ADVANCED PROSECUTOR TRAINING PROGRAM

A Collaborative Effort of

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

and

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ADVANCED PROSECUTOR TRAINING

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FOREWORD

The Advanced 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 under a subgrant (OCJPA 73-21) with the District of Columbia's Office of Criminal Justice Plans and Analysis. The other major parts of the program consist of a novice Prosecutor Training Program for new prosecutors assigned to the Misdemeanor Trial Section of the Superior Court Division (in conjunction with which a 450-page Prosecutor Training Manual has previously been developed); a Management Training Program for management and supervisory personnel; and an Administrative Training Program for secretarial and administrative personnel in the Superior Court Divison. These programs and the manuals connected with them have been prepared by personnel in the United States Attorney's Office and the Institute for Law and Social Research.

The advanced training materials contained herein are the result of a training needs analysis and design effort addressing the specific needs of the Felony Trial Section, Superior Court Division. The United States Attorney and his immediate staff, as well as all the supervisory attorneys in the Superior Court Division, determined which topics were most necessary for inclusion in the Advanced Training Program. It was determined that an emphasis on trial-related skills was required, as well as basic pre-trial tactics and certain esoteric areas of the law. This Advanced Prosecutor Training Manual attempts to meet these needs by designing a training program best suited to the requirements and environment of the Felony Trial Section of the Superior Court Division, a section charged with the responsibility of prosecuting the major common law felonies in the District of Columbia.

It was determined that the best way to achieve a sophisticated treatment of the topic areas, while still incorporating references to unique problems within the Superior Court Division and meeting the specific needs of the prosecutors in the office, was to contract with former Assistant United States Attorneys now engaged in private practice. Each outline contained herein bears the name of the former Assistant United States Attorney who helped prepare it. Those who contributed their time and talents to the project are John D. Aldock, Robert S. Bennett, John G. Gill, Jr., Thomas C. Green, Richard A. Hibey, Robert J. Higgins, Philip L. Kellogg, James L. Lyons, Robert X. Perry, James E. Sharp and Daniel E. Toomey.

In addition to the consultants whose services were engaged, several senior Assistant United States Attorneys worked on the substantive development and actual writing of certain of the training segments. Those Assistants, each of whose names appears on the segment which he developed, are E. Lawrence Barcella, Lawrence T. Bennett, Daniel J. Bernstein, Robert R. Chapman, John O. Clarke, John F. Evans, Paul L. Friedman, Michael Gewirtz, James N. Owens, Robert A. Shuker, and Roger C. Spaeder.

Additional research was performed by two law clerks in the United States Attorney's Office, John A. Bryson and Arthur E. Korkosz, and one law clerk employed by the Institute for Law and Social Research, Paul D. Kamenar, under a contract with the Law Enforcement Assistance Administration to update and complete the preparation of the novice training materials.

During the course of the writing and editing of the advanced training materials contained herein, several senior Assistant United States Attorneys assisted in reviewing the materials. They reviewed for consistency with office policy and to assure that all necessary information was covered and that the legal analysis in each case was sound. Those Assistants are: Roger M. Adelman, William S. Block, John O. Clarke, Robert E. L. Eaton, Jr., John F. Evans, Stephen W. Grafman, Seymour Glanzer, Henry F. Green, W. R. King, Charles H. Roistacher, Robert A. Shuker, Earl J. Silbert, Justin D. Simon, Richard N. Stuckey, Harold J. Sullivan and J. Theodore Wieseman.

The overall management and direction of the project for the United States Attorney's Office was provided by Mr. Paul L. Friedman, Administrative Assistant United States Attorney and Mr. Richard L. Cys, Deputy Chief, Misdemeanor Trial Section, Superior Court Division. Mr. Friedman and Mr. Cys reviewed the drafts of all of the training materials for technical accuracy and consistency with office policy and edited them for submission to the Institute for Law and Social Research. In this task they were assisted by two former Assistant United States Attorneys who served as consultants, Mr. John E. Rogers, who acted as technical director to the initial Prosecutor Training Program, and Mr. Donald T. Bucklin.

The overall management of the project for the Institute for Law and Social Research was provided by Ms. Elizabeth Zicherman, a Training Systems Analyst with the Institute. Ms. Zicherman coordinated the various efforts between the Institute and the United States Attorney's Office and did the final editing and review of all materials. Ms. Zicherman had previously helped develop and apply the methodologies used in the original Prosecutor Training Program.

* * *

Victor W. Caputy was sworn in as an Assistant United States Attorney for the District of Columbia on April 16, 1951. Since that time he has justifiably earned a reputation that is without equal as a forceful, effective and knowledgeable trial advocate and prosecutor of criminal cases on behalf of the United States of America. Throughout the entire course of his career Mr. Caputy has continually and enthusiastically given the invaluable benefit of his knowledge and skill to innumerable Assistant United States Attorneys who had sought his counsel. All of the former and present Assistant United States Attorneys who have contributed to this volume have been his students, and any measure of success which we have achieved as trial advocates is rooted in his teaching. Victor Caputy taught us the art of trial advocacy, instructed us in the need for and manner of adequate preparation for trial and instilled in us tremendous pride in representing the United States in a court of law. Since the purpose of this volume is to train Assistant United States Attorneys and since much of what is contained herein derives from the wisdom imparted by Victor Caputy, we gratefully and respectfully dedicate this volume to him.

* * *

The topics under Section I of this Advanced Training Program are considered non-trial topics - that is, subjects which either do not pertain directly to courtroom-related skills (such as the Prosecutor's Ethical Responsibilities and the Use of the Grand Jury); subjects which are courtroom-related but pertain to the pre-trial stages (such as skills involved in Exclusionary Hearings); and specific areas of the law (such as Conspiracy and Electronic Surveillance). The topics under Section II deal with trial training per se and are arranged in a roughly chronological fashion as they would be used in the preparation and trial of a major felony case.

It is intended that these discussion outlines be used in conjunction with small group seminars of twelve to fifteen prosecutors. Each seminar would last from one and one-half to two hours and would be conducted by the author(s) of the discussion outline, senior trial Assistants and attorney supervisors within the United States Attorney's Office. It is intended that the relevant discussion outline be distributed and reviewed in advance of the particular seminar. A section outlining Parallel References Between Preliminary and Advanced Prosecutor Training Materials has been included to assist in providing background references, from the novice training manual, for these advanced materials.

ADVANCED PROSECUTOR TRAINING

PARALLEL REFERENCES BETWEEN PRELIMINARY AND ADVANCED PROSECUTOR TRAINING MATERIALS

The following indicated portions of the materials from our Prosecutor Training Program for new Assistant United States Attorneys should be reviewed by senior Assistants in preparation for each of the indicated advanced training sessions, in addition to the Advanced Training Materials for each session:

Advanced Training Topics	Preliminary Training Topics for Review
I.A: The Prosecutor's Ethical Responsibilities and Brady Obligations	I.A: The Prosecutive System: An Introduction
I.B: Use of the Grand Jury and Responsibilities of the Grand Jury/Intake Sections	I.F: Preliminary Hearings
I.C: Tactics in Exclusionary Hearings: Confessions	I.H: Confessions: Law and Hearings; I.D: Arrest, Search, Seizure and the Suppression Hearing
I.D: Tactics in Exclusionary Hearings: Search and Seizure	I.D: Arrest, Search, Seizure and the Suppression Hearing
I.E: Tactics in Exclusionary Hearings: Identification	I.G: Identification: Law and Hearings; I.D: Arrest, Search, Seizure and the Suppression Hearing
I.F: The Law of Conspiracy	-----
I.G: Electronic Surveillance	-----
* * *	
II.A: Interviewing and Preparing Witnesses for Trial	II.B: Case Preparation and Examination of Witnesses at Trial
II.B: Preparation and Examination of Expert Witnesses	II.B: Case Preparation and Examination of Witnesses at Trial
II.B.1: Services and Functions of Law Enforcement Agencies in Criminal Cases	II.C: Demonstrative Evidence and Exhibits

II. C: Opening Statement and Closing Argument	II. G: Opening Statement; II. H: Closing Argument in a Jury Trial
II. D: Direct and Redirect Examination of Witnesses	II. B: Case Preparation and Examination of Witnesses at Trial; II. I: Proper Use of Rebuttal
II. E: Cross-Examination of Witnesses	II. B: Case Preparation and Examination of Witnesses at Trial; II. D: Impeachment of Witnesses
II. F: The Hearsay Rule	-----
II. G: The Insanity Defense	-----

ADVANCED PROSECUTOR TRAINING

I.A: THE PROSECUTOR'S ETHICAL RESPONSIBILITIES AND BRADY OBLIGATIONS

Robert R. Chapman
Robert X. Perry

"The United States Attorney is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense that servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . ." Berger v. United States, 295 U.S. 78, 88 (1935)

* * *

"[T]he prosecution has an obligation to set an example of professional conduct. The Government may prosecute vigorously, zealously with hard blows if the facts warrant, for a criminal trial is not a minuet. Nevertheless, there are standards which a Government counsel should meet to uphold the dignity of the Government." Taylor v. United States, 134 U.S. App. D.C. 188, 189, 413 F.2d 1095, 1096 (1969)

* * *

This outline is intended only to state the law relating to the prosecutor's ethical responsibilities and obligations under Brady v. Maryland, 373 U.S. 83 (1963). Recognizing that each situation in which ethical problems inhere is unique unto itself, no effort has been made herein to set forth either office policy or definitive answers to specific problems. Rather, it is anticipated that an understanding of the legal framework, contained in the first part of the outline, will assist the prosecutor in his consideration of the hypothetical situations which are described in Part IV, infra, and in an appreciation of office policy and guidelines which will be discussed by senior supervisors at the seminar discussions to be conducted in conjunction with this outline.

I. The Prosecutor's Duty to Disclose Exculpatory Evidence

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held:

> The supression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87.

In Brady the defendant was sentenced to death after a conviction of first degree murder. He testified that he participated in the robbery but alleged that his accomplice had killed the victim. The prosecutor withheld a statement by the accomplice admitting the killing but claiming that the defendant had wanted to strangle the victim while the accomplice had wanted to shoot him. The Supreme Court quoted the Maryland Court of Appeals as saying that there is "considerable doubt" as to how much good the undisclosed statement would do the defendant, but that it would be "too dogmatic" to say that the jury would not have attached "any signi-fi[illegible]" [illegible] evidence

A. Favorable Evidence

Brady did not specify whether the prosecutor, the defense or the trial judge was to determine what information in the prosecutor's file is exculpatory or "favorable" to the defendant so that disclosure is required. No court has held that it is a defense determination. In fact, several courts have expressly rejected arguments that Brady requires that the defense be permitted to make the determination. See, e.g., United States v. Evanchick, 413 F.2d 950 (2d Cir. 1969); United States v. Harris, 409 F.2d (4th Cir. 1969). The courts have also rejected the alternative of an in camera inspection by the court. United States v. Frazier, 394 F.2d 258 (4th Cir. 1968). The courts' rejection of both defense and court inspection of the prosecutor's file for information "favorable" to the accused leaves but one alternative: It is the duty of the prosecutor to police himself by remaining alert for information that might be "favorable" to the accused and by disclosing such information to the defense.

This duty is a continuous one. When there is substantial room for doubt about whether or not the information in question is favorable, the prosecutor should seek advice from other Assistants, should consult with his supervisors, and only after having done so, should he disclose the favorable evidence. While he may decide, in the first instance whether the evidence is favorable, he cannot decide for the court what is admissible nor can he decide for the defense what is useful.

B. Material Evidence

The most difficult problem created by Brady has been, "What is 'material evidence'?" Some courts in post-Brady cases have read into the word "material" a standard for the degree of harm that the suppression must have caused the defendant to require the reversal of his conviction. Because of the myriad fact situations in which Brady claims can arise, courts have been unable to define a true "materiality" standard. Moreover, the cases that the Supreme Court has decided since Brady have not clarified the "materiality" standard.

1. In Giles v. Maryland, 386 U.S. 66 (1967), the Supreme Court reversed a rape conviction on the ground that the prosecutor had failed to disclose that the prosecutrix had retracted another rape charge prior to trial; and that she had attempted suicide within hours of the foregoing incident and her ensuing hospitalization for psychiatric examination. In a confused five to four holding, the Court remanded the case to the State Court of Appeals without reference to an explicit standard of materiality.

2. In Moore v. Illinois, 408 U.S. 786 (1972), the Supreme Court again failed to articulate a standard for judging the "materiality" of undisclosed evidence. While adhering to Brady in principle, the Court divided five to four on

the significance of the evidence in question. The majority stated the evidence was "an insignificant factor" and "not material to the issue of guilt," while the dissent labeled the evidence "not merely material to the defense [but] they were absolutely critical." 408 U.S. at 806.

In Moore, a bartender, the victim, threw two men out of his bar, and later one returned and shot him with a shotgun. The Government's case consisted of two positive in-court identifications of the defendant as the killer, plus admissions made two days later at another bar in another city as follows: Sanders, a bartender, testified that a man he knew as "Slick" came into his bar with another man and said that it was "open season on bartenders" and that he had shot one in Lansing (where the shooting had occurred). The owner of this bar later agreed to give these two men a ride to a nearby city. During the ride, one of the men again referred to the trouble with the bartender in Lansing. The bar owner identified defendant as one of the two men. Sanders identified defendant as "Slick", the man who had made the admission.

Prior to trial the defense moved for all written statements, but when Sanders testified no specific demand was made for his statement. Sanders had given the police a statement that he had met "Slick" six months before the shooting. The prosecution has an FBI report that "Slick" was in federal prison during that period. Moreover, as Sanders was brought into court to testify, he said to the prosecutor that the person he knew as "Slick" was about 30-40 pounds heavier than the defendant and did not wear glasses. None of these statements was disclosed to the defense. At the post-conviction hearing Sanders indicated that it was impossible that defendant was the man in the bar who had made the admission to him.

The 5-4 majority held that, in view of the strength of the prosecution's case, Sanders' misidentification of the defendant as "Slick" was not material to the issue of guilt. The majority labeled the misidentification as "at most an insignificant factor" while specifically stating they were adhering to the principles of Brady.

The holding of the Moore decision, which clearly sets forth the prerequisites for disclosure of evidence by the prosecution, all of which must exist before disclosure is required, is as follows:

> The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material

either to guilt or to punishment. Important, then, are (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 794-795.

3. While the decision in each case necessarily turns on its own facts, a definition of "material" is beginning to emerge from a growing body of case law.

a. District of Columbia Circuit

In United States v. Lemonakis, __ U.S. App. __, __, 485 F.2d 941, 964 (1973), the United States Court of Appeals for this circuit noted that while the Supreme Court had not yet provided a definition of "materiality," "the rule in this jurisdiction is that reversal is called for when, in the context of the case at the bar, the undisclosed evidence 'might have led the jury to entertain a reasonable doubt about appellant's guilt'," quoting Levin v. Katzanbach, 124 U.S. App. D.C. 158, 16d, 363 F.2d 287, 291 (1966), on appeal after remand, Levin v. Clark, 133 U.S. App. D.C. 6, 9, 408 F.2d 1209, 1212 (1967). However, the Government is not required "to disclose all its evidence, however, insignificant to the defense," Levin v. Katzenbach, supra, 129 U.S. App. D.C. at 162, 363 F.2d at 291, and clearly it is not required "to disclose evidence which appears to be irrelevant." United States v. Bowles, U.S. App. D.C. ___, ___, 488 F.2d 1307, 1313 (1973) (emphasis supplied). Thus, while the requirement of Levin v. Katzenbach that the Government disclose all evidence that "might have led" to the jury's entertaining a reasonable doubt, can be read expansively to include almost any evidence in the possession of the Government, clearly the Court did not intend such a result; for there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work in a case. Moore v. Illinois, supra 408 U.S. at 795.

In the case of Levin v. Katzenback and Levin v. Clark, the undisclosed evidence, that certain witnesses could not recall a secondary transaction not necessary to the Government's case, was seemingly of no great consequence. The secondary transaction was the breaking down of 35 one thousand dollar bills into smaller denominations by the bank teller who had earlier cashed the $35,000 check for the Government witnesses

who were to give the defendant the alleged bribery monies. In denying a petition for rehearing en banc (5-3), the Court seemed to be of the view that the holding was limited to the peculiar facts of the case and that the principle of law involved was unchanged. Judge McGowan stated for himself and two other judges: "Denial of rehearing en banc is not to be taken as indicating that the Government is required to honor a general request for any and all information helpful to a defendant. . ." Levin v. Clark, supra, 133 U.S. App. D.C. at 24, 408 F.2d at 1227 (Statement of McGowan, J.).

