. While ideally suspect's photograph should appear only once in array, convictions have been affirmed where suspect's photo appeared more than once. Simmons v. United States, 390 U.S. 377 (1968); United States v. Robinson, 139 U.S. App. D.C. 286, 432 F.2d 1348 (1970)

3. Each witness viewing photographs should do so out of the presence of other witnesses. MPD General Order 304, No. 7 (Dec. 1, 1971). Police should not indicate which person pictured they suspect of having committed offense.

4. Care should be taken to assure that a witness does not have access to any index of names before making an identification. United States v. McBride, D.C. Cir. No. 73-1286, decided May 8, 1974. The D.C. Police General Order was amended after the McBride decision.

5. Police should keep adequate records of photographs shown witnesses, so that exact group of photographs from which an identification is made can be presented in court later. See MPD General Order No. 7 (Dec. 1, 1971); United States v. Clemons, 144 U.S. App. D.C. 235, 445 F.2d 711 (1971). United States v. Hamilton, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969). United States v. Scriber, D.C. Cir. No. 72-1841, decided May 16, 1974.

6. Courts have held that in determining suggestivity, the court will view the photographic array itself since photographs are "decisive" on issue of suggestivity. United States v. Smallwood, 153 U.S. App. D.C. 387, 389, 473 F.2d 98, 100 (1972); United States v. Hines, 147 U.S. App. D.C. 249, 261, 455 F.2d 1317, 1329 (1971), cert. denied, 406 U.S. 975 (1972); United States v. Hinkle, 145 U.S. App. D.C. 234, 237, 448 F.2d 1157, 1160 (1971); Patton v. United States, 131 U.S. App. D.C. 197, 200, 403 F.2d 923, 926 (1968).

7. After photographic identification, police are not required to conduct confirmatory corporeal line-up in every case. United States v. Hamilton, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969). However, it is the general OFFICE POLICY that no indictment based solely on eyewitness identification is to be returned unless at least one eyewitness has made an in-person identification either on-the-scene or at a lineup, unless the witness and the accused knew each other well before the offense.

8. Photographs displayed to witnesses can be shown to the jury at trial, so long as they are not police "mug shots" which too clearly show that defendant has prior criminal record. Barnes v. United States, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966). Other photographs in police custody may be shown to the jury, however. United States v. Hallman, 142 U.S. App. D.C. 93, 94-95, 439 F.2d 603, 604-05 (1971). Of course, even "mug shots" should and must be used

in pretrial identification suppression hearing before the court out of the jury's presence.

V. Lineups

A. Narrow Fifth Amendment Right

1. The Fifth Amendment privilege against self-incrimination affords no right to refuse to appear in lineup or to refuse to speak for voice identification purposes, because these are not testimonial in nature. United States v. Wade, 388 U.S. 218 (1967).

2. Order to appear in lineup is legitimate condition of pretrial release on bond. Williams v. United States, 136 U.S. App. D.C. 158, 419 F.2d 740 (1969) (en banc). Part of bail order may include order not to change appearance between time of release and lineup. Gregory v. United States, 133 U.S. App. D.C. 317, 410 F.2d 1016, cert. denied, 396 U.S. 865 (1969). Failure to show up or change of appearance in violation of court order may be punished by contempt. Change of appearance or other refusal to cooperate may be brought out and commented on before the jury as evidence of "consciousness of guilt."

3. Unruly, uncooperative, obstreperous defendant - Stovall is not violated if defendant attracts attention to himself at lineup.

B. Police and Office Procedures

See MPD General Order 304, No. 7 (Dec. 1, 1971).

1. At papering, AUSA should determine if there are witnesses who have not viewed suspect at scene or who do not know suspect. If so, and if witnesses were in position where they will probably be able to make identification, lineup should be requested.

2. Preparation of lineup order. Should be served on defense counsel and defendant in court.

3. Police are responsible for assuring presence of witnesses. U. S. Attorney's Office is responsible for assuring notification of defendant and defense counsel and for having AUSA present at lineup.

4. Lineups for adult Negro males are presently conducted Monday, Wednesday and Thursday evenings. Lineups for whites, women and persons with unique physical characteristics (e.g., 300 pounds, 6'11") must be specially scheduled through the Major Violators Branch of the Police Department.

5. Suspects stand behind one-way mirror so they cannot see and intimidate witnesses.

6. Witnesses view lineup one at a time. Witnesses should not converse with each other or with police officer until all have viewed the

lineup. Witnesses may request that participants speak certain words or turn a particular way. Police will have everyone in line comply.

7. At lineup, counsel for suspect is given date, time, place and nature of offense. Counsel is not given names of witnesses viewing lineup or any prior description of suspect given to police. United States v. Eley, 286 A.2d 239 (D.C. Ct. App. 1972); MPD General Order 304, No. 7 (Dec. 1, 1971).

8. Two photographs of lineup taken and preserved - one of line as set by police, one of line as viewed by witnesses after making changes suggested by defense counsel. Available for court.

9. Audio tape recording of entire proceeding preserved. May be subpoenaed for court. Video tape will also soon be available for court purposes.

10. Lineup sheet - listing participants, shield number, counsel appointed, substitute counsel (when applicable) and witness comments - available for court.

C. Counsel

1. Purpose of counsel at lineup.

a. So the suspect will not have to "stand alone" when confronted by his accusers.

b. Reconstructive Function - To enable counsel effectively to reconstruct at trial or at a suppression hearing the circumstances of the pre-trial confrontation. This he does through cross-examining the police and lay witnesses. "Wade envisioned counsel's function at the lineup to be primarily that of a trained observer able to detect the existence of any suggestive influences and capable of understanding the legal implications of the events that transpire. Having witnessed the proceedings, counsel would then be in a position effectively to reconstruct at trial any unfairness that occurred at the lineup, thereby preserving the accused's fundamental right to a fair trial on the issue of identification." United States v. Ash, 413 U.S. 300, 344, (1973) (Brennan, J., dissenting).

Note: Wade said that if relevant information can be provided in the absence of counsel and if police regulations can be implemented which eliminate risks of suggestivity and assure meaningful confrontation at trial, the lineup may no longer be "critical state" requiring counsel. 388 U.S. at 239. In D.C., we may have reached that point.

c. Preventive function is subsidiary to the other two. United States v. Eley, 286 A.2d 239, 240 (D.C. Ct. App. 1972). While counsel's suggestions at lineup may aid in preventing the infiltration of taint, the police and prosecutor are under no obligation to accept counsel's suggestions.

2. Counsel cannot stop lineup by walking out. Substitute counsel may be appointed or, depending on circumstances, lineup may proceed in counsel's absence. Indeed, argumentative defense counsel may be ejected from lineup room. United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970).

3. Counsel may not transform lineup into opportunity to interview government witnesses, United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970), for lineup procedure is not to be converted into discovery device. United States v. Eley, 286 A.2d 239 (D.C. Ct. App. 1972). Indeed, it is our policy to prevent witness interview so long as witness is on third floor of MPD before, during or after lineup.

4. A defendant may waive his right to counsel, so long as waiver is knowing, intelligent and voluntary.

5. Substitute counsel

   a. If retained or appointed counsel fails to attend the lineup, counsel requirement of Wade is met by "substitute counsel" requested to serve either by police or by regular counsel. United States v. Jones, 155 U.S. App. D.C. 328, 336-38, 477 F.2d 1213, 1221-23 (1973); United States v. Neverson, 150 U.S. App. D.C. 133, 140-41, 463 F.2d 1224, 1231-32 (1972); United States v. Randolph, 143 U.S. App. D.C. 314, 443 F.2d 729 (1970); United States v. Queen, 140 U.S. App. D.C. 262, 435 F.2d 66 (1970); United States V. Kirby, 138 U.S. App. D.C. 340, 343-44, 427 F.2d 610, 613-14 (1970).

   b. Benefit of substitute counsel is that he may be able to serve as witness in court. Detriment is that he is not familiar enough with case to make meaningful suggestions at lineup. United States v. Kirby, 138 U.S. App. D.C. 340 427 F.2d 610 (1970). Experience has shown that same substitute counsel appointed to appear for all lineups may be valueless to defendants. United States v. Randolph 143 U.S. App. D.C. 314, 433 F.2d 729 (1970).

   c. Substitute counsel must assist trial counsel in challenging fairness of lineup procedures. United States v. Johnson, 147 U.S. App. D.C. 31, 452 F.2d 1363 (1971).

   d. There is no obligation on the government to assure that substitute counsel and trial counsel confer with each other prior to trial, nor is there an obligation on substitute counsel to communicate with trial counsel if he has nothing significant to tell him. United States v. Jones, 155 U.S. App. D.C. 328, 336-38, 477 F.2d 1213, 1221-23 (1973); United States v. Smallwood, 153 U.S. App. D.C. 387, 389-90, 473 F.2d 98, 100-01 (1972). However, the failure of trial counsel to communicate with substitute counsel prior to trial may be some evidence of deprivation of effective assistance of counsel. United States v. Estes, ___ U.S. App. D.C. ___, 485 F.2d 1078 (1973).

D. Suggestivity at Lineups

1. Fairness depends on the facts. Lineup photograph is "decisive" on issue of suggestivity. United States v. Smallwood, 153 U.S. App. D.C. 387, 389, 473 F.2d 98, 100 (1972); United States v. Hines, 147 U.S. App. D.C. 249, 261, 455 F.2d 1317, 1329 (1971), cert. denied, 406 U.S. 975 (1972); United States v. Hinkle, 145 U.S. App. D.C. 234, 237, 448 F.2d 1157, 1160(1971); Patton v. United States, 131 U.S. App. D.C. 197, 200, 403 F.2d 923, 926 (1968). As court said in Hines, lineup photo can demonstrate that what appears on paper to be significant differences in height and weight are in fact barely noticeable.

2. Number in the line. Generally, MPD will not proceed with less than eight persons in the line. However, even in a two-man co-defendant case in which both men appeared in the same line, a six-man line was approved. United States v. Hines, 147 U.S. App. D.C. 249, 262, 455, F.2d 1317, 1330 (1971), cert. denied, 406 U.S. 975 (1972). (In Hines, the arresting police officer was also in the line). In Patton v. United States, 131 U.S. App. D.C. 197, 403 F.2d 923 (1963), the Court approved a lineup consisting of only five persons with somewhat different builds. If a lineup is attacked on grounds of unfairness, both Hines and Patton are good authority that the line is not unfair.

3. Not suggestive to have suspects in line wear particular garb, speak particular words or turn in particular manner - so long as all participants are required to do so. United States v. Wade, 388 U.S. 218, 233 (1967).

4. It is not suggestive for police to tell witness they may have the criminal in custody, so long as they do not specify which person in line the police suspect. Witnesses naturally assume the police have a suspect if called to a lineup.

5. To avoid suggestivity, persons in line should be of the same sex and race. They should be approximately the same height and weight. If not all are clean shaven or have close-cropped hair, more than one should have facial hair or bush haircut. Clothing is irrelevant to suggestivity (and, for the most part, is controlled by suspect and counsel, not police), unless outlandish.

E. Defense Request for Lineup

1. The lineup is an investigative tool supervised by the Executive Branch i.e., the prosecutor. Decision to employ a lineup is within discretion of prosecutor who may instead choose to rely on other proper methods of identification. See generally United States v. Eley, 286 A.2d 239 (D.C. Ct. App. 1972). (The United States Court of Appeals is less disposed to this view.)

2. The trial court or magistrate is involved only because most lineups are held after court appearance, and court's aid is needed to assure presence of defendant, as a condition of bond, and to assure presence of counsel. However, grand jury subpoenas can also be issued for defendant to appear in lineup. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

3. Because of involvement of courts in signing lineup orders, courts have developed doctrine that it is within the discretion of the court to grant a defense request for lineup. United States v. Caldwell, 151 U.S. App. D.C. 84, 465 F.2d 669 (1972); United States v. McNair, 140 U.S. App. D.C. 26, 433 F.2d 1132 (1970); United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970). Indeed, where a defense request is improperly denied, the conviction will be set aside on appeal since, after trial and an in-court identification, there is no other remedy. United States v. Caldwell, 156 U.S. App. D.C. 312, 481 F.2d 487 (1973). Accordingly, OFFICE POLICY is:

   a. In any case in which eyewitness identification is critical to the prosecution or defense, and there has been no in-person identification of the defendant by any prospective eyewitness, a defense request for a lineup should not be opposed. Even if two or three other eyewitnesses have previously made an in-person identification, a defense request for a lineup should be opposed only after consultation with a supervisor.

   b. Where there has been a prior in-person identification by a witness, such as by way of an earlier lineup or on-the-scene identification, a defense request for a lineup should be vigorously opposed. (Passage of time between offense and lineup, of course erodes a witness' chance to make an identification.)

   c. If a court grants a defense request for a lineup over our objection, the Assistant should advise the court that we will not allow the witness to view the lineup and request the court to rule pre-trial on the admissibility of the in-court identification. If the court suppresses it, we would note an immediate appeal. If the court insists that the witness view the lineup, ask for time to consult with a supervisor before either acquiesing in the court's demand or facing contempt.

   d. If defense requests pre-indictment lineup, ask court to defer to felony judge.

F. Anderson-Eley Lineups

1. Anderson-Eley lineup is one in which defendant is viewed by witnesses to offense with which he is formally charged plus witnesses to other offenses. Name derives from the opinions of the D.C. Court of Appeals in United States v. Eley, 287 A.2d 830 (D.C. Ct. App. 1972) and of U.S. Court of Appeals in United States v. Anderson, ___ U.S. App. D.C. ___, 490 F.2d 785 (1974).

2. The D.C. Court of Appeals in United States v. Eley, 287 A.2d 830 (D.C. Ct. App. 1972), the U.S. District Court in United States v. Anderson, 352 F. Supp. 33 (D.D.C. 1972), and the U.S. Court of Appeals in United States v. Anderson, ___ U.S. App. D.C. ___, 490 F.2d 785 (1974), recognized that government need make no specific proffer that other offenses (for which defendant is to be viewed) involved similar modus operandi.

   a. Under Adams v. United States, 130 U.S. App. D.C. 203, 399 F.2d 574 (1968), cert. denied, 393 U.S. 1067 (1969), the practice of the government notifying the court when witnesses to other offenses would view a suspect and of apprising the court of dates, times, places and similarity of "modus operandi" of the other offenses was a prerequisite to obtaining a lineup order.

   b. As Anderson makes clear, however, the law does not require this: "[S]o long as timely presentment is made before a magistrate and the lineup comports with due process, 'the Government may place [a suspect] in a lineup for any number of offenses it chooses without prior court authorization' . . . . " United States v. Anderson, ___U.S. App. D.C.___, ___, 490 F.2d 785, 788-789 (1974); See also United States v. Perry, ___U.S. App. D.C.___, 492 F.2d 670, aff'g. mem. Crim. No. 72-1186 (D.D.C. Nov. 30, 1972) (unpublished opinion).

   c. There need be no prior disclosure of judicial determination concerning whether the suspect will be required to stand in a lineup, the number of witnesses who will view the lineup, the dates, times, places, nature of similarity (i.e. "modus operandi") of offenses for which the suspect will be viewed. United States v. Anderson, United States v. Eley.

   d. A grand jury subpoena may be used to obtain the presence of a suspect at a lineup to be viewed by witnesses to crimes other than the one for which he stands charged. See United States v. Dionisio, 410 U.S. 1, 14 (1973); United States v. Mara, 410 U.S. 19 (1973). As a practical matter, USAO usually still requests and obtains court orders to obtain the presence of a defendant at a lineup. However, since Eley, the form lineup order used in Superior Court makes no distinction between so-called Wade lineups and Adams lineups, and most judges require no proffer.

3. The Anderson-Eley lineup should be carefully distinguished from the lineup order obtained in Wise v. Murphy, 275 A.2d 205 (D.C. Ct. App. 1971) (en banc). In Wise, there was no probable cause to arrest for any offense, and therefore the suspect could not be detained to obtain evidence without violating the Fourth Amendment. Since the Fourth Amendment requires a reasonable basis for disrupting one's unconditional liberty, the court in Wise, as in Terry v. Ohio, 392 U.S. 1 (1968), required the government to proffer "articulable facts" to detain the suspect in order to place him in a lineup.

   The Anderson-Eley situation is different because the suspect is lawfully in custody for one offense and is simply being viewed by witnesses to other offenses. See United States v. Anderson, ___ U.S. App. D.C.___, ___, 490 R.2d 785, 788-789 (1974).

4. An illegal arrest may taint a subsequent identification and result in suppression. United States v. Johnson, 147 U.S. App. D.C. 31, 40, 452 F.2d 1363, 1372 (1971); Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F.2d 66 (1963).

VI. One-Man Confrontations: On-the-Scene and Spontaneous

A. On-the-Scene

1. If a suspect is arrested within a short time of offense and within an area reasonably proximate to the scene of the crime, he may be returned to the scene of the offense, or the eyewitnesses may be transported to the scene of the arrest, for identification of the suspect. See MPD General Order 304, No. 7 (Dec. 1, 1971); United States v. Hines, 147 U.S. App. D.C. 249, 455 F.2d 1317 (1971), cert. denied, 406 U.S. 975 (1972); United States v. Perry, 145 U.S. App. D.C. 364, 449 F.2d 1026 (1971); Russell v. United States, 133 U.S. App. D.C. 77, 408 F.2d 1280, cert. denied, 395 U.S. 928 (1969).

2. No counsel is required by Sixth Amendment in such cases, both because adversary criminal proceedings have not yet begun, Kirby v. Illinois, 406 U.S. 682 (1972), and because prompt on-the-scene show-ups have been viewed as exceptions to the Wade requirement under Russell.

3. "Russell showups" approved for two reasons

   a. Obvious dangers inherent in one-man show-up without counsel are more than balanced by accuracy and reliability of fresh identification.

   b. Prompt return to the scene reduces unnecessary detentions of innocent persons and allows police to return promptly to investigation.

4. "Russell showup" is governed by due process considerations of Stovall and must not be impermissibly suggestive.

   a. Police officers should remain as neutral as possible consistent with maintenance of custody, and control over suspect. Police should not say or do anything to convey to witness that suspect has admitted guilt, that property or weapons have been seized, or that officer believes suspect is guilty. MPD General Order No. 7 (Dec. 1, 1971). Of course, "[w]hatever the police actually say to the viewer, it must be apparent to him that they think they have caught the villain." Russell v. United States, 133 U.S. App. D.C. 77, 81, 408 F.2d 1280, 1284, cert. denied, 395 U.S. 928 (1969).

   b. Witnesses should view the suspect independently, out of presence of other witnesses.

   c. Fact that suspect is in handcuffs or in back of police cruiser does not violate due process. United States v. Hines, 147 U.S.

App. D.C. 249, 260, 455 F.2d 1317, 1328 (1971), cert. denied, 406 U.S. 975 (1972); Russell v. United States, 133 U.S. App. D.C. 77, 81, 408 F.2d 1280, 1284, cert. denied, 395 U.S. 928 (1969).

d. Fact that suspect is wearing clothing recognized by witness as being similar to that worn by offender is also irrelevant to due process violation. United States v. Washington, 144 U.S. App. D.C. 338, 341-342, 447 F.2d 308, 311-312 (1970); United States v. Cunningham, 141 U.S. App. D.C. 177, 436 F.2d 907 (1970). Young v. United States, 132 U.S. App. D.C. 257, 258, 407 F.2d 720, 721, cert. denied, 394 U.S. 1007 (1969). In Young, it was held permissible to require the suspect to don his own hat, trenchcoat and dark glasses which were similar to clothing described by the witness.

5. There is no requirement that there be exigent circumstances, preventing the utilization of a formal lineup procedure, before police can resort to a one-man on-the-scene show-up. United States v. Hines, 147 U.S. App. D.C. 249, 261, 455 F.2d 1317, 1329 (1971), cert. denied, 406 U.S. 975 (1972).

6. Time limits - While MPD General Order 304 No. 7 (Dec. 1, 1971) permits on-the-scene show-ups within one hour, the U.S. Court of Appeals has rejected the "purely artificial time approach" in favor of a more elastic standard. United States v. Perry, 145 U.S. App. D.C. 364, 449 F.2d 1026 (1971); see also Jones v. United States, 277 A.2d 95 (D.C. Ct. App. 1971). However, four hours has been held too long; the "nexus of time and place between offense and identification" had become "too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses." McRae v. United States, 137 U.S. App. D.C. 80, 87, 420 F.2d 1283, 1290 (1969). While McRae was based largely on absence of counsel and its rationale, thus, is no longer viable after Kirby v. Illinois, 406 U.S. 682 (1972), it is likely that the Court would develop a new due process rationale to exclude an on-scene viewing as much as four hours after the offense, in the absence of a compelling reason.

NOTE: MPD General Order No. 7 (Dec. 1, 1971) admonishes the officer to make written notes of statements made by each witness viewing the suspect and to be alert for spontaneous exclamations or excited utterances.

B. Spontaneous Confrontations

1. Examples: Robbery victim sees man she recognizes as robber walking down the street two weeks after offense and points him out to passing police officers. Rape victim drives around the area of the rape every day for a week looking for rapist, she sees him and goes to police station and brings officer back. A chance meeting in a courtroom hallway as both a witness and the accused arrive for court.

2. Since no formal charges have yet been brought in such case, suspect has no right to counsel. Kirby v. Illinois, 406 U.S. 682 (1972). (Prior to Kirby, spontaneous confrontation, like "Russell showup", was simply viewed as exception to Wade.)

3. Stovall not violated by accidental confrontation. If a witness should see the perpetrator at the police station, in the courthouse or on the street in the absence of a formal lineup and not close in time to the offense, the confrontation does not violate due process if the confrontation was not purposefully arranged by the police. United States v. Neverson, 150 U.S. App. D.C. 133, 140, 463 F.2d 1224, 1231 (1972); United States v. Conner, 149 U.S. App. D.C. 192, 462 F.2d 296 (1972); United States v. Evans, 141 U.S. App. D.C. 321, 326-327, 438 F.2d 162, 167-168 (1971). The key is the absence of deliberate police action.

   a. In Evans, the witness made a spontaneous street identification two weeks after a burglary and then notified the police who flashed a radio lookout which resulted in the apprehension of the defendant to the witness for identification. The court affirmed because the police officer acted reasonably in returning the defendant to the witness in order to confirm that the man arrested was the subject of the lookout.

   b. In United States v. Caldwell, 151 U.S. App. D.C. 84, 465 F.2d 669 (1972), it was pointed out that the spontaneous confrontation by witness A cannot serve as justification to return the suspect to the scene of the offense which occurred weeks earlier to be viewed by witness B. A lineup must be conducted for witness B to attend.

4. One-man confrontations arranged by the police in court, at preliminary hearing, at stationhouse, etc., may be subject to Stovall challenges because not spontaneous, having been arranged by police, and not close in time to the offense, or the accidental viewing. However, not all one-man show-ups are in violation of due process, as evidenced by the facts in Stovall.

   a. Identification of defendant in a courtroom before trial and without counsel is improper. See United States v. York, 138 U.S. App. D.C. 197, 426 F.2d 1191 (1969). However, in the factual context of many of the decided cases, courts have been able to find independent source for in-court identification.

   b. Many of the early cases were decided on the basis of a Wade violation rather than Stovall, but after Kirby v. Illinois, 406 U.S. 682 (1972), those early opinions, involving confrontations prior to institution of formal charges, are no longer valid.

   c. There is critical distinction between witness viewing everyone in courtroom and just the defendant alone in the cellblock.

But formal lineup is still preferable since there may not be enough similar-looking persons of same sex and race in informal courtroom viewing.

d. Assistant U.S. Attorneys in conducting citizen or police hearings with potential for prosecution, should be aware of possible suggestive pre-trial confrontations.

C. Emergencies

1. MPD General Order 304 No. 7 (Dec. 1, 1971) provides that if a victim of an assault is admitted to the hospital in critical condition, a suspect later arrested may be taken to the hospital for a one-man confrontation for identification purposes regardless of the time lapse between offense and arrest. The basis for this provision is the fact situation in Stovall v. Denno, 388 U.S. 293 (1967), where no due process violation was found.

2. OFFICE POLICY - formal lineups are still the rule. Informal lineups are not recorded and present too many proof problems as to what happened.

VII. Motion to Suppress

A. To preserve objection to identification, defendant should raise it pretrial, not during trial or for the first time on appeal. United States v. Thornton, 149 U.S. App. D.C. 203, 462 F.2d 307 (1972); Soloman v. United States, 133 U.S. App. D.C. 103, 408 F.2d 1306 (1969).

B. The two-part hearing.

1. Defendant must establish primary illegality (i.e., denial of right to counsel, or a suggestive confrontation).

2. If primary illegality established, prosecution must prove "independent source" by "clear and convincing evidence." United States v. Wade, 388 U.S. 218 (1967).

3. Even if court finds no primary illegality, the preferred procedure is for the court nevertheless to make a finding, at the time it rules on the challenge, as to whether an "independent source" exists to support an in-court identification. Clemons v. United States, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (en banc), cert. denied, 394 U.S. 964 (1969). This obviates need for remand for additional hearing, if the appellate court rules that there was a primary illegality.

C. Conduct of hearing

1. Hearing should be limited to only identification issue

2. Hearing is not for discovery or delay

3. Defendant must be permitted to testify for the limited purpose of describing the confrontation at identification. His testimony at suppression hearing cannot be used at trial by government in its case-in-chief, but may be used for impeachment under Harris v. New York, 401 U.S. 222 (1971), and in perjury and false declaration proceedings.

4. Hearing should generally be on day of trial, because of difficulty of getting witnesses to court pre-trial

VIII. Standing to Object

A. Rare issue since identification in question is usually that of defendant

B. Identification of cohorts

1. No standing to seek suppression of confession evidence taken from cohorts. Analogous rule may apply to identification of cohorts

2. Majority of court will probably rule Stovall rights are personal and cannot be raised by co-defendant. See, e.g., United States v. Bruton, 416 F.2d 310 (8th Cir. 1969)

IX. Admission of Suppressed Identification

A. Defense evidence

1. Defense can introduce a suppressed identification, although the prosecution is barred.

2. If the defense brings out some facts of the confrontation, prosecution may bring out the rest. United States v. Holiday, ___ U.S. App. D.C. ___, 482 F.2d 729 (1973); United States v. Winston, 145 U.S. App. D.C. 67, 447 F.2d 1236, (1971); Clemons v. United States, 133 U.S. App. D.C. 27, 34, 43, 408 F.2d 1230, 1237, 1246 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

B. Tactical dilemma
If defense brings out confrontation, may look to jury like prosecution tried to hide it.

X. Preparing Witnesses

A. Permissible and wise to tell witness why hearing is important. Witnesses can and should be shown lineup photograph or array of photographs to refresh recollection prior to hearing. "We do not believe that once an eyewitness has made a positive identification, counsel's attempt to review that identification through the use of photographs in a preparatory session falls within the bounds of (Simmons). Such an identification is neither 'initial' nor is it likely to lead to a misidentification, since the witness has already identified the suspect in

a constitutionally acceptable manner." United States v. Hines, 147 U.S. App. D.C. 249, 263, 455 F.2d 1317, 1331 (1971), cert. denied, 406 U.S. 975 (1972).

B. If the witness can, he should testify his identification is based solely on observations at the time of the crime and not on the confrontation.

C. Important considerations in witness' testimony.

1. Opportunity of witness to observe

2. Discrepancies between description given police and defendant's appearance

3. Mis-identification of another person

4. Failure to identify defendant

5. Lapse of time between crime and lineup

6. Prior photographic identification from large group of pictures

7. Exercise of unusual care to make observation

8. Prompt identification at first confrontation

9. Ability and training in identification (e.g., police)

XI. Factors Which May Erase Any Possible Prejudice

A. Very distinctive physical characteristics of the defendant

B. Prior acquaintance of the victim with the defendant

C. Strong corroborative evidence - e.g., victim's wallet on defendant, defendant's fingerprints at scene, hair samples of defendant, admissions of defendant, and other identification of witnesses, defendant caught at scene. The corroboration exceptions are based on policy, not logic - e.g., corroboration decreases chance of a mis-identification, not that corroboration erases the defects in the identification procedure.

XII. Appeal

A. On appeal, the appellate court may consider the testimony at both the pre-trial hearing and the trial in ruling on the existence of independent source. United States v. Kemper, 140 U.S. App. D.C. 47, 433 F.2d 1153 (1970); Hawkins v. United States, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969).

B. The appellate court may also consider whether the out-of-court identification or a tainted in-court identification was harmless beyond a reasonable doubt.

XIII. Other Modes of Identifications

A. Types of identifications

1. Handwriting

2. Fingerprints

3. Voiceprints

4. Hair samples

5. Blood specimens

B. There is no Fifth Amendment self-incrimination privilege against giving handwriting exemplars, fingerprints, voice exemplars, hair samples, blood specimens, etc. Gilbert v. California, 388 U.S. 263 (1967). Such evidence constitutes physical, not communicative or testimonial evidence.

C. Note: Because of the greater scientific precision of these modes of identification, the taking of exemplars is not a critical stage requiring the presence of counsel. Gilbert v. California, 388 U.S. 263 (1967); Lewis v. United States, 127 U.S. App. D.C. 269, 382 F.2d 817, cert. denied, 389 U.S. 963 (1967).

D. There is no Fourth Amendment protection against giving handwriting, fingerprints, voice exemplars, hair samples, or blood specimen. Thus a suspect is subject to grand jury subpoena to produce same. United States v. Mara, 410 U.S. 19 (1973). "The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." United States v. Dionisio, 410 U.S. 14 (1973).

E. Polygraph tests have been held unreliable by the United States Court of Appeals in Frye v. United States, 54 U.S. App. D.C. 46, 293 F.2d 1013 (1923), and therefore they are not admissible.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I. G: Identification: Law and Hearings

The purpose of this lecture is to familiarize the Assistant with the various aspects, problems, policies and case law that pertain to Identification.

OUTLINE OF PRESENTATION NOTES

I. Introduction

A. The problem

B. Judicial Remedy: Ruling inadmissible identification evidence in two instances.

1. Absence of Counsel (in certain instances)

2. Impermissively suggestive identification

II. Basic Supreme Court Cases

NOTES

A. The Wade-Gilbert Rule

United States v. Wade, 388 U.S. 218 (1967)
Gilbert v. California, 388 U.S. 263 (1967)

B. The Stovall Due Process Rule

Stovall v. Denno, 388 U.S. 293 (1967)
Neil v. Biggers, 409 U.S. 188 (1972)

1. Both line-ups and photographic viewings are judged by the same due process standard.

2. Two sources of suggestivity

NOTES

3. Relevant factors in determining whether confrontation was in violation of due process. See United States v. O'Connor, 282 F. Supp. 963 (D.D.C. 1968)

C. Independent Source

D. Admissibility v. Reliability

III. The Pattern of Exclusionary Rules Under Wade-Gilbert-Stovall

NOTES

A. Per Se rule for pre-trial confrontation

B. "Poisonous Fruit" rule for courtroom identifications

C. In-Court Identification

IV. Photographic Showings

A. United States v. Ash, 413 U.S. 300 (1973)

B. Suggestivity

NOTES

1. The validity of the use of photographic identifications to apprehend offenders was recognized by the Supreme Court in Simmons v. United States, 390 U.S. 377 (1968).

2. Suspect's photo should be grouped with a sufficient number of other photos.

3. Each witness viewing photos should do so out of the presence of other witnesses.

4. Keep name index inaccessible to identifying witnesses.

5. Police should keep adequate records of photographs so that exact group of photographs from which identification is made can be presented in court later.

United States v. Clemons, 144 U.S. App. D.C. 235, 445 F.2d 711 (1971).

United States v. Hamilton, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969).

NOTES

6. Court determines suggestivity

7. After photographic identification, police are not required to conduct confirmatory corporeal line-up in every case.

United States v. Hamilton, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969).

8. Photographs displayed to witnesses can be shown to the jury at trial, so long as they are not police "mug shots" which too clearly show that defendent has prior criminal record.

Barnes v. United States, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966).

V. Lineups

A. Fifth Amendment Right Narrow

1. United States v. Wade, 388 U.S. 218 (1967).

NOTES

2. Williams v. United States, 136 U.S. App. D.C. 158, 419 F.2d 740 (1969) (en banc).

B. Police and Office Procedure (See MPD General Order 304, No. 7 (Dec. 1, 1971)

1. At papering, AUSA should determine if there are witnesses who have not viewed suspect at scene or who do not know suspect. If so, and if witnesses were in position, they will probably be able to make identification; lineup should be requested.

2. Preparation of lineup order. Should be served on defense counsel and defendant in court.

3. Police are responsible for assuring presence of witnesses. U.S. Attorney's Office is responsible for assuring notification of defendant and defense counsel and for having AUSA present at lineup.

4. Lineups for adult Negro males are presently conducted Monday, Wednesday and Thursday evenings. Lineups for Whites, women and persons with unique physical characteristics (e.g., 300 pounds, 6'11") must be specially scheduled through the Major Violators Branch of the Police Department.

NOTES

6. Witnesses view lineup one at a time. Witnesses should not converse with each other or with police officer until all have viewed the lineup. Witnesses may request that participants speak certain words or turn a particular way. Police will have everyone in line comply.

7. At lineup, counsel for suspect is given date, time, place and nature of offense. Counsel is not given names of witnesses viewing lineup or any prior description of suspect given to police. United States v. Eley, 286 A.2d 239 (D.C. Ct. App. 1972); MPD General Order 304, No. 7, (Dec. 1, 1971).

8. Two photographs of lineup taken and preserved - one of line as set by police, one of line as viewed by witnesses after making changes suggested by defense counsel. Available for court.

9. Audio tape recording of entire proceeding preserved. May be subpoenaed for court. Video tape will also soon be available for court purpose.

10. Lineup sheet - listing participants, shield number, counsel appointed, substitute counsel (when applicable) and witness comments - available for court.

NOTES

C. Counsel

1. Purpose of counsel at lineup

2. Counsel cannot stop lineup by walking out

3. Counsel may not transform lineup into opportunity to interview government witnesses, United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970), for lineup is not to be converted into discovery device.

4. A defendant may waive his right to counsel, so long as waiver is knowing, intelligent, and voluntary.

5. Substitute counsel

NOTES

D. Suggestivity at lineups

1. Fairness depends on the facts. Lineup photograph is "decisive" on issue of suggestivity. United States v. Smallwood, U.S. App. D.C. 473 F.2d 98, 100 (1972).

2. Number in the line - generally less than eight persons.

3. Not suggestive to have suspects in line wear particular garb, speak particular words or turn in particular manner - so long as all participants are required to do so. United States v. Wade, 388 U. S. 218, 233 (1967).

4. Not suggestive for police to tell witness they may have the criminal in custody, so long as they do not specify which person in line the police suspect.

5. To avoid suggestivity, persons in line should be of same sex and race, approximately same height and weight, and if not all are clean shaven or have close - cropped hair, more than one should have facial hair or bush haircut. Clothing is irrelevant to suggestivity unless outlandish.

NOTES

E. Defense Request for Lineup

1. Lineup is an investigative tool supervised by the prosecutor. Decision to employ a lineup is within discretion of prosecutor who may instead choose to rely on other proper methods of identification. United States v. Eley, 286 A.2d 239 (D.C. Ct. App. 1972).

2. Trial court or magistrate is involved only because most lineups are held after court appearance, and court's aid is needed to assure presence of defendant as a condition of bond and to assure presence of counsel. However, grand jury subpoenas can also be issued for defendant to appear in lineup. United States v. Dionisio, 410 U.S. (1973). United States v. Mara, 410 U.S. 19 (1973).

3. It is within the discretion of the court to grant a defense request for lineup. United States v. Caldwell, 151 U.S. App. D.C. 84, 465 F.2d 669 (1972).

4. Office Policy

F. Anderson-Eley Lineups NOTES

1. Anderson-Eley lineup is one in which defendant is viewed by witnesses to offense with which he is formally charged plus witnesses to other offenses.
United States v. Eley, 286 A.2d 239 (D.C. App. (1972)
United States v. Anderson, ___U.S. App. D.C. ___, 490 F.2d 785 (1974).

2. Government need make no specific proffers that other offenses (for which defendant is to be viewed) involved similar modus operandi.

3. Anderson-Eley lineup should be carefully distinguished from the lineup order obtained in Wise v. Murphy, 275 A.2d 205 (D.C. Ct. App. 1971) (en banc).

4. An illegal arrest may taint a subsequent identification and result in suppression.
United States v. Johnson, 147 U.S. App. D.C. 31, 40, 452 F.2d 1363, 1372 (1971).

VI. One-Man Confrontations: On-the-Scene and Spontaneous

A. On-the-Scene

1. If suspect is arrested within a short time of offense and within an area reasonably proximate to the scene of the crime, he may be returned to the scene of the offense, or the eyewitnesses may be transported to the scene of the arrest, for the identification of the suspect.

NOTES

2. No counsel is required by Sixth Amendment in such cases because:

   Adversary criminal proceedings have not begun
   Kirby v. Illinois, 406 U.S. 682 (1972)

   Prompt on-the-scene show-ups have been viewed as exceptions to the Wade requirement under Russell.

3. "Russell Showups" approved for two reasons.

4. "Russell Showup" is governed by due process considerations of Stovall and must not be impermissively suggestive.

5. There is no requirement that there be extigent circumstances, preventing the utilization of a formal lineup procedure, before the police can resort to a one-man on-the-scene show-up.

6. Time limits - While MPD General Order 304, No. 7 (Dec. 1, 1971) permits on-the-scene show-ups within one hour, the U.S. Court of Appeals has rejected the "purely artificial time approach" in favor of a more elastic standard.
   United States v. Perry, 145 U.S. App. D.C. 364, 449 F.2d 1026 (1971)

NOTES

B. Spontaneous Confronations

1. Examples:

Robbery victim sees man she recognizes as robber walking down the street.

Chance meeting in courtroom hallway as both a witness and the accused arrive for court.

2. Since no formal charges yet have been brought in such cases, suspect has no right to counsel. Kirby v. Illinois, 406 U.S. 682 (1972).

3. Stovall not violated by confrontation.

4. One-man confrontations arranged by the police in court, at preliminary hearing, at station house, etc., may be subject to Stovall challenges, because not spontaneous. However, not all one-man show-ups are in violation of due process, as evidenced by the facts in Stovall itself.

C. Emergencies

1. MPD General Order 304, No. 7 provides that if a victim of an assault is admitted to the hospital in critical condition, a suspect later arrested may be taken to the hospital for a one-man confrontation for identification regardless of the time lapse between offense and arrest. Stovall v. Denno, 388 U.S. 293 (1967).

NOTES

2. Office Policy - formal lineups are still the rule. Informal lineups are not recorded and present too many proof problems as to what happened.

VII. Motion to Suppress

A. To preserve objection to identification, defendant should raise it pre-trial, not during trial or for the first time on appeal.
United States v. Thornton, 149 U.S. App. D.C. 203, 462 F.2d 307 (1972).

B. The Two-Part Hearing

1. Defendant must establish primary illegality.

2. If established, prosecution must prove "independent source" by "clear and convincing evidence."

3. Even if court finds no primary illegality, the preferred procedure is for the court nevertheless to make a finding, at the time it rules on the challenge, as to whether an "independent source" exists to support an in-court identification. Clemons v. United States, 133 U.S. App. D.C. 27, 43, 408 F.2d 1230, 1237 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

NOTES

D. Conduct of Hearing

VIII. Standing to Object

A. Rare issue since identification in question is usually defendant.

B. Identification of Cohorts

United States v. Bruton, 415 F.2d 310 (8th Cir. 1969).

IX. Admission of Suppressed Identification

A. Defense Evidence

1. Defense can introduce a suppressed identification althouth the prosecution is barred.

2. If defense brings out some facts of the confrontation, prosecution may bring out the rest.
United States v. Holiday, ___U.S. App. D.C.___, 482 F.2d 729 (1973).

NOTES

B. Tactical Dilemma - If defense brings out confrontation, may look like prosecution tried to hide it.

X. Preparing Witnesses

A. Witnesses can and should be shown lineup photograph or any of photographs to refresh recollection prior to hearing.
United States v. Hines, 147 U.S. App. D.C. 249, 263 455 F.2d 1317, 1331 (1971), cert. denied, 406 U.S. 975 (1972).

B. If witness can, he should testify his identification is based solely on observations at the time of the crime and not on the confrontation.

C. Important considerations in witness' testimony.

XI. Factors Which May Erase Any Possible Prejudice

A. Very distinctive physical characteristics of defendant.

NOTES

B. Prior acquaintance of the victim with the defendant

C. Strong corroborative evidence

XII. Appeal

A. On appeal, the appellate court may consider the testimony at both the pre-trial hearing and the trial in rating on the existence of an independent source.
United States v. Kemper, 140 U.S. App. D.C. 47, 433 F.2d 1153 (1970).

B. The Appellate court may also consider whether the out-of-court identification or a tainted in-court identification was harmless beyond a reasonable doubt.

XIII. Other Modes Of Identification

A. Types

1. Handwriting

2. Fingerprints

3. Voiceprints

4. Hair samples

5. Blood specimens

NOTES

B. There is no Fifth Amendment self-incrimination privilege against giving handwriting, fingerprint, or voice exemplars Gilbert v. California, 388 U.S. 263 (1967).

C. The taking of exemplars is not a critical stage requiring the presence of counsel.
Gilbert v. California, 388 U.S. 263 (1967).

D. There is no Fourth Amendment protection against giving such exemplars. Thus a suspect is subject to grand jury subpoenaes to produce same.
United States v. Mara, 410 U.S. 19 (1973).