The Lemonakis case concerned undisclosed evidence of seemingly greater significance than that in Levin. While the Court reaffirmed the Levin rule, it found no duty on the prosecution to disclose, stating that the evidence was not "important" enough, and the conviction was affirmed. In Lemonakis, the defendant, Enten, along with others, had been convicted of six burglaries, but the Government at trial had alleged that Enten had masterminded and financed the conspiracy. The withheld evidence was a statement by the accomplice-informant that he had not approached the defendant until after the first burglary. While the Court of Appeals, on the Government's motion, dismissed the first burglary conviction, it affirmed the convictions on the other counts. The Court stated that this was not one of "those particular situations where a fair trial may have been significantly blurred by the nondisclosure". ___ U.S. at __, 485 F.2d at 965. See also United States v. Bowles, supra, ___ U.S. at __, 488 F.2d at 1313-1314.

What is deemed to be "material" to a fair trial may extend beyond evidentiary matters. A recent case concerned the failure by an Assistant United States Attorney to disclose that three jurors had been members of a previous jury which was "castigated" for a not guilty verdict. Because of the strength of the case it was affirmed, but by way of dicta, the court indicated, that, while ordinarily there is not a duty to disclose public aspects of a juror's service, such as voting records and experience, "considerations of basic fairness may generate a duty to disclose" in such circumstances. United States v. Kyle, 152 U.S. App. D.C. 141, 145 469 F.2d 547, 551 (1972), cert. denied, 409 U.S. 1117 (1973).

b. Second Circuit

The pre-Brady standard was that reversal would be required if the Government failed to disclose material evidence which would "probably produce a different verdict." United States v. Kyle, 297 F. 2d 507 (2d Cir. 1961). After Brady, the standard became evidence which is "material" and of "some substantial use" to the defendant. United States v. Polisi, 416 F. 2d 473 (2d Cir. 1969), United States v. Tomanolo, 378 F. 2d 26 (2d Cir. 1967).

In United States v. Keogh, 391 F. 2d 138 (1968), Judge Friendly explained that different standards apply to different situations:

(1) Deliberate prosecutorial misconduct - Where the prosecution's suppression of evidence is "deliberate" - i.e., either a considered decision to suppress for the very purpose of obstructing or a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention - the evidence is "highly material" and reversal is required even in the absence of a defense request in the trial court.

(2) Request cases - Where the prosecutor suppresses evidence "favorable to the accused" which is "material either to guilt or to punishment" and he refuses to disclose it upon request, the conviction must be reversed. This is the Brady standard.

(3) Where there has not been deliberate suppression in the sense outlined in either (1) or (2) supra, the absence of a request is quite relevant, and the case will not be reversed in its absence and in the absence of a "considerably higher" standard of materiality. A defense request "serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files." 391 F. 2d at 147. In such cases, the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense

> would have altered the result. To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties." 391 F. 2d at 148.

In United States v. Miller, 411 F. 2d 825 (2d Cir. 1969), the Second Circuit reversed a conviction because the Government failed to disclose the pretrial hypnosis of a prosecution witness. In United States v. Mele, 462 F. 2d 918 (2d Cir. 1972), the court reversed a narcotics conspiracy conviction because the Government did not disclose that one of its witnesses was a paid informer.

c. Fourth Circuit

In Ingram v. Peyton, 367 F. 2d 933 (4th Cir. 1966), the court in reversing a conviction held that where the withheld evidence is impeaching in character, the evidence must raise a substantial likelihood that it would have affected the verdict. In an earlier case the court held that where the prosecution had been unfair in the disclosure of certain evidence, the test is whether there is a "reasonable possibility" that the evidence might have contributed to the conviction. Barbee v. Maryland, 331 F. 2d 842 (4th Cir. 1964).

d. Fifth Circuit

In Ashley v. Texas, 319 F. 2d 80 (5th Cir. 1963), over a strong dissent, the court held that "material" evidence is evidence, which, even if the prosecution disbelieves it, is of a type or from a source which in all probability would make it very persuasive to a fair-minded jury. In Ashley, the conviction was reversed because the prosecution suppressed certain psychiatric opinion of insanity. In United States v. Franicevich, 471 F. 2d 427, 429 (5th Cir. 1973), the court held it was not error to fail to disclose part of a Farmers Home Administration loan investigation not pertaining to the defendant.

e. Sixth Circuit

In Clay v. Black, 469 F. 2d 319 (6th Cir. 1972), the court reversed a lower court's denial of habeas corpus relief where the prosecutor failed

to inform the defense of an F.B.I. report concerning blood stains in the defendant's car which supported the defendant's version of the case.

f. Seventh Circuit

In Bergenthal v. Cady, 466 F.2d 635 (7th Cir. 1972), cert. denied 409 U.S. 1109 (1973), the court held that reversal was not warranted where the prosecutor withheld a psychiatric report of "no opinion" on defendant's sanity. In United States v. Teague, 445 F.2d 114 (7th Cir. 1971), the court held that the defendant's bank robbery conviction was not prejudiced by the prosecutor's failure to disclose an eyewitness to a robbery of a nearby postal substation that happened approximately thirty minutes before the bank robbery. In United States v. Poole, 379 F.2d 645 (7th Cir. 1967), the court reversed defendant's conviction because the prosecutor failed to reveal to the defense that there was a physician's report that concluded a rape victim had not had sexual intercourse.

g. Eighth Circuit

In Weaver v. United States, 418 F.2d 475 (8th Cir. 1969), the prosecution failed to inform the defense of the existence of a witness to a robbery who after observing the accused stated to federal agents and local police that the defendant was positively not one of the men who robbed the bank. The Eighth Circuit remanded this issue to the District Court for a hearing.

h. Ninth Circuit

In Hibler v. United States, 463 F.2d 455 (1972), the court reversed the defendant's conviction because the evidence that was withheld might have led the jury to entertain a reasonable doubt about the defendant's guilt. The prosecutor had decided that a police officer's testimony that supported the defendant's explanation of why he was driving a car that had been involved in a robbery was not material.

In Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968), the court held that the prosecution's failure to tell the defense that a motel operator had seen a stranger, not the defendant, go into the deceased's room shortly before the body was found, was not "material" in light of the massive weight of evidence against the defendant.

C. Necessity of a Request

In Brady, the defense had requested the suppressed evidence; the Supreme Court's holding, read literally, applies only to evidence that the defendant has asked the prosecutor to disclose. In Moore v. Illinois, supra, the Supreme Court reiterated the importance of the request element in its holding in Brady and specificially decided that a defense request is indispensable in all cases whose disclosure is required by Brady. In this circuit, however, the court has held that a defense request is not a pre-requisite to the operation of the Brady, rule. Levin v. Clark, 133 U.S. App. D.C. 6, 403 F.2d 1209 (1967).

The subsequent ~~Superior~~ Supreme Court case of Moore v. Illinois must therefore be read to overrule Levin which, as previously noted, was intended to be limited to its peculiar facts. The prosecutor must assess all information available to him to determine if it might be favorable or material to the defense. If the evidence is clearly of high exculpatory value to the defense, it should probably be disclosed even in the absense of a defense request. See United States v. Keogh, supra. If, as is more often the case, the prosecutor is at first not sure if certain information should be turned over, he should further investigate the information at hand and consult with other Assistants and his supervisors. If, after such a re-examination of the information, the consensus is that there is still substantial room for doubt, he should disclose the information to the defense. In all other cases, the prosecutor has no ethical or Brady obligation in the absense of a defense request.

D. Timing of Disclosure

Brady did not define the point in the proceedings against the defendant at which the prosecutor must disclose Brady material. Lower courts are generally divided about the appropriate time for disclosure. A number of cases favor pretrial disclosure. United States v. Bonnano, 430 F.2d 1060 (2d Cir.), cert. denied, 400 U.S. 964 (1970); United States v. Trainor, 423 F.2d 263 (1st Cir. 1970); United States v. Polisi, 416 F.2d 573 (2d Cir. 1969). Several cases support turning over information at trial. United States v. Moore, 439 F.2d 1107 (6th Cir. 1971); United States v. Condor, 423 F.2d 904, 911 (6th Cir.), cert. denied, 400 U.S. 958 (1970).

While the A.B.A. Standards relating to the Prosecution Function and Defense Function §3.11 suggests disclosure "at the earliest possible opportunity", the timing of disclosure should turn on the nature of the evidence, but disclosure should never be made until the prosecutor has fully investigated the evidence himself, for example, by interviewing all relevant witnesses.

If the prosecutor is aware of witnesses who may exculpate the defendant, after careful investigation the witnesses should be made available to the defense prior to trial. United States v. Gleason,

265 F. Supp. 880 (S.D.N.Y. 1967). Where these exists a conflict between the Jencks Act, which requires disclosure only after the direct testimony of the witness at trial, and the Brady rule, the material is producible only after the witness has testified, "unless of course, it was favorable to the accused, in which case the prosecution may be obliged to produce immediately." United States v. Bishten, 150 U.S. App. D.C. 51, 56, 463 F.2d 887, 892 (1972). In United States v. Trainor, 423 F.2d 263 (1st Cir. 1970), the court denied relief to the defendant, but at the same time implied that if the evidence in question contained material useful to the defendant at the pretrial stage, the prosecutor's failure to disclose at that time would have required reversal

E. Suppression

The conduct that Brady termed "suppression" can better be called nondisclosure. Although nondisclosure need not be intentional, courts have generally expected some showing that the prosecutor has been negligent, that there was reason for him to believe that the evidence might be useful to the defense. This element of Brady is correlated at least in part to the materiality standard.

To constitute nondisclosure, the Government must have at one time possessed the evidence. While some courts have held that the prosecutor himself need not have possessed the evidence so long as it was in the custody of other Government agents, Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), this position must be vigorously opposed if the evidence in possession of other agencies is not known to the prosecutor; Otherwise, he could be charged with the responsibility of searching the files of all Governmental agencies prior to trial. Ct. Moore v. Illinois, supra, 408 U.S. at 795, but see United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971).

The prosecution and law enforcement agencies must promulgate, enforce, and attempt in good faith to follow rigorous and systematic procedures designed to preserve Brady and discoverable material. United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971); United States v. Clemons, 144 U.S. App. D.C. 235, 445 F.2d 711 (1971): See United States v. Augenblick, 393 U.S. 348 (1969); Savage v. United States, 313 A.2d 880 (D.C. Ct. App. 1974); Banks v. United States, 305 A.2d 256 (D.C. Ct. App. 1974). The Metropolitan Police Department has promulgated such as order in the District of Columbia. See MPD General Order 601, No. 2, Preservation of Potentially Discoverable Material, (May 26, 1972).

II. The Prosecutor's Duty to Avoid Use of Perjured Testimony and/or False Evidence.

It is quite clear that a conviction knowingly obtained through false testimony or evidence is a denial of due process of law and will be reversed. Mooney v. Holohan, 294 U.S. 103 (1934).

A. False Testimony

If the prosecutor knowingly elicits false testimony or permits a witness to testify knowing the testimony to be false or misleading, the conviction will be reversed. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1954); Pyle v. Kansas, 317 U.S. 213 (1942).

In Alcorta, the defendant's homicide conviction was reversed where the prosecutor, knowing that his key witness had had sexual relations with the defendant's wife several times, elicited testimony that the witness had never had sexual relations with her.

In Napue, the prosecutor asked his key witness if he had received any promises, knowing that the witness has received certain promises in return for testimony; the witness answered in the negative. The Supreme Court in reversing the conviction held that the failure of the prosecutor to correct the answer or clarify the false impression created thereby constituted a denial of due process of law.

More recently, the Supreme Court has ruled that knowledge of one prosecutor may be imputed to another Assistant within the same office. In Giglio v. United States, 405 U.S. 150 (1972), the Assistant United States Attorney who presented a case to the grand jury promised a key witness that he would not be prosecuted if he testified before the grand jury and at trial. The witness at trial testified that no promises had been made. The Assistant who tried the case was unaware of the prior promise. The Supreme Court in reversing held that neither the grand jury Assistant's lack of authority nor his failure to inform his superiors and his associates is controlling, and that the prosecution's duty to present all material evidence to the jury was not fulfilled and constituted a violation of due process of law. This "imputed knowledge" concept may possibly cover knowledge of prosecutors in other jurisdictions. See United States v. Carter, 454 F.2d 426 (4th Cir. 1972).

B. False Evidence

In Miller v. Pate, 386 U.S. 1 (1966), the Supreme Court reversed a murder and rape conviction where the prosecutor referred to and exhibited to the jury a pair of "blood stained shorts" which were an important link in the chain of the circumstantial case against the defendant. However, the prosecutor knew that the reddish-brown stains on the shorts were not blood, but paint. The Court held that the prosecution "deliberately misrepresented the truth" and the conviction was reversed.

III. American Bar Association Guidelines

A. Duty to Disclose Exculpatory Evidence

1. The American Bar Association Standards for Criminal Justice Relating to the Prosecution Function.

   a. Standard 3.11 reads as follows:

      Disclosure of evidence by the prosecutor. (a) It is unprofessional conduct for a prosecutor to fail to disclose to the defense at the earliest feasible opportunity evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment. (b) The prosecutor should comply in good faith with discovery procedures under the applicable law. (c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution case or aid the accused.

   b. The commentary following Standard 3.11 reads as follows:

      Beyond the field of evidence which the prosecutor knows would tend to establish innocence or mitigate the degree of the offense there is a less sharply defined area of evidence which would substantially aid the defense. This latter area is too vague to be defined in standards of conduct and must be left to the development of discovery procedures by rule making or statutes.

2. The American Bar Association Code of Professional Responsibility.

   a. DR 7-103(B) reads as follows:

      A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

   b. DR 7-109(A) reads as follows:

      A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

3. As to materiality, both Standard 3.11(a) and DR 7-103(B) set the test as evidence that "tends to negate the guilt." No court has set this vague standard as to Brady mate-

rial, and the Brady formulation, "material to guilt," is preferable. As to the timing of disclosure, Standard 3.11(a) refers to "earliest feasible opportunity" while DR 7-103(B) appears to impose a less stringent "timely disclosure" requirement.

B. Duty to Avoid Use of Perjured Testimony or False Evidence

1. The American Bar Association Standards for Criminal Justice Relating to the Prosecution Functions.

a. Standard 5.6 reads as follows:

> Presentation of evidence.
> (a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence whether by documents, tangible evidence, or the testimony of witnesses.

2. The American Bar Association Code of Professional Responsibility.

a. DR 7-102(A) reads as follows:

> In his representation of a client, a lawyer shall not . . .
> 3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
> 4) Knowingly use perjured or false evidence.
> 5) Knowingly make a false statement of law or fact.
> 6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

IV. Hypothetical Situations Concerning the Prosecutor's Duty to Disclose Certain Evidence

A. In the following hypotheticals:

1. Examine the brief facts;

2. Determine whether the evidence is exculpatory in nature;

3. If the evidence is exculpatory in nature, determine the line of investigation or inquiry which should be pursued;

4. If you determine that disclosure is warranted, determine when it should be made;

5. Determine what type of disclosure is warranted.

B. Hypotheticals

1. You are prosecuting a liquor store robbery in which one of the robbers placed his fingers on the cash register when he took money from the register. The Mobile Crime Laboratory has lifted latent fingerprints from the area of the cash register that the robber touched which do not match the defendant's. The liquor store employs seven people.

2. You are prosecuting a rape case where the complainant makes an on-the-scene identification of her assailant moments after the incident. The complainant was examined by a doctor at D.C. General Hospital approximately one hour after the rape. In his report, the doctor indicates that the complainant smelled of alcohol and appeared to be intoxicated at the time of the examination. You talk with the first police officer on the scene who indicates that the complainant appeared to be highly intoxicated. The complainant advises you in your pretrial interview that prior to the rape she has consumed a six-pack of beer in a two-hour period.

3. You are preparing for a homicide trial and a close friend of the defendant's, John, advises you that one hour after the police found the victim in an apartment building, the defendant in the presence of another person, Bill, told both John and Bill: "I just did in a dude", pointing to the apartment building in question. You speak with Bill who acknowledges that he walked past the apartment building with John and the defendant, but states that the defendant said nothing as they passed the building.

4. You are prosecuting a Burglary I case where the defendant broke into a home owned by the complainant. The complainant positively identified the defendant in a line-up as the burglar. The complaining witness testified before the grand jury, but died one month later. Subsequent to the complainant's death, defense counsel indicates to you that the defendant is willing to plead guilty to unlawful entry and attempt petit larceny.