E. Polygraph tests have been held unreliable by the U.S. Court of Appeals in Frye v. United States, 54 U.S. App. D.C. 46, 293, F.2d 1013 (1923), and therefor they are not admissible.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I. H: Confessions: Law and Hearings

DURATION: 2 hours

The purpose of this lecture is to familiarize Assistants with the law and tactics surrounding the admission into evidence of confessions and their use for impeachment at trial.

OUTLINE OF PRESENTATION:

I. Introduction: Confessions as probative evidence and rationale behind their exclusion

A. Rule #1: If you are assigned a case in which the defendant has confessed, you probably should not have to worry about its admissibility at trial; you should be able to negotiate a plea.

B. Rule #2: A confession is admissible at trial as evidence of the defendant's guilt unless:

1. It was involuntarily given. Bram v. United States, 168 U.S. 532 (1897); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Jackson v. Denno, 378 U.S. 368 (1964).

2. It was obtained in violation of the defendant's Fifth Amendment right against self-incrimination, Miranda v. Arizona, 384 U.S. 436 (1966), unless:

The defendant knowingly waived his right. Miranda v. Arizona, supra; Frazier v. United States, 136 U.S. App. D.C. 180, 419 F2d 1161 (1969).

3. It was obtained in violation of the defendant's Sixth Amendment right to counsel. Miranda v. Arizona, supra; Escobedo v. Illinois, 378 U.S. 478 (1964), unless:

The defendant knowingly waived his right. Miranda v. Arizona, supra.

4. It was obtained after unnecessary delay between the defendant's arrest and his presentation before a magistrate. Mallory v. United States, 354 U.S. 499 (1957); 18 U.S.C. §3501.

5. It was made after indictment in the absence of counsel, Massiah v. United States, 377 U.S. 201 (1964), unless:

   a. The defendant waived his right to counsel. United States v. Crisp, 435 F.2d 354 (7th Cir. 1970); United States v. Tucker, 435 F.2d 1017, (9th Cir. 1970); People v. Lopez, 28 N.Y. 2d 23, 268 N.E. 2d 628, 319 N.Y.S. 2d 825 (1971).

   b. The defendant initiated the interview leading to his confession. United States v. Tucker, supra.

6. The confession was made during a pretrial hearing of a motion evidence on Fourth Amendment grounds. Simmons v. United States, 300 U.S. 77 (1968); Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967), unless:

   The defendant does not object to the admission of the confession. Simmons v. United States, supra.

7. It was made in court at the time of the taking of a plea of guilty, subsequently permitted to be withdrawn. Kercheval v. United States, 274 U.S. 220 (1927).

8. It was obtained as the result of an illegal arrest or other illegal activity. Wong Sun v. United States, 371 U.S. 471 (1963).

C. Rule #3: Although not admissible as evidence of the defendant's guilt, a voluntary confession is admissible at trial to impeach the defendant if he takes the stand even though:

   1. It was obtained in violation of the defendant's Fifth Amendment right against self-incrimination. Harris v. New York, 401 U.S. 222 (1971).

   2. It was obtained in violation of the defendant's Sixth Amendment right to counsel. Harris v. New York, supra.

   3. It was made during a pretrial hearing of a motion to suppress evidence on Fourth Amendment grounds. See Walder v. United States, 347 U.S. 62 (1954); Harris v. New York, supra.

   QUERY whether a statement obtained in violation of Mallory (during unnecessary delay) or Massiah (after indictment in absence of counsel) is admissible to impeach a defendant? See Harris v. New York, supra; Walder v. United States, supra; Pettyjohn v. United States, 136 U.S. App. D.C. 69, 419 F.2d 651 (1969), cert. denied, 397 U.S. 1058 (1970).

D. Rule #4: In arguing why a confession should be admitted, it may be helpful to understand why they are suppressed:

1. Because involuntary confessions are thought to be "inherently unreliable," Lisenba v. California, 314 U.S. 219 (1941).

2. Because police misconduct in obtaining confessions must be deterred. Jackson v. Denno, 378 U.S. 368 (1964); Michigan v. Tucker, ____ U.S. ____, 42 U.S.L.W. 4887 (U.S. June 10, 1974).

3. Because confessions should be admissible only when made by a defendant who is aware of his constitutional rights to counsel and against self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966).

THEREFORE, where a confession is alleged to have been illegally obtained for one or more reasons (e.g., involuntary, unnecessary delay, Miranda violations, etc.) which are apparently substantial, you might argue in favor of admissibility after demonstrating the statement in question to have been (a) reliable, and (b) obtained in accordance with proper police procedures, and (c) made by a defendant who understood his constitutional rights to counsel and against self-incrimination.

E. Rule #5: If you decide to seek the admission in evidence of a questionable confession, be sure that you need it; admission of an illegally obtained confession is unlikely to be found to be harmless error on appeal in the event you obtain a conviction. Where the issue is close, it may be wise to use the confession only to impeach the defendant if he testifies.

F. Rule #6: It is almost always to the government's advantage to have the admissibility of a questionable confession determined before trial, thereby preserving pretrial appeal rights. See 23 D.C. Code §104.

II. Voluntariness As Waiver of Constitutional Protection

A. Burden of raising issue of admissibility is on defendant; but if issue exists, advise Court and recommend pretrial Jackson v. Denno hearing to avoid error at trial and preserve government's right to appeal in the event of an adverse ruling.

B. Burden of proving voluntariness is on the government:

1. By a preponderance of the evidence in Superior Court. Lego v. Twomey, 404 U.S. 477 (1972); Hawkins v. United States, 304 A.2d 279 (D.C. Ct. App. 1973).

2. By a preponderance of the evidence in the District Court. The U.S. Court of Appeals has accepted the rule of Lego v. Twomey, supra, as applicable in the District Court. United States v. Bernett, D.C. Cir. No. 71-1465, decided January 10, 1974, slip op. at 38, n.141.

C. Proving voluntariness: "Totality of the Circumstances". Show that:

1. Defendant was in good physical condition at the time of his confession--he was not ill, intoxicated, under the influence of drugs nor the subject of physical abuse by the police. Brown v. Mississippi, 297 U.S. 278 (1936); See Culombe v. Connecticut, 367 U.S. 568 (1961). But see United States v. Bernett, supra (admission of intoxicated defendant, made when the police had merely asked for his name, held voluntary since essence of voluntariness was absence of coercion).

2. Defendant was not suffering from any mental illness or disability at the time of his statement. See Culombe v. Connecticut, supra (confession from defendant who was mental defective, subject to 5 days of detention and interrogation, and use of his family by police, held involuntary).

3. Booking, lineup or other photographs of defendant taken shortly after confession refute allegations of physical abuse or coercion.

4. Interrogation was for a short period of time, and confession was elicited relatively quickly, without any resistance by defendant to process of interrogation. Haynes v. Washington, 373 U.S. 503 (1968); Leyra v. Denno, 347 U.S. 556 (1954); Harris v. South Carolina, 338 U.S. 68 (1949); Watts v. Indiana, 338 U.S. 49 (1949).

5. No promises were made nor inducements given by the police to elicit confession. Haynes v. Washington, supra; Lynumn v. Illinois, 372 U.S. 528 (1963).

   NOTE: Pressure resulting from informing the defendant of other incriminating evidence, or taking scientific samples from defendant, is not compulsion. See United States v. Poole, infra.

6. Defendant was warned of his Miranda rights. 18 U.S.C. §3501; United States v. Poole, D.C. Cir. No. 72-1533, decided January 17, 1974.

7. Defendant's age and maturity increased his capacity to resist any alleged police pressure. Gallegos v. Colorado, 370 U.S. 49 (1962). But youthfulness alone is not a determinative factor in assessing voluntariness. United States v. Poole, supra; In re J.F.T., D.C. Ct. App. No. 7475, decided June 4, 1974.

8. Defendant is an intelligent, educated individual. Crooker v. California, 357 U.S. 433 (1958); United States v. Cooper, D.C. Cir. No. 73-1745, decided June 6, 1974.

9. Defendant is an experienced criminal, wise in the ways of the police. Stein v. New York, 346 U.S. 156 (1953); United States v. Poole, supra; In re J.F.T., supra.

10. Location of questioning was not calculated to intimidate or pressure defendant. United States v. Bernett, supra; United States v. Cooper, supra.

11. Defendant was promptly brought before a magistrate following his arrest. 18 U.S.C. §3501.

12. Defendant's confession was spontaneous and not in response to questioning.

13. Defendant was generally afforded civil treatment by the police including meals and rest at reasonable hours, opportunities to call attorney or friends and relatives, needed medical care, etc.

14. Interrogation was not at an unreasonable hour.

15. Circumstances of the arrest negated any inference of fear of the police. United States v. Poole, supra.

16. Defendant invited police into his residence to initiate questioning. United States v. Cooper, supra.

D. If the confession is found involuntary and suppressed, consider a pretrial appeal under 23 D.C. Code §104.

III. Unnecessary Delay

A. Law

1. Rule 5(a), Fed. R. Crim. P.: Police officer, after making arrest, must take defendant before nearest available magistrate without unnecessary delay.

2. Mallory v. United States, 354 U.S. 499 (1957): Confession elicited from a defendant during a period of unnecessary delay between arrest and presentment is inadmissible because obtained in violation of Fed. R. Crim. P. 5(a).

3. 18 U.S.C. §3501: Confession is admissible if voluntarily given, and time between arrest and presentment is only one factor to be considered in determining voluntariness. A delay of less than six hours between arrest and presentment is presumptively not an index of involuntariness.

B. Burden of raising issue is on the defendant, who must show:

1. He was arrested. Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1967).

2. There was delay following the arrest. Fuller v. United States, supra.

3. The delay, unless lengthy, was unreasonable. Pierce v. United States, 91 U.S. App. D.C. 19, 197 F.2d 189 (1952).

C. Burden of persuasion as to unreasonableness of delay is on the defendant. Green v. United States, 128 U.S. App. D.C. 408, 389 F.2d 949 (1967); Pierce v. United States, supra; Trilling v. United States, 104 U.S. App. D.C. 159, 260 F.2d 677 (1958) (en banc).

D. To rebut proof of arrest followed by unnecessary delay, show that:

1. Defendant had not been placed under arrest at the time of his statement.

2. If he had been placed under arrest, some delay was necessary.

a. To locate a magistrate (particularly where arrest occurs at night, on a holiday or weekend).

b. To verify his story. Mallory v. United States, supra.

c. To complete normal police booking procedures. Goldsmith v. United States, 107 U.S. App. D.C. 305, 277 F.2d 335 (1960); Holt v. United States, 280 F.2d 273 (8th Cir. 1960).

d. To complete other legitimate police procedures (e.g. to return defendant to scene for Wise - type identification procedure if he was arrested shortly after offense.)

3. Delay occurred only after threshold confession of guilt by defendant. Fuller v. United States, supra; Walton v. United States, 334 F.2d 343 (10th Cir. 1964).

4. Delay was less than six hours. 18 U.S.C. §3501.

5. Defendant did not object to delay. Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964).

6. Defendant was adequately warned and intelligently waived rights to counsel and to remain silent. United States v. Poole, supra.

E. If the confession is found to have been elicited during a period of unreasonable delay and suppressed, consider a pretrial appeal under 23 D.C.C. §104.

IV. Miranda v. Arizona, 384 U.S. 436 (1966): Rights to Counsel and Against Self-Incrimination

A. Held: Statements elicited from a defendant by law enforcement officers during custodial interrogation may not be introduced in evidence by the prosecution unless, prior to the questioning, the defendant was warned of his right to remain silent, that anything he said could be used against him, that he had a right to an attorney, and that if he could not afford one, counsel would be

appointed. The defendant may waive these rights, provided the waiver is voluntary, knowing and intelligent.

B. Issues where statement is alleged to have been elicited from defendant in violation of his Miranda rights:

1. Was defendant in custody at time of statement?

2. Did statement result from interrogation?

3. If the defendant's statement resulted from custodial interrogation, was he adequately warned of his rights before questioning?

4. If defendant's statement occurred after adequate warning of his rights, was his waiver of rights voluntary, knowing and intelligent?

C. Burden of raising issue is on the defendant, who must show that:

1. Law enforcement officers obtained statements from him.

2. The statements were obtained during custodial interrogation. NOTE: If defendant takes stand to establish custodial interrogation, utilize cross-examination to establish waiver.

D. Burden of persuasion is on the government to show that:

1. Miranda warnings were adequate.

2. Defendant voluntarily, knowingly and intelligently waived his right against self-incrimination and, if counsel was not present, his right to counsel.

E. To rebut proof that defendant was in custody at time statement was elicited from him, show that:

1. Statement was made in non-coercive surroundings, such as the defendant's home. McMillian v. United States, 399 F.2d 478 (5th Cir. 1968); Archer v. United States, 393 F.2d 124 (5th Cir. 1968); Evans v. United States, 377 F.2d 535 (5th Cir. 1967); United States v. Cooper, supra; United States v. Bernett, D.C. Cir. No. 71-1465, decided January 10, 1974 (a friend's apartment); O'Toole v. Scafati, 386 F.2d 168 (1st Cir. 1967) (place of business); Miranda v. Arizona, supra.; Green v. United States, 234 A.2d 177 (D.C. Ct. App. 1967) (on street or at the scene of a crime); Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968) (in a car stopped for a traffic violation).

2. Statement was made at a time when the defendant was not a suspect. United States v. Delamarra, 275 F. Supp. 1 (D.D.C. 1967).

3. Statement was made at a reasonable time of day under the circumstances. Cf. Orozco v. Texas, 394 U.S. 324 (1969).

4. Statement was made in presence of defendant's family or friends. Miranda, 384 U.S. at 445, 461, 478 n.46. See also Archer v. United States, supra.

5. Defendant was not under physical restraint at time of statement. United States v. Fiorillo, 376 F.2d 180 (2d Cir. 1967); United States v. Gallagher, 430 F.2d 1222 (7th Cir. 1970). Cf. United States v. Robinson 142 U.S. App. D.C. 43, 439 F.2d 553 (1970).

6. No weapon was held on defendant at time of statement.

7. Defendant had not been searched, fingerprinted, photographed or "booked" at time of statement. Hicks v. United States, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

8. Police told defendant he was not under arrest and was free to leave prior to defendant making statement. Lucas v. United States, 408 F.2d 835 (9th Cir. 1969); Archer v. United States, supra; United States v. Cortez, 425 F.2d 453 (6th Cir. 1970); United States v. Tobin, 429 F.2d 1261 (8th Cir. 1970).

9. Police were courteous and deferential towards defendant. State v. Bode, 108 N.J. Sup. 363, 261 A.2d 396 (N.J. App. 1970); Commonwealth v. Willman, 434 Pa. 489, 255 A.2d 534 (1969).

10. Interrogation eliciting statement was brief. Allen v. United States, supra.

11. Defendant was not confronted with evidence against him nor were his denials discounted by police. Cf. United States v. Robinson, supra; United States v. Phelps, 443 F.2d 246 (5th Cir. 1971).

12. Defendant sought out police or initiated interview with them. But see United States v. Robinson, supra. Cf. Pettyjohn v. United States, 136 U.S. App. D.C. 69, 419 F.2d 651 (1969).

13. Defendant was not arrested following statement. Evans v. United States, supra; United States v. Manglona, 414 F.2d 642 (9th Cir. 1969); United States v. Scully, 415 F.2d 680 (2d Cir. 1969).

14. Defendant's statement was made to undercover officer or other person whom defendant did not know was law enforcement officer. Hoffa v. United States, 385 U.S. 293 (1966).

15. Defendant's statement was made during a "stop and frisk." White v. United States, 222 A.2d 843 (D.C. Ct. App. 1966); Green v. United States, 234 A.2d 177 (D.C. Ct. App. 1967); Keith v. United States, 232 A.2d 92 (D.C. Ct. App. 1967).

16. Statement was made before or immediately after arrest in response to question directed to police protection. State v. Lane, 77 Wash. 2d 860, 467 P.2d 304 (1970).

17. Defendant invited police into his residence to initiate questioning. United States v. Cooper, supra.

F. To rebut proof that statement resulted from interrogation, show that:

1. Statement was volunteered by defendant in absence of any police questioning. Pettyjohn v. United States, supra; Miranda, 384 U.S. at 478; Hicks v. United States, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967); United States v. McNeil, 140 U.S. App. D.C. 3, 433 F.2d 1109 (1969); Bosley v. United States, 138 U.S. App. D.C. 263, 426 F.2d 1257 (1970).

2. Statement volunteered by defendant was non-responsive to police question (e.g., "What is your name?" followed by response, "I'm sorry I killed her."). Parson v. United States, 387 F.2d 944 (10th Cir. 1968); United States v. Bernett, D.C. Cir. No. 71-1465, decided January 10, 1974.

3. Statement was made among defendant's friends, relatives or codefendants and was merely overheard by police. Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1967).

4. Statement was in response to a "threshold" or clarifying question. People v. Savage, 102 Ill. App. 2d 477, 242 N.E. 2d 446 (1968); United States v. Hopkins, 433 F.2d 1041 (5th Cir. 1970). But see Botts v. United States, 310 A.2d 237 (D.C. Ct. App. 1973).

5. Statement was in response to a routine "booking" question. Toohey v. United States, 404 F.2d 907 (9th Cir. 1968); Allen v. United States, supra. But see Proctor v. United States, 131 U.S. App. D.C. 241, 404 F.2d 819 (1968).

6. Statement was in response to "spontaneous" question. United States v. Ganter, 436 F.2d 364 (7th Cir. 1970).

7. Statement was made in response to an emergency question (e.g., to aid medical treatment of victim). People v. Paton, 255 Cal. App. 2d 347, 62 Cal. Rptr. 865 (1967); State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972).

8. Statement was made in response to a declaratory statement rather than a question by police. Bosley v. United States, supra.

G. To prove defendant was adequately warned, show that:

1. Prior to statement police officer read defendant warning as to his rights from PD 47, and defendant initialed PD 47 form which officer identifies and government moves into evidence.

2. If PD 47 form was not initialed by defendant, ask police officer to read from a PD 47 form and elicit testimony that form is identical in content to that read to defendant.

3. Warnings were given in a clear, unhurried manner.

4. If defendant does not speak English, warnings were given in language he understands. DeLaFe v. United States, 413 F.2d 543 (5th Cir. 1969).

5. Defendant was given opportunity to read warnings.

6. Defendant was warned a number of times. United States v. Poole, D.C. Cir. No. 72-1533, decided January 17, 1974.

NOTE: Warnings held adequate in United States v. Frazier, 155 U.S. App. D.C. 135, 476 F.2d 891 (1973) (en banc); United States v. McNeil, supra; Hawkins v. United States, 304 A.2d 279 (D.C. Ct. App. 1973). Warnings held "questionable" in United States v. Martin, and found inadequate in Walker v. United States, 250 A.2d 553 (D.C. Ct. App. 1969) (police failed to tell defendant statement could be used in court).

H. To prove defendant's waiver of his rights was knowing, voluntary and intelligent, show that:

1. Defendant signed written waiver of rights. United States v. Poole, supra.

2. Defendant verbally acknowledged that he understood his rights and was willing to speak. Mitchell v. United States, 140 U.S. App. D.C. 209, 434 F.2d 483 (1970); United States v. Frazier, supra; United States v. Howard, 152 U.S. App. D.C. 258, 470 F.2d 406 (1972). See United States v. Poole, supra (defendant impatient with warnings); Rosser v. United States, 313 A.2d 876 (D.C. Ct. App. 1974) (defendant ignored warnings on purpose); In re J.F.T.; supra (defendant said he knew rights and did not need to be warned); United States v. Cooper, supra (defendant refused to sign written waiver but said he would answer questions of his choosing).

3. Defendant stated he knew his rights and did not need to be warned.

NOTE: While convincing evidence of knowledge and waiver, this may be insufficient without actual warnings. See DuPont v. United States, 259 A.2d 355 (D.C. Ct. App. 1969). But see In re J.F.T., supra.

4. Defendant's responses to questions reflected knowledge of rights. In re J.F.T., supra (defendant said he would answer "some" questions).

5. Defendant's wealth precluded need for warnings as to right to appointed counsel. Miranda, 384 U.S. at 473 n.43, United States v. Messina, 388 F.2d 393 (5th Cir. 1968).

6. Defendant had previously been arrested and warned of rights. Jordan v. United States, 421 F.2d 493 (9th Cir. 1970); United States v. Poole, supra; Rosser v. United States, supra.

7. Counsel was present at time of statement. Miranda, 384 U.S. at 436, 466.

8. Defendant was not under influence of drugs or alcohol at time of waiver. United States v. Welsh, 417 F.2d 369 (5th Cir. 1969); United States v. Poole, supra.

9. Defendant testified he understood his rights. United States v. Poole, supra.

10. Defendant did not ask for counsel; if he did and interrogation nevertheless continued, any confession thereafter obtained is inadmissible. In re R.A.H., 314 A.2d 133 (D.C. Ct. App. 1974).

11. No allegation of coercion or trickery. Rosser v. United States, supra.

12. No delay between warning and the statement. Rosser v. United States, supra.

I. If confession is found to have been elicited in violation of Miranda and therefore suppressed, consider:

1. Requesting a Jackson v. Denno hearing to establish voluntariness of confession so that it may be used to impeach the defendant if he takes the stand. Harris v. New York, 401 U.S. 222 (1971).

2. A pretrial appeal under 23 D.C. Code §104.

3. Whether information obtained as a result of the confession may nevertheless be admissible. Michigan v. Tucker, supra.

V. Confessions of Codefendants: The Bruton Problem

A. The confession of a codefendant implicating a defendant may not be admitted in evidence in a joint trial where the codefendant declarant does not take the stand to testify. Bruton v. United States, 391 U.S. 123 (1968); Smith v. United States, 312 A.2d 781 (D.C. Ct. App. 1973).

But see United States v. Lemonakis, ____ U.S. App. D.C. ____, 485 F.2d 941 (1973), where the court distinguished Bruton as inapplicable when the statements were not contained in a confession but in tape recorded conversations with an informant of questionable credibility, and the court found that the statements were more consistent with the defense than incriminating.

B. When Bruton does not apply:

1. If the codefendant takes the stand and is available for cross-examination, Bruton becomes inapplicable because the defendant secures his right to confrontation. Jackson v. United States, 142 U.S. App. D.C. 19, 439 F.2d 529 (1970); Wallace v. United States, 134 U.S. App. D.C. 50, 412 F.2d 1097 (1969). But see Hamilton v. United States, 139 U.S. App. D.C. 368, 433 F.2d 526 (1970). Even if the co-defendant denies making the statement and therefore cannot be cross-examined effectively, Bruton is still inapplicable. Nelson v. O'Neill, 402 U.S. 622 (1970).

2. Where the codefendant's confession makes no reference to the defendant or such reference was deleted, it may be admissible. Calloway v. United States, 130 U.S. App. D.C. 273, 399 F.2d 1006 (1968).

3. Bruton may not apply where a codefendant's statement implicating the defendant is admissible against the defendant as an exception to the hearsay rule. For the co-conspirator exception to the hearsay rule see Dutton v. Evans, 400 U.S. 74 (1970).

4. Apparently, Bruton does not apply in non-jury trials. See United States v. Castro, 413 F.2d 891 (1st Cir. 1969).

C. Bruton rights may be waived by the conduct of the defendant or his counsel. If counsel asks a witness about statements made by co-defendant, he opens the door to admission of other statements of the co-defendant. United States v. Auclair, 420 F.2d 486 (9th Cir. 1969). Similarly, if the defense of entrapment is offered and the defendant relies on the statements and actions of a deceased accomplice, the government can introduce other statements which that accomplice made to the FBI. United States v. Arceneaux, 437 F.2d 924 (9th Cir. 1971).

D. Violation of Bruton right may be considered harmless error on appeal. Hamilton v. United States, supra.

E. If you are faced with a Bruton problem, consider:

1. Not using the confession of one of multiple defendants.

2. Moving for a severance of defendants.

3. Submitting confession for admission in evidence for joint trial, deleting all references to co-defendants.

4. Having officer to whom confession was made testify as to what he was told, omitting references to co-defendants.

5. Whether co-defendant's confession might be admissible under a limited admissibility theory. See Miller v. Cox, 457 F.2d 700 (4th Cir. 1972) (co-defendant's statement admissible to show defendant's silence as an admission against interest); Harris v. New York, 401 U.S. 222 (1971) (impeachment).

VI. Instructions -- See "Redbook", Criminal Jury Instructions for the District of Columbia (D.C. Bar Assn., 2d Ed., 1972)

A. Evaluation of confessions as substantive evidence: No. 2.46, Alternative B (Alternative A no longer applicable in this jurisdiction. See United States v. Bernett, supra, and Hawkins v. United States, supra.)

B. Evaluation of confessions admitted to impeach defendant. No. 1.09.

C. Confession of codefendant. No. 2.48.

D. Corroboration of confession. No. 2.47.

E. Where police officer testifies as to defendant's confession, consider instruction on "police officer's testimony." No. 2.25.

F. Where defendant testifies and denies making confession, consider instructions on:

1. Defendant as a witness. No. 2.27.

2. Impeachment by prior inconsistent statements. No. 1.06.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I. H: Confessions: Law and Hearings

The purpose of this lecture is to familiarize Assistants with the law and tactics surrounding the admission into evidence of confessions and their use for impeachment at trial.

OUTLINE OF PRESENTATION NOTES

I. Introduction: Confessions as probative evidence and the rationale behind their exclusion

A. Confession should induce plea of guilty

B. When confessions are not admissible at trial as evidence of the defendant's guilt

C. When confessions inadmissible to prove the defendant's guilt are admissible to impeach his testimony

D. Why confessions are suppressed

E. Be careful with questionable confessions!

F. Appealing orders suppressing confessions

- 23 D.C. Code §104

II. Voluntariness

A. Raising the issue

B. Proving voluntariness

1. The standard

- Lego v. Twomey, 404 U.S. 477 (1972).

- Hawkins v. United States, 304 A.2d 279 (D.C. Ct. App. 1973)

C. Circumstances showing voluntariness

NOTES

D. Consider appealing order suppressing confession found to be involuntary

III. Unnecessary Delay -- The Mallory rule

A. The Law

1. Rule 5(a), Fed. R. Crim. P.

2. Mallory v. Unites States, 354 U.S. 499 (1957)

3. 18 U.S.C. §3501

B. Raising the issue

C. Burden of Persuasion

D. Showing that delay between arrest and presentment was not unreasonable

E. Consider appealing order suppressing confession found to have been obtained during period of unreasonable delay

IV. Rights to counsel and against self-incrimination: Miranda v. Arizona, 384 U.S. 436 (1966)

A. Miranda: the holding

B. Miranda: the issues

NOTES

C. Raising Miranda issues

D. The government's burden

E. Showing the defendant was not in custody at the time of his statement

F. Showing the defendant's statement did not result from interrogation

G. Showing the defendant was adequately warned

H. Showing the defendant knowingly, intelligently and voluntarily waived his rights

I. When confession is found to have been obtained in violation of Miranda

V. Confessions of codefendants: the Bruton problem

A. Bruton v. United States, 391 U.S. 123 (1968): the holding

B. When Bruton does not apply

C. Waiver of Bruton rights

D. Harmless error

E. If faced with a Bruton problem

NOTES

VI. Instructions -- See "Redbook", Criminal Jury Instructions for the District of Columbia (D.C. Bar Assn., 2d Ed., 1972).

A. Evaluation of confessions as substantive evidence:
No. 2.46.

B. Evaluation of confessions admitted to impeach defendant.
No. 1.09.

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No. 2.48.

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DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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DISCUSSION NOTES

TOPIC I.I: Discovery

DURATION: 1 hour

The purpose of this discussion is to cover the statutory and case law pertaining to discovery demands by the defense as well as the discovery demands that can be made on the defense by the Government. (Note that the Superior Court Rules of Criminal Procedure are based on the Federal Rules and follow roughly the same numbering.)

OUTLINE OF PRESENTATION

I. Statutory and Case Authority

A. Statutes and Court Rules

1. 18 U.S.C. §3500 (Jencks Act).

2. Rule 16, Fed. R. Crim. P. (Discovery and Inspection).

3. Rule 16, Super. Ct. Crim. R. (Discovery and Inspection) (identical to Fed. R. Crim. P. 16)

4. Rule 2-5 (Effective August 1, 1973), U.S. Dist. Ct. Crim. R. (Informal Discovery and Alibi).

5. Rule 16-I, Super. Ct. Crim. R. (Defense and Alibi).

6. Rule 16-II, Super. Ct. Crim. R. (Informal Discovery).

B. Cases

1. Brady v. Maryland, 373 U.S. 83 (1963).

2. Levin v. Katzenbach, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966).

3. Ellis v. United States, 120 U.S. App. D.C. 271, 345 F.2d 961 (1965).

4. United States v. Skeens, 145 U.S. App. D.C. 404, 449 F.2d 1066 (1971).

C. Other

U.S. Attorney's Office Trial Manual, "Discovery" p. 379.

II. Pre-trial Discovery

A. Informal Discovery

1. Rule 16-II, Super. Ct. Crim. R. and Rule 2-5(a), U.S. Dist. Ct. Crim. R. require defense counsel to certify informal discovery has failed before he may file a discovery motion with the Clerk.

2. Informal discovery is the usual situation.

B. Brady v. Maryland, 373 U.S. 83 (1963).

1. Evidence which tends to exculpate defendant or mitigate punishment must be disclosed.

2. Brady material must be turned over a reasonable period before trial so defense counsel can utilize information.

3. Prior to disclosure, AUSA duty to examine supposedly exculpatory merits of Brady material

4. See Moore v. Illinois, 408 U.S. 786 (1972) where the Court defined the Brady doctrine to include "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." 408 U.S. at 794-95.

C. Document by letter or memo all discovery to defendant. Make it a permanent part of file.

D. Discovery by the Defense: Rule 16, Fed. R. Crim. P. and Super. Ct. Crim. R.

1. Evidence sought must be tangible objects.

a. books

b. papers

c. documents

2. Under Rule 16(a), defendant has right to copies "within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor" of any relevant:

a. written/recorded/statement/confession by him,

b. results or physical/mental examinations,

c. results of scientific tests or experiments, or

d. defendant's recorded testimony before a Grand Jury.

3. Under Rule 16(b) defendant must show materiality and reasonableness in requesting other books, papers, tangible objects, etc,

4. No pre-trial discovery of Jencks materials (Rule 16(b)) is required except that statements of government witnesses who testify at suppression hearing must be turned over to the defense at pre-trial suppression hearing. United States v. Dockery, 294 A.2d 158 (D.C. Ct. App. 1972). Also statements of co-defendants fall under Rule 16(b) and as such are not discoverable as a matter of right, but only upon showing of materiality and reasonableness. United States v. Randolph, 456 F.2d 132 (3d Cir. 1972).

5. The defense does NOT have a right under Rule 16, or any other authority, to require disclosure of names and addresses of government witnesses.

   a. Cases

      United States v. Persico, 425 F.2d 1375 (2d Cir.) cert. denied, 400 U.S. 869 (1970); United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969); Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968); Eley v. United States, 287 A.2d 830 (D.C. Ct. App. 1972); United States v. Baggett, 455 F.2d 476 (5th Cir. 1972) (Rule 7(f)).

   b. Exception was 18 U.S.C. §3432 which required the government in a capital case to disclose names and addresses of its witnesses to defense three days in advance of trial. Now no more "capital" cases (doubtful this exception is viable). However, existence of statute strongly supports that there has never been non-capital case exception.

E. Pre-Trial Discovery by the Government: Rule 16(c), Fed. R. Crim. P. and Super. Ct. Crim. R.

1. Only if defense discovery motion granted may Government move for discovery.

2. Under Rule 16(c) Court may condition defense discovery order, pursuant to Rule 16(a)(2) and 16(b), on condition that Government be able to inspect and copy items within possession, custody or control of defendant (which he intends to use at trial) on a showing of materiality to preparation of the Government's case and reasonableness. Insist on this reciprocality when defense asks for discovery. United States v. Carr, 141 U.S. App. D.C. 229, 437 F.2d 662 (1971).

3. Government cannot get internal defense documents made by defendant, his attorneys, or his agents.

4. Government cannot get statements made by defendant or witnesses to the defendant, his attorneys, or his agents.

F. Protective Orders: Rule 16(e), Fed. R. Crim. P. and Super. Ct. Crim. R.

1. Discovery can be restricted, denied, or deferred upon a "sufficient showing" by the Government made in a written motion for in camera inspection by the Court.

2. Entire sealed statement must be preserved in the record for appeal.

G. There is a Continuing Duty to Disclose Once the Court has Entered an Order: Rule 16(g), Fed. R. Crim. P. and Super. Ct. Crim. R.

1. If there is failure to comply with Rule 16(g), Court may:

   a. order discovery as to the new item,

   b. grant a continuance,

   c. prohibit the admissibility at trial of such undisclosed evidence,

   d. such other order as it deems just.

2. Beware the inherent contempt power of the Court.

H. Government Discovery of the Alibi Defense.

1. Super. Ct. Crim. R. 16-I (limited to felony cases).

2. U.S. Dist. Ct. Crim. R. 2-5(b) (covers all cases).

3. Procedure for both Super. Ct. Crim. R. 16-I and U.S. Dist. Ct. Crim. R. 2-5(b):

   a. Demand by the prosecutor for alibi defense notice must state the

      (1) time of offense,

      (2) date,

      (3) place.

   b. Defendant's notice of alibi defense to the prosecutor must

      (1) be returned within 10 days after demand,

      (2) state specific alibi location,

      (3) provide names and addresses of proposed defense witnesses.

   c. Notice by prosecutor that Government intends to rely on witnesses refuting alibi must

(1) be served within 10 days after defense notice, but

(2) not less than 10 days before trial,

(3) provide names and addresses of Government's witness to establish defendant's presence at crime.

d. Failure to comply by either party may result in:

(1) exclusion of witness' testimony, but

(2) does not limit right of defendant to testify.

4. CAVEAT: Alibi demand will mean giving to the defense names and addresses of your witnesses who establish defendant's presence at the scene of the crime.

III. Discovery in Trial

A. Discovery Under the Jencks Act, 18 U.S.C. §3500.

1. See USAO Trial Manual "Discovery" page 379.00 for an excellent analysis and citation of leading cases. See also United States v. Perry, 145 U.S. App. D.C. 364, 449 F.2d 1026 (1972).

2. Available to defense only after direct examination.

3. "Statements" include:

a. written statements made/signed/adopted/approved by witness,

b. substantially verbatim recital or oral statement made contemporaneously with oral statement

(1) stenographic

(2) mechanical

(3) electrical

(4) recording

(5) transcription

(6) notes if substantially verbatim

(7) no work product privilege

c. Grand Jury transcripts.

NOTE: Defendant can get only his own Grand Jury testimony pre-trial under Rule 16, Fed. R. Crim. P. and Super. Ct. Crim. R.

CAVEAT: Beware of creating Jencks material while preparing for trial.

B. Jencksing the Defense.

1. In United States v. Wright, ____ U.S. App. D.C. ____, 489 F.2d 1181 (1973), the court held that the prosecutor is NOT entitled to defense "Jencks" materials. Id. at 1189-91.

2. Some state cases are contra. State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970); People v. Saunders, 110 Ill. App. 85, 249 N.E.2d 124 (1969)

3. United States v. Wright, supra is NOT binding on the Superior Court. As of February 1, 1971, the D.C. Court of Appeals is the highest court in the District, no longer subject to review by the U.S. Court of Appeals. Therefore, the D.C. Court of Appeals "[is] not bound by the decisions of the United States Court of Appeals rendered after [February 1, 1971]." M.A.P. v. Ryan, 285 A.2d 310 (D.C. Ct. App. 1971). Accordingly, argue the Government's position in Wright when faced with issue of Jencksing the defense, i.e., Government is entitled to defense Jencks materials as if their witness were a government witness.

See also State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970); People v. Saunders, 110 Ill. App. 85, 249 N.E.2d 124 (1969).

IV. Discovery: How it Really Works

A. Post-arraignment meeting with defense counsel (some we never see) for informal discovery.

1. Disclose general nature of the government's case. Avoid evidentiary details and names of witnesses; they already should know identity of complainant. Use meeting as vehicle to disclose defense case.

2. Sense reaction of defense counsel to nature of our evidence. On that basis explore possible plea bargains and go from there.

B. Formal Motion for discovery and inspection usually used as last resort. Result: little formal discovery by government. Remedy: Insist on reciprocal discovery of defense case.

C. Jencks Statements. Usually (by court preference) made available to defense at the call of the case or morning of trial. But law is: "doesn't have to be turned over until witness testifies." Be aware that there are strategic advantages (e.g., long trials) in insisting on the letter of the law.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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WORKSHEET

TOPIC I,I: Discovery

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OUTLINE OF PRESENTATION NOTES

I. Statutory and Case Authority

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3. Ellis v. United States, 120 U.S. App. D.C. 271, 345 F.2d 961 (1965)

4. United States v. Skeens, 145 U.S. App. D.C. 404, 449 F.2d 1066 (1971).

C. Document by letter or memo all discovery to defendant. Make it a permanent part of file.

D. Discovery by the defense under Rule 16.

1. Evidence sought must be tangible objects.

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2. Under Rule 16(a), defendant has right to copies of any relevant:

   written/recorded/statement/confession by him
   results of physical/mental examinations
   results of scientific tests or experiments
   defendant's recorded testimony before a Grand Jury
   "within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor"

3. Under Rule 16(b) defendant must show materiality and reasonableness in requesting other books, papers, tangible objects, etc.

4. No pre-trial discovery of Jencks materials (Rule 16(b)), except for statements of government witnesses to be turned over at pre-trial suppression hearing. United States v. Dockery, 294 A.2d 158 (D.C. Ct. App. 1972). Also statements of co-defendants fall under Rule 16(b) and as such are not discoverable as a matter of right. United States v. Randolph, 456 F.2d 132, (3d Cir. 1972)

5. The defense does NOT have a right under Rule 16, or any other authority, to disclosure of names and addresses of government witnesses.

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b. Exception

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F. Protective Orders (Rule 16(e))

1. Discovery can be restricted, denied, or deferred upon a "sufficient showing" by the Government made in a written motion for in camera inspection by the Court.

2. Entire sealed statement must be preserved in the record for appeal.

G. There is a Continuing Duty to Disclose Once the Court has Entered an Order (Rule 16(g))

1. Failure to comply with Rule 16(g).

2. Beware the inherent contempt power of the Court.

3. The steps.

-demand by the prosecutor for alibi defense notice

-defendant's notice of alibi defense

-notice by prosecutor

NOTES

-failure to comply

4. CAVEAT: Alibi demand means giving the defense names and addresses of your witnesses who establish defendant's presence at the scene of the crime.

III. Discovery in Trial

A. Discovery Under the Jencks Act

1. Read USAO Trial Manual "Discovery" page 379.00 for excellent analysis and citation of leading cases. See also United States v. Perry, 145 U.S. App. D.C. 364, 449 F.2d 1026 (1972).

2. Available only after direct examination.

3. "Statements" include:

-written statement made/signed/adopted/approved by witness
-substantially verbatim recital or oral statement made contemporaneously with oral statement
-Grand Jury transcripts

NOTE: Defendant can get only his own Grand Jury testimony pre-trial under Rule 16.

CAVEAT: Beware of creating Jencks material while preparing for trial.

NOTES

B. Jencksing the Defense

Prosecutor is NOT entitled to defense "Jencks" materials. United States v. Wright, ____ U.S. App. D.C. ____, 489 F.2d 1181, 1189-91 (1973). Wright not binding on Superior Court.

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2. Sense reaction of defense counsel to nature of our evidence - on that basis explore possible bargains - go from there.

B. Formal Motion for discovery and inspection usually used as last resort - Result: little formal discovery by government: Remedy: insist on reciprocal discovery of defense case.

C. Jencks Statements - usually (by court preference) made available at the call of the case or morning of trial. But law is "doesn't have to be turned over until witness testifies." Be aware that there are strategic advantages (e.g., long trials) in insisting on the letter of the law.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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DISCUSSION NOTES

TOPIC I.J: Sentencing

DURATION: 1 hour

The purpose of this discussion is to acquaint the Assistant with the elements, types and purposes of sentencing and to acquaint him with a number of important considerations in the field of sentencing.

OUTLINE OF PRESENTATION

I. General

A. Sentencing is the most neglected and ignored area in an Assistant's training and experience. This undoubtedly results from the feeling that the prosecutorial function ends with the conviction. If the conviction, however, is not to be rendered meaningless by a sentence regarded as too lenient, more emphasis must be placed on sentencing. The U.S. Attorney's Office bears a responsibilty to the community to see that Assistants carry through on their trial efforts by providing the trial judge with information which will result in an appropriate sentence.

B. Generally speaking, an appropriate sentence is one which is imposed after due consideration is given to reforming the offender, disciplining him, protecting society, and deterring others from committing like offenses.

II. Trial Judge's Discretion

A. The trial judge has great discretion, within the framework provided by statutory and decisional law, in imposing sentences.

B. United States v. Tucker, 404 U.S. 443, 446 (1972).

C. Wilson v. United States, 118 U.S. App. D.C. 3;9, 321. 335 F.2d 982, 984 (1963).

D. An appellate court will only interfere where the sentence imposed is unconstitutional or reflects a clear abuse of discretion.

1. North Carolina v. Pearce, 395 U.S. 711 (1969)

2. United States v. McCoy, 139 U.S. App. D.C. 60, 63-64, 429 F.2d 739, 742-43 (1970).

III. Filing Information as to Previous Convictions

A. 23 D.C. Code §111 provides that informations as to previous convictions must be filed "prior to trial or before entry of a plea of guilty" and that a copy of the same must be served on the defendant or his counsel.

B. File the information with the Court by handing it to the courtroom clerk.

C. Always serve both the defendant and his counsel with copies and always retain a copy for our jacket. The record should fully reflect that the information was filed and that the parties were served.

IV. Recidivist Penalties

A. Misdemeanants.

1. 22 D.C. Code §104 provides for the punishment of repeat offenders. As noted above, the proper information must be filed setting forth the previous conviction(s).

2. A second offender is subject to a maximum penalty one and one-half times the maximum provided for that offense (e.g. a second petit larceny subjects an accused to a maximum of 18 months).

3. A third offender is subject to a maximum sentence of three times the maximum provided for the offense (e.g. a third petit larceny conviction may result in a three year sentence).

4. If the defendant may be eligible for a sentence in excess of three years, he must be indicted. 23 D.C. Code §111 (a) (2).

5. 22 D.C. Code §104 applies to convictions anywhere in the United States as well as to lesser included offenses, e.g., a man convicted of robbery in North Carolina is punishable as a second offender if subsequently convicted in D.C. of petit larceny.

B. Felons.

1. 22 D.C. Code §104a provides for life imprisonment for a defendant convicted a third time of a felony.

2. 22 D.C. Code §3202 provides that a person convicted of a second or subsequent crime of violence while armed with a dangerous weapon may be sentenced to life imprisonment. In any event, he must receive a mandatory minimum sentence of 5 to 15 years.

3. As previously noted, the appropriate information must be filed prior to trial or before entry of the plea in order to subject the accused to the extra penalties.

V. Pre-Sentence Reports

A. While most judges do disclose the pre-sentence report to both sides prior to sentencing, it has been consistently held that disclosure is not a matter of right either constitutionally or under the federal rules.

United States v. Queen 140 U.S. App. D.C. 262, 263, 435 F.2d 66, 67 (1970); United States v. Dockery, 145 U.S. App. D.C. 9, 447 F.2d 1178 cert. denied, 404 U.S. 950 (1971);

Gregg v. United States, 394 U.S. 489, 492 (1968).

B. 23 D.C. Code §103 provides that if disclosure is made to the defense, it must be made to the Government. Accord Fed. R. Crim. P. Super. Ct. Crim. R.32(b)(2).

C. Ordinarily the presentence report is prepared by the Probation Officer by talking to the defendant and any friends or witnesses he brings with him. Many times our office is not consulted. It is submitted that if the report is to be more truly representative and balanced, the trial assistant must furnish the Probation Officer with the information in our jackets, e.g. FBI "rap sheet", P.D. 163, etc. as soon after the trial as possible. Simply xerox pertinent information and mail it to them. In addition, if the case has particular importance, phone the Probation Office, find out which person is assigned the case, and personally contact him about looking at our jacket. Since they are no less busy than D.A.'s, show them every courtesy and consideration and it will pay handsome dividends in the report they furnish the court.

D. May the court impose a sentence without a presentence report? Although it is not generally advisable to do so, it has been held that a judge does not abuse his discretion when he sentences without waiting for a presentence report.

1. United States v. Spadoni, 140 U.S. App. D.C. 376, 435 F.2d 448 (1970).

Sentence was imposed sans a pre-sentence report at the defendant's specific request.

2. Fed R. Crim. P. 32(c)(1) requires presentence report "unless the court otherwise directs." Super. Ct. Crim. R. 32(b)(1) requires presentence report "when the court so directs." Appears Federal Rule is automatic whereas Superior Court Rule requires affirmative action by court before presentence report process begins.

3. Wilson v. United States, 278 A.2d 461 (D.C. Ct. App. 1971),

Where information in the record is sufficient to enable the court meaningfully to exercise his sentencing discretion, a presentence report need not be requested.

VI. Federal Youth Correction Act - 18 U.S.C. §§5005 - 026

A. The Youth Act applies to "youth offenders" who are "under the age of twenty-two years at the time of conviction."

1. 18 U.S.C. §5006 (e)

2. Provides as follows:

a. Conviction means the judgement on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

b. This definition is of critical importance in a jury trial where the "[f]inal judgement. . . . means sentence. The sentence is the judgement." Berman v. United States, 302 U.S. 211, 212 (1937). Thus, where a defendant goes to trial immediately prior to his 22nd birthday and is convicted, but is over 22 when he is sentenced, he would appear to be ineligible for FYCA. This may well be a trump card in plea bargaining.

B. Although federal legislation, it does apply to Superior Court. 18 U.S.C. §5024.

C. The primary purpose of the Act is to provide judges with an alternative to jailing youths with the general prison population.

D. Three special benefits that accrue to those sentenced under the Act are:

1. The opportunity to use special "youth" facilities;

2. The possibility of earlier release than an offender being sentenced to "straight time" (see Earl Silbert's Manual, pp. 29-30);

3. The possibility of having the conviction set aside.

E. The Act provides the court with four sentencing alternatives:

1. §5010(a) allows for probation.

2. §5010(b) provides for remanding the offender to the custody of the Attorney General for treatment and supervision in a special youth facility; the offender must be unconditionally discharged not later than 6 years after the date of conviction; and parole

may be granted at any time after commitment but must be granted after four years.

3. §5010(c) authorizes the court to specify a term in excess of 6 years but not to exceed the maximum term authorized by the statute which was violated. Parole may be granted at any time after commitment but must be granted not later than two years before the expiration of the term imposed by the court. 18 U.S.C. §5017(d).

4. §5010(d) provides that where the court finds that the offender will not benefit under FYCA, he may be sentenced under any other applicable penalty provision, i.e. he may be sentenced under the statute violated. Section 5010(e) provides for the defendant to be screened prior to a FYCA sentence (usually lasts for 60 days).

5. In a recent Supreme Court case, United States v. Dorszynski, 42 U.S.L.W. 5156 (June 26, 1974), the Court held that a federal district court must make an express finding that the Youth Corrections Act would be of no benefit to the offender, but does NOT necessitate that such finding be accompanied by supporting reasons. This decision replaces earlier cases that required that the court state reasons for not applying the Act. Small v. United States, 304 A.2d 641 (D.C. Ct. App. 1973); cf. United States v. Coefield, 155 U.S. App. D.C. 205, 476 F.2d 1152 (1973). Accordingly, Dorszynski should facilitate the handling of FYCA cases by leaving the decision whether to apply the act to the sound discretion of the judge.

VII. Narcotic Addicts Rehabilitation Act

A. Title I-28 U.S.C. §2901 - 06, (Title I applies only in U.S. District Court. See 28 U.S.C. §2902).

1. An "eligible individual" is any individual who is charged with an offense against the United States, but this does not include an individual:

a. Charged with a crime of violence;

b. Charged with unlawfully importing, selling or conspiring to import or sell, a narcotic drug;

c. Who has prior charge of a felony pending or who is on probation or whose sentence following conviction has not been fully served provided an individual on parole, probation or mandatory release shall be included if the authority who may require his return to custody consents to his commitment;

d. Civilly committed under this Act on three or more occasions;

e. Convicted of a felony on two or more occasions.

Contrary to the holding in Watson v. United States, 141 U.S. App. D.C. 335, 350, 439 F.2d 442, 457 (1970), the Supreme Court has held that this exception is not unconstitutional. Marshall v. United States, 42 U.S.L.W. 4121 (January 9, 1974).

2. Commitment under Title I is in lieu of prosecution. It is within the discretion of the court to hold the criminal charge in abeyance should the defendant elect to submit to an immediate examination to determine if he is an addict and likely to be rehabilitated. If he elects the examination, he may be confined for no more than 30 days. If it is determined that the defendant is an addict, capable of rehabilitation, he is committed to the Surgeon General provided adequate facilities or personnel are available. There can be no voluntary withdrawal from the examination or any subsequent treatment which may last no longer than 36 months. During this period, the defendant may be conditionally released for supervised aftercare treatment in the community.

If the treatment is successful, the charges against the defendant are dropped; otherwise, prosecution will resume with credit being given to the defendant for the time spent in institutional custody. Such treatment is not deemed a criminal conviction.

B. Title II - 18 U.S.C. §§4251-55.

1. Unlike Title I, Title II speaks in terms of an "eligible offender" as one who has been convicted rather than charged with an offense against the United States.

2. Exclusion is not made of one who has been convicted of unlawfully importing, selling, or conspiring to import or sell a narcotic drug to have enabled the offender to obtain the drug for his own addiction.

3. The initial examination lasts 30 days, after which the Attorney General reports to the court which has placed the suspected addict in custody. If it is determined that the eligible offender is not an addict or not a likely candidate for rehabilitation, the court will impose a sentence. Otherwise, the subsequent commitment may run from not less than six months to not more than ten years and in no event shall it exceed the maximum sentence that could have been imposed. 18 U.S.C. §4253.

4. Conditional release in the legal custody of the Attorney General for supervised aftercare treatment in the community is as if the offender is on parole, and such release may be granted only after 6 months of institutional treatment. (Titles I and II are similar in all other respects.)

C. Title III - 42 U.S.C. §§3411-26.

Title III deals with the civil commitment of persons not charged with any criminal offense. Hence, it is inapplicable to persons with criminal charges pending, on probation, or with part of their sentence not fully served.

VIII. Young Adult Offender Act

A. 18 U.S.C. §4209.

B. The Young Adult Offender Act applies to defendants who have attained their 22nd birthday at the time of conviction. If in the court's discretion the defendant will benefit from treatment provided under the Federal Youth Corrections Act, it may impose sentence upon the defendant pursuant to such act.

C. The YAOA does not apply to any offense for which there is provided a mandatory penalty, nor does it apply to Superior Court. Otherwise, the purposes and aims of FYCA prevail.

D. A recent case upholding the constitutionality of the YAOA as applying only to federal offenses and not purely D.C. Code offenses, and also discussing in depth the purposes and aims of the Act, is United States v. McDonald, 156 U.S. App. D.C. 338, 481 F.2d 513 (1973).

IX. Imprisonment

A. Indeterminate Sentence Act - 24 D.C. Code §203.

1. This local statute provides that if a person is convicted of a felony, the judge must impose a sentence containing both a minimum and maximum term.

2. The minimum cannot exceed one-third of the maximum but may be less. Thus a sentence for ADW of 180 days is an improper sentence. This statute applies even where the judge suspends execution of the sentence and places the defendant on probation.

3. The minimum term imposed represents only the parole eligibility date and is not necessarily the date on which he will be released.

B. Mandatory Minimums

In prescribing punishment for certain D.C. Code violations, the sentencing judge, if he elects not to impose a probationary sentence pursuant to 16 D.C. Code §710, must sentence in accord with the "minimums" provided in the substantive statutes. The court may, however, treat the statutory minimum as the maximum for a particular sentence. Thus, in the case of a defendant charged with second degree burglary (where the penalty is "not less than 2 or more than 15 years") the court may, consistent with the statute, impose a

sentence of incarceration for not less than eight months nor more than two years. Or, since the minimum can be less than (but not more than) one-third the maximum of a given sentence the court could sentence the defendant in the above example to a term of, e.g., not less than one month nor more than two years.

X. Probation

A. General

1. 16 D.C. Code §710 provides:

> . . . the court may, upon conviction, suspend the imposition of sentence [ISS] or impose sentence and suspend the execution thereof [ESS], for such time and upon such terms as it deems best . . . [and] the court may place the defendant on probation under the control and supervision of a probation officer.

2. If probation is revoked prior to the inclusion of the probationary period, the court may:

   a. If imposition of the sentence was suspended, impose any sentence authorized by the statute violated; or

   b. If execution of the sentence imposed was suspended, order execution of the original sentence or any lesser sentence. Super. Ct. Crim. R. 35.

B. Conditions of Probation

The court may attach certain conditions to probation: refrain from law violation; restitution; work regularly; support dependents; pay outstanding debts and obligation; notify Probation Office of change of address; follow Probation Officer's instructions; enroll at N.T.A., undergo psychiatric counseling, etc.....

C. Supervised or Unsupervised Probation.

16 D.C. Code §710 permits unsupervised probation, i.e., periodic visits to the Probation Officer are not needed.

D. Length of Probation

16 D.C. Code §710 does not limit the length of probation for either misdemeanors or felonies. General practice in Superior Court, however, is not to extend probation beyond a five year period. This parallels practice in the federal courts where probation is limited by statute to five years. 18 U.S.C. §3651.

XI. Split Sentence

A. The federal probation statute (18 U.S.C. §3651) explicitly permits the court to impose a prison sentence (in excess of six months) and to specify that following the expiration of a minimum period (not to exceed six months), the execution of the remainder of the sentence is suspended and the defendant be placed on probation. However, the statute prohibits granting probation or giving a split sentence in offenses punishable by death or life imprisonment.

B. Although 16 D.C. Code §710 contains no similar provision, nothing therein prohibits a "split sentence" and Superior Court judges have generally construed the statute as permitting them to impose "split sentences".

Example: Att. Robbery, 1 to 3 years defendant to serve six months, ESS as to unserved balanced, probation for 2 years.

However, we argue that 18 U.S.C. §3651 prohibits giving probation on a split sentence in second degree murder cases. In first degree cases, the judge has no jurisdiction to impose a sentence other than life. 22 D.C. Code §2404.

XII. Work Release

A. Work release is a procedure whereby the person is released from custody, sent to his place of employment to perform his specified activities, and returns to his designated place of confinement at the end of each work day.

B. Whether a person is given the privilege of working at his employment or seeking employment rests within the Court's discretion in cases where the person before the Court is:

1. Convicted of a misdemeanor or of violating a municipal regulation and is sentenced to not more than one year, or

2. Imprisoned for nonpayment of a fine or for contempt of court, or

3. Committed to jail after revocation of his probation.

C. Although a Superior Court judge may <u>order</u> work release following a misdemeanor conviction, he may only <u>recommend</u> it after a felony conviction.

D. As a matter of policy, the D.C. Department of Corrections will <u>not</u> consider a convicted felon for work release <u>prior to six months</u> before his potential release or parole hearing.

XIII. Multiple Sentencing - Consecutive Sentences

A. Query: Whether a single criminal act constitutes more than one violation of a single statute and thus allows imposition of consecutive

sentences for each of the violations (e.g., in an ADW-CDW case, can the court sentence on both offenses consecutively?)

B. In Bell v. United States, 349 U.S. 81 (1955), the Supreme Court announced the "rule of lenity", i.e., in determining whether consecutive sentences are permissible the court must look to the legislative intent of the statutes involved. When the statutory intent is ambiguous, the rule of lenity requires that a sentence be imposed in favor of the defendant. 152 U.S. App. D.C. 371, 471 F.2d 923 cert. denied, Murdock v. United States, 409 U.S. 1044 (1972).

C. In United States v. Alexander, the Court applied the rule of lenity in holding that where by a single act or course of action a defendant has put in fear different members of a group towards which the action is collectively directed, he is guilty of but one offense. Accordingly, multiple convictions and consecutive sentences will be appropriate only where distinct and successive assaults have been committed upon the individual members of the group.

D. The following cases are helpful in seeing how appellate courts have applied the rule of lenity:

1. United States v. Adams, 156 U.S. App. D.C. 415, 481 F.2d 1099 (1973).

   ADW is a lesser included offense of armed rape and armed robbery and merges with them.

2. United States v. Johnson, 155 U.S. App. D.C. 28, 29, 475 F.2d 1297, 1298 (1973).

   ADW is a lesser included offense of armed robbery and merges with it, thus precluding consecutive sentences.

3. United States v. Wimbush, 154 U.S. App. D.C. 236, 237-38, 475 F.2d 347, 348-49 (1973).

   Assault with intent to kill while armed and ADW merge, thus precluding consecutive sentences.

4. United States v. Benn, 155 U.S. App. D.C. 180, 476 F.2d 1127 (1972).

   Assault with intent to rape while armed and ADW have the same three elements and hence merge; no consecutive sentences.

5. United States v. Hill, 152 U.S. App. D.C. 213, 470 F.2d 361 (1972).

   ADW merged with AWIK while armed; the Court vacated the ADW conviction even though concurrent sentences were imposed.

6. Ladner v. United States, 358 U.S. 169 (1958)

   Firing one shot at two federal officers constitutes one violation.

E. However, where each offense requires elements of proof uncommon to other, then consecutive sentences are proper. Cf. Blockburger v. United States, 284 U.S. 299 (1932). The Blockburger Rule is not inflexible though, and gives way where congressional intent is deemed not to clearly require consecutive sentences (e.g. United States v. Alexander, supra). The rule of lenity also serves to restrict its application.

   The Blockburger rationale was followed in the following cases:

   1. United States v. Butler, 149 U.S. App. D.C. 300, 462 F.2d 1195 (1972)

      (consecutive sentences were upheld for murder, larceny and burglary).

   2. Sutton v. United States, 140 U.S. App. D.C. 188, 434 F.2d 462 (1970)

      (consecutive sentences upheld for ADW and robbery of same victim).

   3. Irby v. United States, 129 U.S. App. D.C. 17, 390 F.2d 432 (1967)

      (consecutive sentences proper for burglary and robbery).

   4. United States v. Lucas, 142 U.S. App. D.C. 186, 441 F.2d 1056 (1971)

      (ADW and CDW were separate acts; consecutive sentences proper).

   5. Callahan v. United States, 364 U.S. 587 (1961)

      (consecutive sentences proper for a substantive crime and the conspiracy to commit it).

F. 23 D.C. Code §112 provides for consecutive sentences where the offenses arise out of separate transactions as well as the same transaction but require proof of an element not common to the offenses. See Banks v. United States, 307 A.2d 767 (D.C. Ct. App. 1973). This section changes prior case law which held that absent a specification of consecutiveness a sentence imposed on multiple counts in concurrent. Thus, consecutive sentences are appropriate for ADW and AWIK which arise out of the same transaction because ADW requires proof of assault with a weapon, an element not required by AWIK. Prior case law precluded consecutive sentences in this situation. E.g., Smith v. United States, 135 U.S. App. D.C. 284, 418 F.2d 1120 (1969). This conflict between the Code and the D.C. Circuit's decision will probably be settled on appeal.

XIV. Allocution

A. General

1. The Government does have the right to allocute at the time of sentencing. 23 D.C. Code §103. All too often, however, Assistants do not prepare for allocution, apparently erroneously believing that the most important task was securing the conviction. It is submitted that the trial is not over until after sentence has been imposed. Indeed, the Supreme Court has explicitly recognized that the final judgement is the sentence and not the verdict. Berman v. United States, supra. Accordingly, lest we abdicate our prosecutorial function, we should devote the necessary time and attention toward sentencing.

2. Allocution may be oral or written or both. It may take the form of live testimony (e.g. from the victim, a police officer, a probation or parole officer, etc.) or be written (e.g. filing a memorandum with the Court setting forth the Government's allocution or filing an affidavit). Office policy is to file a written allocution in felony cases.

3. The trial judge, however, depending upon his idiosyncracies may limit the form and length of the allocution.

4. If allocution has been waived as part of the plea bargain, our jacket and the court jacket should fully reflect this. This avoids the situation where the trial assistant is absent at sentencing and another D.A. is standing in and has to take the defense counsel's word as to whether allocution has been waived.

5. What does a D.A. say when he allocutes? There are no hard and fast rules in this area and the answer depends on a host of factors: nature of the offense, prior criminal record, prior probation or parole, age of the defendant, financial resources (restitution may be appropriate), drug habits, medical condition, "back-up" time, any other pending charges, injuries to the victims, etc.

6. Whatever is said should be thought out in advance. Our allocution should be accurate, cogent and practicable, not off-the-cuff, desultory and disjointed.

B. Information Which May Properly Be Considered By The Sentencing Judge

1. Recently filed Government briefs have spotlighted an area in which many of our felony judges are deficient: at the time of sentencing the Court can properly consider information relating to conduct or behavior of the defendant which has not resulted in a conviction.

CONTINUED

2 OF 5

2. For the judges who chronically insist at the time of allocution that they will not receive or act upon any information from the Government unless a criminal conviction has resulted, the following statutory and decisional material can be cited:

a. 18 U.S.C. §3577 provides:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

This congressional enactment explicitly reaffirms an inveterate legal practice that a sentencing judge may consider a wide variety of information in determining an appropriate sentence.

b. The Supreme Court has consistently held that a sentencing judge may consider a wide variety of information as to a defendant's lifestyle, conduct, and mental and moral propensities may also be considered. E.g., Williams v. Oklahoma, 358 U.S. 576 (1959); Williams v. New York, 336 U.S. 241, 245, rehearing denied, 337 U.S. 961 (1949). See also Mempa v. Rhay, 402 U.S. 183 (1971).

In Williams v. New York, supra, the Court affirmed the trial judge in imposing the death penalty because of a series of burglaries believed to have been committed by the defendant, and because the probation report indicated he "possessed 'a marked sexuality'" and was "a 'menace to society.'" 337 U.S. at 244. The Court observed:

> A sentencing judge ... is not confined to the narrow issue of guilt. His task ... is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. Id. at 247.

They also stated in finding that a sentencing judge not be denied pertinent background information "[t]he due clause should not be treated as a device for freezing the evidential procedure of sentencing in the world of trial procedure." Id. at 251.

c. Our own circuit has given its imprimatur to the trial judge considering other offenses committed by a defendant not resulting in convictions. In Jones v. United States, supra. The Court held that a judge could properly consider information as to offenses not resulting in conviction. In United States v. Sheppard, 149 U.S. App. D.C. 175, 462 F.2d 279 cert. denied, 409 U.S. 985 (1972), the Court approved of the trial judge relying in sentencing upon a prior arrest (where the arrest had in fact occurred). The strongest statement recognizing the propriety of the trial judge relying on the prior criminal record of the accused was made recently in United States v. Riley, 157 U.S. App. D.C. 27, 481 F.2d 1127 (1973)(MacKinnon, J. dissenting). "The failure of the panel opinion to consider the criminal record of the person they are dealing with ignores a highly significant factor that was properly considered by the sentencing judge." Id. at 34.

d. The law in other federal circuits is the same as in our own circuit. For example, in United States v. Sweig, 454 F.2d 181 (2d Cir. 1972) the sentence was affirmed where it was based on information not contained in the presentment report which included evidence of offenses for which the defendant was acquitted.

e. It is, of course, clear that a judge may not properly rely on misinformation in sentencing. United States v. Tucker 405 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948).

XV. Motions To Reduce Sentence

A. Motions to reduce sentences are cognizable within 120 days of the imposition of sentence or such other events as specified by rule of court. Super. Ct. Crim. R. P. 35. Beyond 120 days but prior to the expiration of the minimum sentence, the D.C. Parole Board may apply to the court for a sentence reduction. 24 D.C. Code §201(c).

B. Such motions are addressed to the sound discretion of the sentencing judge. See Green v. United States, 157 U.S. App. D.C. 40, 481 F.2d 1140 (1973).

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I.J: Sentencing

The purpose of this lecture is to familiarize the Assistant with the elements, types, and purposes of sentencing and to acquaint him with a number of important considerations in the field of sentencing.

OUTLINE OF PRESENTATION NOTES

I. General

II. Trial Judge's Discretion

A. United States v. Tucker, 404 U.S. 443, 446 (1973)

B. Wilson v. United States, 118 U.S. App. D.C. 319, 321, 335 F.2d 982, 984 (1963)

III. Filing Information as to Previous Convictions

IV. Recidivist Penalties

A. Misdemeanants

B. Felons

V. Presentence Reports

NOTES

VI. Federal Youth Correction Act

A. 18 U.S.C. §§5005 - 26

B. Applies to "youth offenders" who are "under the age of twenty - two years at the time of conviction." 18 U.S.C. §5006 (e).

C. Four sentencing alternatives

VII. Narcotic Addicts Rehabilitation Act

A. Title I - 28 U.S.C. §§2901 - 06

B. Title II - 18 U.S.C. §§4251 - 55

C. Title III - 42 U.S.C. §§3411 - 26

VIII. Young Adult Offender Act

A. 18 U.S.C. §4209

IX. Imprisonment

A. Indeterminate Sentence Act

24 D.C. Code §203

B. Mandatory Minimums

X. Probation

NOTES

A. General

B. Conditions of Probation

C. Supervised or Unsupervised Probation

D. Length of Probation

XI. Split Sentence

XII. Work Release

XIII. Multiple Sentencing - Consecutive Sentences

XIV. Allocution

A. General

B. Information which may properly be considered by the sentencing judge

XV. Motions to Reduce Sentence

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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DISCUSSION NOTES

TOPIC I.K: Citizen's Complaints

DURATION: 1/2 hour

The purpose of this discussion is to acquaint the Assistant with the types of citizen's complaints, the environment and purpose of the Citizen's Complaint Center, and ways of handling problems, administratively and otherwise.

OUTLINE OF PRESENTATION:

I. Importance of Citizen's Complaint Center

A. Screening of all complaints for potential criminal charges.

B. Referrals to other agencies where necessary.

C. Listening - advising function.

II. Environment

A. Types of complaints.

1. Larceny.

2. Consumer complaints.

3. Assaults and threats.

4. Inter-spousal.

5. Boyfriend-girlfriend.

6. Neighbors.

B. Volume.

1. 17,000 complaints per year.

2. 4,500 hearings per year.

3. Results: immense contact with the citizenry in this jurisdiction.

III. Considerations in Initial Encounter

A. Keep in mind the fact that most of these people were referred to the Center by a police officer - they probably expect to obtain an arrest warrant on their initial visit.

B. Understand the complaining witness' state of mind.

1. Angry, distraught, fearful.

2. Disillusioned because of long wait.

3. Is probably at the Center as a last resort.

IV. Interview

A. Introduce self by name and title.

B. Ascertain nature of complaining witness' problem.

C. Attitude.

1. Be attentive and courteous.

2. Let complaining witness tell story but guide it along path of relevance with appropriate questions.

3. Listen!

D. Determine course of action.

1. Nothing to be done.

a. no criminal offense.

b. no method of reaching potential defendant.

c. etc.

2. Matter can be referred to other agency.

a. attempt to contact a specific person at the agency - don't make the individual fight the bureaucracy again.

b. most common referrals:

- Small Claims Court
- Landlord-Tenant Court
- Legal Aid for divorce, custody, etc.
- Youth Aid of Police Department
- Emergency shelter, Salvation Army, Traveller's Aid, etc.

3. Set up hearing where appropriate.

a. Explain necessity and desirability of hearing as opposed to issuing warrant.

b. Where appropriate, set up expedited hearing by having police officer deliver notice to appear or by using telephone to contact potential defendant.

c. Use appointment book.

- Use discretion in setting up hearing.
- At times, expedition may not be desirable.
- Don't make specious promises; destroys credibility of office.

4. Fill out new complaint form completely.

V. Hearing

A. Call all parties and witnesses into a suitable room; don't have people standing.

B. Introduce self; get names of all persons present.

C. Explain the reason for the hearing.

D. Explain your function.

1. Quasi-judicial official.

2. Determination of a possible crime.

3. Determination if prosecution is warranted.

E. Avoid ex parte conversation with defense counsel and parties.

F. Explain how hearing will be conducted.

1. You are in charge.

2. Don't let defense counsel use hearing as a discovery vehicle.

3. Explain that hearing is informal - that you will interrupt from time to time.

4. Be firm but not patronizing.

5. Explain that only one person at a time is to speak and that all questions and comments are to be directed to you.

6. Explain that complaining witness will first relate story; then defendant; then complaining witness again.

7. All this often serves as catharsis.

G. Decision should be made as to whether witnesses should be excluded. Decision must be made on a case-by-case basis.

H. Listen closely to ascertain exactly what complaining witness wants:

1. "just to be left alone"

2. "money damages"

3. "restitution"

4. "apology"

5. "reprimand"

I. If case is one which lacks merit, seize upon factor that will allow you to resolve matter short of prosecution.

J. You may wish to speak to complaining witness alone and involve him in decision-making process. (e.g., explain alternatives and why a particular one ought to be sought.)

K. Call defendant back to room and explain what you have done and intend to do. (Don't emasculate potential defendant).

1. Terminate the matter.

2. Suspend it for a certain period.

3. Decide to issue warrant.

a. have warrant approved.

b. have defendant arrested at convenient time, preferably in morning.

c. explain to complaining witness that defendant will probably be released.

L. Thank all persons for attending.

M. Record your decisions on the complaint form.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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WORKSHEET

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B. Referrals to other agencies where necessary.

C. Listening - advising function.

II. Environment

A. Types of complaints.

B. Volume.

III. Considerations in Initial Encounter

A. Keep in mind the fact that most of these people were referred to the Center by a police officer - they probably expect to obtain an arrest warrant on their initial visit.

NOTES

B. Understand the complaining witness' state of mind.

IV. Interview

A. Introduce self by name and title.

B. Ascertain nature of complaining witness' problem.

C. Attitude.

D. Determine course of action.

1. Nothing to be done.

a. no criminal offense.

b. no method of reaching potential defendant.

2. Matter can be referred to other agency.

Contact a specific person at the agency; don't make the individual fight the bureaucracy again.

3. Set up hearing where appropriate.

NOTES

a. Explain necessity and desirability of hearing as opposed to issuing warrant.

b. Where appropriate, set up expedited hearing by having police officer deliver notice to appear or by using telephone to contact potential defendant.

c. Use appointment book.

4. Fill out new complaint form completely.

V. Hearing

A. Call all parties and witnesses into a suitable room; don't have people standing.

B. Introduce self; get names of all persons present.

C. Explain the reason for the hearing.

D. Explain your function.

1. Quasi-judicial official.

2. Determination of a possible crime.

3. Determination if prosecution is warranted.

NOTES

E. Avoid ex parte conversation with defense counsel and parties.

F. Explain how hearing will be conducted.

1. You are in charge.

2. Don't let defense counsel use hearing as a discovery vehicle.

3. Explain that hearing is informal - that you will interrupt from time to time.

4. Be firm but not patronizing.

5. Explain that only one person at a time is to speak and that all questions and comments are to be directed to you.

6. Explain that complaining witness will first relate story; then defendant; then complaining witness again.

7. All this often serves as catharsis.

G. Decision should be made as to whether witnesses should be excluded. Decision must be made on a case-by-case basis.

H. Listen closely to ascertain exactly what complaining witness wants.

NOTES

I. If case is one which lacks merit, seize upon factor that will allow you to resolve matter short of prosecution.

Examples.

J. You may wish to speak to complaining witness alone and involve him in decision-making process. (e.g., explain alternatives and why a particular one ought to be sought.)

K. Call defendant back to room and explain what you have done and intend to do. (Don't emasculate potential defendant).

1. Terminate the matter.

2. Suspend it for a certain period.

3. Decide to issue warrant.

L. Thank all persons for attending.

M. Record your decisions on the complaint form.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC: I.L: Prosecutor's Management Information System

SEGMENT I: Background and Introduction to PROMIS

DURATION: 1 1/2 Hours

During this segment the Assistant U.S. Attorneys are expected to gain a better understanding of the concept and various uses of the Prosecutor's Management Information System (PROMIS). The presentation will demonstrate the usefulness of PROMIS to the Assistants who use it and will inform Assistants of the background, concepts, and operation of PROMIS.

I. Assistant United States Attorneys in the Superior Court Division can obtain a substantial amount of information on criminal cases since January 1971 by providing just one item of information about a case.

   A. Provide a witness name and I can tell you the following:

      1. Whether the witness ever was a defendant.

      2. Is the witness a witness in another case.

      3. What parties in a particular case a witness is related to and what that relationship is (boyfriend-girlfriend, husband-wife, neighbor, acquaintance, stranger).

      4. Dispositions of the cases the witness is involved and whether the witness was non-cooperative.

   B. Provide a defendant name and I can tell you the following:

      1. What aliases he has used.

      2. All cases he has had and the disposition of those cases.

      3. Whether he has been a witness.

      4. How serious is his criminal history.

      5. Who was the arresting officer in each arrest.

      6. What are the patterns of the continuances in his cases.

7. Who have been his defense counsels,

8. What is the history of release decisions.

C. Provide a defense counsel's name and I can tell you the following:

1. What his plea rate is.

2. Who he has defended.

3. The types of charges he has defended.

4. Disposition of his cases.

5. Continuance patterns.

D. Provide a charge (e.g., rape) and I can tell you the following:

1. How many cases we have considered.

2. How many we have papered.

3. Why the cases were rejected.

4. What release decisions were made for this charge.

5. What are the plea rates for this charge.

6. What is the guilty, nolle, and DWP rate.

7. Who were the principal parties in these cases (defense counsel, witnesses).

8. Who were the victims and were they cooperative.

E. Provide an address in Washington, D.C. (e.g., 1409 14th Street) and I can tell you the following:

1. How many arrests or offenses were made at this address since January 1971.

2. What types of crimes were committed at this address,

3. When did the crimes occur, including time of day or night.

4. Who were the individuals involved (police officers, witnesses, defendants, complaintants).

F. Provide a police officers badge number and I can tell you the following:

1. Arrests he has made since January 1971.

2. Who he has arrested.

3. Where he arrested them.

4. Who were his partners.

5. What are the dispositions of his cases.

6. Why were his cases rejected at screening.

7. What types of charges has he made arrests for.

G. Provide an Assistant United States Attorney's name and I can tell you the following:

1. How many cases he papered or rejected per day or since employed with the office.

2. What are the rejection reasons.

3. His disposition history and reasons for nolle's and DWP's.

4. Types of charges he rejects or accepts.

5. What percentage of blocks on the PROMIS case evaluation worksheet he checks.

II. Setting the Stage for PROMIS

A. The environment before PROMIS in 1969.

1. Court of General Sessions.

2. Papering procedures.

a. Lack of standardization in police prosecutor reports from the various police departments servicing the Washington area.

b. Everybody, i.e., D.A., A.P.O., Judge had defendant by a different name(pre-PDID).

c. Lack of proper facilities creating a concommitant ability to focus attention on the subtleties of case preparation.

d. No one knew what performance statistics looked like because court reported statistics in terms of counts.

3. Mass production of misdemeanor prosecutions.

a. Lack of standardization in the handling of cases as they went through the system, allowing many repeat offenders to slip through the cracks.

b. Backlog and other calendaring problems, as well as the caseload of individual Assistants stimulating a large number of felony breakdowns to accomplish plea dispositions.

4. Poor documentation of reasons for discretionary decisions.

5. Lack of insight into prosecutor or police training needs and performance.

6. Court reorganization and its future demands.

B. Why did the office turn to automation?

1. Five year plan for tracking offenders.

2. Improve control of the caseload.

a. Identify the multiple offender, consolidate his cases, improve plea strategy.

b. Identify recidivists and serious offenders (remove anonymity and give managers instant shorthand knowledge of cases).

c. Identify serious misdemeanors among the bulk of cases.

d. Instant service to public e.g., witnesses calling in about case status.

e. Increase information available to the managers and Assistants in the office.

f. Monitoring and enforcement of evenhandedness in decision-making.

g. Manage by priorities.

- Internal decision-making as to the development of Assistants and Administrative personnel.

- Law Enforcement priorities: Major crimes; identification of areas in the city which may require more police protection.

- Breaking down overall conviction rate into pleas, non-jury and jury decisions in order to evaluate training needs of Assistants and overall performance.

3. Evaluate criminal justice system performance by tracking offenders and events.

C. History of PROMIS.

PROMIS (Prosecutor's Management Information System) is an automated criminal data storage and management reporting system operating in the Superior Court Division of the U.S. Attorney's Office in the District of Columbia. The primary purpose of PROMIS is to provide a method for controlling an expanding caseload in a large urban court system. PROMIS tracks defendants through the court process in the

Superior Court from arrest to final disposition. In so doing, PROMIS also evaluates each arrest referred to the Superior Court Division for prosecution by correlating certain predetermined characteristics about the crime and offender and flagging cases of extreme importance for special pre-trial preparation and intensive monitoring.

In addition to its primary objective, PROMIS produces operational reports such as calendars, workload reports, and statistics; and an on-line retrieval capability for immediate access into the PROMIS data base.

2. A team of systems analysts, management analysts, lawyers, and criminologists designed the system.

3. The system was put into operation on January 1, 1971.

4. The scope of PROMIS.

   a. Screening (PD 163, evaluation sheets, reasons for rejections).

   b. Fingerprint identification number enables the tracking of individuals.

   c. CCR use in analyzing performance, deflating statistics.

   d. Automation requires standardization of procedures and a thorough understanding of how the process works.

III. Computers and Their Usefulness as a Tool for Society

A. Computers are capable of storing, processing and displaying large quantities of data at extremely fast speeds.

B. Computers provide the capability to perform repetitive operations more accurately and efficiently than in manual procedures.

C. Computers are just tools that are used best by those who know their capabilities and limitations.

D. The basic components of a computer:
(use blackboard to show relationships between computer components)

1. Central Processing Unit.

2. Peripheral equipment.

   a. Tapes

   b. Disks

   c. Card Readers

3. Terminals

4. Batch vs. on-line processing

E. The application of computer systems.

1. Scientific applications -- Space program.

During a space mission, four 360/75 computers are connected on-line to receive transmissions of data from the spacecraft on environmental conditions such as temperature, the status of all systems, and navigational data. Several back-up computers are used that are pre-programmed for all contingencies that might arise to enable real time decisions to be made. The systems are used to simulate all the alternatives that are possible. The simulation will analyze the actual data received from transmissions from the spacecraft and, by changing variables, predict the results. For example, if the spacecraft temperature is excessive, the following alternatives will be simulated:

a. Turning the attitude of the spacecraft.

b. Tumbling the spacecraft.

c. Barbecuing the spacecraft (slow roll).

d. Thermal coolant systems alternately accessed.

The simulation depending on its complexity will be completed in minutes testing the various alternatives. The resultant temperature will be predicted and the best alternative indicated.

2. Business oriented applications

a. Credit cards.

b. Bank checks.

c. Accounting - personnel systems.

3. Criminal justice applications.

a. Police information system.

NCIC - as of August 1973:

109,000 transactions per day;

135,000 wanted persons;

842,000 stolen vehicles;

1,426,000 stolen securities;

617,000 stolen guns;

831,000 stolen articles;

387,000 criminal histories.

b. Court systems.

- Court calendaring systems.
- Jury selection system.

c. Prosecutor systems (also nucleus of state-level tracking system).

- PROMIS.

IV. What are the Components of PROMIS?

A. Data Capturing Procedures.

B. Data Input System.

C. Data Edit System.

D. Data Base Maintenance.

E. Batch Reports.

F. On-line Retrieval.

G. Special Reports and Research (importance of reason codes, documentation).

V. How Information is Prepared and Fed to PROMIS?

A. New case input.

1. Screening forms - must record names of all witnesses including chemist.

2. Screening decision.

B. Arraignment.

1. Para-legals.

2. Forms.

C. Misdemeanor trials.

1. Para-legals.

2. Forms.

D. Grand Jury.

1. Indictments.

2. Originals/dismissals.

E. Felony trials.

1. Workload.

2. Arraignment.

3. Dispositions.

4. Sentencing.

VI. What Kind of Data Does the PROMIS Data Base Contain?

A. Information about the defendant.

(Name, alias, sex, race, date of birth, address, facts about prior arrests and convictions, employment status, alcohol or drug abuse, seriousness of defendant criminal history)

B. Information about the crime.

(Date, time and place of the crime, the number of persons involved in the crime, and information about the gravity of the crime in terms of the amount and degree of personal injury, property damage or loss, and intimidation using the seriousness scale developed by criminologists)

C. Information about the arrest.

(Date, time, and place of the arrest, the type of arrest, and the identity of the arresting officers)

D. Information about criminal charges.

(The charges originally placed by the police against the suspect, the charges actually filed in court against the defendant and the reasons for changes in the charges by the prosecutor, the penal statute for the charge, the F.B.I. Uniform Crime Report Name for the charge and the Project Search name for the charge)

E. Information about witnesses.

(The names and addresses of all witnesses, the prosecutor's assessment of whether the witness is essential to the case or not, and any indications of reluctance to testify on the part of the witnesses)

F. Information about court events.

(The dates of every court event in a case from arraignment through motion hearing, continuance hearing and final disposition to sentencing, the names of the principals involved in each event including the defense and prosecution attorneys and judge, the outcomes of the events, and the reasons for the outcomes)

G. The PROMIS data base grows at a rate of 1500 cases per month and contains data for cases since January 1, 1971.

VII. How Does PROMIS Track the Workload?

A. From the vantage point of the crime or criminal incident.

B. From the vantage point of the accused person or defendant.

C. From the vantage point of the court proceedings.

VIII. What are the Outputs of PROMIS?

A. Daily production of PROMIS at the Department of Justice computer processing center.

1. Calendars.

a. One and five day witness control calendar.

b. One and five day management calendar.

c. One and five day preliminary hearing report.

2. Witness subpoenas.

3. Felony trial reports.

a. Individual Assistant workload report.

b. Felony trial workload report.

c. Bench Warrant report.

4. Grand Jury pending cases report.

5. Special reports.

a. Specially assigned cases.

b. New narcotics cases.

c. Turnaround documents.

d. Court case cross index report.

e. Diversion program reports.

6. Research and statistical capability.

   a. Recidivism.

   b. Case intake.

   c. Dispositions.

   d. Evaluation of performance.

   e. Case workload.

   f. Special inquiries.

7. Maintenance reports.

B. On-line inquiries at the Police Department Computer Center.

1. Types of inquiries.

   a. Help.

   b. Pending case status (case).

   c. Identifying defendants with multiple cases (PDID & defendant's name).

   d. Pending cases for police officers (badge number).

   e. Calendars (misdemeanors, preliminary hearing).

   f. Aging (Grand Jury, misdemeanors, felony indictments).

   g. Witness status (witness name).

   h. WALES inquiries.

   i. NCIC inquiries.

   j. TALK messages.

2. When are the on-line terminals helpful.

   a. Screening.

      - Identifying defendants who have pending cases at the time they are rearrested.

      - Identifying defendants who are wanted as a fugitive or on probation, or parole at the time they are rearrested.

- Identifying status of pending cases for police officers.
- Identifying witnesses.

b. File control.