5. You are prosecuting a robbery case in which the complainant has positively identified the defendant as her assailant. You subsequently learn that an eyewitness to the crime has seen a picture of the defendant in a newspaper article that involves and unrelated shooting. The eyewitness indicates that the person in the newspaper photograph appears to be "heavier and stockier" than the person who was involved in the robbery that she witnessed.

6. You are prosecuting a robbery case where the complainant and two eyewitnesses are shown the same group of ten mug shots. The defendant's photograph is positively identified

by the complainant and one of the eyewitnesses. The second eyewitness looks at the photographs, picks out the defendant's photograph, and says, "I don't know." The complaining witness and the eyewitness who identified the defendant in a mug shot identify him in a line-up. The eyewitneess who stated "I dont know" at the viewing of the defendant's mug shot does not attend the line-up.

7. You are prosecuting a robbery case where the complainant and an eyewitness give the identical description of the lone assailant as: Negro male, 20's, about 6 feet tall, 150 pounds wearing red pants and red shirt. About twenty minutes after the robbery, the complainant positively identifies the defendant as her assailant. He is a Negro male, 21, 6 feet tall, 155 pounds, and wearing red pants and a red shirt. Neither of the two eyewitnesses viewed the defendant when he was brought back to the scene.

8. Your complainant in a Burglary I case is a 89 year-old man who has been both an in-patient and out-patient at St. Elizabeth's Hospital for the past twenty-five years. You speak with the complainant whose memory appears to have faded and whose accounts of the incident in question vary significantly from his grand jury testimony. You speak with the complainant's psychiatrist who indicates that the complainant has been diagnosed as a paranoid schizophrenic. The psychiatrist indicates that the symptoms of your complainant's disorder include hallucinations. He further indicates that the complainant is suffering from arteriosclerosis and an attendant loss of memory.

9. You are prosecuting a homicide case where a key eyewitness to the shooting comes forward with information relevant to the case one year after the incident and only after he himself is charged with a felony. Your witness is arrested for two other offenses prior to the homicide trial. While no promises or plea bargains have been made with your eyewitness, all three of his cases have been continued for trial beyond the date of the homicide trial.

10. You are prosecuting an unauthorized use of an automobile case where there are two eyewitnesses. The first witness makes a positive identification from photographs and in a line-up. The second eyewitness only attends a lineup and indicates that he is "not sure" if the defendant was the subject in the stolen car. During a pretrial conference, witness number two ("not sure") says to the first witness, "I'll bet you two to one that the dude that the police caught will be convicted."

11. You are prosecuting a grand larceny case, but prior to trial you ascertain that at the time of the offense the value of the item in question (retail, wholesale, market, and replacement) was under $100. The defendant has indicated a willingness to plead to grand larceny.

12. You are trying an arson case where two people have positively identified the defendant as the person responsible for the criminal act. Subsequent to indictment but prior to trial, you ascertain that there are three other people who were witnesses to the arson. All three witnesses indicate that the defendant was not the person responsible for the criminal act. All three individuals name one other eyewitness who was also present at the time of the fire and who all three indicate will exculpate your defendant. After further investigating the three witnesses' statements, you make the witnesses available to the defense. You have the name and address of the fourth "exculpatory" witness, but the police are unable to locate him.

13. You are preparing for trial in a rape case that occurred in front of the White House. The police in the early stages of investigation ascertain from an unnamed citizen that a subject named Smith, Negro male, 20's, 6 feet all, who hangs in two different bars, was bragging that he was responsible for the rape in front of the White House. During their investigation, the police were unable to locate Smith. Several weeks after the rape, the victim encountered Jones on the street and recognized him as her assailant. She immediately called the police and Jones was arrested. Jones confessed to the rape.

ADVANCED PROSECUTOR TRAINING

I.B: USE OF THE GRAND JURY AND RESPONSIBILITIES OF THE GRAND JURY/INTAKE SECTION

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Note: This outline deals with the various uses of the Grand Jury, its history and present authority; the procedures followed in the Grand Jury/Intake Sections of both the Superior Court and the District Court; preliminary hearing law and procedures (see also Prosecutor Training Manual: Topic I.F.); presentation of cases to the Grand Jury; immunity procedures; the subpoena power of the Grand Jury; and indictment draftsmanship and sufficiency.

I. Brief Historical and Descriptive Background of the Grand Jury

A. History

1. English antecedent -- Established during the reign of Henry II, at the Assize of Clarendon in 1166, in attempt by the monarch to assert his dominance over ecclesiastical and feudal realms.

2. First juries were principally summoned to assist in settling civil disputes and to provide an alternative to the ancient modes of proof by ordeal of fire and water, by oath, or by battle.

3. In 1352 the function of the grand jury was made distinct from that of the petit jury. The grand jury was abolished in England in 1933. United States v. Cox, 342 F.2d 167, 187 n. 10 (5th Cir. 1965), cert. denied, Cox v. Hauberg, 381 U.S. 935 (1965).

4. The early purpose of the grand jury was to guard individuals against malicious prosecutions by private enemies and political trials brought about by the "ill designs of corrupt ministers of state . . . who might commit the most odious of murders in the form and course of justice . . . ." Note, Indictment Sufficiency, 70 Colum. L. Rev. 876, 881 (1970).

B. U.S. Constitutional Basis

1. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." Fifth Amendment, Constitution of the United States.

2. The Fourteenth Amendment does not require the states to initiate criminal prosecutions by grand jury indictment. Hurtado v. California, 110 U.S. 516 (1884); Peters v. Kiff, 407 U.S. 93 (1972). However, prosecutions brought in the name of the United States for "capital, or otherwise infamous" crimes must be instituted by way of grand jury indictment. United States v. Moreland, 258 U.S. 433 (1922).

a. The District of Columbia Code provides that in prosecutions originating in Superior Court, an offense which may be punishable by death must be instituted by the return of an indictment; an offense which is punishable by imprisonment for a term in excess of one year is to be instituted by indictment, unless the accused waives this right. 23 D.C. §301; 16 D.C. Code §702; Super. Ct. Crim. R. 7(a).

b. In District Court the same rules apply. Fed. R. Crim. P. 7(a).

C. Description of Grand Jury in Present Form

1. The grand jury shall be composed of 23 members and not less than 16, and they shall be summoned by the Chief Judge or the Associate Judge designated by him. Super. Ct. Crim. R. 6(a); Fed. R. Crim. P. 6(a).

2. 11 D.C. Code § 1903 provides that a grand jury in the District of Columbia can take cognizance of all cases brought before it regardless of whether the indictment is returnable in District Court or in Superior Court.

3. 11 D.C. Code §1901 provides that the qualifications of grand jurors in the District of Columbia shall be the same as those of federal grand jurors. See 28 U.S.C. 1861 et seq. and 18 U.S.C. §3321, et seq. Special grand juries are governed by 18 U.S. C. §3333.

4. An indictment can only be found upon the concurrence of 12 or more grand jurors. Super. Ct. Crim. R. 6(f); Fed. R. Crim. P. 6(f).

5. A grand jury may serve for no more than 18 months. Super. Ct. Crim. R. 6(g); Fed. R. Crim. P. 6(g).

II. Procedures for the Grand Jury/Intake Section of the United States Attorney's Office.

Note: There are two grand jury sections, one in District Court and one in Superior Court. The former returns about 800 indictments per year for violations of the United States Code; the latter returns about 2,800 indictments a year for violations of the District of Columbia Code.

A. Course of a Case From Felony Complaint Through Indictment

1. Complaint - Papering

Felony complaints are handled specifically by members of the Grand Jury/Intake Sections. All cases are carefully screened at papering.

a. Because of the difficulties in transporting cases (defendants, officers, and appointed counsel) from one court to another, it is to the Government's advantage to make sure the case is in the right court at the time of papering.

b. In the District Court, where about half the indictments returned are for federal narcotics violations, the emphasis is on ensuring that all Controlled Substances Act cases meet the requirements for federal jurisdiction. Unless there are observations of narcotics transactions, possession of a small quantity of narcotics cannot be successfully prosecuted as possession with intent to distribute. 21 U.S.C. §841(a). In a close intent to distribute case, consideration should be given to referring the case to Superior Court if the defendant has a prior Uniform Narcotics Act conviction, because there a felony can be successfully prosecuted without the necessity of proving the additional element of intent to distribute. See 33 D.C. Code § 423(b).

2. Presentment -- Super. Ct. Crim. R. 5.

Note: Presentment as used here refers to the proceeding before a magistrate or judge subsequent to the issuance of a felony complaint. At presentment, the court advises the defendant of his rights, including the right to the assignment of counsel if he is unable to obtain counsel; the court schedules a preliminary hearing; and the court sets bond. Presentment in this sense, differs from the term "presentment" as used in the Fifth Amendment with respect to the grand jury which historically referred to the process by which the grand jury initiated an independent investigation and asked that a charge be drawn. It still serves as the method by which the grand jury asks that a charge be drawn by the United States Attorney who drafts the indictment and then returns to the grand jury to ask for a vote on the indictment as drawn. Gaither v. United States, 134 U.S. App. D.C. 154, 158 n. 1, 413 F.2d 1061, 1065 n. 1 (1969). See §I(A)(4)(b), infra.

a. Persons arrested are required to be brought before the court without unnecessary delay. Super. Ct. Crim. R. 5(a).

   Note: Reasonable delay for police processing is permitted. 23 D.C. Code §562(c)(2); Super. Ct. Crim. R. 5(a).

b. At presentment, a person arrested without a warrant must be informed by the court of the information or complaint, and of any affidavit filed therewith. Super. Ct. Crim. R. 5(b).

c. Interrelation of 18 U.S.C. §3501(c) (providing for presumption of no delay if presented within 6 hours) and consideration of waiver of delay claim. Compare Mallory v. United States, 354 U.S. 449 (1957), with Pettyjohn v. United States, 136 U.S. App. D.C. 69, 419 F.2d 651 (1969); and Frazier v. United States, 136 U.S. App. D.C. 180, 419 F.2d 1161 (1969). Super. Ct. Crim. R. 5(a) states that it shall not conflict with 18 U.S.C. §3501.

d. Time limits for setting date of preliminary hearing at presentment:

(1) Rule 5(c), Super. Ct. Crim. R., incorporates the dictates of the Federal Magistrates Act, 18 U.S.C. §3060.

(a) 18 U.S.C. §3060(b)(1) and Super. Ct. Crim. R. 5(c)(2) require that the preliminary hearing be set within 10 days following the initial appearance (presentment) for an accused person in custody.

(b) Where the accused person is not in custody, the preliminary hearing must be set within 20 days of presentment. 18 U.S.C. §3060(b)(2); Super. Ct. Crim. R. 5(c)(2).

(2) Continuances of preliminary hearing may be obtained only with the consent of the defendant and a show of good cause; absent the consent of the defendant, the prosecutor must show that extraordinary circumstances exist and that delay is indispensable and in the interest of justice. 18 U.S.C. §3060(c); Super. Ct. Crim. R. 5(c)(2).

3. Preliminary Hearings are governed by Super. Ct. Crim. R. 5(c)(1); Fed. R. Crim. P. 5.1.

a. They are conducted by attorneys from the Grand Jury/Intake Section in Superior Court before one of the three federal magistrates.

b. A judge in Superior Court is specifically assigned to hear preliminary hearings beginning usually between 9:30 and 10 a.m.; two Assistants are normally assigned, one presenting cases and one papering and negotiating pleas. The normal calendar is approximately 30 to 40 cases per day.

c. This period provides the unique opportunity for the disposal of weak cases by misdemeanor pleas. Assistants should carefully re-screen cases at preliminary hearing, and make efforts to negotiate pleas at this stage. If it is decided that a misdemeanor disposition is appropriate, an information is prepared so that it can be filed and a plea taken at the preliminary hearing.

d. In District Court, preliminary hearings are conducted by a United States Magistrate. All cases are carefully re-screened on the basis of lineup, chemical analysis, fingerprint, and handwriting reports. The officer or case agent should be reminded at papering to bring these materials to the preliminary hearing.

(1) If it is decided that a misdemeanor disposition is appropriate, an information is prepared so that it can be filed and a plea taken at the preliminary hearing. The United States Magistrates have authority to take pleas to misdemeanors, the penalties for which do not exceed one year in prison and/or a $1,000 fine. 18 U.S.C. §3401. The practice in District Court is to have the Magistrates take pleas in cases where the misdemeanor is either a lesser included offense of the felony charges, or, if a violation of the District of Columbia Code, it is a misdemeanor which could be filed as a related offense pursuant to 11 D.C. Code §502(3).

(2) In cases where the Magistrate has no jurisdiction to take a plea (felony pleas and misdemeanors, the penalty for which is greater than one year and/or $1,000), the plea is arranged through the chambers of the Chief Judge.

e. Conducting a preliminary hearing

(1) Not a legitimate discovery device, although some discovery may be an unavoidable by-product. Super. Ct. Crim. R. 5(c)(1); United States v. King, 157 U.S. App. D.C. 179, 186, 482 F. 2d 768, 775 (1973); Coleman v. Burnett, 155 U.S. App. D.C. 302, 313-315, 477 F. 2d 1187, 1198-1200 (1973); see 18 U.S.C. §3060(a), (e).

(2) No right to raise objections to evidence on grounds that it was unlawfully obtained. Super. Ct. Crim. R. 5(c)(1); Fed. R. Crim. P. 5.1(a). Motions to suppress must be made under Super. Ct. Crim. R. 12, 47 or Fed. R. Crim. P. 12. Cf. United States v. Calandra, __U.S.__, 94 S. Ct. 613 (1974).

(3) A finding of probable cause may be based in whole or in part on hearsay. Super. Ct. Crim. R. 5(c)(1); Fed. R. Crim. P. 5.1(a); Coleman v. Burnett, supra; Washington v. Clemmer, 119 U.S. App. D.C. 216, 225-226, 339 F.2d 715, 724-725 (1964)(Burger, J.); United States v. Hinkle, 307 F. Supp. 117, 121 (D.D.C. 1969); cf. Costello v. United States, 350 U.S. 359 (1956). However, the use of hearsay is more prone to attack. See Coleman v. Burnett, supra, 155 U.S. App. D.C. at 321-22, 477 F.2d at 1206-07.

(4) Emphasis should be on limiting scope of direct, so as not to open matters for cross-examination.

(5) Defendant has a right to present testimony material to the issue of probable cause. See United States v. King, supra, 157 U.S. App. D.C. at 186 482 F.2d at, 775; Coleman v. Burnett, supra, 155 U.S. App. D.C. at 320, 477 F.2d at 1205.

Note: Failure of defendant to call a witness for the preliminary hearing does not justify the prosecutor's cross-examining that witness at the subsequent trial regarding his or her absence at the preliminary hearing in order to characterize the witness's trial testimony as recent fabrication. United States v. Huff, 143 U.S. App. D.C. 163, 169, 442 F.2d 885, 891 (1971). Defendant has a right to subpoena Government witnesses if their testimony could contribute significantly to the accuracy of a probable cause determination. Test in District Court is now materiality, rather than whether testimony will tend to negate probable cause. Compare Coleman v. Burnett, supra, 155 U.S. App. D.C. at 320, 477 F.2d at 1205; with Washington v. Clemmer, 119 U.S. App. D.C. 342, 339 F.2d 718 (1964).

f. The general rule is that the return of an indictment cuts off the right to a preliminary hearing. Super. Ct. Crim. R. 5(c)(2); 18 U.S.C. §3060(e). Jaben v. United States, 381 U.S. 214, 220 (1956); United States v. Milano, 443 F.2d 1022 (10th Cir. 1971). However, if an indictment follows a "defective" preliminary hearing (e.g., where the defendant was denied the right to call witnesses), it may be that the trial judge may take appropriate remedial measures such as reopening the hearing. See United States v. King, supra, 157 U.S. App. D.C. at 186-188 & n. 65, 482 F.2d at 775-777 & n. 65; Coleman v. Burnett, supra, 155 U.S. App. D.C. at 323-325, 477 F.2d at 1208-1210. This concept, however, seems inconsistent with the general rule that return of an indictment cuts off the right to a preliminary hearing and the principle that a preliminary hearing is not a discovery device. In any event the burden is on the defense to raise the issue of defective preliminary hearing immediately rather than await the outcome of the jury's verdict. Coleman v. Burnett, supra, 155 U.S. App. D.C. at 326, 477 F. 2d at 1211.