- Determining case status.
- Answering inquiries from witnesses.
- Pulling jackets for future trial dates.
- Data verification.

c. Special litigation unit.

- Identifying defendants who are major violators.
- Displaying calendars for future court days.
- Identifying defendants with multiple cases.

d. Trial assistants.

- Case status.
- Witness identification.
- Defendants with multiple pending cases.
- Calendars.
- Police officer schedules.
- Plea negotiating.
- Sending messages.

e. Management of aging cases (especially possible jail status).

- Grand Jury.
- Misdemeanor trials.
- Felony trials.

f. Police Department.

- Identifying persons with pending cases at the time of arrest.
- Determining status of pending cases for a police officer.

IX. Each Assistant can make the system more successful

A. PROMIS is not without its problems.

1. Data inaccuracy.

2. Missing cases.

3. Expired cases.

4. Lack of training.

B. How can the Assistants help?

1. Accurate data recording which will be the topic for the next segment of PROMIS.

a. Case evaluation worksheet.

b. Papering forms.

c. Standard case jacket entry book.

2. Becoming aware of PROMIS' inputs and procedures and using the administrative staff effectively.

3. Feedback on success or failure and recommending change for the purpose of making the system more responsive.

X. PROMIS is not just a computer system but a new concept in prosecution

A. Improvements in the Superior Court Division since the start of PROMIS.

1. Increased priority on screening cases.

2. Defining the process and implementing controls and improvements.

3. Special litigation unit and priority prosecution.

4. Performance evaluation.

5. Demonstrated a need to conduct a witness cooperation study.

6. Improved forms and procedures.

7. Introduced long range planning.

8. Demonstrated need for comprehensive training program.

9. Paralegal program.

10. Instant service to witnesses about case status information.

11. Better performance feedback to police (ADW Knife problem).

12. Reduced delay.

13. Improved the capability of the U.S. Attorney to respond to community and other inquiries.

B. Transferability of PROMIS to other jurisdictions.

C. On-line demonstration.

1. Keyboard description.

2. PROMIS inquiries.

3. WALES inquiries.

4. Why the system is sometimes "down".

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC: I.L: Prosecutor's Management Information System

SEGMENT I: Background and Introduction to PROMIS

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OUTLINE OF PRESENTATION NOTES

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A. Provide a witness name and I can tell you the following:

1. Whether the witness ever was a defendant

2. Is the witness a witness in another case

3. What parties in a particular case a witness is related to and what that relationship is

4. Dispositions of the cases the witness is involved in and whether the witness was non-cooperative

B. Provide a defendant name and I can tell you the following:

1. What aliases he has used

NOTES

2. All cases he has had and the disposition of those cases

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4. How serious is his criminal history

5. Who was the arresting officer in each arrest

6. What are the patterns of the continuances in his cases

7. Who have been his defense counsels

8. What is the history of release decisions

C. Provide a defense counsel's name and I can tell you the following:

1. What his plea rate is

2. Who he has defended

3. The types of charges he has defended

4. Disposition of his cases

5. Continuance patterns

NOTES

D. Provide a charge (e.g., rape) and I can tell you the following:

1. How many cases we have considered

2. How many we have papered

3. Why the cases were rejected

4. What release decisions were made for this charge

5. What are the plea rates for this charge

6. What is the guilty, nolle, and DWP rate

7. Who were the principal witnesses in these cases? (defense counsel, witnesses)

8. Who were the victims and were they cooperative

E. Provide an address in Washington, D.C. and I can tell you the following:

1. How many arrests or offenses were made at this address since January 1971

2. What types of crimes were committed at this address

3. When did the crimes occur, including time of day or night

NOTES

4. Who were the individuals involved (police officers, witnesses, defendants, complaintants)

F. Provide a police officer's badge number and I can tell you the following:

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3. Where he arrested them

4. Who were his partners

5. What are the dispositions of his cases

6. Why were his cases rejected at screening

7. What types of charges has he made arrests for

G. Provide an Assistant United States Attorney's name and I can tell you the following:

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3. His disposition history and reasons for nolle's and DWP's

NOTES

4. Types of charges he rejects or accepts

5. What percentage of blocks on the PROMIS case evaluation worksheet he checks

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A. The environment before PROMIS in 1969

1. Court of General Sessions

2. Papering procedures

3. Mass production of misdemeanor prosecutions

4. Poor documentation of reasons for discretionary decisions

5. Lack of insight into prosecutor or police training needs and performance

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B. Why did the office turn to automation?

1. Five year plan for tracking offenders

2. Improve control of the caseload

NOTES

3. Evaluate criminal justice system performance by tracking offenders and events

C. History of PROMIS

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   In addition to its primary objective, PROMIS produces operational reports such as calendars, workload reports, and statistics; and an on-line retrieval capability for immediate access into the PROMIS data base.

2. A team of systems analysts, management analysts, lawyers, and criminologists designed the system

3. The system was put into operation on January 1, 1971

4. The scope of PROMIS

III. Computers and Their Usefulness as a Tool for Society

A. Computers are capable of storing, processing and displaying large quantities of data at extremely fast speeds

NOTES

B. Computers provide the capability to perform repetitive operations more accurately and efficiently than in manual procedures

C. Computers are just tools that are used best by those who know their capabilities and limitations

D. The basic components of a computer:

1. Central Processing Unit

2. Peripheral equipment

a. Tapes

b. Disks

c. Card Readers

3. Terminals

4. Batch vs. on-line processing

E. The application of computer systems

1. Scientific applications

2. Business oriented applications

3. Criminal justice applications

a. Police information system

NOTES

- NCIC - as of August 1973:
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b. Court systems

- Court calendaring systems
- Jury selection system

c. Prosecutor systems (also nucleus of state-level tracking system)

- PROMIS

IV. What are the Components of PROMIS

A. Data Capturing Procedures

B. Data Input System

C. Data Edit System

D. Data Base Maintenance

E. Batch Reports

NOTES

F. On-line Retrieval

G. Special Reports and Research (importance of reason codes, documentation)

V. How Information is Prepared and Fed to PROMIS

A. New Case Input

1. Screening forms - must record names of all witness including chemist

2. Screening decision

B. Arraignment

1. Para-legals

2. Forms

C. Misdemeanor trials

1. Para-legals

2. Forms

D. Grand Jury

1. Indictments

2. Originals/dismissals

NOTES

E. Felony trials

1. Workload

2. Arraignment

3. Dispositions

4. Sentencing

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(Name, alias, sex, race, date of birth, address, facts about prior arrests and convictions, employment status, alcohol or drug abuse, seriousness of defendant criminal history)

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(The charges originally placed by the police against the suspect, the charges actually filed in court against the defendant and the reasons for changes in the charges

NOTES

by the prosecutor, the penal statute for the charge, the F.B.I. Uniform Crime Report name for the charge and the Project Search name for the charge)

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(The names and addresses of all witnesses, the prosecutor's assessment of whether the witness is essential to the case or not, and any indications of reluctance to testify on the part of the witnesses)

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(The dates of every court event in a case from arraignment through motion hearing, continuance hearing and final disposition to sentencing, the names of the principals involved in each event including the defense and prosecution attorneys and judge, the outcomes of the events, and the reasons for the outcomes)

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NOTES

1. Calendars

2. Witness subpoenas

3. Felony trial reports

4. Grand Jury pending cases report

5. Special reports

6. Research and statistical capability

7. Maintenance reports

B. On-line inquiries at the Police Department Computer Center

1. Types if inquiries

a. Help

b. Pending case status (case)

c. Identifying defendants with multiple cases (PDID & defendant's name)

d. Pending cases for police officers (badge number)

NOTES

a. Calendars (misdemeanors, preliminary hearing)

b. Aging (Grand Jury, misdemeanors, felony indictments)

c. Witness status (witness name)

d. WALES inquiries

e. NCIC inquiries

f. TALK messages

2. When are the on-line terminals helpful

a. Screening

b. File control

c. Special litigation unit

d. Trial assistants

e. Management

f. Police Department

IX. Each Assistant Can Make the System More Successful

NOTES

A. PROMIS is not without its problems

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2. Missing cases

3. Expired cases

4. Lack of training

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1. Accurate data recording which will be the topic for the next segment of PROMIS

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3. Special litigation unit and priority prosecution

4. Performance evaluation

5. Demonstrated a need to conduct a witness cooperation study

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B. Transferability of PROMIS to other jurisdictions

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1. Keyboard description

2. PROMIS inquiries

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4. Why the system is sometimes "down"

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC I.L : Prosecutor's Management Information System

SEGMENT II: Social Research Concerns of PROMIS

DURATION: 1 1/2 hours

During this segment the Assistant U.S. Attorneys are expected to gain a better understanding of the research potential of the PROMIS data base and the importance of the Police Officer's Crime Analysis Worksheet for PROMIS and the standard case jacket entry book.

OUTLINE OF PRESENTATION:

I. Definition of a Data Base

A. Criteria of a data base.

1. Factual information about a specific phenomenon used as a basis for analysis, discussion or reasoning.

2. Systematically kept information that is organized for rapid search and retrieval (also by a computer).

B. How PROMIS meets these criteria.

1. PROMIS contains factual information concerning the processing of criminal cases.

2. The data are stored in a systematic way such that information can be retrieved and data searches can be performed.

II. Importance of the PROMIS data base for social science research

A. Unique aspects of the data base.

1. Systematic data are gathered along several dimensions.

a. Defendant information.

b. Victim information.

c. Prosecutor decision-making and the processing of cases.

d. Seriousness of the offense.

e. Police processing.

f. Court processing.

g. Witness information.

Sample of data from the Witness Study.

2. These dimensions can be studied independently or as a unit.

3. These data are continually updated allowing for longitudinal analysis.

B. Consequences of research for the prosecutor and society.

1. Prosecution.

a. Prosecution weaknesses and strengths can be determined (e.g., by type of crime).

b. Prosecutor decisions can be evaluated in light of how systematic they are, how they reflect evidence, and how they reflect the seriousness of the crime.

c. The effectiveness of plea bargaining as it is used by prosecutors can be evaluated.

d. The effectiveness of prosecutor training and the effect of experience (time on the job) can be measured.

2. Society.

a. Citizens' rights can be more fully protected.

b. Prosecution can be sped up or slowed down, insuring due process.

c. The effectiveness of the criminal justice agencies can be evaluated.

3. The Sellin-Wolfgang Index and its consequences for the prosecutor and society.

a. An explanation of the index's purpose.

b. How the index was developed.

c. Uses by the prosecutor.

d. Usefulness to society.

e. A data example - correlation of defendant's arrest record with the score.

4. Gottfredsen Base Expectancy Index and its consequences for the prosecutor and society.

a. Adapting the scale for the prosecutor's use.

b. The usefulness of the index for a prosecutor.

c. The meaning of the index to larger society.

III. Police Officer's Crime Analysis Worksheet for PROMIS

A. Purpose.

1. Sellin-Wolfgang index.

2. Situation of the crime.

3. Preliminary evaluation of evidence.

4. Victim-defendant-witness interrelationships.

B. Uses.

1. Setting priorities.

a. Developing a predicative model of case outcome.

b. Helping to understand the problems of a "mass production" prosecution unit.

2. Research.

a. Allows for evaluative research.

(1) Evenhandedness of prosecutor.

(2) Social factors that influence case outcomes.

(3) Non-legal affects on case passage.

b. Increases knowledge about officially recorded crimes using data other than collected by the police.

IV. Reliability of Data

A. Reliability concerns the consistent entrance of data.

1. The Police Officer's Crime Analysis Worksheet is an interview schedule.

2. Police and prosecutors are "raters" entering data.

3. Inconsistent entries for similar cases by an attorney or inconsistent entries by different attorneys for similar cases result in unreliable data.

4. Interpretations of questions must be the same among raters for reliability to exist.

5. A sample of problem questions (see interview schedule).

   Include police and prosecutor problem questions.

V. Standard Case Jacket Entry Booklet

A. Purpose.

1. Rapid recognition "shorthand" for the most salient procedural information on a case.

2. Elimination of need for interpretation of entries by clerical personnel.

3. Input of case transactions into PROMIS data base.

B. Contents.

1. No-Paper reasons.

2. Continuance reasons.

3. Nolle reasons,

4. Dismissal reasons.

5. Final dispositions.

C. Operational Utility.

1. PROMIS.

2. Benefits to Manual Processing.

D. Research Utility.

1. Benefits to the U.S. Attorney's Office.

2. Benefits to the criminal justice system at large.

VI. Future Changes

A. Crime Analysis Worksheet.

1. Form changes.

2. Use of para-legals.

B. Standard Case Jacket Entry Book.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC I.L : Prosecutor's Management Information System

SEGMENT II: Social Research Concerns of PROMIS

During this segment the Assistant U.S. Attorneys are expected to gain a better understanding of the research potential of the PROMIS data base and the importance of the Police Officer's Crime Analysis Worksheet for PROMIS and the standard case jacket entry book.

OUTLINE OF PRESENTATION NOTES

I. Definition of a Data Base

A. Criteria of a data base

1. Factual information about a specific phenomenon used as a basis for analysis, discussion or reasoning

2. Systematically kept information that is organized for rapid search and retrieval (as by computer)

B. How PROMIS meets these criteria

1. PROMIS contains factual information concerning the processing of criminal cases

2. The data are stored in a systematic way such that information can be retrieved and data searches can be performed

II. Importance of the PROMIS Data Base for Social Science Research

A. Unique aspects of the data base

1. Systematic data are gathered along several dimensions

NOTES

2. These dimensions can be studied independently or as a unit

3. These data are continually updated allowing for longitudinal analysis

B. Consequences of research for the prosecutor and society

1. Prosecution

a. Prosecution weaknesses and strengths can be determined (e.g., by type of crime)

b. Prosecutor decisions can be evaluated in light of how systematic they are, how they reflect evidence, and how they reflect the seriousness of the crime

c. The effectiveness of plea bargaining as it is used by prosecutors can be evaluated

d. The effectiveness of prosecutor training and the effect of experience (time on the job) can be measured

2. Society

a. Citizen's rights can be more fully protected

b. Prosecution can be sped up or slowed down, insuring due process

NOTES

c. The effectiveness of the criminal justice agencies can be evaluated

3. The Sellin-Wolfgang Index and its consequences for the prosecution and society

a. An explanation of the index's purpose

b. How the index was developed

c. Uses by the prosecutor

d. Usefulness to society

e. A data example - correlation of defendant's arrest record with the score

4. Gottfredson Base Expectancy Index and its consequences for the prosecutor and society

a. Adapting the scale for the prosecutor's use

b. The usefulness of the index for a prosecutor

c. The meaning of the index to larger society

NOTES

III. Police Officer's Crime Analysis Worksheet for PROMIS

A. Purpose

1. Sellin-Wolfgang index

2. Situation of the crime

3. Preliminary evaluation of evidence

4. Victim - defendant - witness interrelationships

B. Uses

1. Setting priorities

2. Research

IV. Reliability of Data

A. Reliability concerns the consistent entrance of data

1. The Police Officer's Crime Analysis Worksheet is an interview schedule

2. Police and prosecutors are "raters" entering data

3. Inconsistent entries for similar cases by an attorney or inconsistent entries by different attorneys for similar cases result in unreliable data

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4. Interpretations of questions must be the same among raters for reliability to exist

5. A sample of problem questions (see interview schedule)

V. Standard Case Jacket Entry Booklet

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1. Rapid recognition "shorthand" for the most salient procedural information on a case

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4. Dismissal reasons

5. Final dispositions

C. Operational Utility

1. PROMIS

2. Benefits to Manual Processing

D. Research Utility

1. Benefits to the U.S. Attorney's Office

2. Benefits to the criminal justice system at large

VI. Future Changes

A. Crime Analysis Worksheet

1. Form changes

2. Use of paralegals

B. Standard Case Jacket Entry Book

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

SAMPLE OF RESEARCH CAPABILITY OF PROMIS DATA

TOPIC I.L: Prosecutor's Management Information System

SEGMENT II: Social Research Concerns of PROMIS

Witness Cooperation - A Description of the Problem Using PROMIS Data

Between January 1, 1973 and June 30, 1973 there were 7,849 cases reviewed by the U.S. Attorney's Office. Of these, 6,266 cases (79.8%) had either a complaining or other lay witness. Of the 6,266 cases with a witness, 692 cases (11.0%) were no-papered (not accepted for prosecution) because the witness(es) would not cooperate. Additionally, 764 cases with cooperating witnesses were no-papered for some other reason. Thus, 1,456 cases delete at this point.

Of the remaining 4,810 cases, 466 cases (9.7%) were nol-prossed (prosecution is terminated) because the witness(es) would not cooperate. In addition, 987 cases with a cooperating witness were nol-prossed for some other reason. Thus, 1,453 cases delete at this point, leaving 3,357 cases. Of these, 32 cases (1.0%) were dismissed because of witness cooperation reasons.

A total rate of noncooperation for the 6,266 cases with a witness is the ratio of the sum of the witnesses who do not cooperate at some point in the judicial process (692 + 466 + 32 = 1,190) to the total number of cases (6,266), or 19 per cent. Thus, of the 6,266 cases with witnesses, eventually, 19 per cent were dropped because of witness noncooperation. Another way of stating the problem is that of the total number of cases which are not prosecuted (1,456 + 1,453 + 261 = 3,170 cases), 38 per cent (1,190 cases) are not prosecuted because of witness noncooperation.

WITNESS COOPERATION FREQUENCIES

7,849 Total Cases

6,266 Cases With A Witness

	Paper	No-Paper		Total	
Witness Cooperate	4,810	764	52.5%	5,574	89.0%
Witness No-Cooperate	———	692	47.5%	692	11.0%
Total	4,810	1,456 (delete)	100.0%	6,266	100.0%
	↓ Prosecute	Nolle		Total	
Witness Cooperate	3,357	987	67.9%	4,344	90.3%
Witness No-Cooperate	———	466	32.1%	466	9.7%
Total	3,357	1,453 (delete)	100.0%	4,810	100.0%
	↓ Continued to Trial	Dismissed		Total	
Witness Cooperate	3,096	299	87.7%	3,325	99.0%
Witness No-Cooperate	———	32	12.3%	32	1.0%
Total	3,096	261 (delete)	100.0%	3,357	100.0%
	↓ Trial				

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC II.A: Basic Trial Skills

DURATION: 1 Hour

The purpose of this discussion is to introduce the Assistant to the trial training program and to give him or her some trial fundamentals. Particular attention will be given to the basic structure upon which the following training is built and to the Assistant's role in trial. The trial fundamentals will be expanded upon in the later sessions.

OUTLINE OF PRESENTATION

I. Who's Who in the Courtroom

A. Judge.

1. May "test" you in first appearances.

2. Know your job and show confidence to win him or her over.

B. The court clerk.

1. A Deputy Superior Court Clerk.

2. May or may not also be the judge's law clerk.

3. Responsible for Court Records, entries, marking of exhibits, custody of admitted evidence, administering of oaths, etc.

4. A valuable person to know.

C. The Court Reporter.

1. Usually sits to one side of the court clerk.

2. Easily recognizable by stenographic equipment.

3. Appreciates a list of witnesses prior to trial and Assistants who speak clearly.

D. The Marshal.

1. A Deputy United States Marshal.

2. Functions as bailiff and crier.

3. Responsible for custody of prisoner, order in courtroom, secrecy of jury deliberations, and judge's security.

4. A good person to be friendly with for other occasions.

E. The judge's law clerk.

1. Usually sits alongside the courtroom clerk or in the jury box if a non-jury matter.

2. A good person to know who has the judge's ear and frequently administers the judge's schedule.

3. Can be very useful if given cases Government will rely on in advance of hearing.

F. The prosecutor.

1. Has the counsel table nearest to the jury box.

2. In a small courtroom, files and notes on prosecutor's table are readily visible to the defendant and defense counsel.

G. Defense counsel.

H. Defendant.

I. The jury.

J. Witnesses.

1. Should be excluded from courtroom except when testifying.

2. Called by marshal on counsel's request.

II. The parts of a trial

A. Jury selection/voir dire.

1. Court gets jury panel for monthly jury pool.

2. Government outlines case and questions.

3. Defense questions.

4. Court questions.

5. Alternating strikes by government and defense as jury is impanelled.

B. Opening statement.

1. Purpose - a guidebook for the jury.

2. Have a theme. Plan for your final argument.

3. Keep your opinion out of it.

4. The elements.

5. Don't be too detailed. Witnesses do change their stories.

6. Defense may reserve opening statement until the conclusion of your case.

C. The evidence,

1. The order of presentation.

a.Government witnesses.
- direct examination by prosecutor
- cross-examination by defense
- redirect and re-cross-examination

b.The defense witnesses.
- direct examination by defense
- cross-examination by prosecutor
- re-direct and re-cross-examination

2. Direct examination of witnesses.

a.MOST IMPORTANT.

b.Technique.
- have witness identify self
- keep your witness under control
- quiet him down; it's probably his first time in a courtroom
- have the WITNESS tell his story

3. Exhibits.

a.Always a good idea to have some exhibit

b.Makes the case more real for the jury

c.The technique - 3 easy steps
- have the clerk mark for identification and then have shown to Court and counsel
- have the witness identify the exhibit, describe it for the record and testify concerning it
- move to have introduced as evidence

d. ALWAYS REFER TO EXHIBITS BY EXHIBIT NUMBER, SO THE RECORD IS COMPLETE

4. Cross-Examination.

a. Don't cross-examine unless you have a reason.

b. Never ask a "why" question.

c. Don't try to improve on a good answer.

D. Closing Argument.

1. KEEP NOTES

a. Use sparingly; don't make a note of everything.

b. Key items you want to remember.

2. Have a theme.

3. Prepare - if only one minute.

a. Recapture your theme.

b. Go for the jugular vein - HIT THE ISSUE.

E. Jury instructions and verdict.

1. Instructions to the jury on the law.

a. Conference between prosecutor and defense counsel and court.
b. The Criminal Jury Instructions ("The Redbook") is a practice aid used by everyone, but not a perfect statement of law.
c. The court instructs ("charges") the jury.
d. Bench conference on instructions before given and after.

2. Jury notes and re-instructions.

(Same procedure as for original instructions)

3. The jury verdict.

III. The Government's Case

A. The government has the burden of going forward and must prove each and every element of the crime.

B. The key is knowing the <u>elements</u> of the crime.

1. Primary sources.

a. The statutes (Title 22 D. C. Code; Title 18 U. S. Code).
b. The case law.

2. Secondary sources.

a. The Criminal Trial Manual.
b. The Criminal Jury Instructions ("The Redbook")
your best practical source but not a perfect statement of law.

C. A prosecutor cannot try a case unless he knows what elements he has to prove.

IV. Conduct in the Courtroom

A. Wear a suit.

1. No slacks.

2. No sport coats.

3. No flamboyant ties, shirts, etc.

B. Always be courteous.

1. Stand when addressing the court.

2. Don't challenge the judge.

3. Don't talk down to the judge, witnesses or anybody else.

4. You can be firm without being rude.

C. Restrain emotion.

1. If you disagree with judge, KEEP IT IN THE OFFICE.

Don't discuss judicial failings in the hallways.

2. Never show surprise or anger.

There are only a few instances that call for outrage.

D. Act like the attorney for the people.

1. Be professional.

2. Set a high tone.

3. Show confidence in your case.

4. Address objections to the court; not defense counsel.

E. Act confident.

1. Don't tolerate abuse from court or counsel.

Be firm, but courteous.

2. No one knows everything.

3. Part of experience is learning to handle the times when you don't know the point of law or whatever.

4. An attorney who acts confident is less apt to be challenged.

V. Basic Trial Skills in a Nutshell

A. Know your elements.

B. Show confidence and be firm, but courteous.

C. Let the witness tell his story.

D. Know how to handle exhibits; refer to them by number.

E. When you're finished, sit down.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

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C. The evidence

1. The order of presentation

NOTES

2. Direct examination of witnesses

3. Exhibits

4. Cross-Examination

D. Closing Argument

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2. Don't challenge the judge.

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2. Never show surprise or anger.

NOTES

D. Act like the attorney for the people.

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NOTES

V. Basic Trial Skills in a Nutshell

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B. Show confidence and be firm, but courteous.

C. Let the witness tell his story.

D. Know how to handle exhibits; refer to them by number.

E. When you're finished, sit down.

CHECKLIST/GOUGE

Direct Examination of Witnesses

I. Complaining Witness or eye witness

A. Name, address, and occupation

1. Calling attention to (date), at (time), were you at (location)?

2. Does witness see anyone in the court who he saw at that time and place?

3. Have witness point out who he sees.

4. May record reflect he identified defendant.

5. Circumstances of offense.

6. Attention by witnesses to any physical evidence.

7. Circumstances of witnesses, later attention of defendant to the outlines.

II. Arresting Police Officer

A. Name and profession.

B. Directing witness' attention to date in question.

1. Were you on duty on that date?

2. At (time), where were you?

3. Do you see anyone in the courtroom who you saw at that time?

4. Identification of defendant.

5. May the record reflect he identified the defendant?

C. Circumstances of the offense.

D. Circumstances of identification of defendant.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

SELECTED REFERENCES

Basic Trial Skills

General References

1. Goldstein, Trial Techniques (1st Ed.)

   a. Direct Examination of Witnesses, Sections 314-59.
   b. Exhibits, Sections 360-412.
      (esp. Section 364, Identifying Exhibits
      Section 365, "What is it?"
      Section 366, When Exhibits Offered
      Section 373, Simple Foundation
      Ignore Sections 396, 397.)
   c. Objections, Sections 413-20.
      (esp. Section 422, Few Objections Should Be Made.)
   d. Opening Statement, Sections 256-61, 268-76 and 277.
   e. Arguments to the Jury, Sections 648-663, 681.

2. Am Jur Proof of Facts

3. Am Jur Trials

4. Schweitzer, Encyclopedia of Trial Strategy

D. C. Substantive Law

1. D. C. Annotated Code

2. D. C. Criminal Jury Instructions ("The Redbook")

3. U. S. Attorney's Office Trial Manual

4. Slip Opinions

   a. D. C. Court of Appeals
   b. U. S. Court of Appeals for D. C. Circuit

5. Your Own Notebook

   The importance of keeping your own trial notebook cannot be overemphasized. An approximately 5 x 8 size is easy to carry to Court. It should contain all your checklists, gouges, and your own notes on various crimes, statutes, cases, and procedural points.

D. C. Procedural Law

1. Annual Georgetown Law Review Criminal Circuit Notes

2. Search & Seizure (Georgetown Legal Intern)

3. D. C. Superior Court Rules:

Rules Service Company
5530 Wisconsin Avenue
Chevy Chase, Maryland 20015

You would be well advised to subscribe to the D. C. Rules. The annual subscription of approximately $18.00 covers the rules for the Superior Court, U. S. District Court, D. C. Court of Appeals, and the U. S. Court of Appeals.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC II.B: Case Preparation and Examination of Witnesses at Trial

DURATION: 3 Hours

This discussion will be given in three one hour segments. The first hour will be devoted to sub-topic I (General Principles of Case Preparation). The second hour will be devoted to sub-topic II (Location and Pre-Trial Preparation of Witnesses). The third hour will be devoted to sub-topic III (Direct and Cross-Examination at Trial). The special problems of identification evidence (including photo-identification, lineup identifications, pre-trial hearings and trial testimony) will be treated in detail in a separate lecture.

OUTLINE OF PRESENTATION

I. General Principles of Case Preparation

A. Preliminary Steps.

1. READ THE INDICTMENT/INFORMATION.

a. Does it agree with the statement of facts?
b. Are the charges correct?

2. Check the Case Jacket.

a. PD 163
b. PD 251 (public document)
c. Bail Agency report
d. Narcotics Treatment Administration report
e. Copies of subpoenas
f. Local police record
g. FBI record
h. Conditions of release/bail
i. Statements of witnesses
j. Confessions
k. Preliminary Hearing transcript
l. Grand Jury transcript
m. Copy of arrest warrant
n. Copy of search warrant
o. Mug shot photograph
p. Lineup photograph
q. Chemist/lab report on narcotics
r. Mobile Crime Lab reports
s. FBI Lab reports

t. Handwriting analysis report
u. Certified copies of prior convictions
v. Test fire certificate on gun
w. No-license certificate for pistol
x. Photos of victim's injuries
y. Medical Examiner's report
z. Medical report in sex cases
aa. Latent fingerprint comparison report
bb. Aerial photographs

3. Complete the Case Jacket.

a. Order documents
b. Order transcripts
   - Preliminary Hearing
   - Grand Jury
   - Identification Hearing
   - Any other hearing where testimony taken
c. Serve alibi demand notice on defense in felony cases only.
   - Super. Ct. Crim. R. 16-I
   - BE SURE YOU WANT THE DEFENSE TO HAVE YOUR I.D. WITNESSES' NAMES
   - Defense has 10 days to respond
   - Thereafter, you have 10 days to give defense I.D. witnesses' names and addresses (but not less than 10 days before trial)
d. Make sure evidence has gone to the lab
e. Get test fire and no-license certificates
f. Get corporate seal
g. Get certified copies of prior convictions
h. Order aerial photographs

4. Know Your Elements of the Crime Charged.

a. Make sure you know what you have to prove
b. Be alert for evidence problems
   - law
   - techniques

B. Case Preparation

1. Read your file.

2. Examine and compare reports.

a. Compare
   - statement of facts (PD 163)
   - Bail Agency report
   - Preliminary Hearing transcript
   - Grand Jury transcript
   - et cetera

b. Look for tell-tale names and addresses.
c. Look for discrepancies.
d. Did defendant tell police/bail agency,
   - same employment?
   - same residence?
   - same date/place of birth?
   - et cetera.
e. Look for names of other possible witnesses.

3. Locate all Jencks Act material.

a. 18 U.S.C. §3500:
b. Know the Jencks Act.
c. Jencks statements:
   - a written statement,
   - signed/adopted/approved,
   - by the witness;
   - a substantially verbatim recital of an oral statement (includes police reports and your handwritten notes)
   - Grand Jury or other testimony.
d. Sources.
   - transcripts
   - police reports
   - policeman's notebook (including notes taken to prepare reports)
   - Grand Jury secretary's writeup
   - statements taken by police squads (e.g., Homicide)
   - tape recordings
   - tapes of radio runs
   - tapes at lineups
   - admissions/depositions/etc. in civil suits
   - videotape soundtracks
   - motion picture soundtracks
   - letters of witness
   - memorandum of witness
e. Purpose of the Jencks Act is to make available possibly inconsistent prior statements for impeachment.

4. Prepare for witness interviews.

a. Know your facts
b. Read all the Preliminary Hearing and Grand Jury testimony
c. Study exhibits
d. Ask police about types of witnesses in case
e. ALWAYS HAVE POLICE/SECRETARY PRESENT AT INTERVIEW
   - a necessary witness in case of later impeachment with prior inconsistent statement
   - you can't testify at trial

5. Interview witnesses in your office. Out-of-the-office interviews are the exception.

6. Don't create Jencks material. Have a private code for fact essentials; don't have verbatim notes.

II. Location and Pre-Trial Preparation of Witnesses

A. Locating Witnesses.

1. Case jacket witnesses.

a. PD 163
b. PD 251
c. Subpoenas in jacket
d. Witnesses listed on jacket by Screening AUSA
e. Investigative Squad writeups
   - Homicide
   - Sex
f. Grand Jury secretary's writeup

2. Other witness sources.

a. Police notes, especially from on-scene police
b. Police case files
   - Homicide
   - Sex
c. Additional investigation
   - Police: show him you consider the case important
   - Police: make him do his job
   - visit the scene yourself
   - talk to witnesses at the scene
   - "The DA is here!"

3. Finding the witness.

a. The telephone book. Unlisted numbers can be gotten via Major Crimes Unit
b. Street-address telephone book in the office
c. U. S. Post Office
   - forwarding addresses
   - information from the local mailman
d. Polk's Directory
e. Haines Directories
   - telkey directory
   - criss-cross directory
f. Motor Vehicles Department printout
g. Job inquiries
h. Neighborhood inquiries
i. Check jail/Lorton

j. Check PROMIS
k. Try to involve the FBI

4. Prisoners. Use a Subpoena Ad Testificandum. Forms are in the office.

5. Military witnesses.

a. Procedures in the Dept. of Justice U. S. Attorney's Office Manual.
b. Officials at the Dept. of Justice will handle most of the details.
c. All the services have personnel locators at the Pentagon.

6. Government witnesses.

a. Subpoena local witnesses.
b. Use Dept. of Justice procedures (similar to Military).

B. Protecting/Granting Immunity.

1. Protecting.

Consult either Section or Division Chief.

2. Granting Immunity.

a. Don't make deals.
b. Consult either Section or Division Chief.
c. Must be authorized by Dept. of Justice and an elaborate procedure must be followed. See. 18 U.S.C. §§6001-05.
d. Rare for misdemeanor cases, but has been done.

C. Paying witnesses.

Make sure witness has his witness card: as a general rule, witnesses are not paid until the end of the case. Interim payments can be authorized for actual appearances.

D. Witness Preparation - General Principles.

1. Initial Meeting.

a. Discuss roles
- who AUSA is
- who witness is in relation to case
b. Discussion of case
c. Treat witness with courtesy and dignity
- do not confuse with lack of firmness
- you are in charge of the case

d. Develop rapport with the witness

2. Special Points.

a. ALWAYS HAVE A WITNESS PRESENT (e.g., police/secretary)
b. Note-taking: remember Jencks Act

3. General principles.

a. Emphasize witness is to tell the truth
b. Demeanor is evidence
c. Witness must
   - listen to question
   - be responsive to question
   - be polite
   - keep voice loud and clear
   - pause on cross-examination, so AUSA can object
d. Witness must not
   - speculate or guess
   - ("I don't know" or "I don't remember" if not certain)
   - get "cute" with defense counsel
   - volunteer information on cross-examination
   - laugh or giggle

4. Direct and Cross-Examination.

a. Go over story several times
b. Ask questions just as on direct examination and tell witness this is what you will ask him.
c. Cross-examine witness
   - tell him this is how defense counsel will question
   - nothing to fear
   - emphasize you will protect him
d. Advise witness of areas he can't go into
   - explain hearsay
   - personal knowledge only ("just the facts")
   - suppressed evidence (Miranda, search and seizure)
e. Witness is always to tell the truth; will be under oath
f. Go over exhibits, charts, in-court I.D.'s , etc.

5. Refreshing Recollection and Past Recollection Recorded.

a. Full technique will be covered in trial lecture (part III)
b. Prepare witness to lay foundation; witness not to say "that's all I remember"
c. AUSA will ask:
   "Is there anything further that you now remember concerning _____?"

Witness:
"That is all I now remember" or "at this time"
AUSA:
"Is there anything which will refresh your recollection?"
Witness:
"Yes, (describes whatever it is)"

E. The Police Witness.

1. Appearance.

a. Attitude of professionalism.
"You're a professional man/woman and we want to convey that professionalism to the jury."
b. Vocabulary.
- don't use "policese"
- no "subjects, males, females, boys, girls, etc." instead of "men, women, ladies, young men, etc."
- no "0100 hours"
- no "proceeding" for driving or walking
- plain, good English
c. A good, pressed uniform.
Court is important.
d. No gum, twitching, etc.

2. Conduct in Court.

a. Good posture.
b. Keep cool.
c. On cross-examination, pause before answering; gives the AUSA time to object.

3. Remember police are not professional witnesses.

a. Prepare them like other witnesses.
b. May be their first time in Court.

F. The lay witness.

1. Appearance.

a. Court is important.
b. Dress appropriately, as if interviewing for a job.
c. Jury doesn't know witness but judges by appearance.
d. No gum chewing, twitching, etc.
- watch for witness' peculiar habits
- correct them

2. Conduct in Court.

a. Jury is twelve ordinary people;
   just tell them what happened.
b. Keep temper.
c. AUSA will protect them.
d. Keep voice loud and clear.
e. Pause on cross-examination, so AUSA can object.
f. If positive, say positive,
   especially on identifications.

3. The Witness' Testimony.

a. Go over all details with witness.
b. Witnesses may need to confer to iron out details.
   - perfectly permissible
   - refreshing their memory
c. Go over times/distances/descriptions.
   Experiment with time/distance determinations.
d. Witness may not articulate well.
   - be ready to help
   - not a fabrication of evidence
e. Prepare witness to tell his story.
   - clear
   - cogent
   - comprehensive
f. Prepare for cross-examination.

4. What to do if contacted by defendant/counsel/investigator.

a. Can, but doesn't have to talk to them.
b. Can call police on case or you.
c. You will protect.

G. Expert Witness.

1. Four parts of expert testimony.

a. Qualification of witness.
b. Rapport with jury.
c. Basis of opinion.
d. Statement of opinion.

2. Reason for expert witness.

a. Facts needing explanation/interpretation.
   - Fingerprints
   - Handwriting
   - Medical Examination
   - Psychiatric Examination

- Bloodhound tracking
- Numbers game
- Pickpockets
- Narcotics/PIC
- Narcotics/chemical analysis
- Value (appraisers/brokers/store employees)
- Scientific/engineering/technical data

3. Preparation.

a. Know area of expertise.
   - Am Jur Proof of Facts is excellent
   - Don't let expert run your case

b. Interview in person.

c. Qualifications.
   - Discuss with expert
   - Know questions to ask

d. Basis of opinion.
   Know questions to ask.

e. Importance of getting message to jury.
   Good expert witness already knows this.

H. Child Witness.

1. Children depend on familiarity and trust.

a. Be friendly

b. Spend necessary time;
   child gets to know you.

2. Familiarize child with courtroom.

a. Have child tell story in empty courtroom.
   - can help to have mother sit in witness chair first
   - have family/friends in jury box

b. Explain in repetitive detail.
   - what will happen at trial
   - nice strangers in jury box
   - nice judge on bench
   - friendly AUSA will be there

3. Difficult concept of "to tell the truth".

a. Hard to deal with at trial.

b. Use church/school/home experience.

c. Use upbringing by parents.

d. Examples.
   "Bobby, do you know what it means to tell the truth?"
   "Bobby, what happens to you if you tell a lie?"
   "Bobby, do you understand you have to tell us the truth?"
   "You will tell us the truth, won't you Bobby?"

NOTE: Can defeat yourself by too much talking about "truth". Child must understand to testify to "real" events, not "made up" or "pretend" things.

4. Child witness requires a lot of time.

a. Get child used to court and strange persons. Frequent visits to courthouse if necessary.
b. Get child used to you.
c. Be repetitive.

I. Problem Witnesses.

1. Alcoholic witness.

a. Drying him out.
b. Have frequent witness conferences to ensure he has not fallen off wagon.
c. Drunk on day of trial.
   - How drunk?
   - Do you need him?
   - Save him until last so he can sober up.
   - If essential witness, move for one-day continuance.
d. Emphasize only gets witness fee at end of trial.

2. Addict witness.

a. Get him in NTA/methadone program.
b. Addicts are hard to keep track of.
c. Emphasize only gets witness fee at end of trial.
d. You are friend; if you weren't, might be arrested as material witness.

3. Reluctant witness.

a. Community interest ("it's up to you").
b. Dangerousness of defendant.
c. Failure of prosecution; defendant goes free.
d. Protection available; reprisals unlikely.
e. Your power to compel testimony.
   - Penalties for failure to appear at trial
   - Attachment/bench warrant
   - Marshals/police will come for witness
   - Contempt of court
f. Perjury penalties.

4. Husband-wife privilege.

   a. 14 D. C. Code §306.
   b. Privilege is personal to party testifying; cannot be compelled to testify, but may if so desires.
   c. Cannot testify <u>at all</u> to confidential communications.

J. Summary of Witness Preparation.

1. ALWAYS HAVE POLICE/SECRETARY PRESENT AT INTERVIEW.

2. Know witness.

3. Know infirmities of witness.

4. Prepare witness demeanor on stand.

5. Go over his testimony several times.

6. Show all exhibits to witness.

7. Advise witness of areas he can't go into.

8. Prepare witness to lay foundation for "refreshing recollection" and "past recollection recorded".

9. Cross-examine witness.

10. Take witness to courtroom (esp. children).

11. Advise what to do if contacted by defendant/counsel etc.
    a. Witness may, but doesn't have to talk to them.
    b. Call policeman on case or you.

12. Make sure witness knows you will protect him on cross-examination at trial.

K. Your Preparation for Court.

1. Know your case so well you don't need notes.

   Write out outline to strengthen summary.

2. Prepare a list of witnesses/date/time/place.

   a. For court reporter.
   b. For judge.
   c. For you.
      - voir dire
      - opening statement
      - trial
      - closing argument

3. Have some exhibit for trial.
   Prepare a chart/diagram yours

4. Make sure subpoenas are served.

III. Direct and Cross-Examination of Witnesses at Trial

A. AUSA Role vs. Defense Counsel Role.

1. The main defense weapon is confusion.

   a. Confusion leads to reasonable doubt.
   b. Don't let the defense confuse.
      - the Court
      - the witnesses
      - the jury
      - AUSA
   c. Defense does not have to prove anything; only has to confuse the issues.

2. AUSA role.

   a. Know more about case than anyone in the world; communicate that knowledge to the jury.
   b. Jury should look to you for the facts.
   c. Demeanor is communication.
      - trial attorney is a performing artist
      - instill confidence in cause
      - take charge, starting at the voir dire

3. The two essential points.

   a. You have to prove your case by making out a prima facie case.
   b. Jury has to know that you proved your case to return a guilty verdict.

4. The most common AUSA mistake.

   a. Mistakenly assuming that the jury knows all the facts you do.
   b. Don't assume the jury knows anything.
   c. Don't assume this is a routine case for the jury; may be the biggest thing that ever happened to them.
   d. Don't assume jury pays attention.
   e. Cover all the facts.
   f. Be repetitive; be repetitive.

B. Courtroom Demeanor.

1. Dress.

a. Dress conservatively.
b. AUSA should appear as a dedicated, serious, dependable public servant.
c. Court is not a style show.
   - no sports coats
   - no mod clothes
   - no wild ties
   - no flamboyant shirts
   - no boots
d. AUSA's appearance should not attract attention.
   - be unobtrusive
   - jury should pay attention to your case, not to your personal style show
e. Emphasis on dress is a practical, not an ideological point.

2. Importance of demeanor.

a. Jury must look to AUSA for facts.
b. Starting at voir dire,
   - communicate confidence,
   - communicate competency,
   - communicate knowledge.
c. Communicate by demeanor,
   - take charge
   - act gentlemanly/ladylike
   - don't irritate

3. Important things to do.

a. Always rise when addressing Court.
b. Always be polite to the Court.
   - "Your Honor"
   - juries don't like rudeness
   - you can be firm, but polite
   - being polite is not knuckling under
c. Always address objections to the Court, not defense counsel.
d. Keep back from the jury box.
e. Keep back from the witness stand; causes witness to keep voice up.
f. Appear calm, cool and collected.
g. Ask Court's permission:
   - to proceed with voir dire
   - to question witness
   - for witness to leave stand for demonstration
   - for marshal to get a witness

4. Important things NOT to do.

a. Do not walk around while questioning witness.
b. Do not hold notes.
d. Do not lean or slouch.
e. Never show surprise.
f. Never show anger.
g. Never turn your back on the Court.
Never show disrespect for the Court:
- in the Courtroom
- in the hallways
- during recess
- keep it in the office

C. Direct Examination of Witnesses.

1. Introduction of Witness.

a. Name.
b. Age.
c. Background questions.
- let jury get to know witness
- let witness get over nervousness

2. Narrative.

a. Let witness tell story first.
- Ask "will you tell the Court and jury, please, etc.?"
- The fewer interruptions, the better for the witness
- Chronological order is best
b. Go back and fill in/emphasize details.
c. Important to know your case to know what you want from this witness.
d. Do not rush witness, but do avoid overly repetitive testimony.
e. Use short questions.
f. Witness should know to say he doesn't understand questions, if he doesn't.
g. Leading questions.
- you must avoid them
- can get permission from Court to lead witness if necessary (e.g., children, nervous witness)
h. The secret of direct examination is to let the witness tell his story, but to keep him to the point.

i. Jogging the witness.
- "What, if anything, happened then?"
- "What, if anything, did you then do?"
- "What, if anything, did he then do?"
- "What, if anything, occurred then?"
- "What, if anything, followed then?"

CAUTION: Remember "refreshing recollection" foundation. Witness should answer "that is all I now remember" or "that is all I can remember at this time".

D. Making a record.

1. Remember "cold" record on appeal.

a. Court of Appeals can't guess.
b. Think of record.
c. Don't win at trial and lose on appeal.

2. Things to do.

a. Always refer to exhibits by number, e.g., "Government's Exhibit No. 1 for identification"
b. Always have exhibit described for record.
c. Get distances in record.
- AUSA: "How far away was the man?"
- WITNESS: "From here to the end of that table."
- AUSA: "Your Honor, may the record reflect the witness is indicating a distance of about eight feet?"
- COURT: "Any objection by the defense?"
- DEFENSE COUNSEL: "It looks more like nine feet to me, your Honor."
- COURT: "Any objection by the Government to nine feet?"
- AUSA: "That's agreeable to the Government, your Honor."
- COURT: "The record will reflect the witness has indicated a distance of about nine feet."

d. Remember, if witness does not give distance in feet, you must get distance in record.
e. Get non-testimony evidence in record.
- AUSA: "Where were you hit?"
- WITNESS: "Right here."
- AUSA: "Your Honor, may the record reflect the witness is indicating the left side of her face?"

f. Have witness clearly mark points on diagrams and pictures
- AUSA: "Referring to the picture marked as Government's Exhibit No. 1 for identification, will you indicate where you were standing?"
- WITNESS: "Right there."
- AUSA: "On Government's Exhibit No. 1 for identification, will you put an "x" with a circle around it at the point you have just indicated?"

3. Things to avoid.

a. Avoid pronouns.
- no "this"
- no "it"
- etc.

b. Avoid ambiguities.

E. Refreshing Recollection.

1. FOUNDATION: The witness must lay the foundation by showing that his recollection needs to be refreshed. Prepare your witness to answer "at this time" when he is asked a "now" question. If he simply answers, "That is all I remember", as opposed to "now" or "at this time", no need for refreshing has been shown.

2. The Elements of Refreshing Recollection.

a. Witness testifies recollection is exhausted: "that is all I now remember".
b. Witness testifies something exists which can refresh recollection.
c. Witness identifies item which will refresh recollection.
d. Witness reads item to himself and returns to AUSA.
e. Witness testifies his recollection is refreshed.
f. Witness completes testimony.

Note to Lecturer: Refer to gouge handout for sample questions on refreshing recollection.

3. Important Points.

a. Witness' memory is the evidence, not the document itself.
b. It is irrelevant what the item is.
c. It is irrelevant whether the witness wrote/signed/believes it.
d. Relevant evidence is his recollection, not the refreshing item.
   - essential thing is refreshing recollection
   - jogs his memory
e. Item may not be read aloud by the witness, but must be surrendered before testifying.
f. Item may not be admitted in evidence if only used to refresh recollection.
   - may become admissible by use for impeachment
   - may become admissible as past recollection recorded

F. Past Recollection Recorded.

1. Foundation.

a. Exhaust present recollection.
   - witness' recollection not refreshed after reading document
   - refreshing recollection has failed

CONTINUED

3 OF 5

b. Same technique as foundation for refreshing recollection.

2. Elements of Past Recollection Recorded.

a. Recollection not refreshed after reading document; witness unable to speak from present memory.
b. Document made near in time to the event; witness' memory was then fresh.
c. If he wrote it himself, he correctly recorded the facts. Witness may testify he habitually records such matters correctly.
d. If someone else wrote it,
   - witness read it while his memory was still fresh
   - witness knew at that time it was true and correct
e. Writing is unaltered original (or true copy of unaltered original).

Note to Lecturer: Refer to gouge handout for sample questions on past recollection recorded.

3. Important Points.

a. Technique is used usually after refreshing recollection has failed.
b. Purpose is to turn the document itself into evidence.
c. Refreshing recollection; witness testimony is evidence.
d. Past recollection recorded; the document is the evidence.
e. Once the document has been admitted, have witness read it to the jury.

G. Cross-Examination.

1. The two purposes.

a. Admission of facts supporting Government case.
b. Impeachment of witness.
   (See separate discussion Section II D for specific techniques.)

2. The manner of cross-examination.

a. Keep object of examination hidden.
b. A fumbling, hesitant manner can work well.
   - don't overdo
   - WITNESS: "Boy, is this AUSA dumb."
   - read papers while talking
   - apparently not paying attention to witness answers
   - witness becomes over-confident and vulnerable
c. Don't use "movie-type" cross-examination.

3. The DON'T's.

a. Don't examine unless witness has hurt your case.
b. Don't try to improve a good answer.
c. Never ask a why question.
d. Don't let counsel "tip" the witness to danger areas by his objections to your questions.
e. Don't ask too many questions; have a definite objective.
f. Don't lose sight of your objective.
   - have a point to your cross-examination
   - don't be diverted

4. The DO's.

a. Do prepare.
   - take notes
   - preparation is most important aspect
   - know what you want on cross-examination
b. Do ask short questions.
c. Do use simple language.
d. Do ask leading questions.
   - "Yes" or "No" answer
   - don't let witness weasel out of answer
e. Do go over every detail.
f. Do look for inconsistencies.
g. Do use exhibits as cross-examination tools.
h. Do let witness talk.

5. Some techniques.

a. Test witness' memory as to other times/dates.
   - Ask witness about dates/times shortly before/after event
   - Jump around on dates
b. Get lots of details from witnesses;
   - the more alibi witnesses the better
   - the more details the better
   - very hard for witnesses to keep details straight
c. If alibi witnesses contradict each other:
   - emphasize contradictions in final argument
   - don't let them know they have contradicted each other
d. If witnesses agree on every detail of alibi:
   - undoubtedly prepared story for Court together
   - emphasize "remarkable" sameness in final argument
e. "Have you talked with anyone about this case?"
   - frequently witnesses will deny having talked to anyone
   - make the most of denials
   - improbable that witness did not talk to someone
f. Increase improbabilities in testimony by questioning.

g. The "I don't remember" witness.
- the more times the witness "does not remember", the better for your case
- emphasize in closing argument
- jury will be suspicious if witness remembers everything on direct examination and nothing on cross-examination

h. Use the "after-thought" question.
- witness' guard will be down immediately after stepping down from stand
- use "By the way ..." question
- gets emphasis
- catches witness by surprise

i. End examination on a high note; have a good question in reserve if possible.

6. Cross-Examination of Defendants.

a. Rambler.
- doesn't answer questions directly
- instruct him to answer your questions
- use short, simple, clear questions

b. Lecturer.
- lectures you on the facts
- keep him on the stand
- let him hang himself by his arrogance
- lead from one inconsistency to another

c. Evader.
- not certain of anything
- ask simple, clear questions
- his evasions will demolish him

d. Hostile Defendant.
- emphasize his hostility
- "You don't like me, do you?"
- "But you never met me before today, did you?"
- be calm and extremely courteous
- let witness destroy himself by anger
- particularly effective in violence cases

e. Remember: Juries sympathize with whoever is on the stand. Don't bully defendants/witnesses.

f. Defendant's "story".
- hard to remember all the details of a lie
- take defendant back and forth over details
- same jump-around technique as for alibi witnesses
- let defendant destroy himself

g. Defendant's demeanor is assertive.
- demeanor is evidence to jury
- let him be assertive
- get him on details
- get him on facts
- get him on improbabilities

7. Cross-examination and final argument.

   a. Get a good answer and use it in final argument.
   b. A rhetorical question in final argument is better since the witness cannot answer.
   c. Emphasize contradictions and improbabilities.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC II.B: Case Preparation and Examination of Witnesses at Trial

This discussion will be given in two one hour segments. The first hour will be devoted to sub-topics I (General Principles or Case Preparation) and II (Location and Pre-Trial Preparation of Witnesses). The second hour will be devoted to sub-topic III (Direct and Cross-Examination at Trial). The special problems of identification evidence (including photo-identification, lineup identifications, pre-trial hearings and trial testimony) will be treated in detail in a separate lecture.

OUTLINE OF PREPARATION NOTES

I. General Principles of Case Preparation

A. Preliminary Steps

1. READ THE INDICTMENT/INFORMATION

2. Check the Case Jacket

3. Complete the Case Jacket

NOTES

4. Know Your Elements of the Crime Charged

B. Case Preparation

1. Read Your File

2. Examine and compare reports

3. Locate all Jencks material

4. Prepare for witness interviews

NOTES

5. Interview witnesses in your office

6. Don't create Jencks material

II. Location and Pre-Trial Preparation of Witnesses

A. Locating Witnesses

1. Case jacket witnesses

2. Other witness sources

3. Finding the witness

4. Prisoners

NOTES

5. Military witnesses

6. Government witnesses

B. Protecting/Granting Immunity

1. Protecting

2. Granting Immunity

C. Paying witnesses

D. Witness Preparation - General Principles

1. Initial Meeting

2. Special Points

NOTES

3. General principles

4. Direct and Cross-Examination

5. Refreshing Recollection and Past Recollection Recorded

E. The Police Witness

1. Appearance

2. Conduct in Court

NOTES

3. Remember police are not professional witnesses

F. The Lay Witness

1. Appearance

2. Conduct in Court

3. The Witness' Testimony

4. What to do if contacted by defendant/ counsel/investigator

NOTES

G. Expert Witness

1. Four parts of expert testimony:

2. Reason for expert witness

3. Preparation

H. Child Witness

1. Children depend on familiarity and trust

2. Familiarize child with courtroom

NOTES

3. Difficult concept of "to tell the truth"

4. Child witness requires a lot of time

I. Problem witnesses

1. Alcoholic witness

2. Addict witness

3. Reluctant witness

NOTES

4. Husband-wife privilege

J. Summary of Witness Preparation

1. ALWAYS HAVE POLICE/SECRETARY PRESENT AT INTERVIEW

2. Know witness

3. Know infirmities of witness

4. Prepare witness demeanor on stand

5. Go over his testimony several times

6. Show all exhibits to witness

NOTES

7. Advise witness of areas he can't go into

8. Prepare witness to lay foundation for "refreshing recollection" and "past recollection recorded"

9. Cross-examine witness

10. Take witness to courtroom (especially children)

11. Advise what to do if contacted by defendant/counsel/etc.

12. Make sure witness knows you will protect him on cross-examination at trial

K. Your Preparation for Court

1. Know your case so well you don't need notes

NOTES

2. Prepare a list of witnesses/date/time/ place

3. Have some exhibit for trial

4. Make sure subpoenas are served

III. Direct and Cross-Examination of Witnesses at Trial

A. AUSA Role vs. Defense Counsel Role

1. The main defense weapon is confusion

2. AUSA Role

3. The two essential points:

NOTES

4. The most common AUSA mistake

B. Courtroom Demeanor

1. Dress

2. The importance of demeanor

3. Important things to do

4. Important things NOT to do

NOTES

C. Direct Examination of Witnesses

1. Introduction of Witness

2. Narrative

D. Making a record

1. Remember "cold" record on appeal

2. Things to do

3. Things not to do

NOTES

E. Refreshing Recollection

1. FOUNDATION

2. The Elements of Refreshing Recollection

3. Important Points

F. Past Recollection Recorded

1. Foundation

2. Elements of Past Recollection Recorded

3. Important Points

NOTES

G. Cross-Examination

1. The two purposes:

2. The manner of cross-examination

3. The DON'T's

4. The DO's

5. Some techniques

NOTES

6. Cross-Examination of Defendants

7. Cross-examination and final argument

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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Training for Assistant United States Attorneys

TOPIC II.B: Workshop - Case Preparation and Examination of Witnesses at Trial

INTRODUCTION: The Assistants will participate in a workshop discussion on the direct examination of witnesses using the facts prepared for the Darlene Moore case. The purpose of the workshop is to discuss the various aspects and problems associated with this trial technique presented through the cited case. A senior trial Assistant will moderate the workshop and involve other special resource persons as necessary. Using the approach the participants will engage freely in the discussion.

I. Other possible witnesses to the offense - the PD 163 indicates that the defendant listed Alvin West as a friend and associate; his address is the same as the address where the offense occurred.

A. Is Alvin West a possible defense witness?

B. How should you contact Alvin West?

C. Considering his possible hostility to the Government's case, what do you say during interview with Alvin West?

II. Government's Witness Conference

A. Some of your witnesses show up drunk: how do you handle this?

B. Some of your witnesses refuse to come to your office: how do you handle this?

C. Some of your witnesses are missing: how do you handle this?

D. At the witness conference some of your witnesses, for the first time, become hostile: how do you handle this?

E. At the witness conference, witness changes story: how do you handle this?

III. On the day of trial the complaining witness, who has been subpoenaed, does not appear: what do you do?

IV. On the day of trial you determine that your complaining witness has not been subpoenaed and is missing: what do you do?

V. On the day of trial you show your witness the broom for the first time and he tells you that is not the broom used by the defendant: what do you do?

VI. During direct examination one of your witnesses cannot remember a crucial part of his testimony: what do you do?

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Training for Assistant United States Attorneys

TOPIC II.B: Simulation - Case Preparation and Examination of Witnesses at Trial

INTRODUCTION: Following the discussion on direct examination of witnesses, an Assistant is asked to demonstrate this technique in a simulated environment. He/she is provided with a statement of facts about a simple assault case and specific instructions pertaining to what he/she is expected to accomplish in this demonstration. To further assist him/her, the Assistant is provided with a checklist or gouge of the steps he/she might generally follow in the direct examination of a witness in a simple assault case.

I. Facts

A. Complaining witness, landlord, reports to police that he was hit on the head with a broom held by defendant, tenant, after he had ordered him to sweep up mess he had placed on hallway floor in apartment building. Defendant arrested on scene.

B. Defendant's Anticipated Version - Defendant testifies that (1) both he and complaining witness were drunk at the time of the alleged assault; (2) that complaining witness fell and was cut on head by knife held by complaining witness; (3) that defendant was physically injured on head by complaining witness.

II. Instructions

Purpose of this direct examination is to elicit from the complaining witness the time, date, and location of the assault and the circumstances of the assault. You are also to elicit the identity of any physical evidence and the identity of the defendant by the complaining witness.

You are also to call the arresting police officer to establish his connection to the case, i.e., the date and location of arrest and circumstances of any identification made by witness.

CHECKLIST/GOUGE

Witness Location Sources

1. Case Jacket Witnesses

   - PD 163
   - PD 251
   - Subpoenas in jacket
   - Witnesses listed on jacket by screening AUSA
   - Investigative Squad writeups
     - Homicide
     - Sex
   - Grand Jury secretary's writeup

2. Other witness sources

   - Police notes
     - especially on-scene police
   - Police case files
     - Homicide
     - Sex
   - Additional investigation
     - Police: show him you consider the case important
     - Police: make him do his job
     - visit the scene yourself
     - talk to witnesses at the scene

3. Finding the witness

   - The telephone book
     - unlisted numbers can be found via Major Crimes Unit
   - Street-address telephone book in the office
   - U. S. Post Office
     - forwarding addresses
     - information from the local mailman
   - Polk's Directory
   - Haines Directories

- telkey directory
- criss-cross directory

° Motor Vehicles Department printout
° Job inquiries
° Neighborhood inquiries
° Check jail; Lorton
° Check PROMIS
° Try to involve the FBI

4. Prisoners

° Use a Subpoena Ad Testificandum
- forms in the office

5. Military Witnesses

° Procedures in the Dept. of Justice U. S. Attorney's Office Manual
° Officials at the Dept. of Justice will handle most of the details
° All of the services have personnel locators at the Pentagon

6. Government Witnesses

° Subpoena local witnesses
° Use Dept. of Justice procedures (similar to Military)

CHECKLIST/GOUGE

Recollection Refreshed

CAVEAT: The witness must lay the foundation by showing that his recollection needs to be refreshed. Prepare your witness to answer "at this time" when he is asked a "now" question. If he simply answers that is "all" he remembers (as opposed to "now" or "at this time"), no need for refreshing has been shown.

Elements of Proof

The witness testifies:

1. His present recollection is exhausted.
2. Something exists which can refresh it.
3. This item is that something.
4. Having read it, his recollection is refreshed.

NOTES

1. The essence of present recollection refreshed is the testimony of the witness, not the document itself (as in past recollection recorded).
2. It is irrelevant what the item is or whether the witness wrote it/signed it, or believes it to be true. The essential thing is that it refreshes his recollection, it jogs his memory. The relevant evidence is his recollection, not the item which refreshed it.

3. The item may not be read aloud by the witness, must be surrendered before testifying and may not be admitted into evidence by either party if only used to refresh recollection. (May become admissible by use for impeachment or as past recollection recorded if the witness' recollection is not refreshed.)

CHECKLIST/GOUGE

Past Recollection Recorded

Elements of Proof

1. Witness' recollection not refreshed after reading document (i.e., unable to speak from present recollection).

2. The writing was made at a time near to the event (i.e., his memory was fresh).

3. If he wrote it himself, that he remembers correctly recording the facts (he may testify he habitually records such matters correctly):

   OR

   If someone else wrote it, that he read it while his memory was still fresh and knew that it was true and correct (see Wigmore, Section 748).

4. That the writing is the unaltered original (or, if necessary, a true copy of the unaltered original).

NOTES

1. This technique is usually used after refreshin recollection has failed. The purpose is to turn the document used for refreshing into evidence itself.

2. In refreshing recollection, the witness' testimony is the evidence. In past recollection recorded, the document is the evidence.

3. Once the document has been admitted, have the witness read it to the jury.

CAVEAT: Some judges may put you off with "the document speaks for itself." You should argue vigorously that the witness has stated it is a correct statement of his recollection and that the writing is now in evidence. In the interest of fairness, the jury should now know what the statement says instead of wondering about it until later. It will save time if the witness reads it to the whole jury instead of passing it to each juror.

Exhausting Present Recollection

1. I hand you Government's Exhibit No. _____ for identification. Will you please read it?

2. Have you finished reading it?

3. Please return it to me. Having examined Government's Exhibit No. _____ for identification, do you now have an independent recollection of anything else?

The Time of Making the Document

1. I show you again Government's Exhibit No. _____ for identification Can you tell us what this is?

2. Who prepared/typed/wrote it?

3. When was that done?

4. And how long after (event) was that done?

If He Wrote It

1. How do you identify Government's Exhibit No. _____ for identification as having been prepared by you?

2. What was your occasion for preparing it?

3. Please tell us whether it is a correct record of the facts as you then knew them?

If Someone Else Prepared the Document

1. Can you identify Government's Exhibit No. _____ for identification, and if so, how?

2. When did you first see it?

3. Did you have occasion to read it through at that time?

4. How long after ___(event)_____ was that?

5. At that time, did you still have a clear recollection of ___(event)_____?

6. Was Government's Exhibit No. _____ true and correct?

Verifying the Authenticity

1. Has Government's Exhibit No. _____ for identification been changed or altered in any way since (you read it/wrote it/it was prepared)?

2. Is the statement which you have identified as Government's Exhibit No. _____ for identification true and correct today?

Admission of the Document

1. Your Honor, I move the admission into evidence of Government's Exhibit No. _____ for identification as Government's Exhibit No. _____.

2. (Have the witness read it to the jury.)

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SELECTED REFERENCES

Case Preparation and Examination of Witnesses at Trial

1. Locating and Interviewing Witnesses

   2 Am Jur Trials, p. 230
   "Sources of Information", pp. 244-59
   "Interviewing the Witness", pp. 259-66, 269-83.

2. Investigating the Criminal Case: General Principles

   1 Am Jur Trials, p. 481

3. Locating and Preserving Evidence in Criminal Cases

   1 Am Jur Trials, p. 555.

4. Cross-Examination of Defendant

   6 Am Jur Trials, p. 297
   Wellman, Arthur: The Art of Cross-Examination. Macmillan, 1962 (paperback), 4th Rev. and Enl. Ed.

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DISCUSSION NOTES

TOPIC II.C: Demonstrative Evidence and Exhibits

DURATION: One Hour

The purpose of this discussion is to make the trial Assistant aware of developing and using non-testimonial evidence in the courtroom, and the proper method of identifying and admitting such evidence.

OUTLINE OF PRESENTATION

I. Non-Testimonial Evidence in General

A. Non-Testimonial Evidence includes:

1. Tangible things which the judge or jury can examine and thereby perceive facts about those things in evidence.

a. other terms:
(1) real evidence
(2) demonstrative evidence
(3) objective evidence
(4) autoptic evidence

b. examples:
(1) guns
(2) photographs
(3) money
(4) handwriting exemplars

2. Courtroom Demonstrations

a. can be non-testimonial
Example: having victim and defendant stand side-by-side so jury can compare height, build, size, etc.

b. can be testimonial in nature
Example: witness acting out a stabbing. "Acting out" is testimony if it is the witness' version of what happened and prosecutor must make an oral description for the record.

c. can be both non-testimonial and testimonial in nature

B. Important Points on Non-Testimonial Evidence

1. Non-Testimonial Evidence Requires the Support of Testimony.

a. for authentication
b. for relevancy

2. Most Non-Testimonial Evidence is Circumstantial.

the object/demonstration is offered as the basis of an inference that other facts are true
example: defendant's clothing matching description given by the victim
example: bloody knife recovered from murder suspect

3. Jurors can understand what they see better than what they hear.

a. always have an exhibit, even if only a rough diagram
b. the "silent witness" of an exhibit speaks loudest to the jury

C. Most Common Types of Non-Testimonial Evidence

1. Seized items

a. weapons
b. narcotics
c. stolen goods
d. clothing of defendant/victim

2. Maps and diagrams

3. Photographs

4. Aerial photographs

5. Documents

6. Courtroom demonstrations

7. Expert witness exhibits

a. fingerprints
b. handwriting

D. Sources of Non-Testimonial Evidence

1. Your witnesses

a. demonstrate to the jury what happened
b. prepare a map/diagram of the area for use at trial

c.draw a map/diagram at trial
- usually will only work if witness has prior experience in drafting

2. Ask in witness interviews about other possible items/exhibits

3. Law enforcement agencies

a.FBI laboratory
(1)blood
(2)document analysis
(3)clothing
(4)fibers
(5)firearms
(6)glass fragments and particles
(7)gunpowder test
(8)hair examples
(9)handwriting analysis
(10)tape recordings
(11)paint analysis
(12)shoeprints
(13)tool marks
(14)typewriting analysis
(15)etc.

b.Bureau of Narcotics & Dangerous Drugs (BNDD)
(1)qualitative and quantitative analysis of all suspected drugs
(2)heroin
(3)cocaine
(4)psychedelics (e.g., LSD, Peyote)

c.MPD Mobile Crime Laboratory
(1)aerial photographs
(2)evidence recovered from scene
(3)fingerprints
(4)maps, charts, and diagrams

d.MPD Identification Section
(1)lineup photographs
(2)mug shots

e.MPD pistol range (Police Headquarters)
Testfire certificates

f.MPD Central Records Division
no-license certificate for weapons case

4. Assistant United States Attorney

prepare your own diagrams and maps

5. Other sources. E.g., Recorder of Deeds for certificate of corporate existence

E. Discovery

1. Super. Ct. Crim. 16, 16-II.

2. Fed. R. Crim. P. 16.

3. Brady v. Maryland, 373 U.S. 83 (1963).

a. the heart of the Brady holding:
(1) suppression by the prosecutor
(2) after a request by the defense
(3) of evidence material to guilt/punishment
(4) which evidence is favorable to the accused

b. See Moore v. Illinois, 408 U.S. 786 (1972)

4. Same discovery principles as those covered in the discovery lecture.

II. Exhibits in General

A. Pre-trial.

1. Items marked/initialed for identification.

2. Make sure chain-of-custody is complete.

3. Get all exhibits

e.g., make sure blood, hair samples, etc. have gone to FBI laboratory and examination is complete

e.g., make sure BNDD has completed analysis of drugs and chemist is available for trial

e.g., have no-license and test, type and fire certificates in gun cases

e.g., have "corporate seal" where ownership of stolen goods is in a corporation

4. Prepare witnesses.

a. show them exhibits and find out what they know about them

b. explain procedure for identification of exhibits at trial

5. Prepare an exhibit list for trial

Have two columns for check-offs: one "marked for identification"; the other "admitted in evidence"

B. Trial -- Marking and Identification: The Four Steps

1. Have clerk mark exhibit for identification

2. Show marked exhibit to Court and defense counsel

3. Have witness identify exhibit

e.g., "That's my watch, there's a chip on the crystal here on the side, etc."

e.g., "I can identify it by my initials and the date which I wrote here on the side at the time I seized it."

e.g., "I can identify it by the Serial No. as the same gun I seized."

4. Have the witness describe the exhibit for the record

e.g., "This is a Bulova 21 Jewel watch with a Speidel band, etc."

e.g., "This is a 17-inch Motorola Color TV set, etc."

e.g., "This is a .38 caliber Smith & Wesson Police Special revolver, etc."

C. Trial -- Special Points

1. Make sure firearms are unloaded and on "safe".

Have marshal or policeman check.
(a)judge's and jury's peace of mind
(b)emphasize dangerousness of weapon

2. In cases with large number of exhibits, consider pre-trial markings for identification.

D. Trial -- Admission in Evidence

1. Fundamentals

a. Marking and identification as discussed
b. Showing of relevancy by testimony
c. Ruling of Court on admissibility
d. Record reflecting exhibit received in evidence

2. Time to move admission into evidence

   a. two possibilities:
      (1) individually, immediately after showing of relevancy
      (2) together, at end of case-in-chief

   b. in either case, have a checklist so you are sure exhibit was offered in evidence
      very easy to forget at trial to offer exhibits in evidence

E. Trial -- Use of Evidence

1. Place admitted exhibits where jury can see them during trial.

   publish to jury
   i.e., have admitted exhibits passed among the jurors so they can personally inspect

2. Use large diagrams/maps so witnesses can show occurrence of events.

   a. always have a diagram/map even if you have to make it yourself
   b. the single most effective exhibit
      acts as a "silent witness"
   c. remember: jurors can understand what they see better than what they hear

3. Staging is important.

   a. Court and jury can see exhibits during testimony
   b. witness can testify effectively
   c. examples:
      (1) diagram/map: have witness leave the stand, testify at the exhibit, and mark on it
      (2) weapons: have the witness demonstrate how weapon was used

4. Use exhibits in closing argument

   a. very effective
   b. make sure jury knows they can have exhibits in the jury room
      "Now, ladies and gentlemen, you have only to ask the marshal if you wish to see any of these exhibits in the jury room."

F. Maintaining Evidence

1. Clerk's function in relation to evidence which has been marked for identification or admitted into evidence.

2. Release of evidence after trial: possibility of substitution (e.g., photocopies of documents or photographs of exhibits)

III. Courtroom Demonstrations

A. Discretion of the Trial Judge

1. Considerations:

a.relevancy
b.danger of undue prejudice
c.distraction of jury from the issues
d.confusion and delay incident to demonstration

2. Trial judge's discretion is very broad

a.highly unlikely he will be reversed for denying demonstration
b.possible he will be reversed for permitting a demonstration

B. Very Effective Evidence

1. Simple demonstrations are usually permitted. They can be strikingly effective.

2. Many witnesses can demonstrate what they saw much better than they can describe it. This is particularly true with poorly educated witnesses.

3. A witness who testifies poorly in response to questions can be very vivid when actually demonstrating to the jury what happened.

4. Demonstrations (and maps/diagrams) are both the easiest and the most effective non-testimonial evidence in most cases.

C. Procedure

1. Ask permission of the Court

a.for witness to demonstrate whatever it is
b.for witness to leave the stand and demonstrate whatever it is

2. Ask witness to conduct demonstration

3. In robberies, assaults, etc. AUSA can take part of victim, and witness can take part of robber, etc.

IV. Making a Record

A. Always Refer to Items by Exhibit Number So That the Record is Complete. Do not refer to exhibits as "it", "that", "this".

B. Make Sure the Witness Identifies the Exhibit And Describes the Exhibit So the Court of Appeals Will Know What It Was.

C. When Exhibits Are Marked During Testimony (e.g., "X" marks the spot on a photograph), Refer to Those Markings So the Record Is Complete.

D. When There Is a Courtroom Demonstration, Make Sure the Record Is Complete as to What the Witness Is Doing and What He Is Demonstrating

e.g., "Your Honor, may the record reflect that the witness is indicating that the man who attacked him came over his right shoulder with a knife, stabbing him in the left front part of his chest?"

E. Where Mug Shots, Inflammatory Photographs, Etc. Are Not Used, Have Them Marked For Identification, and Make a Complete Record for Appellate Review As To Why They Were Not Used (e.g., exercise of judicial discretion). This Includes Exhibits Which You Decide Not to Use, Because, For Example, They Are Too Inflammatory. The Point Is To Show the Court of Appeals That a Selection of the Least Inflammatory Photographs Was Made, Rather Than That Inflammatory Photographs Were Introduced Into the Trial.

V. Special Exhibit Problems

A. Photographs

1. Witness testifies:

a. photograph is a portrayal of a certain scene
b. the photograph is a correct representation of the scene

2. You do not need photographer nor the conditions of the taking.

B. Official Records

1. An official record/entry or the lack of such record/entry, may be proved by a certificate made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, and authenticated by the seal of his office.

Super. Ct. Crim. R. 27, Super. Ct. Civ. R. 44
Fed.R.Crim.P. 27, Fed.R.Civ.P. 44.

2. The essentials:

a. a certificate of record/lack of record
b. made by public officer having a seal of office
   - and official duties in the po.itical subdivision where the record is kept
c. authenticated by the seal of office

3. Corporations: Certificate under seal from the Recorder of Deeds of the corporation's existence in the District of Columbia (the "corporate seal")

   a. necessary where ownership of stolen property is in a corporation
   b. there is a USAO file with "corporate seals" of major D. C. corporations

4. Lack of license to carry a pistol

   a. Central Records Division of MPD
   b. make sure seal on certificate

C. Ownerhip In a Partnership, Estate, Etc.

1. Partnership - have a partner testify

2. Estate - have executor testify

3. Trust - have a trustee, trust officer, or administrator testify

4. Corporation not qualified in D. C. - have director or officer testify

D. Business Records

1. Federal Shopbook Rule

   a. 28 U.S.C. §1732
   b. applies in Superior Court as a "Court established by Act of Congress" 28 U.S.C. §1732(a)

2. "Any writing or record ... shall be admissible as evidence of an act/transaction/occurrence/event"

   a. <u>if</u> made as a memorandum or record of the act, etc.
   b. <u>and if</u> made in the regular course of business
   c. <u>and if</u> it was the regular course of <u>such business</u> to make the memorandum or record
   d. <u>and if</u> made at the time of the act/etc. or within a reasonable time thereafter

3. Don't need an original witness

   Can get records into evidence with just a custodian of the records.

4. The technique and illustration are set out in the checklist/gouge which is a handout for this lecture.

E. Maps and Diagrams

1. Requirements

a. doesn't have to be to scale
   should be as accurate as possible in circumstances
b. only has to be "fair representation" of area
c. discretion of trial judge

2. Technique

a. witness identifies the map/diagram
b. witness verifies it is a correct and "fair representation"
   - witness makes any corrections to map/diagram to make it a "fair representation"
c. witness testifies concerning the map/diagram
d. map/diagram formally offered in evidence

3. Example

Q. "I show you what has been marked as Government's Exhibit No. 1 for identification, which purports to be a diagram. Can you identify it?"

A. "Yes, it's a diagram of the first floor of my house."

Q. "Is it accurate (correct) (a fair representation)?"

A. "Yes, except my living room is a little longer than it's shown there."

Q. "Would you take this pen and change the diagram so it is an accurate representation of the first floor of your home?"

A. (Witness changes diagram)

Q. "Would you put your initials alongside the changes you have made on the diagram?"

A. (Witness initials changes)

Q. "Is Government's Exhibit No. 1 for identification now an accurate representation of the first floor of your home?"

A. "Yes."

4. Some important points

a. prepare witnesses for Court by showing them diagrams/maps you intend to use
b. have accurate map/diagram <u>before</u> you go to court

c. explain to the witness how the diagram/map will be used at trial
   (1) explain how he should mark the diagram/map at trial
   (2) know before you go to Court how you want your diagram/map marked
d. always carry a "magic marker" with you in Court
e. consider marking self-adhesive stickers and labels and having witness affix them to map/diagram
   (1) ensures a visible mark on the diagram/map
   (2) ensures a uniform marking system
   (3) works well with photographs also
f. <u>always</u> have a map/diagram in your case
   very powerful visual aid for jury
   make it yourself if you have to

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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WORKSHEET

TOPIC II.C: Demonstrative Evidence and Exhibits

The purpose of this lecture is to make the trial Assistant aware of developing and using non-testimonial evidence in the courtroom, and the proper method of identifying and admitting such evidence.

OUTLINE OF PRESENTATION NOTES

I. Non-Testimonial Evidence in General

A. Non-testimonial evidence includes:

1. Tangible things

2. Courtroom Demonstrations

B. Important Points on Non-Testimonial Evidence

1. Non-testimonial evidence requires the support of testimony.

2. Most non-testimonial evidence is circumstantial.

3. Jurors can understand what they see better than what they hear.

NOTES

C. Most Common Types of Non-Testimonial Evidence

1. Seized items

2. Maps and diagrams

3. Photographs

4. Aerial photographs

5. Documents

6. Courtroom demonstrations

7. Expert witness exhibits

D. Sources of Non-Testimonial Evidence

1. Your witnesses

NOTES

2. Ask in witness interviews about other possible items/exhibits

3. Law enforcement agencies

4. Assistant United States Attorney

5. Other sources

Discovery

1. Super.Ct.Crim.R. 16 and 16-II

2. Ref.R.Crim.P. 16

3. Brady v. Maryland, 373 U.S. 83 (1963); see Moore v. Illinois, 408 U.S. 786 (1972)

NOTES

4. Same discovery principles as those covered in the discovery lecture.

II. Exhibits in General

A. Pre-trial

1. Items marked/initialed for identification.

2. Make sure chain-of-custody is complete.

3. Get all exhibits.

4. Prepare witnesses.

5. Prepare an exhibit list for trial

B. Trial -- Marking and Identification: The Four Steps

1. Have clerk mark exhibit for identification.

NOTES

2. Show marked exhibit to Court and defense counsel.

3. Have witness identify exhibit.

4. Have the witness describe the exhibit for the record.

C. Trial -- Special Points

1. Make sure firearms are unloaded and on "safe".

2. In cases with large number of exhibits, consider pre-trial marking for identification.

D. Trial -- Admission in Evidence

1. Fundamentals

2. Time to move admission into evidence

NOTES

E. Trial -- Use of Evidence

1. Place admitted exhibits where jury can see them during trial.

2. Use large diagrams/maps so witnesses can show occurrence of events.

3. Staging is important.

4. Use exhibits in closing argument.

F. Maintaining Evidence

1. Clerk's function in relation to evidence which has been marked for identification or admitted into evidence.

2. Release of evidence after trial: possibility of substitution.

III. Courtroom Demonstrations

A. Discretion of the trial judge

NOTES

1. Considerations:

2. Trial judge's discretion is very broad.

B. Very Effective Evidence

1. Simple demonstrations are usually permitted.

2. Many witnesses can demonstrate what they saw much better than they can describe it.

3. A witness who testifies poorly in response to questions can be very vivid when actually demonstrating to the jury what happened.

4. Demonstrations (and maps/diagrams) are both the easiest and the most effective non-testimonial evidence in most cases.

C. Procedure

1. Ask permission of the Court.

NOTES

2. Ask witness to conduct demonstration.

3. In robberies, assaults, etc. AUSA can take part of victim and witness can take part of robber, etc.

IV. Making a Record

A. Always Refer to Items by Exhibit Number So That the Record is Complete.

B. Make Sure the Witness Identifies the Exhibit And Describes the Exhibit So the Court of Appeals Will Know What It Was.

C. Whan Exhibits Are Marked During Testimony, Refer To Those Markings So the Record is Complete.

D. When There Is a Courtroom Demonstration, Make Sure the Record is Complete as to What the Witness is Doing and Demonstrating.

E. Where Mug Shots, Inflammatory Photographs, Etc. are Not Used, Have Them Marked for Identification And Make a Complete Record for Appellate Review As to Why They Were Not Used.

NOTES

V. Special Exhibit Problems

A. Photographs

1. Witness testifies

2. You do not need photographer nor the conditions of the taking.

B. Official Records

1. An official record/entry or the lack of same can be proved by a certificate.

a. Super.Ct.Crim.R. 27, Super.Ct.R.Civ.P. 44

b. Fed.R.Crim.P. 27, Red.R.Civ.P. 44

2. The essentials

3. Corporations

4. Lack-of-license to carry a pistol

NOTES

C. Ownership in Partnership, Estate, Etc.

1. Partnership - have a partner testify.

2. Estate - have executor testify.

3. Trust - have trustee, trust officer, or administrator testify.

4. Corporation not qualified in D.C. - have director or officer testify.

D. Business Records

1. Federal Shopbook Rule

a. 28 U.S.C. §1732

b. applies in Superior Court as a "Court established by Act of Congress"
28 U.S.C. §1732(a)

2. "Any writing or record ... shall be admissible as evidence of an act/transaction/occurrence/event"

3. Don't need an original witness

4. The technique

E. Maps and Diagrams

1. Requirements

2. Technique

3. Example

4. Some important points

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Training for Assistant United States Attorneys

TOPIC II.C: Workshop - Demonstrative Evidence and Exhibits

INTRODUCTION: The Assistants will participate in a workshop discussion on demonstrative evidence and exhibits using the facts prepared for the Darlene Moore case. The purpose of the workshop is to discuss the various aspects and problems associated with this trial technique presented through the cited case. A senior trial Assistant will moderate the workshop and involve other special resource persons as necessary. Using this approach, the participants will engage freely in the discussion.

I. Chain of custody

In many cases you will have fungible items such as narcotics, hair, blood, etc., which must be identified and admitted into evidence. You must always be cognizant of showing your chain of custody to establish that the fungible item originally seized is the same as the item introduced in Court. Assume that a uniformed officer obtains head hair samples from the defendant which are then placed in an envelope and sealed, initialed and dated by the officer. The envelope is then turned over to the Mobile Crime Lab officer who also initials and dates the envelope and logs the envelope into the property book. Several days later a second Mobile Crime Lab officer takes the envelope to the FBI lab for examination. What witnesses are necessary to have the hair samples introduced into evidence? What case authority is there?

II. Identification of evidence

Occasionally you will find that evidence has not been properly marked by your police officers. Assume that you have a blue denim jacket seized from the defendant at the time of his arrest which you wish in evidence to corroborate your complaining witness' identification. The officer did not initial or date the jacket, but merely placed it on the property book as evidence. Are you precluded from introducing the jacket? If not, what methods can be used to overcome the problem created by the seizing officer? The officer wants to initial the evidence now. What do you do?

III. Proof of prior convictions

Assume that a defendant has taken the stand, and on cross-examination he has denied having been previously convicted of an offense which you have verified. What can you use to prove the prior conviction? Assume that the defendant's prior conviction was under an assumed name. How can you establish the prior conviction?