4. Defendant held for the action of the grand jury.

a. In Superior Court if a defendant is held for nine months and an indictment is not returned, he shall be released from custody. 23 D.C. Code §102. This does not bar prosecution, but is intended to assure that a defendant is not held indefinitely awaiting action by the grand jury. This statute does not, of course, preclude a speedy trial issue. See Barker v. Wingo, 407 U.S. 514 (1972).

b. In District Court, Rule 2-7(b)(3) requires that all indictments must be returned within 45 days of the date of arrest, unless an extension is granted by the Chief Judge for good cause. Some judges have held that this rule applies to cases where an arrest was made but the case was originally no papered, or where the defendant was taken back into custody as in an escape case.

c. Requirement of "presentment" and procedure of "Gaitherizing." Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969).

(1) The grand jury customarily votes twice on each case, first the vote on a presentment (cf. § 2 supra) i.e., an initial accusation with generalized charges; and second, the

vote on the specific charges included in the indictment, where the grand jury as a body must pass on the actual terms of an indictment. Gaither v. United States, supra, 134 U.S. App. D.C. at 164, 413 F.2d at 1701.

(2) If evidence has already been presented to the grand jury, the Assistant United States Attorney may add an additional charge and ask the grand jury to approve it before or at the time the grand jury approves the specific charges.

d. Return of a true bill -- the United States Attorney may withhold his signature from an "indictment" and thus legitimately prevent the return of the indictment. See United States v. Cox, supra; In Re Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970); Rule 7(c), Fed. R. Crim. P.; Super. Ct. Crim. R. 7(c), 48(a)(1).

e. A court cannot prevent the United States Attorney from representing a case to another grand jury, even on the basis of hearsay testimony in some cases.

(1) When, because of a defect in the indictment or discovery of additional information, a case is presented for reindictment before a grand jury different from the one which returned the original indictment, no witnesses need appear and the reindictment may be based solely on the transcripts from the previous grand jury presentation. United States v. Wagoner, 313 A.2d 710 (D.C. Ct. App. 1974), petition for rehearing en banc denied, D.C. App. No. 7192, June 7, 1974.

(2) A different and infrequent situation is presented when a grand jury votes not to indict a case which the office considers should be indicted and therefore re-presents the case to another grand jury. There is no question that this can be done. United States v. Thompson, 251 U.S. 407 (1920); Ex parte United States, 287 U.S. 241 (1932); United States v. Kysar, 459 F.2d 422 (10th Cir. 1972); United States v. Vaughn, 255 A. 2d 483 (D.C. Ct. App. 1969); United States v. Kennedy, 220 A. 2d 322 (D.C. Ct. App. 1966). But in such cases, the Wagoner procedure is not to control, that is, ordinarily the case will be presented through live witnesses. See United States Attorney's Memorandum of June 19, 1974.

f. Return of an "ignoramus" - When 12 grand jurors do not concur in finding an indictment, the foreman is required to report this fact to the court forthwith in cases of defendants detained or released on conditions. Super. Ct. Crim. R. 6(f); Fed. R. Crim. P. 6(f). The grand jury section files daily notices of dismissal in cases that are ignored; and ignoramuses are also reported on the indictment return sheets.

B. Conduct Within the Grand Jury

1. Grand jury reporters should be instructed to record only evidence presented to the grand jury i.e., tesitmony of witnesses, introduction of documents, records, and exhibits.

a. Communications between the Assistant United States Attorney and the grand jury are not recorded. However, these off the record remarks are not to be made when a witness is in the room. If it becomes necessary for the Assistant United States Attorney to have a discussion with the grand jury, the witness must be temporarily excused.

b. Inquiries of witnesses, off the record, are to be avoided. Durant v. United States, 292 A. 2d 157 (D.C. Ct. App. 1972).

c. There is no requirement that grand jury proceedings be recorded. Durant v. United States, supra, 292 A. 2d at 159. Fed. R. Crim. P. 6(d), (e); Super. Ct. Crim. R. 6ldC, (e). But courts disfavor nonrecordation, and if defendant moves for recordation, some circuits place heavy burden on Government to show legitimate interest for nonrecordation. See, e.g., United States v. Price, 474 F. 2d 1223 (9th Cir. 1973).

d. The Jencks Act (18 U.S.C. § 3500 (e)(3) makes grand jury testimony of Government witnesses discoverable if that witness testifies at trial.

2. Secrecy requirement - Fed. R. Crim. P. 6(e); Super. Ct. Crim. R. 6(e).

a. Disclosure of proceedings before the grand jury, with the exception of deliberations and voting, may be made to the prosecutors who may use the information in the exercise of their official duties.

(1) No other disclosure may be made by those present except under order from a court of the District of Columbia.

(2) In some cases the court may order an indictment sealed and prevent the disclosure of its existence until the accused has appeared in court for the purposes of bond.

b. Proscription against unauthorized persons. Fed. R. Crim. P. 6(d) and Super. Ct. Crim. R. 6 (d) provide that, other than the grand jurors, only the prosecutor, the witness being examined, the reporter, and an interpreter, when needed, may be present in the grand jury room. During deliberation and voting, only members of the grand jury may be present. See United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953); United States v. Hector, 290 A. 2d 504 (D.C. Ct. App. 1972).

(1) When prisoners testify before the grand jury, a Marshal may not be present.

(2) Interpreters - See United States v. Hector, supra.

3. Sufficiency of evidence before a grand jury

a. Hearsay evidence is clearly admissible. Costello v. United States, 350 U.S. 359 (1956); United States v. Wagoner, supra.

b. Courts will rarely, if ever, look behind an indictment returned by a duly constituted grand jury on grounds of sufficiency of evidence presented. See Costello v. United States, supra; Lawn v. United States, 355 U.S. 339 (1958). However, care should be taken to present some evidence on each element of the offense.

4. Considerations as to presentation of hearsay and direct testimony.

a. Availability of witnesses.

b. Desire to commit certain witnesses to their testimony prior to trial.

c. Technique of calling certain adverse witnesses to commit them to their story.

Very often people who are friends of the defendant, or minimally involved due to their presence at the scene of the crime will appear at trial as defense witnesses. An appearance at the grand jury will commit them to a firm position well before trial.

d. Avoid presenting cumulative testimony; this only opens the door for conflicting statements on the record.

5. Awareness of Jencks Act problems

a. Correlation between police department forms, grand jury statement and grand jury testimony -- correcting discrepancies at this early stage.

b. Keep inquiries short and to the point and avoid unwitting inconsistencies and exploration into tangential matters such as legality of arrest, search, etc. A witness before the grand jury has no right to challenge evidence on the grounds of unlawful seizure. United States v. Calandra, __U.S.__, 94 S. Ct. 613 (1974).

c. Importance of preservation of grand jury minutes. United States v. Angenblick, 393 U.S. 348 (1969); United States v. Perry, 153 U.S. App. D.C. 89, 471 F. 2d 1057 (1972); United States v. Bryant, 142 U.S. App. D.C. 132, 439 F. 2d 642 (1971).

(1) No constitutional right to transcription to testimony.

(2) Where the testimony is recorded, the Jencks Act applies, and fault can be ascribed to the Government for failure to preserve the grand jury minutes. Such failure may be grounds for dismissal of the indictment. This error can be remedied, but it should be avoided in the first place. See United States v. Person, 155 U.S. App. D.C. 455, 478 F. 2d 659 (1973). Similarly, for causing some testimony to be given off the record. Durant v. United States, supra, 292 A. 2d at 159.

III. Rights of Persons Before the Grand Jury -- Grand Jury Subpoena Authority

A. Right to counsel - necessity of warning

1. If accused is subpoenaed to the grand jury, must appear although he has the right to invoke the Fifth Amendment.

a. Even though defense counsel assures you that the defendant will assert his Fifth Amendment right, sometimes a defendant will testify once in the grand jury.

b. In some cases involving police officers, white collar crimes, or prominent members of the community, a "lifeboat" letter may be sent to the subject of the investigation inviting him to tell his side of the story, if he so desires.

2. Necessity of giving adequate Fifth Amendment warning.

a. Inquire in cases where accused testifies voluntarily as to whether he has sought and obtained the advice of counsel.

b. Any person called before a grand jury who is a target of its investigation or a potential defendant should be so informed and advised of his rights under Miranda. He should also be advised that if during his testimony he wishes to consult with his counsel before answering a particular question, he may seek and obtain permission of the foreman to do so.

c. Absent extraordinary circumstances, an attorney should not be requested or required to corroborate in front of the grand jury the fact that he has advised his client of his Fifth Amendment rights.

d. Where the possibility of perjury exists, it is necessary to obtain clear responses, i.e., ambigous response or response in attempt to throw inquiry off track will not constitute perjury. See Bronston v. United States, 409 U.S. 352 (1973).

If perjury seems likely, advise the witness of the statutes concerning perjury and false declarations 18 U.S.C. §§ 1621, 1623.

3. Immunity procedures

a. Official immunity procedures -- See 18 U.S.C. §6001 et seq.

(1) Transactional immunity

(2) Use immunity - most preferable because it does not require the Government to abandon prosecution.

(3) Procedure - The Assistant must fill out the appropriate request form and submit it to the Justice Department in order to obtain the approval of the Assistant Attorney General in charge of the Criminal Division. With his letter, the Assistant must file a motion with the Chief Judge of the District Court for a grant of immunity, irrespective of whether the proceeding is in Superior Court or District Court. Note that once the Assistant Attorney General's approval has been obtained, the judge "shall" issue the immunity order. 18 U.S.C. §6003(a). Thus the signing of the order should be ex parte and need not even be on the record. The motion and order will be filed in a miscellaneous court file which can be sealed in appropriate cases.

b. Unofficial immunity -- agreements of the United States Attorney -- three-step process:

(1) Initial discussion with counsel

(2) Off-the-record discussion with witness

(3) Setting perimeters of extent of immunity. Any agreement reached between the Government and defense counsel should be set forth in a letter to counsel, or if the agreement is oral it should be set out in a memorandum to the file so that it will be available if needed at a later date. Any agreement not to prosecute should be conditioned upon full and honest disclosure by the defendant.

c. In the case of unofficial immunity it should be made clear that an agreement not to prosecute binds only the United States Attorney for the District of Columbia, unless the United States Attorney from another jurisdiction waives his right to prosecute in writing.

d. It should also be noted that a plea arrangement entered into by an Assistant United States Attorney is binding on the Government even though the Assistant United States Attorney was not authorized to negotiate. Giglio v. United States, 405 U.S. 150 (1972).

e. It should be made clear to persons granted official or unofficial immunity that their immunity does not shield them from prosecution for perjury or false statement before the grand jury or at trial.

4. Right under statute that witness not be asked questions by grand jury based on information obtained by illegal wiretap. 18 U.S.C. §§ 2511(1), 2517(3).

   a. Statutory proscription discussed in In Re Evans, 146 U.S. App. D.C. 310, 452 F.2d 1239 (1971) and Gelbard v. United States, 408 U.S. 41 (1972).

   b. However, where Government asserts that wiretap was legal and has court order to show it, witness has no right to refuse to answer questions where "derivative use" immunity was granted. In re Persico, 491 F.2d 1156 (2d Cir. 1974). The Court in Persico distinguished Gelbard showing that in the latter case, the illegality of the wiretap was conceded; but in Persico, wiretapping will not be presumed illegal when there is a court order and therefore, the grand jury proceedings should not be interrupted for a suppression hearing.

5. Same right does not inhere respecting a question obtained through evidence in violation of Fourth and Fifth Amendments. See United States v. Blue, 384 U.S. 251 (1966). See also United States v. Calandra, __U.S.__, 94 S. Ct. 613 (1974).

   An indictment may even be returned based upon inadmissible evidence. However, office policy is that no indictment should be returned based substantially on evidence that is clearly inadmissible.

6. Subpoena power of grand jury.

   a. United States v. Dionisio, 410 U.S. 1 (1972); United States v. Mara, 410 U.S. 19 (1973).

      (1) Dionisio and Mara permit the grand jury to obtain by subpoena virtually all non-testimonial or non-communicative evidence without a violation of Fourth or Fifth Amendment rights.

         (a) Writing exemplars

         (b) Blood samples

         (c) Fingerprints

         (d) Voiceprints

         (e) Hair samples

         (f) Requirement to appear in a lineup.

See also United States v. Anderson, __U.S. App. D.C. __, 490 F.2d 785 (1974).

(2) The Dionisio court still retains Fourth Amendment "reasonableness" constraints to guard against a subpoena duces tecum too sweeping in its terms. United States v. Dionisio, supra, 410 at 770.

b. Procedure

(1) A witness (police officer) is called to give testimony relevant to the issuance of the subpoena, i.e., the facts forming the basis of the subpoena; then the grand jury votes on the request of the United States Attorney to command the person to do the acts requested.

(2) The subpoena is served on the individual and directs him to appear at a particular time and place and to produce the required materials.

(3) Upon refusal, the witness is taken before the Chief Judge who will order him to comply with the grand jury subpoena upon pain of contempt.

c. There is no necessity that the person be under arrest or that a matter be pending against him in grand jury, and as Dionisio points out, a witness' compulsory appearance before a grand jury is not the equivalent of a "seizure" and hence no Fourth Amendment objections can be made.

d. The Dionisio procedure is distinguishable from Davis v. Mississippi, 394 U.S. 721 (1969), where the defendant's seizure was obtained by means of a lawless "dragnet" detention that violated the Fourth Amendment -- not the taking of the fingerprints.

e. Remember that it is the grand jury, not the prosecutor, who has the power to subpoena. In Durbin v. United States, 94 U.S. App. D.C. 415, 221 F.2d 520, an Assistant U.S. Attorney caused subpoenas to issue for a witness on numerous occasions but never took him before the grand jury because he was not satisfied with the witness' statements. The Court admonished that the United States Attorney's Office is not a proper substitute

for the grand jury room and that the use of a grand jury subpoena is not "a compulsory administrative process of the United States Attorney's Office." Durbin v. United States, supra, 94 U.S. App. D.C. at 417, 221 F.2d at 522.

7. Subpoena Duces Tecum

a. Since subpoenas are issued by an Assistant United States Attorney on behalf of the grand jury, when subpoenas are issued in connection with investigations that are not yet ready for presentation to the grand jury, an entry should be made in the grand jury book concerning to whom the subpoena was issued, the date, and the person, the possible violation: when the documents are received, their receipt should also be noted in the book. If a case develops from the materials requested, further witnesses and entries will be made; if not, then the investigation can be closed out by another entry.

b. In cases requiring bank or telephone records, an accompanying letter may be sent requesting that the existence of the subpoena not be disclosed for ninety days so there will be no interference with the investigation. In the absence of such a letter to the telephone company, automatic notification will be given by the telephone company to the subscriber. For procedures and policy, see Department of Justice Memorandum No. 796 (Feb. 20, 1974.) Each grand jury section has appropriate sample letters to telephone companies and financial institutions.

8. Privilege question

a. General rule -- " 'The public . . . has a right to every man's evidence', except for those persons protected by a constitutional, common law, or statutory privilege." Branzburg v. Hayes, 408 U.S. 665, 689 (1972).

b. First Amendment privilege argument was rejected for newsmen in Branzburg v. Hayes, supra. However, the Department of Justice must approve any subpoena for newsmen or their materials.

c. A witness who voluntarily testifies before a grand jury without invoking the privilege against self-incrimination, of which he has been advised, waives the privilege and may not thereafter claim it when he is called to testify as a witness at trial. Ellis v. United States, 135 U.S. App. D.C. 35, 44-48. 416 F.2d 791, 800-804 (1969).

IV. Indictment draftsmanship and sufficiency. See Note, Indictment Sufficiency, 70 Colum. L. Rev. 876 (1970).

A. Form of Indictments

1. The indictment shall be a plain, concise, definite written statement of the essential facts constituting the offense charged. Super. Ct. Crim. R 7(c); Fed. R. Crim. P. 7(c).

2. The indictment must be signed by the prosecutor, Super. Ct. Crim. R. 7(c), and by the foreman of the grand jury. Super. Ct. Crim. R. 6(c). See also Fed. R. Crim. P. 6(c), 7(c).

Only the United States Attorney or certain designated Assistant United States Attorneys may sign indictments. Indictments returned by a grand jury are to be signed and reviewed by those designated persons and in accordance with the procedures outlined in the United States Attorney's memorandum of December 14, 1973.

3. Recital of official or customary citation of statute or rule, regulation or other provision of law which defendant is alleged to have violated.

4. Special statutory considerations of the D.C. Code concerning sufficiency of indictments.

a. In most cases, except forgery, where it is necessary to aver legal tender intended to pass as currency, it is sufficient to describe the item simply as money. 23 D.C. Code § 321.

b. In cases in which an intent to defraud is an element of the offense, it is sufficient to allege that the defendant acted with such intent without alleging an intent to defraud a particular person. 23 D.C. Code § 322.

c. When a defendant is charged with committing sodomy, the indictment is sufficient if it states that the defendant committed certain unnatural and perverted sex acts with a person or an animal without specifying the particular act. 23 D.C. Code §3502. On proper motion, however, the defendant is entitled to a bill of particulars. 23 D.C. Code §3502.

B. Joinder and Severance of Indictments

1. Two or more offenses, felonies or misdemeanors, may be charged in separate counts of the same indictment or information if they are of the same or similar character,

or if they are part of the same transaction, or if they are part of a common scheme or plan. 23 D.C. Code §311 (c); Super. Ct. Crim. R. 8(b); Fed. R. Crim. P. 8 (b).

3. The court may order two or more indictments and/or informations joined for trial if the offenses and the defendant or defendants could have been joined in a single indictment or information. 23 D.C. §312; Super. Ct. Crim. R. 13; Fed. R. Crim. P. 13.

   If, however, either the Government or the defendant is prejudiced by the joinder of defendants or offenses in an indictment or information, or by a joinder for trial (Rule 13, supra), the court may order an election, or separate trials for the prejudicial counts, or may grant a severance of defendants. 23 D.C. Code § 313; Super. Ct. Crim. R. 14; Fed. R. Crim. P. 14.

4. An indictment or information filed in District Court may contain both offenses prosecuted under the United States and the District of Columbia Codes, so long as they are otherwise properly joinable. 23 D.C. Code § 311(b); 11 D.C. Code § 502(3).

5. Judicial decisions

   a. The matters of joinder and severance are within the sound discretion of the trial court which should grant severance only when sound judicial judgment leads it to believe that one defendant cannot have a fair trial. Smith v. United States, 315 A.2d 163 (D.C. Ct. App. 1974).

   b. The trial court's ruling on these matters should be overruled on appeal only if there is a clear abuse of discretion. Hurt v. United States, 314 A.2d 489, (D.C. Ct. App. 1974).

C. Test for indictment sufficiency

1. There are two criteria for measuring the sufficiency of an indictment:

   a. Whether it sufficiently apprises the defendant of the charges against him so that he may adequately prepare his defense.

   b. Whether it describes the offense with which he is charged with sufficient specificity to protect against future jeopardy for the same offense or offenses.

Russell v. United States, 369 U.S. 749, 763-764 (1962); United States v. McBride, D.C. Cir. No. 72-1394, decided May 7, 1974, slip op. at 3-4; Gaither v. United States, 134 U.S. App. D.C. 154, 159, 413 F.2d 1061, 1066 (1969).

2. An indictment need not set out all the elements of an offense which the jury must find before it may convict. It is sufficient if the essential elements are necessarily implied. See Stapleton v. United States, 260 F.2d 415 (9th Cir. 1958); United States v. Jeffries, 45 F.R.D. 110 (D.D.C. 1968).

D. Variances and Amendments

1. A "variance" occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different, i.e., "varies," from those alleged in the indictment. Gaither v. United States, supra 134 U.S. App. D.C. at 164, 413 F.2d at 1071.

   a. A variance is bad because it deprives the defendant of notice of details of the charge against him and protection against reprosecution.

   b. A variance does not necessitate a dismissal of the indictment unless there is showing of prejudice. Gaither v. United States, supra 134 U.S. App. D.C. at 165, 413 F.2d at 1072.

   c. An indictment will be dismissed if it lacks a critical element of the crime charged. Jackson v. United States, 123 U.S. App. D.C. 276, 278, 359 F.2d 260, 262 (1966).

   d. A variance is fatal when there is substantial difference between what an indictment charges and what is proven at trial. Stirone v. United States, 361 U.S. 212 (1960) (defendant indicted for violating interstate commerce laws by importing materials into one state, but evidence at trial showing exportation of materials as proof of violation required reversal).

2. Amendment

   a. Amendment occurs when charging terms of indictment are altered literally or in effect by prosecutor or court after the grand jury has passed upon them. Gaither v. United States, supra, 134 U.S. App. D.C. at 164, 413 F.2d at 1071.

b. Bad to use amendment since it may deprive defendant of right to be tried on charges as found by grand jury.

c. Strict rule that amendments to indictment mean that the indictment is no longer the product of the grand jury, and hence are impermissible. Ex parte Bain 121 U.S. 1 (1887).

d. Courts have sometimes used the term "constructive amendment" which means that the variance at trial is so substantial as to amount to "amendment" and, hence, is impermissible. See Stirone v. United States, supra.

3. Technical errors and omissions

a. The precision and detail of the indictment or information formerly demanded are no longer required. Imperfections of form not prejudicial are disregarded and common sense prevails over technicalities. 1 C. Wright, Federal Practice and Procedure § 123 at 219-20 (1969); Fed. R. Crim. P. 7(c) (3).

b. Amendments to an indictment are permitted when the change concerns form rather than substance. Russell v. United States, 369 U.S. 749 (1962); United States v. Fawcett, 115 F. 2d 764 (3d Cir. 1940); United States v. Campbell, 235 F. Supp. 94 (E.D. Tenn. 1964).

c. Permissible Amendments - matters of form

(1) Correct misnomer

(2) Cure typographical error e.g., where date of alleged crime amended by changing 1967 to 1966 since defendant not misled nor any substantive right affected. United States v. Stapleton, 271 F. Supp. 59 (D.C. Tenn. 1967).

(3) It is permissible to amend an indictment to correct a person's name since name is considered a matter of form. United States v. Owens, 334 F. Supp. 1030, 1031 (D. Minn. 1971).

d. Impermissible Amendments

(1) Omission of year prevented indictment from charging offense within statute of limitations. United States v. Gammill, 421 F. 2d 185 (10th Cir. 1970).

(2) Insertion of comma in corporate defendant's name which had effect of substituting a 1951 corporation for a dissolved 1941 corporation was impermissible. United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2d Cir. 1961).

4. Compare Information with Indictment

a. United States Attorney may prosecute misdemeanors by information rather than indictment since no Constitutional right to indictment for misdemeanors.

b. Information is a charge by a United States Attorney rather than grand jury and therefore prosecutor is free to amend information at anytime in either form of substance, so long as no additional or different offense is charged. Fed. R. Crim. P. 7(e); 1 C Wright Federal Practice and Procedure § 128 at 279 (1969).

E. Use of indictment forms

1. Increased efficiency -- routine cases

2. Constant re-evaluation of form to avoid sufficiency problems.

3. Allows for a certain amount of consistency.

F. Desirability of re-indicting in lieu of working with erroneous indictment.

Ease with which case can be re-indicted -- rereading the testimony presented to a previous grand jury is permitted. United States v. Wagoner, 313 A. 2d 719 (D. C. Ct. App. 1974), petition for rehearing en banc denied, D. C. Ct. App. No. 7[illegible], June 7, 1974. After the testimony is read the Assistant United States Attorney should ask on the record whether any additional testimony is requested. Be sure a negative reply is recorded. See United States Attorney's Memorandum of June 19, 1974.

G. "Overindicting" vs. "underindicting" -- relationship to plea bargaining.

1. It is a violation of office policy to charge an offense for which insufficient evidence was presented before the grand jury.

2. Advisability of presenting alternative theories of offense, e.g., larceny act: charge, larceny, embezzlement; receiving stolen property, on appropriate facts, 23 D. C. Code § 314; unauthorized use of motor vehicle, grand larceny; forgery and uttering.

3. Awareness of affording trial Assistant latitude in plea bargaining.

V. Role of Prosecutor in Grand Jury Section

A. Importance of "buck stops here" attitude

1. Critical evaluation of the case at the indictment level. Before an indictment is returned all relevant evidence should be in the jacket to help the trial Assistant.

2. Role of form 900's in District Court.

3. Questions relating to presentment of case to grand jury.

4. Dismissal before indictment may be indicated in cases where the complainant's story is shaky, e.g., intra-family assault case.

5. Be on the lookout for difficult search and seizure or Miranda problems.

6. Question of when to indict or obtain additional information. Once an indictment is returned, the grand jury's duty is completed and it may not be used merely to gather additional evidence or "lock-in" testimony. Indeed, it has been held improper to use a grand jury for the sole dominant purpose of preparing an already indicted case for trial. United States v. George, 444 F.2d 310, 314 (6th Cir. 1971); United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964); In Re National Window Glass Workers, 287 F. 219, 226-227 (N.D. Ohio 1922); See United States v. Doe, 455 F.2d 1270 (1st Cir. 1972). However, if a new offense is involved, a new investigation is appropriate.

B. Prosecutor -- guide or ruler of grand jury?

1. Control of grand jury. The grand jury should be very familiar with its function of finding probable cause.

2. Phenomenon of "runaway" grand jury.

3. "Rubber stamp" grand jury.

4. Technique of eliciting assistance of grand jury in difficult cases, i.e., conscience of the community.

C. Preparation of grand jury for hearing of evidence in cases

1. Outline to grand jury what evidence they will hear.

2. Particular importance of outline in complicated cases.

3. Make sure the grand jurors know the elements of the offense you are asking them to indict, and outline the charges.

D. Role of the prosecutor in grand jury section in plea bargaining. Advantage of taking pre-indictment felony plea, or disposing of case as misdemeanor if there are too many problems with the felony case.

VI. Miscellaneous

A. Interstate agreement on detainers

24 D.C. Code § 701 et seq. is an interstate compact relating to persons in other jurisdictions under detainer emanating from the District of Columbia.

1. Rights of prisoners in other jurisdictions to be brought to answer to indictment in the District of Columbia -- right to be tried on all indictments within 120 days.

2. Obligations of prosecuting authority, upon request that the prisoner be brought to the District of Columbia to be tried, to try a prisoner on all outstanding indictments within 120 days.

3. Right of prisoners to resist being brought to jurisdiction.

VII. Reading List

Frisbie v. United States, 157 U.S. 160 (1895)

Hale v. Henkel, 201 U.S. 43 (1906)

Blair v. United States, 250 U.S. 273 (1919)

United States v. Thompson, 251 U.S. 407 (1920)

Costello v. United States, 350 U.S. 359 (1956)

Brown v. United States, 359 U.S. 41 (1959)

Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964)

Coleman v. Alabama, 399 U.S. 1 (1970)

Kastigar v. United States, 406 U.S. 441 (1972)

Gelbard v. United States, 408 U.S. 41 (1972)

Branzburg v. Hayes, 408 U.S. 665 (1972)

United States v. Dionisio, 410 U.S. 1 (1973)

United States v. Mara, 410 U.S. 19 (1973)

Gaither v. United States, 134 U.S. App. D.C. 154, 413 F. 2d 1061 (1969)

United States v. Durbin, 94 U.S. App. D.C. 415, 221 F.2d 520 (1954)

United States v. King, 157 U.S. App. D.C. 179, 482 F.2d 768 (1973)

United States v. Wagoner, 313 A.2d 719 (D.C. Ct. App. 1974), petition for rehearing en banc denied, D.C. App. No. 7192, June 7, 1974.

Durant v. United States, 292 A.2d 157 (D.C. Ct. App. 1972).

Coleman v. Burnett, ___ U.S. App. D.C. ___, 477 F.2d 276 (1972)

United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965)

Wiltsey v. United States, 222 F.2d 600 (4th Cir. 1955)

In Re Egan, 450 F.2d 199 (3d Cir. 1971)

Charge to the Grand Jury, 12 F.R.D. 495 (N.D. Calif. 1952)

Charge to the Grand Jury, 30 Fed. Cas. 992, No. 18, 255 (C.C.C. Calif. 1872)

8 J.W. Moore, Federal Practice ¶¶ 6.01-6.07 (Cipes Ed.1973)

1 L. Orfield, Criminal Procedure Under the Federal Rules 331-527 (1966)

Orfield, The Federal Grand Jury, 22 F.R.D. 343 (1959)

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 930, 18 U.S.C. §§ 6001-6005 (1970)

ADVANCED PROSECUTOR TRAINING

I.C: TACTICS IN EXCLUSIONARY HEARINGS: CONFESSIONS

Richard A. Hibey

TACTICS IN EXCLUSIONARY HEARINGS: CONFESSIONS

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TACTICS IN EXCLUSIONARY HEARINGS: CONFESSIONS

This outline is intended only to cover the strategy and tactics to be used in confession suppression hearings. The law concerning confessions is set forth in the Prosecutor's Training Manual: Topic I.H. It is intended that this outline be used in conjunction with that topic outline.

I. Basic Considerations

A. Use of Confession in Plea Negotiations

B. Admissibility: Confessions Admissible Unless:

1. Involuntary

2. Obtained in violation of non-waived Fifth Amendment right against self-incrimination or Sixth Amendment right to counsel.

3. Obtained after unnecessary delay between arrest and presentment

4. Made during pretrial hearing of motion to suppress evidence on Fourth Amendment grounds

5. Made in court during a subsequently withdrawn plea of guilty

6. Obtained as the result of an illegal arrest or other illegal police activity

C. Use of Confessions for Impeachment

If not admissible in evidence, confession still usable to impeach defendant if voluntarily made. Harris v. New York 401 U.S. 22 (1971).

D. Need for Pre-trial Resolution of Admissibility Issue

1. Government's case: Resolve voluntariness, Miranda, Mallory, Massiah, Simmons, Kercheval and Wong Sun issues

2. Impeachment: Resolve voluntariness issue

3. Government's right to appeal: 23 D.C. Code § 104; 18 U.S. Code § 3731

II. Historical Considerations Ancillary to a Discussion of Confession Suppression

A. Involuntariness and Fundamentally Unfair Police Conduct

1. Untrustworthiness and unreliability of the statement

2. Unlawful police conduct as affecting fundamental fairness

Suppression as a device for removal of incentive to act improperly; unreliability of statement becomes irrelevant

B. Unlawful Police Conduct - Mallory Rule and Supervisory Power of the Supreme Court - 18 U.S.C § 3501

C. Right to Counsel - Miranda Rule - prophylactic application and effect

D. Practical Result

1. Reversal of the historical tide - Shift in analysis and emphasis

2. Miranda and the legitimization of the Interrogation Process

III. Procedural Approaches to Determinations of Admissibility

A. Motions

1. Pretrial motions

2. Motions during trial

3. Impact on discovery, witness' trial testimony and on defendant's testimony

B. Voluntariness - unlawful police conduct - Jackson v. Denno, 378 (1964); Lego v. Twomey, 404 U.S. 477 (1972)

1. Burden of going forward on defendant to show:

a. Confession made

b. By coercion or coercive techniques

2. Burden of persuasion on Government to show voluntariness by a preponderance of the evidence, not beyond a reasonable doubt, United States v. Bernett, D.C. Cir. No. 71-1465, decided January 10, 1974, slip op. at 38 n. 141, which noted that Lego v. Twomey, supra, overruled, Pea v. United States, 130 U.S. App. D.C. 66, 397 F.2d 627 (1968) (en banc); see also Hawkins v. United States, 304 A.2d 279 (D.C. Ct. App. 1973). Thus the only applicable jury instruction, to be applied in both trial courts in the District of Columbia, is No. 2.46, Alternative B.

3. See Pros. Trg. Manual: Topic I.H, § II.

C. Mallory Rule

1. Burden of going forward on defendant to show:

a. He was arrested

b. There was delay following arrest

c. The delay was unreasonable

d. Statements were made during delay

2. Burden of persuasion on Government to show delay was not unnecessary, or no delay.

D. Miranda Rule

1. Burden of going forward on defendant to show:

a. Uncounselled statements taken from accused

b. During period of custodial interrogation

2. Burden of persuasion on Government to show adequate warnings and waiver of rights.

IV. Tactical Considerations

A. Voluntariness - Test

1. Investigation to determine existence of all statements of defendant - oral or written.

a. Interview all officers and witnesses

b. Recover and read all reports of the case

c. Photos of accused at time of arrest and jail

2. Time, place and circumstances of each statement

a. Time - in relation to arrest and duration of interview, general chronology of events

b. Place - physical surroundings of interrogation

c. Circumstances - capacity of accused to resist interrogation - infra, A. 3.

d. Technique of interview employed by police - infra A. 4.