IV. Assume that an officer from the Mobile Crime Lab has made a diagram of the scene at 1100 Ninth Street, N.W.

1. Is the diagram admissible and, if so, for what purpose?

2. What foundation would you have to lay in questioning the officer in order to have the diagram admitted into evidence?

3. What if it turns out that the diagram is not to scale? Can you still have it admitted? How?

4. What if the officer or person making the diagram is not available for trial? Can you still get it admitted? How?

5. Do you have to have a diagram admitted into evidence, or is it sufficient to have it marked for identification so that a witness can refer to it during his testimony?

6. What if you make up your own diagram? How can you use it at trial?

7. How could you best use the diagram at trial? What about markings by the witnesses? What about during final argument?

8. Why should a trial attorney always have some "magic markers" in his briefcase?

V. Assume that you are trying a bank robbery case and have blow-ups of aerial photographs showing the robbers escape route and where the defendant was arrested.

1. Do you need the officer or person who took the aerial photograph? If so, why so? If not, why not?

2. Suppose in preparing for trial you learn that your magic markers will not mark on the aerial photographs. What preparations could you make prior to trial to handle this problem?

3. Suppose you have a total of 12 different witnesses all of whom were standing at different locations in the photograph. How might you prepare, prior to trial, to avoid confusion as to who was standing where?

VI. Assume you are trying a murder case with four defendants and 91 exhibits, some of which relate to one defendant, some to another. Assume further that you have 20 photographs of the body of the deceased. You have determined that 10 are too inflammatory to use. The judge has suppressed six of the remainder at a pre-trial hearing, for the same reason. You intend to go forward with only the remaining four photographs.

1. Should you have the Clerk mark and retain all 20 photographs, just the 10 at the pre-trial hearing, or just the four that you may use at trial? Why? What numbering system might you use? What record should you make?

2. As to the other 91 exhibits, is a straight numbering from 1 to 91 the only way to go? What other numbering or marking system might you use? Suppose you had 91 exhibits in a murder case with one defendant but four (4) murders. How might you number the exhibits in such a case?

3. Suppose one of your exhibits is marked as Government's Exhibit No. 1 and admitted, for the Government, and the same exhibit is marked Defense Exhibit No. 7, and admitted for the defense. Is there anything wrong with this? Is this one exhibit, two exhibits, or what?

4. Suppose you have a complicated fraud case, involving three defendants, and 2,000 documentary exhibits. What steps might you take pre-trial to make the trial easier? What special exhibits might you want prepared for trial?

VII. How would you handle the following exhibit problems?

1. You have a petty larceny involving a theft of meat from a supermarket. The defendant was arrested with the stolen meat. What are you going to do for a pelf at trial, two months later?

2. You have a murder which was committed by dropping a three hundred pound block of ice on the decedent. The ice has been recovered, entered in the police property system, and is now in a locked freezer. Can you use it as an exhibit at trial? What about marking? What about the Clerk taking custody of the evidence in the event of a conviction?

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Training for Assistant United States Attorneys

TOPIC II.C: Simulation - Demonstrative Evidence and Exhibits

INTRODUCTION: Following the discussion on demonstrative evidence and exhibits, an Assistant is asked to demonstrate this technique in a simulated environment. He is provided with a statement of facts about a simple assault case (Darlene Moore Case) and specific instructions pertaining to what he is expected to accomplish in this demonstration.

I. Facts

An officer from the Mobile Crime Lab has processed the scene at 1100 - 9th Street, N.W., and has obtained the following information:

1. Seized the broom in the hallway.

2. Took a color photo of August Jones which shows his injuries.

3. Took samples of the liquid stain which was placed in a locked-sealed envelope and forwarded to the Serology Section of the FBI Lab.

Mr. Jones: (The complainant has already testified as to the assault, the extent of his injuries, and he has verbally described the weapon used by the defendant.)

II. Instructions

At trial, your witnesses are Mr. Jones, the Mobile Crime Lab Officer, and the FBI Serologist. Your objective is to have admitted into evidence the three items obtained by the Mobile Crime Lab.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

TOPIC II.C: Simulation Example - Demonstrative Evidence and Exhibits

INTRODUCTION: Following the simulation exercise by an Assistant on demonstrative evidence and exhibits and critique by other senior trial Assistants, the participants are provided with an example of the use of this technique on the Darlene Moore Case. This example will be compared to the prior demonstration of the Assistant and discussed.

Prosecutor: Your Honor, I would ask that this broom be marked as Government's Exhibit 1 for identification and this photo be marked as Government's Exhibit 2 for identification. May the record reflect that I am showing these two items to defense counsel.

Q. Mr. Jones I now show you Government's Exhibit 1 for identification and ask you whether this article is similar in size, shape, color and material to the article Miss Moore struck you with?

A. Yes, it is.

Q. Does Government's Exhibit 1 for identification differ in any respect from the article you were struck with?

A. No, this appears to be the same broom I was struck with.

Q. Mr. Jones, after the police arrived were any photos taken of you?

A. Yes.

Q. Where were you when these photos were taken?

A. At police headquarters.

Q. When were the photos taken?

A. An hour after the incident.

Q. Around the time these photos were taken, did you have an opportunity to observe your appearance?

A. Yes, I did.

Q. Mr. Jones, I show you a photo which has been marked as Government's Exhibit 2 for identification and ask if you can identify it?

A. Yes, I can.

Q. For the record, what does the photo depict?

A. It is a photograph of me taken at police headquarters shortly after the incident.

Q. And does the photo, which is Government's Exhibit 2 for identification, accurately depict your appearance at that time?

A. Yes, it does.

Prosecutor: Your honor, at this time I request that Government's Exhibit 2 for identification be admitted into evidence and that the jurors be allowed to view this exhibit.

Mobile Crime Lab Officer: (The officer has already testified as to his general duties and specifically as to having seized a broom and samples of a liquid stain at the scene of the offense).

Q. Officer I now show you Government's Exhibit 1 for identification and ask you if you can identify it?

A. Yes, I can.

Q. And how do you identify it?

A. I identify it by my initials MCL and the date which have been scratched into the handle.

Q. For the record would you describe what is Government's Exhibit 1 for identification?

A. It is a broom which is four foot in length.

Q. And is Government's Exhibit 1 for identification the broom you have previously testified about?

A. Yes, it is.

Prosecutor: Your Honor, I request that Government's Exhibit 1 for identification be admitted into evidence. I further ask that this lock-seal envelope and its contents be marked as Government's Exhibit 3 for identification, and may the record reflect that I am showing it to counsel.

Q. Officer I show you Government's Exhibit 3 for identification, and ask you if you can identify it?

A. Yes, I can.

Q. And how do you identify it?

A. I identify it by my name, date, and MCL number which appear on the envelope.

Q. What is Government's Exhibit 3 for identification?

A. It is the lock-sealed envelope in which I placed samples of a liquid stain that I found at the scene of the offense.

Q. Could you describe the function of the lock-sealed envelope?

A. It is a specially designed envelope that can be sealed so that its contents cannot be tampered with without destroying the envelope.

Q. After placing the samples in Government's Exhibit 3 for identification, was the envelope secured?

A. Yes, it was. I personally sealed the flap and two locks on the envelope.

Q. After sealing Government's Exhibit 3 for identification, what did you do with it?

A. I took it to the FBI Lab and turned the lock-seal envelope with its contents over to a supervisor at the Lab.

Serologist from FBI:

Q. I show you Government's Exhibit 3 for identification and ask you if you can identify it?

A. Yes, I can.

Q. And how do you identify it?

A. By my initials, date and FBI Lab number which I placed on the envelope at the time I examined the contents of the envelope.

Q. What was the condition of Government's Exhibit 3 for identification at the time you received it?

A. It was in a locked and sealed condition.

Q. Was there any signs that this exhibit had been tampered with prior to your opening it and examining its contents?

A. No.

Prosecutor (At conclusion of testimony): Your Honor, I request that Government's Exhibit 3 for identification be admitted into evidence.

CHECKLIST/GOUGE

Marking and Admission of Exhibits

The Steps

1. Have clerk mark exhibit for identification.
2. Show exhibit to Court and defense counsel.
3. Have witness identify exhibit.
4. Have witness describe exhibit for record.
5. Establish relevancy by direct examination.
6. Move admission.

Illustration

1. "Your Honor, may this be marked as Government's Exhibit No. 1 for identification?" (Hand to clerk.)
2. (Clerk should pass up to judge after marking.)
3. "Your Honor, may the record reflect that I am giving Government's Exhibit No. 1 for identification to defense counsel for his examination?"
4. "Mr. (witness), I hand you what has been marked as Government's Exhibit No. 1 for identification and ask you if you can identify it?"
5. "How can you identify it?"

6. "What is Government's Exhibit No. 1 for identification? (Would you describe it for the record?)"

7. (Establish relevancy of exhibit by witness' testimony.)

8. "Your Honor, the Government moves the admission of Government's Exhibit No. 1 for identification as Government's Exhibit No. 1."

CHECKLIST/GOUGE

Business Records

Federal Shopbook Rule
28 U.S.C. § 1732

Elements of Proof

1. Any writing or record.

2. Made as a memorandum or record of any act/transaction/occurrence/event.

shall be admissible

3. IF made in the regular course of business.

4. AND IF it was the regular course of the business to make such memorandum/record at the time of such act/transaction/occurrence/event, or within a reasonable time thereafter.

The Technique

1. Subpoena the custodian to bring the records.

2. Have the custodian testify his employment/duties include custody of the records.

3. Establish that the records were kept in the regular course of business.

4. Establish that it was the regular course of this business to make the memorandum record at or shortly after the act/transaction/occurrence/event in question.

NOTES

1. The Federal Shopbook Rule applies in Superior Court as a "Court established by Act of Congress". 28 U.S.C. § 1732(a).

2. Other circumstances may be shown to affect the writing/record's weight. The other circumstances shall not affect admissibility. 28 U.S.C. § 1732(a), para 2.

3. "Business" includes business, profession, occupation, and calling of every kind. 28 U.S.C. § 1732(a), para 3.

4. Photocopies/microfilm/etc. are admissible as the original whether the original is in existence or not. No "best evidence" rule here. 28 U.S.C. § 1732(b). Tactically, however, you should always have the original records. Photocopies can be substituted after they're in evidence.

5. Police records of convictions: not admissibl under this rule. Clainos v. U. S., 82 U.S. App. D. C. 278, 163 F.2d 593 (1947).

6. Medical records: opinions/diagnostic entries not admissible. New York Life Ins. Co. v Taylor, 79 U. S. App. D. C. 66, 147 F.2d 297 (1945). (Opinion by Thurmond Arnold.)

Illustration:

1. (Identify witness and establish employment.)

2. Do your duties include keeping custody of _____ records?

3. In response to a subpoena, have you brought with you today, certain of those records?

4. Would you produce them, please?

5. (Have the clerk mark them for identification.)

6. I hand you what has been marked as Government Exhibit No. _____ for identification. Are these the records you brought with you today in response to the subpoena?

7. Were Government's Exhibits _____ for identification kept in the regular course of business?

8. In making the entries in Government's Exhibit No. _____ for identification, was it the regular course of business to make those entries at or shortly after the (act/transaction/occurrence/event in question)?

9. (If necessary, develop who made the entries, how it was done, what the records were used for in the business.)

10. (Move the admissible.)

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DISCUSSION NOTES

TOPIC II,D: Impeachment of Witnesses

DURATION: 2 hours

The purpose of this discussion is to explain and teach the authority for and theories and techniques of the impeachment of witnesses on cross-examination.

OUTLINE OF PRESENTATION

I. Definition of Impeachment

A. As used here, impeachment means discrediting the witness (usually on cross-examination) through suggestion or proof that he/his testimony is not credible and not to be believed.

B. Impeachment is the single most effective cross-examination technique.

C. Other definitions of impeachment:

1. In a broad sense, "impeachment" includes any discrediting of a witness by extrinsic evidence as to the validity of his testimony.

2. This discussion is directed only to cross-examination techniques.

3. An example of the broader meaning of impeachment:

The testimony of a defense witness supports the self-defense claim. Either through cross-examination or through independent rebuttal evidence we show that this witness was in another room when the crime took place, or could not see the incident.

II. Significance of Impeachment

A. The two main classes of impeachment:

1. An attack on the witness' qualifications to testify at all (e.g., a convicted felon).

2. An attack, by prior inconsistent statement, on the testimony he gave on direct examination.

B. Perry Mason-type cross-examination is rarely effective.

C. Witnesses often testify about such limited matters as to make impeachment the best, if not the only way to attack their testimony.

D. The techniques are standard.

III. Relationship of Impeachment and Cross-Examination

A. Impeachment is one aspect of cross-examination.

B. The same general evidentiary rules apply to both impeachment and cross-examination.

1. Impeachment must relate to the testimony of the witness on direct examination or to the qualifications of the witness to testify.

2. In general, impeachment must relate to material matters.

3. Impeachment is used to raise questions about testimony - not to establish substantive proofs.

C. Types of Impeachment.

1. As to qualifications of the witness to testify:

a. prior conviction of crime,

b. bias,

c. character/trait in issue.

2. As to the testimony on direct examination:

a. prior inconsistent statement - oral.

b. prior inconsistent statement - written.

c. prior inconsistent statement - testimony.

d. prior inconsistent statement - Miranda-barred confession.

IV. Impeachment by Prior Conviction

A. The principle: Once a felon, thief, or drug user, one's veracity is subject to close scrutiny.

B. The statutory authority and judicial interpretations;

1. 14 D.C. Code §305.

   a. felony.

   b. misdemeanors involving dishonesty or false statements.

2. Luck v. United States, 121 U.S. App. D.C. 151, 156, 348 F.2d 763, 768 (1965).

C. The two-edged sword: applicability to Government witnesses.

1. Defense pressures to demand information about Government witnesses.

2. The office policy regarding such request.

D. Pre-trial Preparation: digging up the past.

1. MPD Form 163

2. FBI Record.

3. Bail Agency interview sheet record.

4. MPD Identification folder.

5. Interviewing witnesses.

6. Obtaining certified copies of prior conviction.

E. The Technique.

1. Tactics: when to impeach.

   a. whether to impeach at all.

   b. the do-it-first theory.

   c. the save-it-until-last theory.

2. The form of the question.

   Example: "Are you the same Robert Jeffry Smith who was convicted in September, 1970 in U.S. District Court for armed robbery, in Criminal Case No. 817-0?"

   If the defendant denies the prior conviction, you must be prepared to establish through rebuttal evidence that he is one and the same person that was previously convicted. This can be done several ways, the surest of which is fingerprint comparison (i.e., you call a fingerprint expert to examine defendant's fingerprints now, and those taken from the person who was booked for the

prior offense and subsequently convicted). Another way to establish the prior conviction would be to call as a witness the arresting officer from the earlier case. Either of these approaches takes time. For most, you should go into trial armed with certified copies of all the defendant's prior convictions which you seek to use for impeachment. Your bona fides will thus be established, even in the event of trouble.

F. The limiting instruction: No matter when you do utilize impeachment, is it essential that the judge follow up with a limiting instruction, explaining to the jury the reason that such evidence was presented to them?

1. The case law is mixed. Lofty v. United States, 277 A.2d 99, (D.C. Ct. App. 1971); Dixon v. United States, 287 A.2d 89 (D.C. Ct. App. 1972). Lofty says yes - prior inconsistent statement case. Dixon says no need for limiting instruction after impeaching for prior conviction.

2. Redbook Instruction 1.08. See annotation following instruction.

V. Impeachment Through Bias

A. Theory.

B. Implementation.

When the family comes to testify, and you cannot cut up the defendant's mother, sweetheart or aging aunt, underscore the close relationship with your defendant. (e.g., final argument - "Might you not conclude, ladies and gentlemen, that they are testifying from the heart?")

VI. Character Evidence

A. The general rule in theory and practice.

A defendant's character is not an issue unless he chooses to make it so; the theory is not reality. Consider the following cases:

1. Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

2. Gay v. United States, 241 A.2d 446 (D.C. Ct. App. 1968).

3. Wooten v. United States, 285 A.2d 308 (D.C. Ct. App. 1971).

B. The proper use of character testimony.

1. Michelson v. United States, 335 U.S. 469 (1948).

a. "Do you know defendant?"

b. "How long and in what circumstances?"

c. "Do you know others in the community who know the defendant?"

d. "Have you had an occasion to discuss with them his reputation for _____?

e. "What is that reputation?"

f. Remember: Only reputation, not the witness' opinion.

2. Michelson Cross-examination.

a. "Who were the people you discussed his reputation with?"

b. "When was that; the date, time and place?"

c. "What was said?"

d. "Had you heard about the defendant's troubles?"

e. Consider rebuttal evidence.

3. Local progeny - United States v. Awkard, 122 U.S. App. D.C. 165, 352 F.2d 641 (1965).

4. Character testimony is limited to the trait in issue.

C. "Impeachment" in Self-Defense Cases.

1. Victim.

2. Defendant.

3. Burks v. United States, 152 U.S. App. D.C. 284, 470 F.2d 432 (1972), held that where defendant's sole defense was self-defense, it was prejudicial error to bar testimony that showed victim's violent character. Very few cases where it applies.

VII. Impeachment by Prior Inconsistent Statements

A. Types of prior inconsistent statements.

1. Oral Statement.

2. Written/Signed Statement (sworn or unsworn).

3. Prior Testimony.

4. Miranda-barred confession.

B. Pre-trial preparation.

1. Responsibilities of papering assistant.

2. Police forms.

a. 251.

b. 163.

c. Statements taken by squads.

3. Transcripts (e.g., grand jury and preliminary hearing).

4. Defense-created Jencks material.

a. Investigator notes.

b. Witness statements.

c. There is nothing wrong with asking potential defense witnesses whether the defense interviewed them or took statements.

d. In United States v. Wright, ____ U.S. App. D.C. ____, 489 F.2d 1181 (1973), the court held that the prosecutor is NOT entitled to defense Jencks materials. Id. at 1189-91. Wright is not binding on Superior Court. See M.A.P. v. Ryan, 285 A.2d 370 (D.C. Ct. App. 1971). See also:

(1) State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970);

(2) People v. Saunders, 110 Ill. App. 85, 249 N.E.2d 124 (1969)

(3) People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651 (1969).

5. Witnesses.

a. Police Officers/Special Police Officers.

b. Non-police.

c. Expert Witnesses (e.g., psychiatrist).

d. Using the pre-trial witness conference.

e. Always have a secretary/policeman present for witness interviews.

C. Laying the foundation for impeachment during cross-examination.

1. Remember that a proffer of impeaching evidence may be demanded by the court or defense counsel.

2. Don't tip the witness off. Use a casual, vague manner.

3. Lock him into his story. Have him repeat the statements he made under direct examination; get him to deny the existence of any contradictory statements.

D. Springing the trap: The oral statement.

1. Have the witness repeat the statement given on direct examination.

2. Get him to deny that he ever made any contrary statement.

3. Direct him to the time, place and statement which contradicts his testimony. Example:

"Do you recall being interviewed by Officer Smith of the Robbery Squad on March 5, 1973 about 8:00 p.m.?"

"Do you recall telling him that _____?"

4. Affirmance of the prior statement.

Affirmance allows you to inquire about his memory at time of act and at trial and to explore which statement is correct.

5. Denial/lack of memory.

a. You must produce the witness who heard the prior statement.

b. The judge should probably give a cautioning instruction to the jury that impeachment is not substantive evidence. Robinson v. United States, 113 U.S. App. D.C. 372, 308 F.2d 327 (1962).

6. Proving the prior statement.

Call the witness who heard the statement as a rebuttal witness at the close of the defense case.

E. Springing the Trap: The Written Statement.

1. Have the witness repeat his testimony on direct examination.

2. Have him deny having ever made any contradictory statement.

3. Direct his attention to the statement and ask him whether or not he made it.

4. Produce the statement and have it marked as an exhibit.

5. Have the witness identify his handwriting, his signature, or his initials. Establish that there have been no changes made to the statement since he signed it.

6. Have the witness affirm that the statement was true at the time he made it.

7. Example:

"Do you remember giving Officer Smith a statement at the Homicide Office shortly after the murder?"

"I would like this marked as Government's Exhibit No. 1 for identification."

"I show you Government's Exhibit No. 1 for identification; is that your initial on page 1 and your signature at the bottom of page 2?"

"Have there been any changes made to this statement since you signed it?"

"Was this statement true and correct at the time that you gave it to Officer Smith?"

"Did you say in the statement that _____?"

8. Proving the Prior Statement.

a. Statements reduced to writing and signed may be introduced into evidence.

b. If the witness denies his signature or the statement, you will have to produce a witness to establish that on rebuttal.

c. The statement comes into evidence only for impeachment and not as substantive evidence.

F. Springing the trap: Prior testimony.

1. Have the witness repeat his testimony on direct examination.

2. State the time, place and occasion of the prior testimony, and ask him if he testified.

3. Ask whether he was under oath as he is now.

4. Reading from the transcript, call his attention to the exact question asked and the answer he gave.

5. Ask whether he was asked that question and gave that answer.

6. Example:

"Do you recall testifying before the grand jury on May 5, 1972?"

"Were you under oath and sworn to tell the truth, just as you are now?"

"Before the grand jury, were you asked this question by the Assistant U.S. Attorney and did you make this answer, 'And what time did you leave home?' Answer, '9:00'?"

"Were you asked that question and did you give that answer?"

7. Proving the prior testimony.

   a. If the witness denies or "does not remember" question and answer, you will have to recall the court reporter to prove the transcript.

   b. The court reporter should bring with him his original notes or stenographic pad.

G. Impeaching with a Miranda-barred confession.

1. A Miranda-barred confession may be used to attack defendant's credibility at trial if he tells a contrary story.

2. Harris v. New York, 401 U.S. 222 (1971).

H. The rule against impeaching one's own witness.

1. The witness who spins you.

2. General Rule: A party may not impeach its own witness. Belton v. United States, 104 U.S. App. D.C. 81, 259 F.2d 811 (1958).

   CAVEAT: The rule does not preclude the party from presenting other evidence which varies from or even contradicts that given by such witness. Pritchett v. United States, 87 U.S. App. D.C. 347, 185 F.2d 438 (1951).

3. 14 D.C. Code §102 controls impeachment of your own witness. Statutory requisites must be demonstrated before impeachment.

   a. Surprise. Court must be satisfied that the party is surprised, but need not make a specific finding. Wheeler v. United States, 93 U.S. App. D.C. 159, 211 F.2d 19 (1953).

   b. Surprise must be claimed in good faith. United States v. William Brown, 134 U.S. App. D.C. 1, 411 F.2d 716 (1969).

   c. Witness must be apprised of the circumstances and contents of the prior statement.

   d. Witness must be given a chance to explain the inconsistency.

4. Other authorities.

   a. Rule 26, Fed. R. Crim. P.

b. Rule 26, Super. Ct. Crim. R.

5. The technique: how to handle the situation.

a. Go to the bench and request a hearing out of the presence of the jury.

b. Cross-examine the witness about the previous statement: He may well come around and reaffirm the previous statement.

Case study: The key witness testified at trial that he could not tell whether the person who emerged from the alley after the shooting was male or female. The prosecutor claimed surprise. During the hearing which then ensued, the prosecutor showed the witness the signed prior statement. The witness then testified before the jury that he had seen a tall, colored man emerge from the alley. (In short, the witness reverted to his first statement.) Robinson v. United States, 113 U.S. App. D.C. 372, 308 F.2d 327 (1962).

NOTE: Distinction between this procedure and its result and the technique of refreshing recollection.

c. If the witness does not shape up as the result of the hearing, move to impeach him, and when the Court grants motion, proceed just as if you were impeaching a defense witness.

IX. Protecting/Rehabilitating Your Own Witnesses: Preparation is the Key

A. Prior Inconsistent Statements.

1. Find them out during pre-trial conference.

2. Iron them out during trial.

B. Prior Convictions.

Defuse the situation by simple inquiry into your witness' background, then drop the matter. (Make sure you prepare witness during pre-trial for cross-examination explanations.)

C. Rehabilitation with Prior Consistent Statements.

Hearsay as to prior consistent statements, whether before or after the inconsistent statement, is admissible where the witness' credibility is assailed by either an inconsistent statement or an attempt to show a complaining witness is motivated by something other than truth. Copes v. United States, 120 U.S. App. D.C. 234, 237, 345 F.2d 723, 726 (1964) (Numerous cases cited in footnotes.)

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WORKSHEET

TOPIC II.D: Impeachment of Witnesses

The purpose of this discussion is to explain and teach the authority for and theories and techniques of the impeachment of witnesses.

OUTLINE OF PRESENTATION NOTES

I. Definition of Impeachment

II. Significance of Impeachment

A. The two main classes of impeachment

B. Perry Mason type cross-examination is rarely effective.

C. Witnesses often testify about such limited matters as to make impeachment the best, if not the only way to attack their testimony.

D. The techniques are standard.

NOTES

III. Relationship of Impeachment and Cross-Examination

A. Impeachment is one aspect of cross-examination.

B. The same evidentiary rules apply to both impeachment and cross-examination.

C. Types of Impeachment

1. As to qualifications of the witness to testify:

2. As to the testimony on direct examination:

IV. Impeachment by Prior Conviction

A. The principle: Once a felon, thief, or drug user, one's veracity is subject to close scrutiny.

B. The statutory authority and judicial interpretations

1. 14 D. C. Code §305.

2. The Luck Case: Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

NOTES

C. The two-edged sword: applicability to government witnesses

D. Pre-trial preparation: digging up the past

E. The technique

1. Tactics

2. The form of the question

F. The limiting instruction

1. The case law is mixed. Lofty v. United States, 277 A.2d 99 (D.C. Ct. App. 1971); Dixon v. United States, 287 A.2d 89 (D.C. Ct. App. 1972).

2. Redbook Instruction 1.08. See annotation following instruction.

V. Impeachment through Bias

A. Theory

B. Implementation

VI. Character Evidence

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B. The proper use of character testimony

1. Michelson v. United States, 335 U. S. 469 (1948).

2. Michelson cross-examination

3. Local progeny - United States v. Awkard, 122 U. S. App. D. C. 165, 352 F.2d 641 (1965).

NOTES

4. Character testimony is limited to the trait in issue.

C. "Impeachment" in self-defense cases

VII. Impeachment by Prior Inconsistent Statements

A. Types of prior inconsistent statements

B. Pre-trial preparation

1. Responsibilities of papering assistant

2. Police forms

3. Transcripts

4. Defense-created Jencks material
United States v. Wright, ____ U.S. App. D.C. ____, 489 F.2d 1181 (1973).

State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970).

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People v. Saunders, 110 Ill. App. 85, 249 N. E. 2d 124 (1969)

People v. Damon, 24 N. Y. 2d 256, 247 N. E. 2d 651 (1969)

5. Witnesses

C. Laying the foundation for impeachment during cross-examination

D. Springing the trap: the oral statement

1. Have the witness repeat the statement given on direct examination

2. Get him to deny he ever made any contrary statement

3. Direct him to the time, place and statement which contradicts his testimony

4. Affirmance of prior statement

NOTES

5. Denial/lack of memory

6. Proving the prior statement

E. Springing the trap: the written statement

1. Have the witness repeat his testimony on direct examination

2. Have him deny ever having made any contradictory statement

3. Direct his attention to the statement and ask him whether or not he made it

4. Produce the statement and have it marked as an exhibit

5. Have the witness identify his handwriting, signature or initials

6. Have the witness affirm that the statement was true at the time he made it

NOTES

7. Example

8. Proving the prior statement

F. Springing the trap: prior testimony

1. Have the witness repeat his testimony on direct examination

2. State the time, place and occasion of the prior testimony and ask him if he testified

3. Ask whether he was under oath as he is now

4. Reading from the transcript, call his attention to the exact question asked and the answer he gave

5. Ask whether he was asked that question and gave that answer

6. Example

NOTES

7. Proving the prior testimony

G. Impeaching with a Miranda-barred confession

1. May be used to attack defendant's credibility at trial

2. Harris v. New York, 401 U.S. 222 (1971)

H. The rule against impeaching one's own witness

1. The witness who spins you

2. General rule: a party may not impeach its own witness

Belton v. United States, 104 U.S. App. D. C. 81, 259 F.2d 811 (1958)

Pritchett v. United States, 87 U.S.App. D. C. 347, 185 F.2d 438 (1951)

3. 14 D. C. Code §102 controls impeachment of your own witness

NOTES

Wheeler v. United States, 93 U.S. App. D. C. 159, 211 F.2d 19 (1953).

United States v. William Brown, 134 U.S. App. D. C. 1, 411 F.2d 716 (1969).

4. Other authorities

Rule 26, Federal Rules Criminal Procedure

Rule 26, Superior Court Rules Criminal Procedure

5. The technique: how to handle the situation

Robinson v. United States, 113 U. S. App. D. C. 372, 308 F.2d 327 (1962).

IX. Protecting/Rehabilitating Your Own Witnesses

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B. Prior Convictions

C. Rehabilitation with Prior Consistent Statements

Copes v. United States, 120 U. S. App. D. C. 234, 237, 345 F.2d 723, 726 (1964)

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

TOPIC II.D: Simulation A - Impeachment by Prior Conviction

INTRODUCTION: Following the lecture on impeachment of witnesses, an Assistant is asked to demonstrate the technique of impeaching a witness by prior conviction in a simulated environment. He is provided with a statement of facts about a simple assault case and specific instructions pertaining to what he is expected to accomplish in this demonstration.

I. Facts

On a charge of simple assault, the Government has established a prima facie case. The defendant has taken the stand and attempted to absolve herself of guilt. You have information that the defendant was arrested on February 10, 1972 for forgery, and was subsequently convicted and placed on probation for one year.

II. Instructions

A. Make the necessary pretrial preparations regarding this type of impeachment.

B. Identify the point in the trial at which the witness should be impeached.

C. Impeach the witness.

D. Assume defendant denies prior conviction; what do you do?

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Training for Assistant United States Attorneys

TOPIC II.D: Simulation B - Impeachment by Prior Inconsistent Statement

INTRODUCTION: Following the lecture on impeachment of witnesses, an Assistant is asked to demonstrate the technique of impeaching a witness by inconsistent statement. He is provided a statement of facts about a simple assault case and specific instructions pertaining to what he is expected to accomplish in this demonstration.

I. Facts

During the trial, the Government has presented its case and rested. The defendant has taken the stand and recited a denial of the offenses charged and has stated that the time of the crime he was in the company of Ted, a person known to him by first name only. You note that when initially questioned by the police, as reflected by the PD 163 the defendant stated that he was with John....Moreover, at trial the defendant has stated that he has never seen the complaining witness prior to the court appearance at trial---- Your jacket however, indicates that the arresting officer informed the papering assistant that the defendant had initially indicated that he knew the complaining witness, and that the latter was trying to frame him because of bad blood between them.

II. Instructions

Impeach the witness.

CHECKLIST/GOUGE

Character Witness

Elements of Proof

Defense counsel is limited to the following questions:

1. Do you know the defendant?
2. How long have you known him?
3. Under what circumstances have you known defendant?
4. Do you know other people who know him?
5. Have you had occasion to discuss his reputation for (trait in issue) ?
6. And what is his reputation?

MICHELSON v. UNITED STATES, 335 U.S. 481 (1948).

NOTES

1. Character testimony is always in the nature of hearsay. The witness is allowed only to summarize what he has heard concerning the defendant's reputation in the community.
2. The witness may not testify to his opinion nor his personal knowledge of defendant's activities. It is the community's opinion that counts, not that of the witness.
3. Consider a voir dire out of the presence of the jury if you know character testimony is coming.

Cross-Examination of Character Witness

Pin the witness down on details of when the defendant's reputation was discussed. Frequently, there was no discussion and the witness has really been testifying as to his opinion. He can't testify to his opinion. If he has, his testimony should be stricken.

1. When was it that you last heard the defendant's reputation, about which you have testified, discussed?

2. What was said about defendant's reputation?

3. What was the occasion for discussing defendant's reputation?

4. Who was present?

5. Where was that?

You can ask about arrests which did not lead to convictions. Since it is the community's opinion that counts, the form of the question must be "have you heard"; never ask "do you know".

1. Have you heard that defendant was arrested for (or convicted of) murder in 1966?

The idea is that if the community hasn't heard about the trouble the defendant's been in, the community's opinion of his reputation is not very valid.

CHECKLIST/GOUGE

Prior Inconsistent Statement

WRITTEN STATEMENT

Elements of Proof

1. Have the witness repeat the statement(s) given on direct examination.

2. Have him deny having made any contradictory statement.

3. Direct his attention to the statement and ask whether or not he made it.

4. Produce the statement and have it marked as an exhibit.

5. Have the witness identify his handwriting/signature/initials.

6. Establish that there have been no changes made to the statement since he signed it.

7. Have the witness affirm that the statement was true at the time he made it.

8. Introduce it into evidence.

9. If the witness denies the statement, you will have to produce a rebuttal witness to prove his signature/that he made it.

NOTE: The statement is impeachment and not substantive evidence.

The Technique

1. (Lock him into his story.)

2. Have you ever made any statement to anyone contrary to what you have just told us?

3. Do you remember giving Officer Smith a statement at the Homicide Office shortly after the murder?

4. (Have the statement marked for identification.)

5. I show you Government's Exhibit No. _____ for identification; is that your initial/signature/handwriting?

6. Has any change been made to Government's Exhibit No. _____ for identification since you signed/initialed/made it?

7. Was Government's Exhibit No. _____ true and correct at the time you signed/initialed/made it?

8. Did you say in the statement marked Government's Exhibit No. _____ that _____?

CHECKLIST/GOUGE

Prior Inconsistent Statement

ORAL STATEMENT

Elements of Proof

1. Have the witness repeat the statement(s) given on direct examination.

2. Get him to deny that he ever made any contrary statement.

3. Direct him to the time, place, and statement which contradicts his testimony.

4. If he affirms the prior statement, you may inquire into his memory then versus his memory at trial and which statement is correct.

5. If he denies/has lack of memory, you must produce on rebuttal the witness who heard the prior statement.

The Technique

1. (Lock him into his story.)

2. Did you ever tell anyone at any time that (contrary statement)?

3. Do you recall being interviewed by/talking to (name) on (date) about (time) at (place)?

4. Do you recall telling him that _____?

NOTE: A statement/confession inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by Miranda may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of a defendant who takes the stand at trial. Harris v. New York, 401 U.S. 222 (1971).

CONTINUED

4 OF 5

CHECKLIST/GOUGE

Prior Inconsistent Statement

PRIOR TESTIMONY

Elements of Proof

1. Have the witness repeat his statement(s) given on direct examination.

2. State the time, place and occasion of the prior testimony, and ask him if he testified.

3. Ask whether he was under oath as he is now.

4. Reading from the transcript, call his attention to the exact question asked and the answer he gave.

5. Ask whether he was asked that question and gave that answer.

The Technique

1. Do you recall testifying (time/place/occasion)?

2. Were you under oath and sworn to tell the truth just as you are now?

3. (Before the Grand Jury/in that case), were you asked this question and did you make this answer: "Question: (read the question); Answer: (read the answer)"?

4. Were you asked that question and did you give that answer?

5. (Don't let the witness explain anything, until he has admitted/denied he made the answer.)

NOTE: If the witness denies/"does not remember", you will have to call the court reporter on rebuttal. The reporter should bring with him his original notes or stenographic pad.

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SELECTED REFERENCES

Impeachment of Witnesses

Impeachment By Prior Conviction

1. 14 D. C. Code Section 305 (In effect, abolishes the Luck Rule. Luck v. United States, 121 U. S. App. D. C. 757, 348 F.2d 763 (1965).

Character Evidence

1. Michelson v. United States, 335 U. S. 469 (1948).

2. United States v. Awkard, 122 U. S. App. D. C. 165, 352 F.2d 641 (1965).

3. United States v. Bishton, 150 U. S. App. D. C. 51, 463 F.2d 887 (1972).

Evidence of Other Offenses

1. "Design or plan." Payne v. United States, 111 U. S. App. 94, 96-7, 294 F.2d 723, 725-26 (1961), (Murphy Game).

2. "Intent" in assault cases. Generally D must raise defense of accident first and then bring in intent assaults on rebuttal. 2 Wigmore 363 (3rd Ed. 1940). McCormick (1st Ed.) p. 331.

3. Drew v. United States, 118 U. S. App. 11, 16, 331 F.2d 85, 90 (1964). Admission for (1) intent, (2) motive, (3) absence of mistake/accident, (4) common scheme where proof of one crime tends to establish other, and (5) identity of person charged.

4. Gay v. United States, 133 U. S. App. 337, 410 F.2d 1036 (1969). Admissibility is within discretion of court.

5. Wooten v. United States, 285 A.2d 309 (D. C. Ct. App.) (1971). Proper instructions by Court saved the case on appeal.

6. To show predisposition where defendant pleads entrapment. If defendant raises entrapment, the government can show readiness to commit crime by prior similar act. Sherman v. United States, 365 U. S. 369 (1958). Masciale v. United States, 356 U. S. 386 (1958). But not where prior

offenses are too remote in time to raise factual issue of predisposition. Hansford v. United States, 112 U.S. App. D.C. 359, 364-66, 303 F.2d 219, 224-26 (1962) (en banc).

NOTE: Where the defendant raises, but does not plead: "When defense counsel asks questions thought to be suggestive of entrapment, he should be instructed to plead the defense or abandon the line of questioning." (i.e., if defendant raises entrapment by questioning, the government can put in predisposition proof of other crimes.) United States v. Neuman, 141 U.S. App. D.C. 131, 436 F.2d 285 (1970) cert. denied, 401 U.S. 974

"Impeachment" in Self-Defense Cases

Burks v. United States, 152 U.S. App. D.C. 284, 470 F.2d 432 (1972).

Impeachment with Prior Inconsistent Statements

1. "Jencksing" the defense

State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970).
People v. Saunders, 110 Ill. App. 85, 249 N.E.2d 124 (1969).
People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651 (1969)
United States v. Wright, ____ U.S. App. D.C. ____, 489 F.2d 1181 (1973).

2. Impeaching your own witness

General Rule: Can't impeach own witness.

Belton v. United States, 104 U.S. App. D.C. 81, 251 F.2d 811 (1958).
Rule 26, Federal Rules Criminal Procedure
Rule 26, Superior Court Rules Criminal Procedure
Robinson v. United States, 113 U.S. App. D.C. 372, 308 F.2d 327 (1962).

Evidence contradicting own witness is admissible.

Pritchett v. United States, 87 U.S. App. D.C. 347, 185 F.2d 438 (1951).

Statutory Exception for Surprise:

14 D.C. Code §102

Surprise: Court must be satisfied that the party is surprised, but need not make a specific finding. Wheeler v. United States, 93 U.S. App. D.C. 159, 211 F.2d 19 (1953).

Good faith: Surprise must be claimed in good faith. United States v. William Brown, 134 U.S. App. D.C. 1, 411 F.2d 716 (1969).

3. Impeachment with Miranda-barred confession

Harris v. New York, 401 U.S. 222 (1971).

Limiting Instructions Following Impeachment

1. Criminal Jury Instructions ("Redbook").

Instruction 1.08. See annotation following instructions.

2. Lofty v. United States, 277 A.2d 99 (D.C. Ct. App. 1971).

3. Robinson v. United States, 113 U.S. App. D.C. 372, 308 F.2d 327 (1962).

Rehabilitating with Prior Consistent Statements

1. Copes v. United States, 120 U.S. App. D.C. 234, 237, 345 F.2d 723, 726 (1964).

2. Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968).

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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Training for Assistant United States Attorneys

MOCK TRIAL NO. 1: Prosecutor's Instructions - United States v. Darlene Moore

INTRODUCTION: The purpose of this mock trial is to give the prosecutor experience in basic techniques of direct examination of witnesses, marking and admission of exhibits, impeachment by prior conviction, and opening statement and closing argument. It is also designed to develop overall courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely upon material contained in his case jacket. This includes the Prosecution Report (PD 163), the information charging the offense, copies of subpoenas, a copy of the bail agency report, a copy of the bail conditions, a copy of the Narcotics Treatment Administration report, and a copy of the defendant's D. C. criminal record. In this mock trial the prosecutor should also h a certified copy of the defendant's prior conviction. The participant assigned the role of arresting officer should have the broom seized at the time of arrest.

INSTRUCTIONS TO PROSECUTOR: The prosecutor will be expected to:

1. Make a simple, concise opening statement covering the elements of simple assault and setting out the date, time, and place of the offense and the general outline of the Government's case;

2. Conduct direct examination of the complainant to get the story into evidence and have the broom marked and identified by the complainant;

3. Conduct direct examination of the arresting officer and have the broom marked and identified by the officer and admitted as an exhibit;

4. Impeach the defendant with her prior conviction;

5. Make a concise final argument and a concise rebuttal.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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MOCK TRIAL NO. 1: Instructor's Handout for Role Players - United States v. Darlene Moore

INTRODUCTION: The purpose of this mock trial is to give the prosecutor experience in basic techniques of direct examination of witnesses, marking and admission of exhibits, impeachment by prior conviction, and opening statement and closing argument. It is also designed to develop overall courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely upon material contained in his case jacket. This includes the Prosecution Report (PD 163), the information charging the offense, copies of subpoenas, a copy of the bail agency report, a copy of the bail conditions, a copy of the Narcotics Treatment Administration report and a copy of the defendant's D.C. criminal record. In this mock trial, the prosecutor should also have a certified copy of the defendant's prior conviction. The participant assigned the role of arresting officer should have the broom seized at the time of arrest.

OUTLINE OF ROLES:

I. The Complainant (August Jones)

The complainant testifies generally as set out on the PD-163 in the trial jacket. If cross-examined, he denies having provoked or abused defendant, or having known the defendant prior to the incident.

II. Arresting Officer (D. K. Obey)

The arresting officer testifies mainly to the seizure and chain of custody of the broom so it can be marked and admitted as an exhibit.

III. Trial Judge (Blackstone)

Since the objective is to demonstrate an easy, troublefree case, the judge should intrude as little as possible and should not interject his personality. In addition, he should not be overly strict in his application of the law.