3. Capacity of accused to resist as measured in the totality of the circumstances by:

a. Absence of physical brutality

b. No threats of physical abuse

c. No police activity which arouses apprehension

(1) No incommunicado detention

(2) No shuttling to different jails

(3) No stripping defendant of his clothing

(4) No threats against defendant or reprisal against family or friends

d. Interrogation statement was brief

(1) Number of interrogators

(2) Time spent in questioning

(3) General structure of the interrogation

e. No weakening of defendant's will to resist or psychological duress

(1) No denial of food, sleep

(2) Conveniences of hygiene

(3) No use of drugs or denial of medication

f. No promises or inducements, such as

(1) Talking to Assistant United States Attorney regarding favored treatment

(2) Dismissal of charges

(3) Lower bail

(4) Probation or light sentence

N.B. Number and times promises, if any were made; emotional state of accused; misrepresentations of police see Frazier v. Cupp, 394 U.S. 73, (1969)

g. Police use of family or friends

(1) No psychological tricks

(2) Absence of attempt to establish false friendships

(3) No emotionally distressing encounters with family and friends

(4) Parents present at time of confession

(5) Presence of attorney or defendant given opportunity to call attorney

h. Mental condition of defendant

(1) Age, maturity, education, intelligence. N.B. - Truthfulness alone is not a bar to effective waiver

(2) Previous experience with police interrogation

(3) Lack of mental illness

i. Physical condition of defendant, consider:

(1) Defendant not drunk, addict, ill or in pain

(2) If ill, defendant given needed medical treatment

4. Technique of interview used by police

The following tactics and techniques, taken from F. Inbau, Criminal Interrogations and Confessions (1967), are included here to make Assistants aware of the tactics sometimes used by the police in interrogating suspects. Assistants should consider how the techniques used may affect the impression conveyed to the judge and jury regarding the circumstances surrounding the statement given. Some of these techniques may also prove useful in cross-examining the defendant in court.

Tactics and Techniques Sometimes Used by Police for Interrogation of Suspects Whose Guilt Police Believe is Definite or Reasonably Certain

a. Display an air of confidence in the subject's guilt

b. Point out some, but by no means all, of the circumstantial evidence indicative of a subject's guilt

c. Call attention to the subject's physiological and psychological symptoms of guilt

d. Sympathize with the subject by telling him that anyone else under similar conditions or circumstances might have done the same thing

e. Reduce the subject's guilt feelings by minimizing the moral seriousness of the offense

f. Suggest a less revolting and more morally acceptable motivation or reason for the offense than that which is known or presumed

g. Sympathize with the subject by (1) condemning his victim, (2) condemning his accomplice, or (3) condemning anyone else upon whom some degree of moral responsibility might conceivably be placed for the commission of the crime in question.

h. Utilize displays of understanding and sympathy in urging the subject to tell the truth

i. Point out the possibility of exaggeration on the part of the accuser or victim or exaggerate the nature and seriousness of the offense itself

j. Have the subject place himself at the scene of the crime or in some sort of contact with the victim or the occurrence

l. Appeal to the subject's pride by well-selected flattery or by a challenge to his honor

m. Point out the futility of resistance to telling the truth

n. Point out to the subject the grave consequences and futility of a continuation of his criminal behavior

o. Rather than seek a general admission of guilt, first ask the subject a question as to some detail of the offense, or inquire as to the reason for its commission

p. When co-offenders are being interrogated and the previously described techniques have been ineffective, "play one against the other"

Tactics and Techniques Sometimes Used by Police For Interrogation of Suspects Whose Guilt is Uncertain

q. Ask the subject if he knows why he is being questioned

r. Ask the subject to relate all he knows about the occurrence, the victim, and possible suspects

s. Obtain from the subject detailed information about his activities before, at the time of, and after the occurrence in question

t. Where certain facts suggestive of the subject's guilt are known, ask him about them rather casually and as though the real facts were not already known

u. At various intervals ask the subject certain pertinent questions in a manner which implies that the correct answers are already known

v. Refer to some non-existing incriminating evidence to determine whether the subject will attempt to explain it away; if he does, that fact is suggestive of his guilt

w. Ask the subject whether he ever "thought" about committing the offense in question or one similar to it

x. In theft cases, if a suspect offers to make restitution, that fact is indicative of guilt

y. Ask the subject whether he is willing to take a lie-detector test. The innocent person will almost always steadfastly agree to take practically any test to prove his innocence, whereas the guilty person is more prone to refuse to take the test or to find excuses for not taking it, or for backing out of his commitment to take it

z. A subject who tells the interrogator, "all right, I'll tell you what you want, but I didn't do it", is in all probability guilty

5. Practical considerations of a motion to suppress confession on grounds of involuntariness

a. Defendant must be a witness in the ordinary case

b. As a practical matter, to be believed he must be corroborated

c. Police officers who are witnesses will not have been interviewed by defendant's counsel before-hand

d. Police officer's testimony must be tested against documentation and "disinterested third parties" in the case

e. Cross-examination of defendant must include questions concerning:

(1) An in-court admission that he committed the crime. This is admissible for impeachment at trial if defendant testifies. Harris v. New York, 401 U.S. 222 (1971). But cf. Rule 104(d), Proposed Federal Rules of Evidence.

(2) His confession to the police being truthful (as evidencing his ability to recall with specificity his actions at the time)

(3) Chronology of events

(a) Time and date of crime

(b) Time and date of arrest

(c) Identification of arresting officers

(d) Advice of rights given

(e) Meaning of the admonition of rights

- why was it misunderstood?

- previous experience with police

- prior criminal convictions

(f) Time of confession, place

- oral, written, dictated

(4) Lack of elements of coercion

(5) Absence of witnesses and evidence that would corroborate his version

f. Where a defendant calls police officer as his witness, prosecutor has right of cross-examination and therefore may lead the witness. Examination should include:

(1) Chronology of events

(2) Time and date of crime

(3) Initiation of investigation

(4) Time and date of arrest

(5) Circumstances - advice of rights - how given, when where

(6) Measure of his understanding - absence of drugs and alcohol, evidence of competency

(7) Indication of voluntariness - assert the negative of any proposition supporting coercion

(8) Corroborative evidence - records taken during processing

g. Voluntariness can no longer be separated from the waiver doctrine because many of the same factors which show absence of voluntariness also demonstrate absence of valid waiver.

h. Delay in presentment does not establish involuntariness per se

6. Problems peculiar to voluntariness hearing

a. Defendant as a witness

(1) Important to get as much detail as possible from him regarding circumstances of confession

(2) Ability to recall with great specificity has a bearing on question of his being overborne

(3) If his written signed confession is not in his own words, an explanation of whose words they are and how they were subscribed by defendant is critical

(4) Defendant's familiarity with criminal justice system from prior involvement

b. Time

The greater the length of time between arrest and presentment the greater the possibility of coercion. Alston v. United States, 121 U.S. App. D.C. 66, 348 F.2d 72 (1965), a Mallory Rule case, speaks of the "inherently coercive" atmosphere of a police station (a five minute delay between arrest and presentment was unnecessary under Mallory)

c. Physical evidence of coercion - Precise details of physical injuries must be known and documented

d. Relationships between accused and others who became involved in process which results in a confession

e. Purpose of the police in interrogating the accused

Impact of Miranda on this purpose. After the warning is given, an accused may be asked if he wishes to waive his rights and make a statement. Previously the purpose of securing a statement had to be read in terms of sinister police conduct bearing on voluntariness or unfair behavior. Miranda legitimizes the effort to get a statement.

B. Unnecessary Delay in Presentment: Rule 5, Mallory, 18 U.S.C. § 3501

1. Investigation to determine chronology of events

a. Implications of the time factor could control outcome of the motion to suppress

b. Arrest - activity which ensued - presentment

2. Statements made during period of necessary delay

a. Effort to solve crime

b. Processing

c. Lineups

d. Thrust of this "defense" is that each moment of time, which must be accounted for, must have been filled with reasonable activity not designed to create a delay for the purpose of getting defendant to confess

3. Threshold admissions

If an incriminatory statement is made before or shortly after arrest and in a time normally consumed for administration and processing, the statement is admissible regardless of how much delay ensues before the accused in presented, i.e., after the statement is made.

4. Noteworthy features of motion to suppress a confession on Mallory grounds

a. Elements of coercion focus not on the overbearing of defendant's will but the "inherently coercive" atmosphere attendant to an arrest and incarceration

b. Where delay fails to have any legitimacy then the coercive factor is emphasized. Thus, "institutional coercion"- a refinement of the coercion that can render a confession involuntary - could cause the suppression of a voluntary confession

c. When there is intelligent waiver of the rights to counsel and to remain silent, and the accused voluntarily submits to interrogation, the aim of the Mallory Rule, to insure that suspects are advised of their rights and to prevent the coercion inherent in custodial isolation, is accomplished

d. Advice by a police officer of defendant's Miranda rights can take the place of magistrate doing the same thing

e. Derivative evidence - Fruit of the poisonous tree doctrine applies to Mallory cases

5. Problems Peculiar to Mallory Hearing

a. Defendant need not be a witness in order to sustain his prima facie showing

b. Documents will easily establish the period of delay, i.e., where the arrest occurred; how long the delay which ensued

c. Accuracy of records - conflict of handwritten time notations with automatic time devices

d. Locating all officers involved in the action - impact on setting times. This is especially true where an investigation of crime, in presence of defendant, takes place before he is arrested.

e. Coping with the defense's examination of officers designed to eliminate all justifiable reasons for delay. Importance of preparing the witness for this line of examination.

C. Miranda Rule

Statement of the rule -

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 effectuation of these rights, provided the waiver is voluntary, knowing and intelligent. Whether the warning need be given at all and the effectiveness of the warning, if given, are measured by determination of all the facts and circumstances surrounding it.

1. Investigation to determine existence of all statements of defendant - oral or written

   a. Interview all officers and witnesses

   b. Read all reports of the case

   c. Time and place and circumstances of each statement

2. Custodial interrogation - focus on the accused - determining custody. Factors to be considered include:

   a. Place of interrogation

      (1) Police station

      (2) Police vehicles

      (3) Penitentiary

      (4) Suspect's home, place of business

      (5) Familiarity of location to defendant

      (6) Lack of isolation from outside world v. "police dominated atmosphere"

      (7) Hospital setting

(8) Traffic stop - "relative routineness of the police inquiry" (suspicious circumstances)

(9) General on-the-scene investigation

b. Time of interrogation

c. Persons present at the interrogation

(1) Defendant's relatives, friends and uniformed police

(2) Impact of this on voluntariness issue

d. Indicia of arrest - deprivation of defendant's freedom of action in any significant way

(1) Physical control over person: no longer free to go - subjective opinion of officer that he would not let defendant go, or that he had enough evidence to arrest defendant

(2) Objective factors: absence of printing and mugging and other arrest procedures

(3) Lack of search of person

(4) Flat statement to defendant that he is under arrest

(5) Defendant not a suspect at time of questioning

e. Length and form of questions

(1) Relative routineness of police inquiry evidencing lack of focus

(2) Brevity v. length - who are you, where live, what are you doing, is car yours, what happened to him?

f. Defendant summons police and thus initiates interviews.

g. Lack of arrest after interview

h. Statements constituting crime and statements to an undercover agent

i. Statement after traffic stop-relative routineness of the police inquiry.

j. Elements of custody

(1) Does the nature of traffic offense in the case give rise to accusatory setting?

(2) Are questions accusatory as to some other specific crime?

(3) Are questions merely general?

(4) Has an investigation on the scene focused on the person as to a specific crime?

(5) Stop and frisk procedure - Terry type brevity and neutrality of questions search turns up incriminating evidence; custody sets in

3. Interrogation

a. Volunteered statements

Ones that are not made in response to questioning by any officer

b. Threshold and clarifying questions

I did it - did what? - killed her

c. Routine questions and booking procedures

Statements during form filing process see Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283 (1964); Proctor v. United States, 131 U.S. App. D.C. 241, 404 F.2d 819 (1968); Harris v. New York, 401 U.S. 222 (1971).

d. Spontaneous questions eliciting unexpected incriminating answers

e. Emergency questions - protection of self or others

f. Confrontation of accused with evidence against him

(1) Purpose of police in so doing

(2) Is the confrontation a form of interrogation designed to elicit an incriminating response? See Frazier v. Cupp, 394 U.S. 731 (1969)

g. Statements in response to statement by others (purpose of police - in nature of confrontation or was the statement volunteered?)

h. Conversations between defendant and others which are overheard by police do not constitute interrogation. Similarly, questions asked by persons other than law enforcement officers, if not acting as agents for such officers, do not constitute interrogation.

4. Adequacy of warnings

   a. Number of warnings

   b. Display of PD 47

   c. Signing of PD 47; answers to questions in defendant's own handwriting

   d. Substance of warning specifically stated in the record "rights card"

   e. Clarity - deliberately not perfunctorily given

   f. Timing at the very beginning of the interrogation

   g. Corroboration not required where there is a contradiction

   h. Cure of a defective warning - new warning

5. Waiver

   The Government's burden of persuasion - voluntary relinquishment of a known right. Knowing and intelligent waiver of the privilege against self incrimination and right to counsel.

   a. Incorporates elements of non-coercion developed in cases concerning voluntariness and lawfulness of police conduct

   b. Incorporates elements of the propriety and efficiency of police activity as developed in the Mallory line of cases

   c. Keys on fundamental concepts of communication - did the police clearly and unequivocally make their warnings and did the defendant understand them and responsibily articulate his desire to talk without his lawyer present?

6. Practical considerations of a Miranda hearing

   a. Questioning initiated after the arrest

      (1) If custody firmly established, Miranda rights strictly enforceable

      (2) Burden of proving waiver must be met

   b. Factors demonstrating adequate waiver:

      (1) Defendant signed written waiver of rights.

      (2) Defendant verbally acknowledged that he understood his rights and was willing to speak.

(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 warning.)

(4) Defendant's wealth precluded need for warning as to right to appointed counsel.

(5) Defendant had previously been arrested and warned of rights.

(6) Counsel was present at time of statement.

(7) Defendant was not under influence of drugs or alcohol at time of waiver.

(8) Defendant signed or initialed more than one copy of statement.

c. Questioning before arrest but after "focus" is on the accused

(1) Whether defendant was deprived of his freedon in any significant way

(2) Whether situations evidence relative routineness of of inquiry, inherently coercive or unfriendly atmosphere. The operation of a police interrogation procedure

(3) In order to establish (c), it is important to know what was on the officer's mind or in his knowledge at the time of the questioning

d. Questioning begins before arrest or focus

(1) Turns on when the arrest occurred or when the focus was on defendant

(2) What was the knowledge and intent of the officer at the time of initiation of the questioning and during each phase of it?

e. Determining custody or focus

(1) Conflicting testimony of officers

(2) Ambiguity or inconclusiveness of documentary evidence

(3) Imprecision in narration of detail of conversations between police and defendant on which the issue turns

f. Interrelationship of voluntariness and Mallory concepts with the Miranda Rule.

D. Confessions of Codefendants: The Bruton Problem

1. 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).

2. 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) (but see Hamilton v. United States), 139 U.S. App. D.C. 368, 433 F.2d 526 (1970) even if the codefendant denies making the statement and therefore cannot be cross-examined effectively. Nelson v. O'Neill, 402 U.S. 622 (1970).

3. Where the codefendant's confession makes no reference to the defendant or such references are deleted, it may be admissible. Calloway v. United States, 130 U.S. App. D.C. 273, 399 F.2d 1006 (1968).

4. Bruton may not apply where a codefendant's statement implicating the defendant is admissible against the defendant as an exception to the hearsay rule.

   Co-conspirator exception to the hearsay rule. See Dutton v. Evans, 400 U.S. 74 (1970).

5. If you are faced with a Bruton problem, consider:

   a. Not using the confession of one of multiple defendants.

   b. Moving for a severance of defendants.

   c. Submitting confession for admission in evidence for joint trial, deleting all references to codefendants.

   d. Having officer to whom confession was made testify as to what he was told, omitting references to codefendants.

   e. Whether codefendant's confession might be admissible under a limited admissibility theory. See Miller v. Cox, 457 F.2d 700 (4th Cir. 1972) (codefendant's statement admissible to show defendant's silence as an admission against interest); Harris v. New York, 401 U.S. 222 (1971) (impeachment).

ADVANCED PROSECUTOR TRAINING

I.D: TACTICS IN EXCLUSIONARY HEARINGS: SEARCH AND SEIZURE

Richard A. Hibey

This outline is intended to cover only the strategy and tactics involved in a search and seizure suppression hearing. The law concerning arrest, search and seizure is set forth in the Prosecutor's Training Manual: Topic I. D. It is intended that this outline be used in conjunction with that topic outline.

I. Historical Considerations

A. Federal Rule

The Supreme Court has long endorsed the suppression of evidence taken by the police in violation of the Fourth Amendment and related Federal statutes. Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914). Through the years the Supreme Court became increasingly aware of the existence of unlawful police conduct which had a direct bearing on the Constitutional rights of the citizen.

B. State Rule

In 1949, Wolf v. Colorado, 338 U.S. 25 (1949) seemed to recognize the fact that fundamental constitutional rights were being violated by state police. Yet the court's respect for the concept of federalism resulted in its refusal to sanction such activity by the states.

In 1961, Mapp v. Ohio, 367 U.S. 643 (1961) applied the Fourth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.

C. Result and Rationale

Both history and the rationale for the exclusionary rule in the Fourth Amendment situation -- to remove the incentive to violate constitutional rights by preventing the use of fruits thereof (see Elkins v. United States, 364 U.S. 206 (1960)) constitute the judicial realization that such violations of law are widespread and not to be tolerated.

D. Reasonableness Analysis

The touchstone of every court decision analyzing search and seizure questions is reasonableness. This should be the underlying theme of any proof.

II. Procedural Approach to Determination of Admissibility

A. Standing

1. Aggrieved person - Rule 41(e), F.R. Crim. P.; SCR Rule 41(g)

2. Umbrella theory - McDonald v. United States, 355 U.S. 451 (1948)

3. Elimination of the proprietary interest concept - Cecil Jones v. United States, 362 U.S. 257 (1960) Cf. SCR Rule 41(g)

4. Expectation of privacy - Alderman v. United States, 394 U.S. 165 (1969) Katz v. United States, 389 U.S. 347 (1967)

5. Abandonment - Hester v. United States, 265 U.S. 57 (1924); Parman v. United States, 130 U.S. App. D.C. 188, 193-194, 399 F.2d 599, 564-565, cert. denied, 393 U.S. 858 (1968)

B. Burden of Proof - on the defendant to establish:

a. Lack of probable cause

b. Impermissible scope

c. Whether the burden of proof ever shifts to the Government once a prima facie showing has been made is open to question. Compare Rouse v. United States, 123 U.S. App. D.C. 348, 359 F.2d 1017 (1966) and Smith v. United States, 122 U.S. App. D.C. 339 342 n. 7 353 F.2d 877, 880 n. 7 (1965).

C. Motion

1. Pretrial

a. Impact on discovery

b. Impact on witnesses

c. Impact on defendant's testimony

2. Motions must be timely filed and may not be renewed at trial. Jenkins v. United States, 284 A.2d 460 (D.C. Ct. App. 1971). See Pros. Trg. Manual: Topic I.D.

III. Tactical Considerations

A. General

1. Since the burden of proof is on the defendant, the Government has the right to cross-examine each witness in support of the defendant's attempt to establish a prima facie case.

2. Defendant is bound by the answer of his witness unless there is an exceptional evidentiary circumstance.

3. Prosecutor therefore may establish proof through the use of leading questions of the witnesses defendant has called. These are, in the usual case, police officers. Any confusion can be cleared up very easily on cross-examination. The judicial reaction to this technique is generally displeasure.

4. After defendant has rested, the prosecutor should make a motion in the nature of a request for dismissal or judgment for the Government on the ground that the defendant has not sustained his burden of proof. If the motion is granted, the hearing is terminated with a minimum of discovery to the defendant and a limited number of witnesses, who will later be Government witnesses with testimony that is impeachable at trial. Also, the defendant might have testified, and such testimony has legitimate uses at trial for purposes of impeachment. If the motion is denied, he may then proceed with his affirmative case.

5. If the prosecutor's motion is denied and he proceeds to his own proof, an appellate court will review the entire record rather than be limited to evidence elicited only by the defendant is his case-in-chief.

6. The credibility of the police is a critical issue in every case. The sources of its testing include:

   a. Direct contradiction by defendant or other witnesses

   b. Testimony of disinterested third parties

   c. Inherent cogency of the officer's testimony weighed against the other facts and circumstances in evidence

   d. Records of radio runs

   e. Reports filed at the time of case

   f. Officer's experience and training on law enforcement

7. Hearsay is admissible in the hearing. United States v. Matlock, ___ U.S. ___, 94 S. Ct. 980 (1974).

B. Situational

1. Warrantless arrests and seizures

   a. When did the arrest occur?

      (1) What was in the mind of officer?

      (2) Was defendant free to go?

   b. Circumstances of the arrest

      (1) Suspicious behavior under Terry

      (2) Approach, confront and interrogate

      (3) Probable cause - Brinegar v. United States, 338 U.S. 160 (1949); Bell v. United States, 120 U.S. App. D.C. 383, 254 F.2d 82 (1958)

c. What was seized?

(1) Fruits

(2) Instrumentalities

(3) Weapons

(4) Contraband

(5) "Mere evidence"

d. Scope - where was it seized?

e. Circumstances of the seizure

(1) Plain view

(2) Abandonment

(3) Pat-down

(4) Search incident to a lawful arrest

2. Arrests with warrant

a. Is there probable cause? - To be construed from a reading of the four corners of the affidavit. See III. B. 5. infra.

b. Circumstances of execution of warrant as bearing on reasonableness and scope of a warrantless seizure. Cf. III. B. 1. d., e.

3. Search Warrants

a. Is there probable cause? - To be construed from a reading of the four corners of the affidavit. See III. B. 5. infra.

b. Circumstances of execution of warrant as bearing on the reasonableness and scope of a warrantless seizure. Cf. III. B. 1. d., e. 18 U.S.C. §3109; 23 D.C. Code §521 et seq. (Supp. IV 1971).

4. Scope of search and seizure

a. Persons - United States v. Robinson, 42 LW 4055 94 S. Ct. 467 (1973); Gustafson v. Florida, 94 S. Ct. 488 (1973).

b. Fixed premises

(1) Warrant requirement

(2) Chimel searches under Chimel v. California, 395 U.S. 752 (1969).

(3) 18 U.S.C. §3109: 23 D.C. Code §591 et seq. (Supp. IV 1971)

(4) Consent

(5) Plain view

c. Automobiles - Relaxation of warrant requirement where probable cause is established - Elimination of the contemporaneousness doctrine Chambers v. Maroney, 399 U.S. 42 (1970)

5. The Informant

a. Reliability establishing probable cause - sources of determination:

(1) Hearsay corroborated by personal observation of officer - Draper v. United States, 358 U.S. 307 (1959)

(2) "Underlying circumstances" of information which informant credited as reliable AND "underlying circumstances" which led the officer to credit his source. Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Ventresca, 380 U.S. 102 (1965); Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1973).

b. Nature of the proof of reliability

(1) Police officer - reasons and observations

(2) Warrant and affidavit

c. Identity - Where reliability of informant remains a serious issue on the question of probable cause and cannot be established by independent proof, disclosure of the identity of the informant may be the only way to prevent suppression.

This is to be distinguished from the case invoking the disclosure of the identity of an informant at trial. In a suppression hearing the issue is existence of probable cause; in trial, argue that the standard for determining disclosure is materiality and relevance going to a defense which negates guilt.

d. Neutralizing impact of an undercover officer on the disclosure problem, - in suppression hearing, barring exceptional circumstances affecting his credibility, the agent's first hand testimony will suffice to meet probable cause and negate necessity of disclosure of informant's identity. However, depending on the charge brought against the defendant, informant's disclosure is governed by his participation in the criminal venture. Fundamental issues of guilt or innocence, entrapment and credibility may necessitate his identification.

e. Derivative evidence - Fruit of the poisonous tree - is suppression dispositive of the case?

(1) Tangible evidence

(2) Intangible evidence - statements

(3) Independent basis for admissibility of evidence - burden is on the Government to establish this basis.

ADVANCED PROSECUTOR TRAINING

I.E: TACTICS IN EXCLUSIONARY HEARINGS: IDENTIFICATION

Paul L. Friedman
Robert A. Shuker

This outline is intended to cover only the strategy and tactics involved in an identification suppression hearing. The law concerning identification suppression is contained in the Prosecutor's Training Manual: Topic I.G. It is intended that this outline be used in conjunction with that topic outline.

I. Basic Considerations

A. Legal Bases for Exclusion of Identification Evidence

1. Problem confronting courts is to minimize the possibility of mistaken identification.

2. Judicial remedy is to rule identification evidence inadmissible in two instances: impermissibly suggestive identification and absence of counsel.

a. Impermissibily suggestive identification - i.e., if the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" amounting to a denial of due process. Stovall v. Denno, 388 U.S. 293 (1967); Neil v. Biggers, 409 U.S. 188 (1972).

(1) One source of suggestivity is the nature of the lineup or photographic array itself.

(2) The other source of suggestivity is the conduct of the police or prosecutor as it affects the viewer.

b. Absence of counsel - because without counsel it is difficult to reconstruct what occurred at the identification procedure and thus difficult to show impermissible suggestivity. United States v. Wade, 388 U.S. 213 (1967); Gilbert v. California, 388 U.S. 263 (1967).

(1) Counsel requirement only applies after formal charge has been filed in court. Kirby v. Illinois, 406 U.S. 682 (1972).

(2) Counsel requirement only applies to a corporeal lineup or showup and not to a photographic identification procedure. United States v. Ash, 413 U.S. 300 (1973).

3. While unjustified absence of counsel or impermissible suggestivity requires the court to exclude the out-of-court identification of a witness, the Government may introduce an in-court identification if it can show by "clear and convincing evidence" that the identification is based upon an "independent source" and not the fruit of the improper identification.

   a. "Poisonous Fruit" rule - If there was an unconstitutional pre-trial identification which is ruled inadmissible, the in-court identification also is excluded if it is the fruit of the unconstitutional pre-trial identification.

   b. However, the court may find that the opportunity for and ability of the witness to observe the defendant at the time of the offense establishes a basis to admit the identification testimony totally independent to the tainted procedure.

   c. Even if the court at the pre-trial hearing finds no constitutional violation, it should always make a finding regarding independent source so that the appellate court need not remand if it disagrees with the trial court's finding regarding constitutionality of out-of-court identification. Clemons v. United States, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (en banc), cert. denied, 294 U.S. 964 (1969).

   d. Factors relevant to independent source:

      (1) Opportunity to observe - e.g., length of encounter, distance between the witness and suspect, lighting conditions, witness' state of mind, unobstructed view.

      (2) Nature, detail and accuracy of description given by the witness.

         (a) Description recorded by police from witness.

         (b) Articulation of remembered observations of defendant's description by witness in court, not recorded by police.

      (3) Any subsequent identification, failure to identify or misidentification by the witness

(4) Additional indicia of recollection of events that transpired during commission of offense (e.g., surroundings, movements, clothing).

(5) Sincerity, intelligence, integrity and lack of hostility of the witness as projected in court.

B. Distinction Between Admissibility and Reliablity

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

2. Crucial for the judge at a pre-trial suppression hearing to understand that a weak pre-trial identification is not to be suppressed merely because it lacks reliability. Lack of reliability goes only to weight the jury should give to the identification, not to its admissibility. See United States v. Brooks, 146 U.S. App. D.C. 1, 7, 449 F.2d 1077, 1083 (1971); Russell v. United States, 133 U.S. App. D.C. 77, 82, 408 F.2d 1280, 1285, cert. denied, 395 U.S. 928 (1969).

Absent a claim that the identification is constitutionally infirm, "the reliability of the resulting identification is for the jury to decide," Russell v. United States, 133 U.S. App. D.C. 77, 82, 408 F.2d 1280, 1285, cert. denied, 395 U.S. 928 (1969).

3. Photographic identification

a. Entire question before the court at pre-trial hearing is fairness (since counsel is not required): Was photographic display suggestive?

b. This question is best answered by a physical examination of photos. If there is a sufficient number of photos and defendant does not stand out conspicuously, display was fair.

c. If witness only says picture "looks like" the offender, the identification is still admissible. Jury can look at photograph itself, except in the case of mug shots, and compare with defendant on trial. United States v. Hines, 148 U.S. App. D.C. 441, 460 F.2d 940 (1972). "While 'resemblance' testimony projects some uncertainty on

the part of the witness, it is part of the evidence which the jury may consider to constitute a basis for a guilty verdict . . ." United States v. Brooks, 146 U.S. App. D.C. 1, 7, 499 F.2d 1077, 1083 (1971).

4. Lineup Identification

   a. Issues at pre-trial hearing are:

      (1) Was counsel present?

      (2) Was lineup unduly suggestive in composition?

      (3) Was identification by witness a product of external suggestion?

   b. While burden is technically on defense to show absence of counsel or suggestivity, Government may usually easily demonstrate:

      (1) Counsel was present.

      (2) The actual array of people was fair (the lineup photograph may be introduced in evidence and is decisive on this issue).

      (3) There was no suggestivity in actions or works of law enforcement personnel prior to or during the conduct of the lineup.

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

C. Motion to Suppress

1. 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); Soloman v. United States, 133 U.S. App. D.C. 103, 407 F.2d 1306 (1969); Sup. Ct. Crim. R. 47; Fed. R. Crim. P. 12.

2. A pre-trial suppression of identification evidence may be appealed pursuant to 23 D.C. Code §104 or 18 U.S.C. §3731.

II. Preparation of Witnesses

A. General

1. Understand the entire problem and all possible theories and issues. Be prepared with authorities necessary to counter the motion and to defeat all theories on which it may be granted.

2. Always have a pre-trial conference with witnesses, and remember that police officers must be as carefully prepared as lay witnesses.

3. Explain to lay witnesses the limited purpose of the suppression hearing and the distinctions between it and a trial.

4. Witnesses should examine all evidence which is even arguably relevant. Have police witnesses locate and produce all Jencks material. Have all witnesses review all their prior statements.

   a. To refresh recollection

   b. They may be confronted with Jencks statements because of United States v. Dockery, 294 A.2d 158 (D.D. Ct. App. 1972).

5. 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.

   a. But always make sure to point out who he previously identified--i.e., make sure the showing is conducted so as to refresh recollection and does not itself become a new identification procedure at which the witness might make a tentative or mistaken identification.

   b. "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).

6. If the witness can, he should be prepared to testify that his identification is based solely on observations at the time of the crime and not on the on-scene identification, the lineup or the viewing of photographs.

B. Interviewing the Lay Witness

1. Prior description given.

   a. Check PD 163, PD 251, radio run.

   b. Ask witness what he remembers. If it differs from description contained in police forms, find out why - e.g., inaccuracy, haste, confusion, excitement.

2. Conditions under which witness observed defendant.

   a. Lighting, distances, duration of event, parts of person actually observed, positions from which observations were made.

   b. Check scene yourself to learn if witness is accurately remembering conditions; consider re-enactment at scene.

3. Explore what factors make witness certain he identified proper man.

   a. It may be that there is no single feature to which witness can point, but rather it is the totality of the features ("Those eyes, that nose, that mouth, all put together, that's the man.")

   b. Help witness to articulate the fact that he remembers the totality of the face.

4. Find out what witness did not notice (e.g., clothing, fact that gun was held in the right hand), and why. The answer will usually be rational and helpful (e.g., "I was concentrating on his face.")

5. The factors of age, height and weight usually contain the most inaccuracies. But if the witness' prior description or present recollection is inaccurate in these factors, learn it during the interview - not in court. Be ready to demonstrate, for example, that his judgment of weights is always bad.

6. Explore any infirmities of the witness that might undercut his identification (e.g., poor eyesight, had been drinking just prior to offense, not wearing glasses at time of offense, blow to the head).

7. The identification procedure

   a. On-the-scene

      (1) Time between offense and viewing.

      (2) Whether police said anything to indicate suspect had admitted guilt or that property or weapons were seized.

      (3) Whether suspect was in handcuffs or otherwise restrained.

      (4) Whether clothing of suspect was similar to that worn by persons who committed offense.

      (5) Whether witness viewed and identified suspect alone or in presence of other witnesses.

   b. Photographic viewing

      (1) Mug books - About how many books and photographs did witness view before making identification? If there were many, this demonstrates a cautious person, reluctant to make an identification unless certain. Whether witness saw index of names in back of mug book.

      (2) Photographic array - How many pictures were grouped together for the viewing? Were they all of a similar type - e.g., all full-length color polaroids? Did the suspect appear only once in the array?

      (3) Whether the police officer said anything about the pictures to suggest a particular suspect.

      (4) Whether the witness viewed the photographs out of the presence of other witnesses.

      (5) Words of witness at moment of identification.

   c. Lineup

      (1) Prior to witness interview, always obtain a transcript of the lineup and listen to the audio tape recording of the lineup.