IV. The Defendant (Darlene Moore)

The defendant, on this set of facts, should not have gone to trial. However, she should take the stand and deny urinating in the hall (but give no clear explanation of the puddle) and further deny hitting Mr. Jones. If asked, she should admit her prior conviction.

V. Defense Counsel (Arnold Stern)

He is defense counsel in name only and should not object to the prosecution's case unless the mistakes are outrageous.

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DISCUSSION NOTES

TOPIC II.E: Jury Selection

DURATION: 45 Minutes

The purpose of this lecture is to give the participant an introduction to annotating jury lists and basic techniques of voir dire.

TRAINING MATERIALS: Sample jury list with USAO arrest records annotation

OUTLINE OF PRESENTATION:

I. Annotating the jury list

A. Source of jurors

1. Jury commission

2. Random computer selection from voter rolls

3. Training file with complete details if you are interested.

B. Information on the jury list

1. Name
2. Age
3. Home address
4. Occupation
5. Arrest record (confidential - varies with judge whether defense is entitled to it).

C. Sources of information

1. Assistants' memos on prior juries

Juror's verdicts
Information from voir dire of jury panels
Other information developed by Assistants

2. Other sources

Criminal record check (should be on United States Attorney's Office jury list)

D. Annotation techniques

1. Importance

A profile of jurors' biases

- Prior verdicts - the propensity to convict or acquit
- Relationship to victims of other crimes - lack of sympathy for accused (many jurors themselves have been victims)
- Relationship to defendants in other criminal cases (especially the juror's police record)
- Relationship to law enforcement personnel
- Any other observations

2. Propriety of the prosecutor having juror information

See U. S. v. Kyle 152 U.S. App. D.C. 141, 469 F.2d 547 (1972) (prosecutor who had knowledge of prejudicial arousing comments addressed to three jurors at previous trial has duty to disclose that information to defense at instant trial).

3. Devise a simple annotation code

e.g., a "+" for a guilty verdict, a "o" or "-" for an acquittal
A red "X" or large "NO" or "!" to indicate a juror to be struck from any jury

4. Keep your own list up to date

Read the other Assistants' memos and code them to your list daily
It may be helpful to have a separate list of the numbers or names of jurors who are definite strikes

5. Publish your own jury results immediately

II. Selecting the jury at voir dire

A. Judge has discretion to conduct **voir dire himself.** Fed. R. Crim. P. 24(a)

B. Set the tone by your manner and attitude

1. Mood of professionalism

Courtesy and etiquette
Firmness - you're the prosecutor
Convey belief in your cause
An attitude of confidence

2. Attempt to develop rapport

You represent the people
You want all the facts developed

C. Preparation for voir dire

1. Know your facts

2. Know your dates, witnesses, and addresses

It may be helpful to have the essentials on
a separate sheet of paper
A separate sheet is also useful for opening statement

3. Know the problems in your case

D. Voir dire

1. Prosecutor's role

Introduce self, defendant, defense counsel. (If new jury, explain what voir dire is.)
Identify charges
Identify case
Identify Government witnesses (photo of decedent in murder case)

Make sure court reporter's record is complete
- "If your answer to any question is yes, please rise and identify yourself so that the court reporter knows who is speaking."
- (To panel as a whole) "I take it by your silence your answer is no."

If judge does not, ask about prior experience with crime
- "Please come up to the bench if your answer to either of the following questions is yes:

  - "Has anyone here, or any member of your family or a close friend, ever been accused of or a victim of a crime?"
  - "Has anyone here ever been a witness in a criminal case?"

2. Voir dire at the bench

If judge does not ask, then ask about relationship to accused/witness/victim of a crime.
- Ask if experience/relationship would affect verdict.
- Explore other attitudes/relationships.

If a victim, ask if the person was caught and convicted.
- Many victims are bitter about the lack of justice in their case.

If related to an accused, find out attitude.
- Many persons, e.g., parents of drug addicts, hate crime and criminals because of their experience.

If an accused/related to an accused, find out if they thought their case was fairly handled.
- Many persons do think they were fairly treated by police.
- Many persons in trouble when young are very law and order in middle age.
- Many persons think that getting in trouble with the police is what straightened them or their relative out.

If a witness, find out if they thought the case was properly handled and the police did a good job.

REMEMBER:

- a victim who thinks the police don't do their job;
- an accused or relative who thinks they were unjustly accused or treated;
- a witness who thinks a case was poorly handled:

ARE PROBABLY NOT GOOD GOVERNMENT JURORS.

CAVEAT: DON'T ASSUME YOU KNOW SOMEONE'S ATTITUDE. ASK QUESTIONS. FIND OUT.

3. Inform jury panel of possible problems

Problem witnesses/victims
- Children
- Addicts
- Informants
- Accomplices
- Those with criminal record
- e.g., "Would anyone be less inclined to believe a witness simply because he or she were a child?" (or an addict, policeman, or whatever)
- Work this into final argument.

4. Watch defense counsel

No arguments to jury, e.g., "If alleged accomplice testifies, will prospective jurors give fair consideration to possibility that he is lying to save his neck?"
No improper questions, e.g., "Does anyone know me as pastor of the True Faith Church?"
Go to bench first, if you expect trouble
Get names of defense witnesses when they are identified at voir dire; then check them out
If defense counsel tries to call witnesses not identified at voir dire, object!

5. Discretion of trial judge to control voir dire

a. Proper defense questions

(1) Where trial judge does not elect to conduct voir dire, defense counsel entitled to ask veniremen whether they would give greater credence to testimony of police officer merely because he is a police officer. Harvin v. United States, 297 A.2d 774 (D.C. Ct. App. 1972). See Brown v. United States, 119 U.S. App. D.C. 203, 338 F.2d 543 (1964); Sellers v. United States, 106 U.S. App. D.C. 209, 271 F.2d 475 (1959).

(2) Fourteenth Amendment requires trial judge to interrogate veniremen on subject of racial prejudice after defendant's timely request. Ham v. South Carolina, 409 U.S. 524 (1973).

b. Improper defense questions

(1) Failure of trial judge to ask defense questions on insanity defense did not amount to abuse of broad discretion to constitute reversible error. United States v. Cockerham, 155 U.S. App. D.C. 97, 476 F.2d 542 (1973).

(2) Absent showing by defense that proffered questions for voir dire with respect to self-defense are reasonably calculated to discover actual or likely source of prejudice, no abuse of discretion to omit such questions. United States v. Robinson, 154 U.S. App. D.C. 265, 475 F.2d 376 (1973); United States v. Peterson, ____ U.S. App. D.C. ____, 483 F.2d 1222 (1973), cert. denied, 94 S. Ct. 367 (1973).

(3) No abuse of discretion to omit questions that focus on propositions of law which belong in the court's domain rather than that of jury. Davis v. United States, 315 A.2d 157 (D.C. Ct. App. 1974).

6. Impanelling jury - strikes

It's all guesswork
RULE OF THUMB - when in doubt, strike!
Superior Court limits
- Felonies - 10 preemptory strikes
- Misdemeanors - 3 preemptory strikes
Procedure:
- Strike by jury box number
- You strike one
- Clerk fills the vacancy
- Defense strikes one
- Clerk fills the vacancy
- You strike one, etc.
All strikes done at bench

7. Rule on witnesses

Once jury is in box, get rule on witnesses.
Do it before opening statement

D. REMEMBER, JEOPARDY ATTACHES WHEN THE JURY IS IMPANELLED AND SWORN.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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WORKSHEET

TOPIC II.E: Jury Selection

The purpose of this lecture is to give the participant an introduction to annotating jury lists and basic techniques of voir dire.

OUTLINE OF PRESENTATION: NOTES

I. Annotating the jury list

A. Source of jurors.

B. Information on the jury list.

C. Sources of information.

1. Assistants' memos on prior juries.

2. Other sources.

D. Annotation techniques.

1. Importance.

NOTES

2. Propriety of the prosecutor having juror information

See U. S. v. Kyle
152 U.S. App. D.C. 141, 469 F.2d 547 (1972).

3. Devise a simple annotation code.

4. Keep your own list up to date.

5. Publish your own jury results.

II. Selecting the jury at voir dire

A. Set the tone by your manner and attitude.

1. Mood of professionalism.

2. Attempt to develop rapport.

NOTES

B. Preparation for voir dire

1. Know your facts.

2. Know your dates, witnesses and addresses.

3. Know the problems in your case.

C. Voir dire

1. Prosecutor's role

2. Voir dire at the bench

CAVEAT: DON'T ASSUME YOU KNOW SOMEONE'S ATTITUDE. ASK QUESTIONS. FIND OUT.

3. Inform jury panel of possible problems

NOTES

4. Watch defense counsel

5. Discretion of trial judge

a. Proper questions

Harvin v. United States, 297 A.2d 774 (D.C. Ct. App. 1972)

Ham v. South Carolina, 409 U.S. 524 (1973)

b. Improper questions

United States v. Cockerham, 155 U.S. App. D.C. 97, 476 F.2d 542 (1973)

United States v. Robinson, 154 U.S. App. D.C. 265, 475 F.2d 376 (1973)

NOTES

United States v. Peterson, ____ U.S. App. D.C. ____, 483 F.2d 1222 (1973), cert. denied, 94 S. Ct. 367 (1973)

Davis v. United States, 315 A.2d 157 (D.C. Ct. App. 1974)

6. Impanelling jury - strikes

7. Rule on witnesses

D. REMEMBER, JEOPARDY ATTACHES WHEN THE JURY IS IMPANELLED AND SWORN.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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Training for Assistant United States Attorneys

TOPIC II.E: Simulation - Conducting Voir Dire

INTRODUCTION: Following the lecture on jury selection, an Assistant is asked to demonstrate the technique in a simulated environment. He is provided with a statement of facts or sample case. To further assist him the Assistant is provided with a checklist or gouge for the steps he might generally follow in conducting voir dire.

I. Facts

A. Ann Sloane was robbed at gun point about 7:00 in the evening on July 4, 1972 on the south east corner of 14th and U Streets, N. W. The defendant, Ned Brooks, was later identified by her in a lineup and charged by the Grand Jury with armed robbery. There was an eye witness, Franklin Smith. Conduct the voir dire.

B. The same facts as in A above, except that Ann Sloane is a convicted prostitute and known narcotics addict. Conduct the voir dire.

C. On April 11, 1973, there was an attempted breaking and entering at the premises 811 Acker Street, N.E. A broken tricycle on the front porch was taken. Subsequently, the defendant, Maurice Mivins was charged with attempted burglary in the second degree and petty larceny of the tricycle. The Government's main witness at trial will be Rufus Wingate, who has a prior conviction for burglary. The tricycle was not recovered and the only evidence is Wingate's testimony. Conduct the voir dire.

D. Two persons respond to the victim/accused of crime question. Conduct the voir dire at the bench.

II. Instructions

The purpose of this simulation is to give the participant experience in conducting voir dire. In I.B. and I.C. above, the participant must also be able to handle the problem of the marginal witness.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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SAMPLE JURY LIST

MARCH 1973 - GOVERNMENT

NAME	AGE	OCCUPATION/EMPLOYER	ADDRESS
1. Harriet L. Adams	41	Analyst Defense Dept., N.S.A.	7417 7th St., N.W. 20012
2. Dorothy M. Albert	39	Librarian Gen. Accounting Office	2755 Ordway St., N.W. 20008
3. Kate W. B. Alfriend	54	Asst. to Director U.S. Dept. of Agriculture	3044 N St., N.W. #2 20007
4. John B. Ambers	68	Laborer Architect of Capitol	6223 8th St., N.W. 20011
5. Andrew J. Andrews	25	Clerk U. S. Information Agency	945 Division Ave.,N.E. 20019
6. Frank Applewhite	43	Maintenance Laborer Natl. Capital Housing	1300 Florida Ave.,N.W. 20009
7. David D. Armwood	48	Vault Teller Treasury Dept.	1724 Minnesota Ave.,SE 20020
8. Christopher Avery	32	Computer System Analyst U.S.Dept. of Agriculture	5615 33rd St., N.W. 20015
9. Robert L. Baltimore	55	Computer Operator Dept. of Human Resources	334 16th St., N.E. 20002
10. Ivan G. Barnes	20	Deck Attendant Library of Congress	1516 Emerson St., N.W. 20011
11. John C. Barringer	50	Custodial Leader Andrews Air Force Base	2108 Eye St., N.E. 20002
12. Gracie E. Bell	42	Janitor Cameron Station	4331 4th St., S.E. 20032
13. Lucille J. Berry	47	Complaints & Appeals Off. Dept. of Human Resources	23 17th St., S.E. 20003
14. Patsy A. Blackley	29	Clerk-Typist Internal Revenue Service	1314 Girard St., N.W. 20009

SAMPLE JURY LIST (CONTINUED)

MARCH 1973 - GOVERNMENT

NAME	AGE	OCCUPATION/EMPLOYER	ADDRESS
151. Pauline R. Temoney	32	Clerk U.S. Patent Office	2412 Elvans Rd.,S.E. 20020 #101
152. Laurence E. Thomas	55	Supvy.Program Manager Smithsonian Institution	4241 Blaine St.,N.E. 20019 #20
153. Harry D. Thompson	50	Mgr. Retail Store U.S.Naval Research Lab.	5319 1st St., N.W. 20011
154. Thelma L. Thompson	53	Nursing Assistant St.Elizabeths Hospital	5107 Jay St., N.E. 20019
155. Maurice B. Tilghman, Sr. Lottery, '51, nolle; poss. of no. slips, '51, dismissed	54	Mail Clerk Dept. of Defense	904 Farragut St., N.W. 20011
156. Nancy E. Tompkins	44	Medical Record Librarian DHR - MHA - Area B CMHC	815 Kennedy St., N.E. 20011
157. Eli Turner P.L., '55, nolle	55	Sup. Teller U.S. Treasury	1710 33rd Pl., S.E 20020
158. Dorothea A. Walker	27	Probation Officer D.C.Superior Court	121 12th St., S.E. 20003 #500
159. Velma R. Watson	52	Librarian Dept. of Labor	22 Jefferson St., N.E. 20011
160. M. Denise West	31	Editor Dept. of State	2025 I St., N.W. 20006
161. Inez C. Williams	53	Card Punch Operator Govt.Printing Office	906 K St., N.E. 20002
162. Ralph Williams	30	Admin. Tech. D.C. National Guard	2844 Hartford St.,S.E. 20020
163. Hassie G. Wilson	55	Nurse Asst. Walter Reed Army Hospital	3331 Croffut Pl., S.E. 20019
164. Audrey R. Wright	46	Secretary Dept. of Army	3242 T St., S.E. 20020
165. James V. Wright	57	Letter Carrier U.S. Postal Service	2577 Irving St., N.E. 20018
166. William E. Wright	45	Press Helper Bur.Engraving & Print.	1638 U St., S.E. 20020

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

SAMPLE JURY LIST

MARCH 1973 - NON-GOVERNMENT

NAME	AGE	OCCUPATION/EMPLOYER	ADDRESS
168. Sheppie G. Abramowitz	37	Director, D. C. Office University of Cincinnati	5026 Klingle St., N.W. 20016
169. Margaret B. Alexander	70	Retired (Govt.)	4618 Warren St., N.W. 20016
170. Laura S. Allen	63	Domestic Mrs. J. W. Mannion	623 K St., N.E. 20002
171. Joeanna Alston	55	Minister	613 4th St., N.E. 20002
172. Hazel K. Anderson	66	Technician in Pathology Howard University	2001 16th St., N.W. 20009 #304
173. Ransom Anderson, Jr.	55	Auto.Equip.Serviceman 11th & O St., S.E.	832 50th Pl., N.E. 20019
175. May M. Arlt	62	Account Coordinator Estee Lauder, Inc.	560 N St., S.W. 20024
175-A. Norman H. Aronovic	26	Display Assistant Saks Fifth Avenue	117 Varnum St., N.W. 20011
176. Hazel L. Atkinson	42	Diet Dept. Sibley Hospital	4523 15th St., N.W. 20011
176-A. Milton S. Baddy	60	Shipping Clerk Control Data Corp.	1421 Potomac Ave.,S.E. 20003
177. Lula B. Baker Threats, '49, nolle	59	Housewife	1824 Savannah St., S.E. 20020
178. Ernest L. Barber	33	Bus Operator WMATA-METRO	4218 12th Pl., N.E. 20017
179. Clemantine H. Barnes	59	Beautician Self-employed	1122 Ismont St., N.W. 20010
180. Mary E. H. Battle	45	Child Care Tech.	#2 - 1318 W St., N.W. 20009
180-A. Raymond Baylor Unleashed dog, '56, fine $10	53	Retired (Govt.)	3232 Ely Pl., S.E. 20010

SAMPLE JURY LIST (CONTINUED)

MARCH 1973 - NON-GOVERNMENT

	NAME	AGE	OCCUPATION/EMPLOYER	ADDRESS
473.	Rosyth L. White	52	Retired (Govt.)	4200 3rd St., N.W. 20011
474.	Charles Wiggins	54	Truck Driver Mazo-Lerch Co., Inc.	1523 Otis St., N.E. 20017
475.	Alsie M. Wilder	45	Housewife	1711 Irving St., N.W. 20010
476.	Magrieta L. Willard	24	Not employed	3820 Benton St., N.W. 20007
477.	Anthony Williams Att rob.,'68,DWOP; PPW,'68, nolle	26	Cook University Nursing Home	300 Tennessee Ave., N.E. 20002
478.	Dorothy L. Williams	21	Clerk Giant Food, Inc.	5119 E St., S.E. 20019
479.	Vannetta J. Willis	64	Retired	205 Oglethorpe St. W. 20011
480.	Conrad N. Wilson, Sr.	42	Parking Mgr. -P.M.I. 1725 DeSales St.,N.W.	4443 E St., S.E. #1 20019
481.	Mary E. Wilson	48	Homemaker	2224 Perry St., N.E. 20018
483.	Hazel P. Wood	22	Student	4605 9th St.,N.W. 20011
484.	Helen A. Woodberry	35	Housewife	1249 Raum St.,N.E. #4 20002
485.	Rome Wooten, Jr.	41	Truck Driver American Hospital Supply Corp.	224 Varnum St., N.W. 20011
486.	Mike Zarpas DO, '65, unk	53	Real Estate Salesman F.W. Berens Sales, Inc.	4600 Conn. Ave., N.W. 20008

CHECKLIST/GOUGE

Jury Selection Procedure

Voir Dire

I. "May it please the Court, ladies and gentlemen of the prospective jury panel..."

II. Introduce

- ° Self (and Govt. co-counsel)
- ° Defendant (ask him to stand and face panel)
- ° Defense Counsel (name and member of D. C. Bar only)

III. "If your answer to any question is yes, please rise and identify yourself, so that the court reporter knows who is speaking."

QUESTION: "Does anyone know myself, (my co-counsel), Mr. (defendant's name), Mr. (defense counsel)."

"I take it by your silence your answer is no."

IV. State the Charges

- ° Nature
- ° Time and date
- ° Place
- ° Example: "In this case, the Government (Grand Jury) charges that (the defendant) robbed (the victim). Furthermore, the Government (Grand Jury) charges that this robbery took place at (address) (descriptio at or about (time) on (day of week) (date).

QUESTION: "Based solely on information I have just given you, has anyone heard of, read or seen anything whatsoever about this case?"

V. Introduce Witnesses

° Police Officer (Member of Metropolitan Police Dept.)

° Other witnesses including prospective defense witnesses (pronounce names correctly)

QUESTION: "Does anyone know any of the witnesses I have introduced?"

"I take by your silence your answer is no."

VI. If Court Does Not Ask:

QUESTION: "Please come up to the bench if your answer to either of the following questions is yes:

"Has anyone here, or any member of your family or a close friend, ever been accused of, or a victim of, a crime?"

"Has anyone here ever been a witnes to a crime?"

VII. QUESTION: "Does anyone know any reason whatsoever why you could not render a fair and impartial verdict in this case, based solely on the evidence introduced in Court, and the law as his honor will instruct you on it?"

"I take it by your silence your answer is no."

QUESTION: "Has anyone, members of his family, or close friend, either have been or are now employed with any type of law enforcement agency, e.g., FBI, local police, U.S. Marshal's Service, Justice Department, Military Police, etc.?"

"Has any member of jury or a close family member studied law in any fashion?"

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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DISCUSSION NOTES

TOPIC II.F: The Proper Use of Objections

DURATION: 1 1/2 hours

During this discussion, the participant is expected to gain a better understanding of the types of objections that are available to a trial attorney, the reasons for making of such objections, and the techniques utilized. We will discuss four basic points: (1) whether an objection should be made; (2) types of objections; (3) hearsay rule; and (4) formulating the objection. Mention should also be made of the current status of the Proposed Federal Rules of Evidence.

REFERENCES: McCormick's Handbook on the Law of Evidence (2d ed. 1972); 6 Am Jur Trials pp. 605-40.

OUTLINE OF PRESENTATION:

I. Objections: Practical Considerations

A. Purpose of Objection.

1. Prosecutor must control the trial. Once defense counsel starts down an improper path without objection, difficult to bring him back.

2. Burden on prosecutor to make timely objection since the judge will not notice errors sua sponte. Fed. R. Crim. P. 52(b); United States v. Thomas, 147 U.S. App. D.C. 43, 452 F.2d 1373 (1971).

B. Trial Tactics. In general, always object to improper questions and do so forcefully. When in doubt, object, but do not become petty. Weigh the following considerations.

1. Don't object if you are certain the answer will not hurt your case.

2. Influence of unnecessary or ungrounded objections upon jury.

3. Drawing jurors attention to the subject of the objection.

4. Being sustained on objections makes you look very good to the jury.

II. Types of Objections

A. Objection before a witness testifies to all of that witness' forthcoming testimony. Request offer of proof, especially with character witnesses.

B. Objections to form of defense counsel's questions.

1. Question is leading (on direct examination only).

2. Question is argumentative.

3. Question assumes facts not in evidence.

4. Question is vague and ambiguous.

5. Question has already been asked and answered (repetitive; cumulative).

C. Objections to substance of question.

1. Question calls for inadmissible hearsay.

2. Question calls for speculation or opinion.

3. Question misstates facts in evidence.

4. Question is beyond scope of direct examination.

5. Question is improper defense attempt to impeach without adequate foundation.

6. Question is irrelevant.

D. Objections to substance of answer.

1. Answer is unresponsive or volunteered. Only the examiner (usually on cross) is entitled to this objection.

2. Answer is opinion or lack of personal knowledge.

3. Answer contains inadmissible hearsay.

E. Incompetence of witness to answer, e.g., question designed to elicit privileged communication.

F. Failure to lay proper foundation for the introduction into evidence of particular exhibits or testimony.

1. Photos.

2. Documents.

3. Demonstrative evidence.

4. Opinion evidence - is expert qualified?

III. Hearsay

A. Definition: Generally, hearsay evidence is a statement, written or oral, of an out-of-court declarant offered to prove the truth of the matter contained therein. Assertive conduct may also be hearsay.

B. Out-of-Court Utterances or Conduct Which Are Not Hearsay.

1. Utterances and writings offered to show effect on hearer or reader.

2. Non-assertive conduct. For example, testimony that bank teller was pale and shaky not considered hearsay to show robbery was taking place by intimidation.

C. Evidence ostensibly hearsay, e.g., former testimony, is admissible if offered for nonhearsay purpose.

1. To impeach.

2. To show perjury.

3. In general, not offered for truth of contents.

D. Exceptions to Hearsay Rule: Usually contain elements of necessity and reliability. (Exceptions where, Declarant Must be Shown to be Unavailable, i.e., death, insanity, illness, exercise of any privilege, etc.)

1. Testimony at Former Hearing.

a. Testimony was under oath.

b. Testimony was subject to cross-examination by the present party opponent or by one who had identical interest to cross-examine.

c. Not a violation of Sixth Amendment confrontation clause.

2. Dying Declarations.

a. Can be used only in homicide cases, i.e., first and second-degree murder, manslaughter and negligent homicide.

b. Declaration must have been made by decedent.

c. Must relate to matters proximate to the killing.

3. Declaration Against Interest.

a. Must be against pecuniary or penal interest.

b. Statements containing both self-serving and dis-serving facts.

4. Statements of Personal or Family History.

   a. Must be made by a family member or one intimately associated with the family.

   b. Must be made without apparent motive to deceive.

   c. Need not be first-hand knowledge.

   (Exceptions where, Availability of Declarant Immaterial.)

5. Past Recollection Recorded.

   a. Contents of document are based upon first-hand knowledge of person testifying in court.

   b. Document must have been made or acknowledged at or near time of event when witness' recollection was fresh.

   c. Witness must testify that upon reviewing document, he has no independent memory of event.

   d. Witness must swear contents of document are true.

   NOTE: Difference between past recollection recorded and refreshing memory.

6. Business Records: Federal Shopbook Rule 28 U.S.C. §1732.

   a. Authentication of and foundation for admitting business records are one and the same.

   b. Need only bring the custodian of the record to court.

   c. Medical and hospital records are included except subjective judgments thereon.

7. Prior Identification.

   a. Although prior consistent statements are technically hearsay, this exception is allowed where identification is an issue in the case.

   b. Cannot prove identification through testimony of police officer where identifying witness reneges on pre-trial identification in the courtroom.

8. Admissions: Evidential, Judicial, and Representative.

   a. Requirements:

      (1) Declarant party to law suit

(2) Must be offered against him and not in his favor

(3) No need for first-hand knowledge

b. Formal admissions are pleadings or stipulations.

c. Co-conspirator admissions.

d Admissions by silence.

9. Excited Utterances.

a. Many spontaneous declarations are in fact non-assertive or, if assertive, are not offered to prove the truth of the assertion.

b. Inappropriately referred to as res gestae.

c. Must be sufficient startling event and statement must be spontaneous reaction to event without reflective thought.

10. State of Mind.

a. Relevant to show:

(1) Intention

(2) Purpose

(3) Design

(4) Motive

(5) Belief

(6) Fear

b. Declarations of present mental or emotional state are usually admissible.

c. Declarations of intention offered to show subsequent acts of declarant.

See United States v. Johnson, D.C. Dist. Ct. No. 288-70, decided January 10, 1972 (deceased girl's statement "I am going to get an abortion" introduced against defendant). See also People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944).

d. Declarations to show memory or belief as proof of previous happenings NOT an exception. See United States v. Brown, ____ U.S. App. D.C. ____, 490 F.2d 758 (1973).

11. Declaration concerning Bodily or Physical Condition.

a. Declarations of present bodily feelings, symptoms and condition.

b. Declarations made to a physician consulted for treatment.

c. Declarations made to physician employed only to testify.

12. Official Records.

a. 28 U.S.C. §1733 exception for records and papers of the United States for Federal Courts.

b. Authentication problems.

c. Previous judgments.

13. Local Exception Rule.

Hearsay statement is admissible where it appears that the defendant himself was present at the time the out-of-court statement was made. United States v. Harris, 141 U.S. App. D.C. 253, 258, 437 F.2d 686, 691 (1970).

14. D.C. "Penumbra Rule".

Murphy Auto Parts Co. v. Ball, 102 U.S. App. D.C. 416, 249 F.2d 508 (1957) and United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d 170 (1969) stand for the proposition that if the out-of-court statement has elements of several exceptions to the hearsay rule, then it is properly received into evidence.

IV. Phrasing and Presenting the Objection

A. Indicate Objection by a Clear Succinct Statement of the Ground or Grounds of the Objection. Be precise - avoid meaningless labels such as "res gestae"; a sharp judge will ask for specific statement of your theory.

EXAMPLE: "Objection, the question is leading." A more complete objection should be given at the bench if necessary - avoids argument in front of jury.

B. Continuing Objection Theory.

1. "Continuing objection" interposed to a line of questioning. Although court need not accept it, nevertheless, the jury gets the message.

2. Form.

a. "Object to this line of questioning."

b. Make specific objection once and then say "Same objection" at appropriate time.

C. Presenting the Objection.

1. Make as soon as rule of evidence is violated. Bunter v. United States, 245 A.2d 839 (D.C. Ct. App. 1968).

2. Rise, state objection, remain standing until judge rules. Do not "thank" the judge for his ruling whether sustained or overruled.

3. If witness begins to answer an improper question before you could object, then object to question, move to strike answer, and request court to instruct jury to ignore both question and answer. You can move to strike an improper question as well. Motion to strike depends on whose witness it is -- should not be your own.

4. Be prepared to argue merits of objection at the bench.

5. If defense counsel objects to your question, consider:

   a. Stating proper rule that permits your question at the bench.

   b. Offer of proof to whow propriety of question outside of jury's presence at the bench. "May the Government make an offer of proof at this time?"

6. During closing argument, object forcefully to improper statements and approach the bench. Consider also moving to strike improper statements.

7. While one should not hesitate to object to improper statements, he should be certain he is right. Otherwise, the effect on the jury is very detrimental to the Government.

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WORKSHEET

TOPIC II.F: The Proper Use of Objections

During this discussion, the participant is expected to gain a better understanding of the types of objections that are available to a trial attorney, the reasons for making such objections, and the techniques utilized. We will discuss four basic points: (1) whether an objection should be made; (2) types of objections; (3) hearsay rule, and (4) formulating the objection.

REFERENCES: McCormick's Handbook on the Law of Evidence (2d ed. 1972); 6 Am Jur Trials pp. 605-40.

OUTLINE OF PRESENTATION: NOTES

I. Objections: Practical Considerations

A. Purpose of Objection.

B. Trial Tactics.

II. Types of Objections

A. Objection before witness testifies.

B. Objections to form of questions.

C. Objections to substance of question.

NOTES

D. Objections to substance of answer.

E. Incompetence.

F. Failure to lay proper foundation.

III. Hearsay

A. Definition.

B. Utterances not hearsay.

C. Admissible if offered for non-hearsay purpose.

D. Exceptions.

Declarant Unavailable.

1. Testimony at Former Hearing.

2. Dying Declarations.

NOTES

3. Declarations Against Interest.

4. Statements of Personal or Family History.

Availability of Declarant Immaterial.

5. Past Recollection Recorded.

Compare with refreshing memory.

6. Business Records: Federal Shopbook Rule 28 U.S.C. §1732.

7. Prior Identification.

8. Admissions: Evidential, Judicial, Representative.

9. Excited Utterances.

10. State of Mind.

United States v. Brown, ____ U.S. App. D.C. ____, 490 F.2d 758 (1973).

NOTES

11. Declaration Concerning Bodily or Physical Condition.

12. Official Records.

13. Local Exception Rule.

United States v. Harris, 141 U.S. App. D.C. 253, 258, 437 F.2d 686, 691 (1970).

14. D.C. "Penumbra Rule".

Murphy Auto Parts Co. v. Ball, 102 U.S. App. D.C. 416, 249 F.2d 508 (1957).

United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d 170 (1969).

IV. Phrasing and Presenting the Objection.

A. Indicate Objection by Clear Succinct Statement. Avoid meaningless labels such as "res gestae".

B. Continuing Objection Theory.

C. Presenting the Objection.

CHECKLIST/GOUGE

Objections

I. Form of Question

- Leading
- Calls for speculation
- Argumentative
- Assumes facts not in evidence
- Vague and ambiguous
- Misstates facts in evidence
- Already answered (repetitive/cumulative)
- Beyond scope of direct

II. Substance of Question

- Irrelevant
- Immaterial
- Calls for hearsay
- Insufficient foundation/calls for self-serving hearsay (e.g., asking arresting officer about defendant's exculpatory statements)

III. Answer

- Unresponsive
- Inadmissible opinion

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DISCUSSION NOTES

TOPIC II.G: Opening Statement

DURATION: 30 Minutes

This discussion is to develop an understanding by the participant of the purpose, requirements, techniques, and limitations of the Government's opening statement.

OUTLINE OF PRESENTATION:

I. Purpose - A guidebook for the jury

A. To outline the Government's expected case so the jury will be able to follow the evidence.

B. To emphasize the important themes in your case so the jury will be certain to pick them up during trial.

1. The theme of your case
2. Important exhibits
3. Important admissions or testimony
4. The Government's theory of the case

II. Requirements

A. Cover the elements of the crime charged.

1. The opening statement must define a crime. If your opening statement does not show the judge that the Government expects evidence to show the defendant committed a particular crime, in all its elements, then the defense will move for a judgement for acquittal, the judge will grant it, and you will be out of Court.

2. Read the indictment/information to the jury.

3. Make sure you cover venue, i.e., that the crime was committed in the District of Columbia.

B. Keep your opinion out of it.

1. Your opinion is of no evidentiary value.

2. Cover the evidence and tie it to the elements of the crime.

III. Techniques

A. Have your opening statement organized.

1. Do not read from notes.

2. Use a narrative style.

a. A chronological order works best
b. Tell a story
c. Make it interesting
d. Keep their attention
e. Be descriptive (Choose action words, not passive narrative.)

3. Have notes with the essentials of the case.

a. A separate list of the date, time and place of the crime
b. List also the Government witnesses
c. A ready reference for jury selection
d. A ready reference for opening statement
e. A ready reference during trial
f. Avoid mispronouncing witnesses' names
g. Avoid having to fumble through the case jacket

4. Listen to the defense opening statement.

a. Make notes of main points
b. Make sure he proves what he said he would
c. Comment on deviations in your final argument

B. Things not to do

1. Don't be too explicit.

a. Don't go into too much detail
b. Witnesses do change their stories on the stand
c. Just a general guide for the jury

2. Don't mention possibly inadmissible evidence.

a. Don't mention clearly inadmissible evidence, e.g. suppressed confessions, hearsay, etc. Resolve those by insisting on pre-trial determination
b. Beware of mentioning evidence which may become inadmissible (e.g., evidence which may still be suppressed either pretrial or at trial in a separate hearing)
c. Be aware of affect it is having on the judge
d. Jury will think you have not proved case if you mention evidence and don't produce it in the trial.

3. Do not explain weaknesses in your case.

   a. Emphasize the positive
   b. Don't do the defense's job
   c. Don't deflate your case by confusing jury

4. Don't say "expect to prove" every few words.

   a. Distracts jury
   b. Is bad psychologically
   c. Say once at the beginning and then give the jury a clear, interesting narrative

5. Don't give your whole case away.

   a. In spite of discovery, defense may not know your whole case
   b. Jury will not stay interested if the case is just a repeat of your opening statement
   c. Another reason not to be too explicit

6. Don't argue the case, but be positive.

   You argue at the end, not the beginning of the case

7. Don't let the defense get away with anything.

   a. Be ready to object during defense opening statement
   b. Don't let defense counsel argue the case
   c. If defense gives a reserve opening statement, don't let them use it to comment on Government case
   d. Don't let defense counsel mention inadmissible evidence
   e. Don't let defense counsel drag in irrelevant and emotional topics

C. The three rules of opening statement

1. Cover the elements.

2. Tell a story and keep it interesting.

3. Don't be too specific.

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WORKSHEET

TOPIC II.G: Opening Statement

This lecture is to develop an understanding by the participant of the purpose, requirements, techniques, and limitations of the Government's opening statement.

OUTLINE OF PRESENTATION: NOTES

I. Purpose - A guidebook for the jury

A. To outline the Government's expected case.

B. To emphasize the important themes in your case.

II. Requirements

A. Cover the elements of the crime charged.

B. Keep your opinion out of it.

1. Your opinion is of no evidentiary value.

2. Cover the evidence and tie it to the elements of the crime.

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WORKSHEET

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This lecture is to develop an understanding by the participant of the purpose, requirements, techniques, and limitations of the Government's opening statement.

OUTLINE OF PRESENTATION: NOTES

I. Purpose - A guidebook for the jury

A. To outline the Government's expected case.

B. To emphasize the important themes in your case.

II. Requirements

A. Cover the elements of the crime charged.

B. Keep your opinion out of it.

1. Your opinion is of no evidentiary value.

2. Cover the evidence and tie it to the elements of the crime.

III. Techniques NOTES

A. Have your opening statement organized.

1. Do not read from notes.

2. Use a narrative style.

3. Have notes with the essentials of the case.

4. Listen to the defense opening statement.

B. Things not to do.

1. Do not be too explicit.

2. Do not mention possibly inadmissible evidence.

NOTES

3. Do not explain weaknesses in your case.

4. Do not say "expect to prove" every few words.

5. Do not give your whole case away.

6. Do not argue the case.

7. Do not let the defense get away with anything.

C. The three rules of opening statement.

1. Cover the elements.

2. Tell a story and keep it interesting.

3. Don't be too specific.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
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DISCUSSION NOTES

TOPIC II.H: Closing Argument in a Jury Trial

DURATION: 45 min.

This discussion provides the rudiments from which the participant is expected to develop a better understanding of the closing argument in a jury trial. This will include a discussion of how to prepare for the closing argument from the initial interview with witnesses through the trial, and how each stage of a trial should be considered as an essential element of the closing argument. Emphasis will be placed on preparation for the closing argument, jury contact, organization of matters to be argued, pitfalls to avoid, and techniques which promote salient features of one's case.

OUTLINE OF PRESENTATION:

I. Organization

A. Preparation.

1. Pretrial.

a. Witness interviews conducted with due consideration for possible use during closing.

b. Preparation of matters other than witnesses' testimony. See e.g., United States v. Robinson, 148 U.S. App. D.C. 140, 143 n.3, 459 F.2d 1164, 1167 n.3 (1972) (defendant's pretrial statement to court admitting guilt not admissible and improper for closing argument).

c. Consideration of instructions to be requested.

2. Trial.

a. Opening statement to comport with closing argument - contains hints of matters to be elaborated upon during closing argument.

b. Present witnesses in most favorable demeanor thus creating a feeling of credibility.

c. Solicit from witnesses positive expressions and "catchy" phrases, e.g., "God help me, please help me."

d. Tangible evidence.

e. Record daily and during breaks facts and important points to be elaborated upon during argument.

3. Prior to Argument.

   a. Organize closing and rebuttal arguments.

   b. Consider what matters should be retained for rebuttal.

   c. Know the precise instructions which will be given by the court.

4. Control Time of Presentation.

   a. Lateness of hour.

   b. Need for rest.

   c. Automobile parking lots close.

   d. Family responsibilities.

B. Closing Argument.

1. Preliminary Matters.

   a. Place notes in inconspicuous place easily available for eyesight reference without breaking continuity.

   b. Demeanor, attire, attitude.

   c. Addressing the Court.

   d. Addressing the jury.

      (1) Do not copy another's style.

      (2) Look at the jurors directly.

      (3) Jury's memory controls.

   e. Immobility whenever to restrict distractions.

   f. Consider in advance extent and timing of reference to visual displays.

2. Outline of Argument.

   a. Reiterate principal charges avoiding any reference to lesser-included offenses.

   b. Discussion of the evidence; narrow the issues.

   c. Explanation of all prosecution theories which will be the subject of instructions, i.e., aiding and abetting, accessories.

d. Anticipate weaknesses and cover large holes in your case.

e. Instructions of the Court.

(1) Quotation of language jury will hear from the judge. (e.g., language from instructions).

(2) Comparison of facts with instructions, i.e., credibility -- comparison of defendant's demeanor throughout trial and on the stand with the complainant's; emphasis of motive and special interest in the outcome.

(3) Emphasis on special instructions, i.e, flight, or concealment, impeachment with prior convictions, etc.

f. Rhetorical questions, i.e., who was the judge and jury for the deceased?

g. Keep some points for rebuttal thus preventing defense from responding. Also keep most forceful conclusion for rebuttal.

3. Conduct of Argument.

a. Know your judge.

b. Know your law.

c. Draw upon juror's experience in regard to probability or improbability of actions. "Use common sense."

d. Don't testify. You're not a witness.

e. Use verbatim phrases of merit; use simple words.

f. Analogies -- i.e., circumstantial evidence.

g. Display tangible items in evidence.

h. Diagrams, charts, etc. in evidence aid in argument to explain.

i. Characterization of defendant -- must proceed with caution. (Don't call defendant "monster", "liar".)

j. Always remain aware of possible objections.

k. "Is there any other conclusion, but _____?"

l. "Can you, on this evidence, conclude anything but _____?"

C. Defendant's Argument.

1. Take notes during argument.

2. Be prepared to object whenever necessary; never be afraid to object, and be forceful if necessary, when desiring to convey feeling of outrage to jury.

D. Rebuttal Argument.

1. Always argue on rebuttal; never waive single most important stage in prosecution since jury is most likely to remember the last argument.

2. Attack the argument of defendant's counsel.

3. Emphasize the credibility of the defense case and witnesses.

4. Maximize aspects of the prosecution case not previously argued and retained for rebuttal (motive, if not previously argued, may be the subject of rebuttal without its being countered.)

5. Avoid reiteration of matters previously argued; try not to rehash the evidence.

6. Argue within the framework of defendant's argument as new matters may be objectionable.

7. Close on a forceful and positive p[illegible]

II. Limits

A. Court.

1. Check allotment for closing and rebuttal -- avoid embarassment of being cut off.

2. Objections -- from the well or at the bench.

3. Rulings on objections and sua sponte objections.

4. Instructions.

a. Stating the law correctly in argument.

b. Arguing inferences when the instruction is to be given, i.e., missing witness; stolen property.

c. Arguing inferences when instructions will not be given, i.e., missing witness.

B. Ethical Considerations.

1. ABA Standards Relating to the Prosecution Function and the Defense Function §5.8(d), 5.9 (Approved Draft 1971).

a. Argue reasonable inferences; avoid mistakes.

b. Personal belief concerning testimony or guilt may not be argued.

c. Do not inflame nor prejudice the jury.

d. Argument must be maintained within the context of the case.

e. Matters outside the record may not be argued unless such matters may be deemed of common knowledge.

2. Office Policy.

C. Prosecutorial Misconduct.

1. Cases digested in:

a. USAO Criminal Trial Manual, page 477.00 (through June 10, 1971).

b. Georgetown Law Journal Annual Circuit Note (Criminal for U.S. App. D.C.

c. No current digest for D.C. Court of Appeals decisions.

2. Latitude in closing argument.

a. Prosecutor is permitted some wider latitude in closing argument especially in rebuttal. Test is whether defendant was prejudiced in receiving fair jury verdict by prosecutor statements.

Pritchett v. United States, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), cert. denied, 341 U.S. 905 (1951); see United States v. Fort, 143 U.S. App. D.C. 255, 271, 443 F.2d 670 686 (1970), cert. denied, 403 U.S. 932 (1971).

b. Defense counsel must object to improper closing statements or else standard for appellate review is "plain error". See Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968); United States v. Stevenson, 138 U.S. App. D.C. 10, 12, 424 F.2d 923, 925 (1970).

3. The DON'T's.

a. Don't appeal to passion.

b. Don't appeal to prejudice.

c. Don't argue excluded evidence.

d. Don't use inflammatory language.

e. Don't misstate facts. See King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967).

f. No personal opinion.

g. No "liars", "perjury", etc.

h. No "monsters", "punks", "hoodlums", etc.

i. No "Mr. Defendant", but "the defendant" is okay.

j. Avoid comment on missing witnesses.

(1) tricky area.

(2) witness must be peculiarly available to defense.

(3) and witness' testimony would elucidate transaction if present.

k. Never comment or imply anything from defendant's failure to take stand.

l. Don't go overboard.

m. Prosecutorial misconduct is a direct result of lack of common sense.

4. The Big DO:

a. Make a strong closing argument.

b. Criminal trial is not a minuet.

c. Be vigorous.

d. Strike hard blows.

e. Don't pussy-foot around.

5. The Common AUSA Mistake.

a. "If you don't really say anything, you can't get in trouble."

b. Don't paralyze yourself worrying.

c. Be aggressive.

d. Hit the facts.

e. Remember: you can't get in trouble if you stick to the facts.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC II.H: Closing Argument in a Jury Trial

This discussion provides the rudiments from which the participant is expected to develop a better understanding of the closing argument in a jury trial. This will include a discussion of how to commence preparing for the closing argument from the initial interview with witnesses through the trial, and how each stage of a trial should be considered as an essential element of the closing argument. Emphasis will be placed on preparation for the closing argument, jury contact, organization of matters to be argued, pitfalls to avoid, and techniques which promote salient features on one's case.

OUTLINE OF PRESENTATION NOTES

I. Organization

A. Preparation

1. Pre-trial

United States v. Robinson, 148 U.S. App. D.C. 140, 143 n.3, 459 F.2d 1164, 1167 n.3 (1972)

2. Trial

3. Prior to Argument

4. Control Time of Presentation

NOTES

5. Jury Considerations

B. Closing Argument

1. Preliminary Matters

2. Outline of Argument

3. Conduct of Argument

C. Defendant's Argument

D. Rebuttal Argument

II. Limits

A. Court

B. Ethical Considerations

1. ABA Standards

2. Office Policy

C. Prosecutorial Misconduct

1. Cases digested in:

a. USAO Criminal Trial Manual, page 477.00 (through June 10, 1971).

b. Georgetown Law Journal Annual Circuit Note (Criminal) for U.S. App. D.C.

c. No current digest for D.C. Court of Appeals decisions.

2. Latitude in closing.

a. Pritchett v. United States, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), cert. denied, 341 U.S. 905 (1951).

b. Plain error standard on review. Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968).

3. The DON'T's

4. The Big DO

5. The Common AUSA Mistake

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

TOPIC II.H: Workshop - Closing Argument in Jury Trial

INTRODUCTION: The Assistants will participate in a workshop discussion on the closing argument in a jury trial using the facts prepared for the Darlene Moore case. The purpose of the workshop is to discuss the various aspects and problems associated with this trial technique presented through the cited case. A senior trial Assistant will moderate the workshop and involve other special resource persons as necessary. Using this approach the participants will engage freely in the discussion.

I. The defendant's prior act of urination has been introduced through testimony.

A. Do you argue this to the jury?

B. If you argue it, do you argue it as an unfortunate occurrence or to demonstrate the depravity of the defendant?

C. If you argue an unfortunate occurrence, how do you counteract the jury sympathy for the defendant in this embarrassing predicament?

II. The photograph of Mr. Jones' injury has been admitted into evidence.

A. Do you use the picture in your closing argument or merely refer to it?

B. If you use the picture, how do you present it to the jury?

III. Defense counsel interrupts your argument and correctly accuses you of misstating the facts.

A. What preparation should you have made for this possibility?

B. Should you ask to approach the bench or should you apologize from the well of the Court, assuming you recognize the mistake, or is any comment necessary?

C. If you are invited to the bench and the judge rules for the defendant, what, if anything, should you do in front of the jury? Should you thank the judge for his ruling?

IV. Defense counsel incorrectly accuses you of misstatement.

A. Should you state the basis for your remark in the well of the Court or ask to approach the bench?

B. If you do the former and the judge calls you down for not approaching the bench, what do you do?

C. What do you do if the judge incorrectly rules against you and you have not been to the bench?

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

DISCUSSION NOTES

TOPIC II.I: Proper Use of Rebuttal

DURATION: 1 Hour

The purpose of this discussion is to give the participant information on the proper use of rebuttal evidence during trial.

OUTLINE OF PRESENTATION

I. Rebuttal Evidence

A. Definition and Types of Rebuttal Evidence.

1. Rebuttal evidence is confined to refuting the evidence of the defendant.

a. Does not include evidence merely supporting case-in-chief.
b. Rebuttal evidence is intended to "rebut".
c. Witness may be new witness.
d. Witness may be one who has already testified, but now testifying on point first raised in defendant's case.

2. Types of rebuttal evidence.

a. Evidence refuting point(s) of defendant's case
b. Evidence having effect of "impeaching" defense witness by putting credibility in issue.
c. Evidence which completes a cross-examination foundation laid on cross-examination.

3. Difference between "rebuttal impeachment" and cross-examination impeachment.

EXAMPLE: The defendant testifies he had no specific intent to steal because he was so drunk he was totally incapacitated. Nevertheless, you know he gave the police complete information on his name, residence, relatives, etc. for PD-163 at time of arrest.

You cannot impeach on cross-examination with a police report not signed or adopted by defendant.

You prepare to "impeach" on rebuttal by asking on cross-examination about information in PD-163. Then, on rebuttal, you have police officer testify to defendant's condition at time of PD-163 interview and how defendant was able to give rational answers. The "impeachment" inference is that defendant was not dead drunk if he knew his name, residence, relatives, etc.

NOTE TO LECTURER: Note overlapping of types of rebuttal evidence discussed above. The PD-163 testimony on rebuttal has the effect of (1) refuting a point of defendant's case (i.e., no specific intent because dead drunk); and (2) "impeaching" defendant's credibility because of variation between facts and his testimony. There is no cross-examination impeachment as such, because only on rebuttal does the existence of the impeaching facts become known to the jury.

B. Admissibility of Rebuttal Evidence.

1. General Rule: Admissible after defense rests.

2. Order of Proof in discretion of Court. Court can permit you to re-open your case after defense rests, but that is highly unlikely.

3. Limitations on admissibility.

a. Relevancy
b. Discretion
c. Timeliness

4. Legal effect on jury.

a. Substantive evidence is evidence refuting a point raised in defendant's case.
b. Impeachment evidence:
   - evidence completing cross-examination, foundation for impeachment;
   - other evidence putting witness' credibility in issue.
c. Substantive evidence can have impeaching effect.
d. Evidence admitted only for impeachment cannot be considered by jury as substantive evidence in case.

5. Defense remedy when improper rebuttal evidence permitted.

   a. General rule: harmless error absent showing of prejudice.
   b. Abuse of Court discretion; occasionally plain error.
   c. Defense's only remedy may be "surrebuttal".
      - also known as "rejoinder".
      - by any other name it is rebuttal to your rebuttal.
   d. Any error in admissibility waived by defense if no timely objection.
      - possible exception: incompetent counsel.
      - possible exception: outrageous plain error.

II. AUSA's Use of Rebuttal Evidence

A. Trial Tactics.

1. Proper rebuttal evidence not subject to pre-trial discovery rules.

2. Rebuttal witness available in court to listen to defense case.

   a. "Rule on witnesses" generally not applicable.
   b. Keep your police officer in court.
      - he can spot holes in defense testimony that you would miss.
      - has first-hand factual knowledge.

3. Evidence known to AUSA pre-trial should, if admissible, be introduced in case in chief in virtually every instance.

   a. Do not "SAVE" for rebuttal
   b. Avoid adverse ruling by Court after defense rests.
   c. Avoid jury suspicion that rebuttal evidence is recently fabricated.
   d. Take bite out of defense.
   e. Don't be left "holding the bag".

B. Method of Introduction.

1. If rebuttal in nature of impeachment of witness, must lay proper foundation.

2. If introduced as substantive evidence, do not have to lay same foundation nor give defense witness opportunity to recant his facts.

3. Never put rebuttal witness on stand without first ascertaining answer to rebuttal questions out of jury's presence.

C. Specific Uses of Rebuttal Evidence.

1. To disprove a defense witness' statement of material fact made in Court by using testimony of other.

2. To attack the credibility of a defense witness by other evidence which shows bias, or evidence which shows that the defense witness' in-court testimony is inconsistent or contradictory with his statements or actions occurring before he took the stand.

3. To discredit a defense witness' testimony about material facts by evidence which proves the frailties of his perception and/or recollection.

III. AUSA's Preparation of Rebuttal Evidence: Thorough Preparation of Case.

A. "Know your case." Examine and cross-examine all your witnesses.

B. Confer with defense counsel pre-trial to "psych out" probable defense.

C. Do not assume any possible defense will not be raised. Prepare for <u>all</u> possible defenses.

D. Have investigating officer available during all stages of trial to assist you in gathering rebuttal evidence.

E. Keep your witnesses available for rebuttal - <u>away from courtroom</u>.

F. Do not knuckle under to court merely because you need recess to prepare evidence.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

WORKSHEET

TOPIC II.I: Proper Use of Rebuttal

The purpose of this discussion is to give the participant information on the proper use of rebuttal evidence during trial.

OUTLINE OF PRESENTATION NOTES

I. Rebuttal Evidence

A. Definition and Types of Rebuttal Evidence.

1. Rebuttal evidence is confined to refuting the evidence of the defendant.

2. Types of rebuttal evidence.

3. Difference between "rebuttal impeachment" and cross-examination impeachment.

B. Admissibility of Rebuttal Evidence

1. General Rule: Admissible after defense rests.

NOTES

2. Order of proof in discretion of Court

3. Limitations on admissibility

4. Legal effect on jury

5. Defense remedy when improper rebuttal evidence permitted

III. AUSA's Use of Rebuttal Evidence

A. Trial Tactics.

1. Proper rebuttal evidence not subject to pre-trial discovery rules.

2. Rebuttal witness available in court to listen to defense case.

NOTES

3. Evidence known to AUSA pre-trial should, if admissible, be introduced in case in chief.

B. Method of Introduction

1. If rebuttal in nature of impeachment, must lay proper foundation.

2. If introduced as substantive evidence, do not have to lay same foundation nor give defense witness opportunity to recant his facts.

3. Never put rebuttal witness on stand without first ascertaining answer to rebuttal questions out of jury's presence.

C. Specific Uses of Rebuttal Evidence.

1. To disprove a defense witness' statement of material fact.

2. To attack the credibility of a defense witness.

NOTES

3. To discredit a defense witness by proving the frailties of his perception and/or recollection.

III. AUSA's Preparation of Rebuttal Evidence: Thorough Preparation of Case

A. "Know your case."

B. Confer with defense counsel.

C. Prepare for all possible defenses.

D. Have investigating officer available during all stages of trial.

E. Keep your witnesses available for rebuttal away from courtroom.

F. Do not knuckle under to court pressure to waive rebuttal.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

TOPIC II.I: Simulation - Proper Use of Rebuttal

INTRODUCTION: Following the discussion on proper use of rebuttal, an Assistant is asked to demonstrate the technique on a simulated environment. He is provided with a statement of facts about a simple assault case and specific instructions pertaining to what he is expected to accomplish in the demonstration. To further assist him the Assistant is provided with a checklist or gouge of the steps he might generally follow in the use of rebuttal on a simple assault case.

I. Facts

A. Complaining witness, landlord, reports to police that he was hit on the head with a broom held by defendant, tenant, after he had ordered him to sweep up mess he had placed on hallway floor in apartment building. Defendant arrested on scene.

B. Defendant's Version - Defendant testifies that (1) both he and complaining witness were drunk at the time of the alleged assault; (2) that complaining witness fell and was cut on head by knife held by complaining witness; (3) that defendant was physically injured on head by complaining witness.

II. Instructions

A. Call arresting police officer to testify that (1) defendant sober. PD 251 will verify this information; (2) complainant sober.

B. Call emergency room doctor to testify injury to complainant not compatible with knife cut.

C. Introduce photo of defendant taken incident to his arrest which shows no head injury.

CHECKLIST/GOUGE

Proper Use of Rebuttal

I. Thoroughly prepare case for possible use of rebuttal evidence

   A. "Psych" out possible defenses

   B. Have all relevant witnesses present or "on call"

II. After defense rests, evaluate any additional evidence as relevant rebuttal evidence

   A. Ask for short recess to confer with your witnesses.

   B. Never put rebuttal witness on stand without first asking him same questions outside presence of jury.

   C. Watch out you don't "overkill", i.e., present so much evidence in a simple case that the jury will think you must believe your case has problems.

III. Keep an officer/investigator in court so you have him when you need him.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

MOCK TRIAL NO. 2: Prosecutor's Instructions - United States v. Darlene Moore

INTRODUCTION: The purpose of this mock trial is to present the prosecutor with a more realistic situation than was encountered in Mock Trial No. 1. Specifically, the prosecutor will be given experience in handling problem exhibits, dealing with a strict but fair judge, handling a defense character witness, putting on a corroborating witness and dealing with a more involved defense story. It is also designed to develop overall courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely upon material contained in his case jacket. This includes the Prosecution Report (PD 163), the information charging the offense, copies of subpoenas, a copy of the bail agency report, a copy of the bail conditions, a copy of the Narcotics Treatment Administration report, and a copy of the defendant's D.C. criminal record. The participant assigned the role of arresting officer should have the broom seized at the time of arrest and a photograph of the complainant's injuries.

INSTRUCTIONS TO PROSECUTOR: The prosecutor will be expected to:

1. Make a more sophisticated opening statement than in Mock Trial No. 1. The opening statement should set the theme the prosecutor expects to develop during the trial;

2. Conduct direct examination of the complainant to get the story into evidence and have the broom marked and identified by the complainant;

3. Conduct direct examination of a corroborating eye-witness;

4. Conduct direct examination of the arresting officer to have the broom (which the officer did not mark at the time of the seizure) and a photograph (which was not made by the officer) of the complainant's injuries both admitted as evidence;

5. Handle objectionable direct and cross-examination questions of the defense counsel;

6. Handle improper proffers of character testimony and conduct cross-examination questions of a character witness;

7. Handle detailed testimony by the defendant;

8. Make more sophisticated final and rebuttal arguments tying together the theme of the opening statement and the evidence in the case.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

MOCK TRIAL NO. 2: Instructor's Handout for Role Players - United States v. Darlene Moore

INTRODUCTION: The purpose of this mock trial is to present the prosecutor with a more realistic situation than was encountered in Mock Trial No. 1. Specifically, the prosecutor will be given experience in handling problem exhibits, dealing with a strict but fair judge, handling a defense character witness, putting on a corroborating witness, and dealing with a more involved defense story. It is also designed to develop overall courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely upon material contained in his case jacket. This includes the Prosecution Report (PD 163), the information charging the offense, copies of subpoenas, a copy of the bail agency report, a copy of the bail conditions, a copy of the Narcotics Treatment Administration report, and a copy of the defendant's D.C. criminal record. The participant assigned the role of arresting officer should have the broom seized at the time of arrest and a photograph of the complainant's injuries.

OUTLINE OF ROLES:

I. The Complainant (August Jones)

He should testify, as in Mock Trial No. 1, substantially in accord with the PD-163 in the trial jacket.

II. Eye-Witness (Raymond Alston)

The objective is to put in evidence corroborating the complainant. His basic story is that he saw the defendant squatting near a puddle in a dark corner in the building's front hallway. He knocked on the door of his friend, the manager, August Jones, and told him he thought a woman was "taking a leak" in the hallway; that when he came back with Mr. Jones she was pulling up her shorts; that Mr. Jones was very upset and told her to leave but she insisted on cleaning it up; and that she acted very funny, like she was drunk or doped up and suddenly hit Mr. Jones with the broom for no reason.

III. Arresting Officer (D. K. Obey)

Officer Obey testifies he forgot to mark the broom for identification at the time he seized it. The objective is to present the prosecutor with the problem of somehow getting the broom in evidence. In addition, Officer Obey produces pictures which were taken by a Mobile Crime Lab technician who is on leave at the time of the trial. The objective is to present the prosecutor with the opportunity of using the photographs as evidence if he can get them in.

IV. Defense Counsel (Arnold Stern)

The defense counsel should attempt objectionable cross-examination questions of government witnesses, objectionable (e.g.,leading) questions of defendant, and proffer the defendant's mother as a character witness. In addition, he should call the Reverend Smith as a character witness and ask the Reverend's opinion of the defendant's general character. The objective is to teach the prosecutor how to handle inept defense proffers of character testimony.

V. The Defendant (Darlene Moore)

A. Alternative #1

The defendant attempts to get in testimony that has nothing to do with the case. This can be testimony as to how good she did in grade school, how well she gets along with everyone on the job, or anything else that occurs to the person playing the defendant that has nothing to do with the issues in the case. The objective is to teach the prosecutor to handle the "rambling" witness. The defendant's basic story on the issues should be that she did not urinate; that she spilled beer in the hallway after leaving a boyfriend's apartment; that Mr. Jones had made sexual overtures in the past; that he appeared drunk and accused her of urinating in the hall; that she was afraid of him; that he then started screaming at her and slapped her; that he told her he was going to "fix her" because she thought she was too good for him; that he lunged at her again, and that was when she struck him with the broom. If asked on cross-examination, she can testify she was "so upset" by her experience that she fled out of the building to a bar across the street where she had four or five beers to calm down.

B. Alternative #2

The defendant should present a sympathetic picture to support a defense of either self-defense or "justifiable" simple assault. The objective is to teach the prosecutor to handle the witness who has a believable, sympathetic story. On the issues, the defendant should initially deny the offense, then break down on cross-examination and admit to drinking several beers in boyfriend Alvin West's apartment; that Alvin threw her out because she wouldn't have sex with him; that she had to go to the bathroom but Alvin wouldn't let her back in; that Mr. Jones shouted up the stairs for them to quiet down; that her home was three blocks away and she couldn't wait; that she had never done anything like this in her life and (crying) was so ashamed; that Mr. Jones came out and cursed her and called her a "filthy whore" and several obscene names; that he threw the broom and newspapers at her and said if she didn't clean it up he would push her into it; that she tried to sweep with the broom, but was crying so hard she couldn't; that Mr. Jones kept screaming and calling her names and the next thing she remembered was running down the street; that she didn't remember hitting Mr. Jones; and that when she came back later to pick up her coat at Alvin West's, Mr. Jones grabbed her and called the police.

VI. Trial Judge (Blackstone)

The judge should follow the strict letter of the law. He should be fair but show no consideration for the prosecutor. He should not rule arbitrarily or inject judicial idiosyncrasies into the trial.

(OPTIONAL)
VII. Defense Eye-Witness (Alvin West)

The objective is to present imperfect corroboration of the defendant's case. In either Alternative #1 or Alternative #2 he should testify that the defendant left his apartment to go home; that neither he nor she was upset; that they had not been drinking; that he heard a noise downstairs and went to the head of the stairs just in time to see the complainant slap the defendant, who then hit him with the broom. If questioned on cross-examination about the puddle, he should testify that the plumbing is very old and occasionally there are leaks in the front hallway, but that he has not complained because he didn't think the manager would do anything to fix the leaks.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

MOCK TRIAL NO. 3: Prosecutor's Instructions - United States v. Tyrone Scott

INTRODUCTION: The purpose of this mock trial is to give the prosecutor experience in handling a property offense and dealing with a hostile judge. In addition, it presents him with the problem of the victim who cannot identify the defendant, and gives him the opportunity to visit the scene of the crime, develop his own exhibits, handle circumstantial evidence, and make an imaginative opening statement and closing argument. It is also designed to further develop courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely on material contained in his case jacket and his own investigation. The participant assigned the role of arresting officer should have the briefcase seized at the time of arrest.

INSTRUCTIONS TO PROSECUTOR:

A. The Prosecutor will be expected to:

1. Handle a victim who cannot identify the defendant;

2. Handle the question of value in a petit larceny case;

3. Handle the inference from recently stolen property and tie all the facts together into a circumstantial evidence case; and

4. Handle a hostile judge.

B. The Prosecutor, may, if he desires:

1. Conduct additional investigation;

2. Prepare any exhibits of his own;

3. Visit the scene of the crime; and

4. Make a more imaginative opening statement and closing argument than previously.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

MOCK TRIAL NO. 3: Instructor's Handout for Role Players - United States v. Tyrone Scott

INTRODUCTION: The purpose of this mock trial is to give the prosecutor experience in handling a property offense and dealing with a hostile judge. In addition, it presents him with the problem of the victim who cannot identify the defendant, and gives him the opportunity to visit the scene of the crime, develop his own exhibits, handle circumstantial evidence, and make an imaginative opening statement and closing argument. It is also designed to further develop courtroom presentation skills.

TRIAL MATERIALS: The participant assigned the role of prosecutor will rely on material contained in his case jacket and his own investigation. The participant assigned the role of arresting officer should have the briefcase seized at the time of arrest.

OUTLINE OF ROLES:

I. The Complainant (Hamilton Burger, an Assistant U. S. Attorney in the Superior Court Division)

Notwithstanding the PD-163, he should testify that he left work, went to the Lerner Law Book Store on E Street to purchase a book on constitutional law, left the book store and walked towards the parking lot at 3rd & E Streets. He stopped at the corner of 5th & E for the traffic light and set his briefcase on the sidewalk so he could leaf through the book he had just bought. He happened to look up, and although the light had not changed, observed a man in a purple shirt and purple pants on the other side of the street headed east carrying a briefcase. He remembered thinking it looked very much like his own briefcase and at that moment, looked down and saw that his briefcase was gone. The light had changed and he ran after the man shouting, "stop thief!" By that time the man was almost down to 4th Street. As he got across the street a policeman came out of Building A of the Superior Court Division and started running after the man. He stopped near Building A so as not to interfere with the police. Some of his friends came up and asked him what happened, and he started telling them that he thought his briefcase had been stolen. He didn't notice where the policeman or the man had gone. A couple of minutes later a policeman came up with a man and the briefcase. The policeman was carrying the briefcase. He could not say for certain whether it was the same policeman that came out of Building A, or whether the man with the policeman was the man that he had seen carrying the briefcase. The briefcase was his, however. If pressed on cross-examination, he can testify that he has trouble telling policeman apart in uniform, that there are lots of people dressed in flashy clothes like the defendant's in the Courthouse area, and that he couldn't say for sure whether the man with the briefcase was running or just walking fast. At trial, he should have the briefcase, not the policeman.

II. Arresting Officer (R. L. Pettegrew)

He should testify that he came to Building A to check on an outstanding traffic warrant for a ticket he had written, that he was off-duty and on his way home when he came out the south door of the building, that he heard someone yelling "stop thief!", and that they seemed to be indicating a man dressed in a purple shirt and purple pants carrying a briefcase and proceeding east on E Street. There were quite a few people on the sidewalk, apparently waiting for a bus. He started after the man, but lost sight of him several times because of the number of people on the sidewalk. He finally caught up with the man on the northeast corner of 4th and E Streets. The man was standing on the corner and the briefcase was leaning against a wall several feet away. He asked the defendant about the briefcase and the defendant said a man dressed all in purple had just run by and dropped the briefcase. If asked, he should testify that he is sure the defendant was the same man he first saw with the briefcase. He should further testify that he took the defendant back to where Mr. Burger was standing, and that Mr. Burger identified the briefcase as being his. At that time he placed the defendant under arrest. If asked on cross-examination, he should testify that prior to that time the defendant was not under arrest, that he was only being held for investigation, but was not free to go. He should further testify that he put his initials on the briefcase and then gave it back to Mr. Burger who said he had to have it in his work. He should identify his initials on the briefcase used for the exhibit.

III. Defense Counsel (Alan Will)

The defense counsel should attempt objectionable cross-examination including asking the arresting officer what the defendant said (self-serving hearsay), asking the complainant whether he had been drinking, and whether he has ever used drugs, asking the complainant whether the reason he can't identify the defendant is because all black people look alike, and ask any witness any objectionable questions that occur to him.

IV. Trial Judge (Blackstone)

The judge should be hostile to the prosecutor. He should argue with the prosecutor from the bench and ask him if he is trying to railroad the defendant, since it is obvious the complainant cannot identify the defendant as the man who took the briefcase. In addition, he should ask the prosecutor if he doesn't know that the defendant is a narcotics addict, and if the defendant wouldn't be better off getting treatment instead of being persecuted by the United States Attorney's Office. He should hold the prosecutor's feet to the fire on the inference from recently stolen property. He should show open favoritism for defense counsel and infer that because the prosecutor is young and inexperienced, he doesn't know what he is doing. This can include questions such as, where did he go to law school, what was his standing in law school, what mark did he make on the Bar examination, doesn't he feel ashamed trying a case like this when he doesn't know what he's doing, and how long has he been in the United States Attorney's Office. He should not sustain a prosecutor's objection unless the ground for that objection is given. He should, in addition, state that many of the high and mighty use marijuana but they're always ready to put a black person in

jail for getting mixed up with drugs. He may, in addition, ask the prosecutor if he knows that by convicting this man he is in effect denying him any future opportunity for decent employment. He should, at some point, threaten to have the U. S. Attorney, the Chief of the Superior Court Division, and (asking the prosecutor what Section he is in) the prosecutor's supervisor, all brought to Court to be held in contempt for having sent such an ill-prepared, wet-eared, rude prosecutor to his Court. The objective of the judge's conduct is to provide a realistic situation of judicial interference and paranoia.

V. The Defendant (Tyrone Scott)

The defendant's story is that he had been standing on the street corner for approximately a half hour before he was arrested, that he was waiting for his girlfriend who had some trouble in court, but he didn't know what. That a man came running across the street who was dressed exactly as he was, which was why he noticed him, and that the man had a briefcase which he laid up against the wall of the building at the corner. While he was trying to figure out why the man dropped the briefcase and then ran off, the policeman came up and arrested him. In addition, he should testify that the policeman asked him if a man dressed all in purple had run by there with a briefcase, and that he told the policeman the man had dropped the briefcase there against the wall, that the policeman then picked the briefcase up, and told him he was under arrest for robbery. That he told the policeman that he had nothing to do with it but the policeman said, "one black guy in a purple suit is as good as another."

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

Training for Assistant United States Attorneys

MOCK TRIAL NO. 4

Prosecutor's Instructions - United States v. Floyd Williams

LEARNING OBJECTIVES

The purpose of this mock trial is to give the prosecutor experience in handling a narcotics offense, including chain of custody, expert witness, and enhanced penalty problems. Since the main charge is a felony, the case jacket also includes transcripts of the Preliminary Hearing and Grand Jury proceedings for the use of the prosecutor. The indictment includes a misdemeanor charge, which requires a separate expert witness from the felony charge. In addition, the defendant was arrested on a warrant for an offense unrelated to those charged in this indictment. The prosecutor must handle the case without prejudicing the defendant by bringing in anything about the unrelated offenses.

TRIAL MATERIALS

The participant assigned the role of prosecutor will have a case jacket which includes Grand Jury and Preliminary Hearing transcripts. The participant assigned the role of chemist will have a lock-sealed envelope containing the narcotics and the narcotics paraphernalia seized at the time of arrest.

INSTRUCTIONS TO PROSECUTOR

The prosecutor will be expected to:

1. Prosecute a charge which is a felony because of a prior conviction of the defendant for the same offense;

2. Prosecute both a possession of narcotics and possession of implements of crime (narcotics paraphernalia);

3. Handle the marking and admission of exhibits whose admissibility depends upon making every link in the chain of custody from seizure to trial;

4. Qualify and conduct direct examination of a narcotics squad officer as to the identification and use of narcotics paraphernalia; and

5. Qualify and conduct direct examination of an analytical chemist as to his analysis of suspected narcotics.

DISTRICT OF COLUMBIA UNITED STATES ATTORNEY'S OFFICE
SUPERIOR COURT DIVISION TRAINING PROGRAM

MOCK TRIAL NO. 4 - Instructor's Handout for Role Players -
United States v. Floyd Williams

LEARNING OBJECTIVES

The purpose of this mock trial is to give the prosecutor experience in handling a narcotics offense, including chain of custody, expert witness, and enhanced penalty problems. Since the main charge is a felony, the case jacket also includes transcripts of the Preliminary Hearing and Grand Jury proceedings for the use of the prosecutor. The indictment includes a misdemeanor charge, which requires a separate expert witness from the felony charge. In addition, the defendant was arrested on a warrant for an offense unrelated to those charged in this indictment. The prosecutor must handle the case without prejudicing the defendant by bringing in anything about the unrelated offenses. It also presents an opportunity for using rebuttal testimony.

TRIAL MATERIALS

The participant assigned the role of prosecutor will have a case jacket which includes Grand Jury and Preliminary Hearing transcripts. The participant assigned the role of chemist will have a lock-seal envelope containing the narcotics and the narcotics paraphernalia seized at the time of arrest.

OUTLINE OF ROLES

I. The Arresting Officer (Lawrence Wilshire)

He should testify that he was on duty during the four to midnight shift as a member of the Metropolitan Police Department assigned a foot patrol in the 14th and U Streets area. At about 7:30 p.m. he observed the defendant on the southeast corner at 14th and U Streets. He knew the defendant from his prior three years of patrol in the area and knew that there was an outstanding warrant for him on a charge of robbery. He approached the defendant, informed him he was under arrest on the warrant for robbery, and searched him. In his right trouser pocket there were three tin foil packs of a white powder which he assumed to be narcotics. In his shirt pocket there was a Kool cigarette pack containing a hypodermic needle, a syringe, and a bottle top. The bottle top contained a small piece of cotton. He should further testify that he kept all these items in his possession until arriving at the 1st District Station, where the defendant was booked. At the station, he placed all the items in a small manila envelope, placed his initials on the envelope, and turned it over to Officer Lawrence Addanza from the Narcotics Squad. He should also be able to identify his initials on the manila envelope if it is shown to him.

II. The Narcotics Officer (Lawrence Addanza)

(This role requires someone familiar with narcotics cases and narcotics paraphernalia)

He should testify that he has been on the Metropolitan Police Department twelve years, the last six of them with the Narcotics Squad. That he has interviewed approximately 1100 addicts during that time, has made physical examinations of the same number, and has attended numerous training courses on drugs and drug offenses. In connection with that assignment, he has had extensive contact with experienced police officers and with federal agents of the Bureau of Narcotics and Dangerous Drugs, concerning the source, distribution, and use of narcotics. During his time on the Squad, he has personally made 300 arrests for narcotics offenses, 175 of which have resulted in convictions. He has previously testified and qualified as an expert witness on the illegal use and administration of narcotics on four occasions in the U. S. District Court for the District of Columbia, and on eleven occasions in the District of Columbia Superior Court. He should testify that as to the offense, on October 17, 1972, he was on duty and responded to the 1st District Station for a report of a narcotics arrest. If asked, he may testify that it is police department policy that a narcotics squad officer respond for any narcotics-related arrest. Upon arriving at the 1st District, he received three tin foil packs and some narcotics paraphernalia from Officer Wilshire. He conducted a field test on a little bit of the powder from each tin foil and received a positive result for a narcotic of the opiate group. He then placed the items in a lock-sealed envelope, and upon returning to the Narcotics Squad office at Metropolitan Police Headquarters, put it in a locked box for transmission to the BNDD laboratories for a chemical analysis. He should be able to identify the information he wrote on the lock-sealed envelope if it is shown to him. The main body of his testimony should concern the manner in which the paraphernalia, such as that seized from the defendant, is used to administer narcotic drugs and why the items seized from the defendant are particularly suited to that purpose.

III. The Chemist (Nathan Whalen)

(This role requires someone familiar with narcotics cases and narcotics paraphernalia)

He should testify that he holds a Bachelor of Science in Chemistry from Northwestern University and a Master of Science in Quantitative Analysis from Case Western Reserve. He has been employed by the BNDD and its predecessor, The Bureau of Narcotics, for seven years. During that time, he has conducted chemical analyses of questioned substances in approximately 5,000 cases. He has testified and been qualified as an expert witness in chemistry in the United States District Courts for the Southern District of New York, the Northern District of Florida, the Eastern District of Louisiana, and the Southern District of California, in addition to 13 occasions in the District of Columbia Superior Court. He should be able to identify the lock-sealed envelope, and the items therein. He should testify that he ran the following tests on the items in the envelope:

Qualitative:

1. Color test (either Marquis reagent or Froehdes reagent or nitric acid reagent),

2. Microcrystalline with red mercuric iodide, and

3. Three thin-layer chromatographic tests.

Quantitative:

1. Gas chromatographic or

2. Ultra-violet spectaphotometric

He should testify that the items in the tin foil packs tested out to be 3% heroin hydrochloride, and 97% mannitol, with traces of quinine. As to the narcotics paraphernalia, he should testify that the syringe and the bottle top contained traces of heroin hydrochloride, but not a usable amount. He should testify that after completing his test, he placed all items in a lock-sealed envelope which was then placed in a safe and has remained there until he brought it to Court today and gave it to the prosecutor.

IV. Defendant (Floyd Williams)

He should testify that he was arrested by the police on a trumped up warrant for a crime he had nothing to do with, that the police have been out to get him for years because he won't knuckle under to them. He should further testify that he did not have any of the narcotic items on him and that the first time he saw them was when they got to the police station. While at the station, the police tried to get him to confess to the robbery, and when he refused to do so, they said they would really "fix him." Then one of the policemen went into another room and came back with the narcotics items which he said they were going to say they had found on the defendant. When the defendant asked them why they were doing this to him, the policeman said "Man, we're just trying to make a living like everybody else, and if I don't make enough cases my family doesn't eat."

V. Trial Judge (Blackstone)

He should be strict but fair. The objective is to have the prosecutor present the case in accordance with the law. This can include the trial judge asking what crime narcotics paraphernalia are "implements" of, holding the prosecutor to a strict chain of custody, and ensuring that the narcotics officer and the chemist are properly qualified before allowing them to give expert opinion testimony.

CHECK LIST/GOUGE

Narcotics Cases

ELEMENTS: Narcotics cases generally have the three following elements:

1. Possession
2. Of narcotics (paraphernalia)
3. In an unlawful manner

WITNESSES: Narcotics cases generally have three classes of witnesses:

I. The arresting officer (possession)

II. The narcotics officer (chain of custody)

III. The chemist (analysis of narcotics)

NOTES

1. Do not leave narcotics lying around! If the defendant or his friends in court can get at them, they may "disappear." Make sure the chain of custody is followed after trial. Remands happen.

2. Always give the lock-seal envelope to the narcotics officer and the chemist when they testify. THEY MUST HAVE THIS ENVELOPE. It has their notes as to dates, etc. If defense objects, use it as an exhibit to refresh their recollection.

3. In PIC (Possession of Implements of Crime) cases, the narcotics officer may testify as an expert on narcotics paraphernalia. Do not ask the chemist; he doesn't know anything about them. The narcotics officer is your expert. If your chain of custody is under attack, ask the court's permission to recall the narcotics officer after the chemist

makes the final link in the chain of custody and the "works" are in evidence.

4. The crime in PIC cases for which the implements are possessed is Title 33 D.C. Code §402 (a) "Administer...any narcotic drug, except as authorized in this chapter." If the judge asks you to submit evidence on the point, ask him to take judicial notice of Title 33 of the D.C. Code.

5. The BNDD (Bureau of Narcotics and Dangerous Drugs) Form 7 is very important. The narcotics officer should have a copy of it. In any event there is a copy stapled to the lock-seal envelope the chemist has. Study it before trial so you know what exactly was seized.

6. There is a line of cases that requires a usable quantity" of narcotics to sustain UNA (Uniform Narcotics Act) possession (33 D.C. Code §402(a). Edelin v. United States, 227/A.2d 395 (D.C. Ct. App. 1967). However, "traces" can be used in a PIC case to show that paraphernalia were used for narcotics.

I. The Arresting Officer

A. Name, rank and duty assignment

B. Directing attention to _____(date)_____

1. Were you on duty?
2. At __(time)__, where were you?
3. Did you have an occasion to see anyone whom you see in court today?
4. Whom? (Point to him. Where is he sitting? What is he wearing?)
5. Your Honor, we would ask the record reflect that he has identified the defendant.

C. Describe what happened

1. How did it come about that you saw the defendant?
2. What, if anything, was the defendant doing?
3. What, if anything, did you do?
4. Did you have an occasion to make any seizure?
5. What did you seize?

D. Identify the exhibit.

1. (Have the clerk mark the lock-seal envelope as a Government exhibit for identification. At this point the seals should still be intact.)

2. I show you what has been marked as Government exhibit number _____ for identification. Can you identify? (He should not be able to identify the outer envelope. Have him break the seals or tear the envelope open. Eventually he will come to his original envelopes with his initials. Have the clerk mark as an exhibit for identification each item he takes out of the envelope after breaking the seals.)

3. How do you identify it?
4. Will you describe Government's exhibit number _____ (the items he seized).

E. Chain of Custody

1. Officer, to whom did you give the items you have identified as Government exhibits number _____ for identification?
2. How was this done?
3. (Have him place all items back in the original lock-seal envelope at the conclusion of his testimony.)

II. The Narcotics Officer

A. General Qualifications

1. State your name.
2. Where and by whom are you employed?
3. How long have you been so employed?
4. What are your duties?

B. PIC Case - Additional Qualifications as Expert Witness

1. Approximately, how many narcotics cases have you worked on?
2. Have you ever testified in court before with reference to narcotics violations?
3. Approximately, how many times?
4. In those cases, did you testify as an expert in the field of narcotics?
5. Have you had any schooling or training in the field of narcotics?
6. Would you give the court and the ladies and gentlemen of the jury some information on that?
7. (Have you ever had occasion to write or lecture on narcotics? If so, where?)
8. In the course of your work, have you ever had the opportunity to interview narcotic addicts?
9. Do you know the manner in which narcotic addicts inject drugs?
10. Can you briefly, yet concisely, explain your last answer?
11. Have you ever conferred with addicts about the use of narcotics?

C. Chain of Custody

1. Directing attention to (date)
2. Did you have occasion to receive any items from Police Officer (arresting officer's name) ?
3. What did you receive?
4. Where? (How did this come about?)
5. What did you do with the items? (The answer should cover putting them in a lock-seal envelope and transmitting to the chemist.)
6. I show you what has been marked as Government's exhibit number _____ for identification; can you identify it?
7. How do you identify it? (He should be able to identify his initials, his lock-seal envelope, etc.)
8. Are these the items you received from Officer _____, delivered to (name of chemist) _____ ?

D. PIC Testimony

1. Have you ever seen items similar to these before?
2. How are they used? (At this point he should put on a demonstration of the use of the syringe, etc.)

E. Conclusion of Testimony

1. (Have officer place all items back in lock-seal envelope.)

III. The Chemist

A. Qualifications

1. State your name and occupation.
2. What is your academic background? (If he does not focus on chemistry, ask specific questions.)
3. Was any of your training in analytical work?
4. Since completing your academic work, has your occupation dealt with analytical chemistry?
5. How long have you worked doing narcotics analyses?
6. About how many analyses have you run on suspected narcotics?
7. Have you ever testified as an expert witness before?
8. On how many occasions?

B. His analysis of the narcotics

1. HAND THE CHEMIST THE ENVELOPE WITH ALL OF THE EXHIBITS IN IT.
2. I hand you what has been marked as Government exhibits number _____ through _____.
3. Can you identify them (it)?
4. How do you identify them? (He will probably answer "These are the items I received.....")
5. Did you make a narcotics analysis of these items?
6. What kind of tests did you run?
7. What were the results of those tests?
8. What did you do with the items after completing your tests?
9. Are those items you referred to the exhibits that are marked as Government exhibits number _____ through _____?

POLICE FIELD TESTS FOR NARCOTICS

Police narcotics kits contain chemical ampules into which small samples of suspected substances are dropped.

1. Opiate/heroin - Marquis reagent: purple precipitate

2. Cocaine - Cobalt thiocyanate reagent: blue, flaky precipitate

3. Marijuana - Duquenois test

   a. drop into red-banded ampule
   b. decant into blue-banded ampule - HCl: purple reaction
   c. decant into yellow-banded ampule - chloroform: settles on bottom; mix; a reddish-purple substance settles on bottom.

Warning: Other substances than narcotics will give positive field test results. The field tests are preliminary tests only, and you must have a chemist at trial.

LABORATORY CHEMICAL TEST FOR NARCOTICS

QUALITATIVE TESTS:

1. Color test

   a. Marquis reagent test - purple
   b. Froehdes reagent test - purple turning green
   c. Nitric acid test - yellow

2. Microcrystalline with red mercuric iodide

3. Thin-layer chromatographic test (The chemist usually runs three of these TLC tests.)

QUANTITATIVE TESTS

1. Gas Chromatographic
2. Ultra-violet spectaphotometric