(2) Recreate situation: Where was the witness before coming into the lineup room? Did anyone say anything to him about the lineup? What did he do in the lineup room? What was said to him? What did he respond? Is he positive about the identification?

(3) By using lineup photograph, develop testimony regarding number of people in line; that they were same sex and race, approximately the same height and weight.

C. Police Witnesses

1. The testimony of a police witness regarding an out-of-court identification by an eyewitness or a description previously given by a witness is technically hearsay and cumulative. However, it is relevant and proper to enable the jury to get a full picture of the identification process. Such testimony is more meaningful to a jury than the 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), cert. denied, 394 U.S. 964 (1969).

2. Officer on scene who took description and broadcast it over police radio

   a. Did his description come directly from a particular witness or was it an amalgamation of what numerous witnesses told him.?

   b. Explore inaccuracies, inconsistencies, incompleteness. Find out reasons and emphasize these to the officer.

   c. Get his original notes which may be producible under the Jencks Act.

3. Arresting officer (if there was an on-the-scene identification)

   a. Time period between offense and/or arrest and viewing.

   b. Proximity of offense location to arrest location.

   c. What officer said to witness when he returned suspect to scene for viewing.

d. Whether suspect was in handcuffs or otherwise restrained at time of the viewing.

e. Whether each witness viewed the suspect independently.

f. Reasons for arresting particular suspect and returning him to the scene - was there probable cause or something less?

g. Officer should have written notes of statements made by each witness viewing the suspect.

4. Officer who showed mug books

a. What he said to witness.

b. Approximate number of books and photographs shown.

c. Type of photographs.

d. Whether witness had access to index of names of those depicted while looking through books.

e. Words of witness at time of identification; get officer's notes.

5. Officer who showed photographic array

a. How many photographs were in the grouping?

b. How many times did suspect appear in array?

c. Type of photographs - e.g., black and whites, polaroids.

d. Officer must have exact group of photographs for introduction in court. They should be identified by name, PDID number and, usually, by officer's initials and/or date of photographic showing. This information shold be recorded in statement of facts of PD 163.

e. Words of officer when showing photos.

f. Exact words and any physical reaction of witness at time of identification.

6. Officer present at lineup

a. Description of lineup room and procedure.

b. Location of witnesses prior to viewing lineup; lack of communication.

c. Identification procedure - what was said to witness; response of witness and any physical reaction; time taken to make identification (e.g., positivity, hesitancy).

d. Identification of lineup photograph and defendant in photo.

e. With lineup sheet, demonstrate that defendant was wearing particular shield number and was the person identified.

III. The Hearing

A. Strategy

1. Take command of the situation by describing to the judge the motions filed by defendant. Condition the judge to think your way by telling him what authorities you will rely on and what your theory is.

2. Where defendant does not contest what appears to be an arguable legal question get him to waive any such claim, or at least make the record clear.

3. If the motion will be decisive, advise the judge.

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, it should always make a finding as to whether an "independent source" exists to support an in-court identification. See 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).

C. Conduct of the hearing.

1. Hearing should be limited to the identification issue.

a. It is not a discovery device or a mini-trial.

b. Try to put on only enough evidence to meet the issues raised in the defense motion.

c. Do not give the defendant ammunition for impeachment at trial.

d. Do not put on two witnesses (especially police) to say the same thing.

2. Be "record conscious".

3. Who should call the witnesses?

a. Argue that it will save time if each side calls its own witnesses.

b. Especially with lay witnesses, it is better if you call them since they are unfamiliar with court procedures and you have prepared them.

c. Defense will leave gaps in the evidence if they call your witnesses, and thereby confuse the issues.

4. Defendant is permitted to testify for the limited purpose of describing the confrontation at identification. His testimony at the suppression hearing cannot be used at trial by the 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.

a. Cross-examine him extensively to develop impeachment material for trial.

b. Use same tactic for other defense witnesses.

D. Important considerations in witness' testimony at hearing and trial

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 of photographic showing

6. Failure to exercise care to make observation

7. Lack of ability and training in identification

E. Argument and Decision

1. Argue only enough to win. Don't confuse the judge.

2. Force the judge to make appropriate findings of fact and give legal reasons for his rulings, i.e., conclusions of law. ("Does Your Honor find ...?", "Is Your Honor ruling ...?")

3. In some cases, written findings and conclusions may be necessary; offer to provide them.

   a. The court cannot make credibility findings against you if the defendant offers no evidence. It is appropriate to remind the judge that the evidence is "uncontradicted."

   b. If the court's ruling is based solely or primarily on factual findings, we cannot appeal an adverse ruling so urge the court to explicitly find your witnesses credible.

4. Where appropriate, you should insist that the Court make each of the following findings:

   a. There was no undue suggestivity in the lineup array viewed by your identification witness which would in any way taint that lineup identification. The lineup identification is therefore admissible.

   b. Counsel was present at the lineup representing the defendant, so Wade has been complied with.

   c. There was no undue suggestivity in the photographic display viewed by your identification witness which would in any way taint that photographic identification. The photographic identification is therefore admissible.

   d. Even if there were a taint in a. and c., and even if b. had not been adhered to, there is no doubt but that there is an independent source for the identification made by your identification witness (based on ample opportunity to observe, close proximity of observation, unobstructed view, good lighting conditions, description witness was able to give police, and witness' ability to narrate and recollect the events, etc.), so that he would still be allowed to make an in-court identification.

IV. Testimonial Procedure at Hearing

A. Order of Proof

1. Lay witness - (identifying witness)

a. Brief discussion of offense

b. Opportunity to observe

c. Identification of defendant in court

d. Photographic identification

(1) Not suggested by police

(2) Did not consult with others

(3) Identified alone

e. Identify photographs - they "appear to be" the photographs he was shown; can never say for certain they are same photographs because not kept in his custody.

f. Photographs

(1) How shown

(2) How selected

g. Lineup identification

(1) Not suggested by police

(2) Did not consult with others

(3) Identified alone

h. Identify lineup photograph

i. Always establish independent source

2. Police officer who showed photographs or attended lineup.

a. Photographs

(1) Basis for selecting

(2) Identify photos

(3) Showed to witness - no suggestivity

(4) How identification made

b. Arrested defendant; identify defendant

c. Lineup

(1) Procedures

(2) Photograph of lineup

(3) Describe defendant's changed appearance

3. May need police officer who ran lineup

4. May need police officer who took description

B. Evidence

1. Photographs

2. Lineup photographs

3. Composite

4. Lineup sheets

5. Tape and/or transcript of lineup proceedings.

6. Police reports with descriptions

a. PD 251

b. Lookout

c. Flash

C. Testimony of the identifying witness

1. Name, date, time.

2. Introduction to the crime--Where were you? Who else was present? What if anything unusual occurred at that time?

3. What were the lighting conditions at the time of the crime?

4. How far were you from the man who was robbing you?

5. Was your view of the man who was robbing you obstructed by anything, at all, at any time?

6. Were you looking at the robber? How long? All the time or part of the time? When?

7. What did you observe about him? (Description, height weight, age, clothing)

8. Did you give description to police?

9. Anything else you remember about the man which you didn't get a chance to tell police?

(After completing testimony on events of crime. . .)

10. Calling your attention to the date of _____, 19___, did you have occasion to go to Metropolitan Police Headquarters at 300 Indiana Avenue, N.W., in the District of Columbia? While there, did you have occasion to view some photographs? Do you remember what room you were in when you viewed these photographs? Approximately how many photographs did you view at that time? Did you identify any one of the persons in these photographs as the man who robbed you on _____ at _____?

11. Calling your attention to the date of _____, did you have occasion to see Officer _____, of the Metropolitan Police Department, on that date? Where were you when you saw him? Were you alone, or was anyone else with you? At that time and place, did you have occasion to view any photographs?

I show you what have been marked Government's Exhibits No. 1(a)--1(k) for identification. Would you examine them please, sir? Have you ever seen them before? When was that?

When Officer _____ showed you these photographs, what if anything did he say to you?

Did he say anything else that you remember? When you examined these photographs on _____, did you recognize any of the men in the photographs? Which man or men did you recognize?

Sir, that photo which you have held up has a number and letter on it, doesn't it? Would you read that number and letter to us please? When you say you recognized the person in Government's Exhibit No. _____ for identification, whom did you recognize him as being?

Was there any doubt in your mind that this was the man who robbed you?

12. Calling your attention to the date of _____, did you have occasion to go over to 300 Indiana Avenue, N.W., to police headquarters, to view a lineup?

I show you Government's Exhibit No. 2 for identification; do you recognize what it portrays? Does it fairly and accurately portray the lineup that you viewed on _____?

Just prior to viewing the lineup, where were you? Did anyone talk to you about who would be in the lineup before you actually viewed it?

When you viewed the lineup, what, if anything was said to you by anyone? Who said that, if you know? Was anything else said to you? Did you recognize anyone in this lineup as the man who robbed you on _____?

Sir, if you will examine Government's Exhibit No. 2 for identification, you will notice that each man in this lineup is wearing a shield, and that each shield has a number--is that correct? Will you tell us, please, the shield number of the man whom you recognized as the man who robbed you on _____?

Was there any doubt in your mind that this was the man who robbed you on _____?

13. Now, Mr. _____, I want you to take a look around the courtroom if you will, and tell us if you see the man who robbed you on _____ in this courtroom today? Will you indicate where you see him in this courtroom, and tell us what he is wearing today, please?

Your Honor, may the record reflect that he has identified the defendant, _____? Thank you, Your Honor.

Mr. _____, is there any doubt in your mind that the defendant is the man who robbed you on _____? Thank you, I have no further questions.

D. Testimony of the Officer who showed witness mug books

1. Name and profession

2. Calling your attention to the date of _____, were you a member of the Metropolitan Police Department at that time? On that day at approximately _____p.m., were you on active duty? Where were you assigned at the time?

At that time, did you have occasion to see Mr. _____ (identifying witness)? Where did you have occasion to see Mr. _____? And did you show him mug books at that time?

What are mug books? Approximately how many different individuals' pictures are contained in a mug book?

How many books did Mr. _____ examine? Were you present when Mr. _____ examined these books? Did he identify anyone from these books as the man who robbed him on _____?

3. Officer _____, do you know (have you come to know) a man by the name of _____? Do you see him in this courtroom, and what is he wearing today? Your Honor, may the record refelct that he has identified the defendant, _____? Thank you, Your Honor.

   Officer _____, do you know whether there were any pictures of the man you have just identified here in court, Mr. _____, the defendant, in the mug books that Mr. _____ examined on _____?

4. Whose picture did Mr. _____ select from those mug books? Were you present when he made the selection? What did he say?

E. Testimony of the Officer who showed array of photographs to witness.

1. Name and profession

2. Calling your attention to the date _____, in the course of your police duties, did you have occasion to see Mr. _____? Where did you see him? Was he alone when you saw him?

   What was your purpose in seeing Mr. _____ on this date? Did you show him any photographs at that time?

   Officer, I show you Government's Exhibit Numbers 1(a)--1(k) for identification. Would you examine them please? Do you recognize them? How do you recognize them? What are they?

   When you showed these photographs to Mr. _____, what, if anything did you say to him?

   Did Mr. _____ examine these photographs in your presence? What, if anything, did Mr. _____ say and and do when he examined these photographs?

   You will notice that each of these photographs has a number and letter on it officer. Will you please tell us the number and letter of the photograph identified by Mr. _____?

   Do you know the identity of the person in the photograph which is Government Exhibit No. 1 (_) for identification? Do you see that person in this courtroom today? Where do you see him in this courtroom, and what is he wearing today? Your Honor, may the record reflect that the officer has identified the defendant, _____? Thank you, Your Honor.

F. Testimony of Officer at the Lineup

1. Name and profession

2. Calling your attention to the date of _____, were you a member of the Metropolitan Police Department that date? Were you on active duty on that date?

Calling your attention to the time of approximately ___p.m. on that date, in the course of your duties, did you have occasion to be present in the lineup located at Metropolitan Police Headquarters at 300 Indiana Avenue, N.W.? Would you describe that lineup room for us please?

Are you familiar with the procedures normally employed by the police department in conducting a lineup? Was any lineup conducted in your presence on the evening of _____? Were those procedures adhered to in the conducting of that lineup? What are those procedures?

3. On that evening, in that lineup room, did you have occasion to see a man by the name of _____ (identifying witness)?

Where was Mr. _____ when you first saw him? Did there come a time when Mr. _____ left the lineup room? Were you present with him in the lineup room until he left? Prior to the time that Mr. _____ left that lineup room, were there any people on the stage that you have described?

What occurred in the lineup room before Mr. _____ left? Was anything at all said to Mr. _____ about who would be in the lineup room?

After Mr. _____ left the lineup room, did there come a time when he returned? Approximately how much later was that? Were you still present in the lineup room? Had you left the room at all before he returned?

What if anything did Mr. _____ do when he returned into the lineup room? Were there any people on that stage at this time?

Officer, I show you Government's Exhibit No. 2 for identification; do you recognize it? What is it? Does it fairly and accurately represent the lineup that was viewed by Mr. _____?

Where were you in relation to Mr. _____ when he viewed that lineup? Did you say anything to Mr. _____? What, if anything was said to Mr. _____ when he viewed that lineup? By whom? Was anything else said to him? What if anything did Mr. _____ say when he was asked this question? Approximately how long after Mr. _____ was asked this question did he say that Number _____ was the man?

Officer _____, do you know who the man was wearing the Number _____ in the lineup depicted in Government's Exhibit Number 2 for identification? What is that man's name? Do you see the man who was wearing Number _____ in that lineup in this courtroom today? Would you indicate where you see him in this courtroom, and what he is wearing today? Your Honor, may the record reflect that he has identified the defendant? Thank you, Your Honor.

I have no further questions of this witness. Your Honor, for purposes of this hearing, the Government moves the introduction into evidence of Government's Exhibit Number 2 for Identification. Thank you, Your Honor.

V. Testimonial Procedure at Trial

A. General Principles

1. For every witness on the issue of identification, the testimony should be just as detailed and particular at trial as it was at the identification hearing.

2. Obviously, those factors which were relevant for the judge's consideration at the hearing on the issues of taint and independent source are equally relevant to the jury in considering the reliability of the identification.

3. 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, identification of other witnesses, defendant caught at scene.

4. Reminders at Trial

   a. The lineup photograph should always be introduced into evidence at trial. You want the jury to see how fair the lineup was.

   b. Your identification witness is not competent to give the name of the person whose photograph he identified; only the police officer can do that.

c. Your identification witness is not competent to give the name of the person whom he identified at the lineup (unless he knew his name before the crime occurred); only the police officer can do that.

5. Admission of suppressed identification

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

b. If the defense brings out some facts of the confrontation, prosecution may be permitted to bring out the rest. United States v. Holiday, D.C. Cir. No. 23, 582, decided July 12, 1973; United States v. Winston, 145 U.S. App. D.C. 67, 447 F.2d 1237 (1971); Clemons v. United States, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237, 1246 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

B. Mug shots

1. While mug shots may be displayed and discussed at the pre-trial hearing before the Judge, mug shots may not be displayed or mentioned to the jury because they show that the defendant has a prior criminal record. Barnes v. United States, 124 U.S. App. D.C. 317, 365 F.2d 509 (1966). Compare United States v. Hallman, 142 U.S. App. D.C. 93, 94-95, 439 F.2d 603, 604-605 (1971).

2. When mug shots have been shown to a witness, the following procedure should be employed at trial.

a. The eyewitness

Sir, calling your attention to the date of _____, at approximately _____ p.m., did you have occasion to see Officer _____?

Where were you when you saw Officer _____? Were you alone or with other people? Was anyone else with Officer _____?

At that time and place, did you have occasion to view any photographs? What was your purpose in viewing those photographs? Approximately how many photographs did you view at that time?

What if anything was said to you by Officer _____, or anyone else, at the time that you viewed these photographs? Was anything else said to you at that time?

When you were shown these photographs, sir, did you identify any of the individuals depicted? How many individuals did you identify? Whom did you identify this person as being?

b. The Officer who showed the photographs

Officer, at that time and place, did you have occasion to show Mr. _____ any photographs? How many photographs did you show him?

Were these photographs of __(number)__ separate individuals, or were some of these _____ photographs pictures of the same individual?

Were these black and white photographs or colored?

Were these photographs of men, women, or men and women?

Were these photographs of black men, white men, or black and white men?

Were these photographs of men of different ages, or approximately the same age? How old were the oldest and youngest men whose pictures were in this group of __(number)__ photographs?

At the time that you showed the photographs to Mr. _____, was he alone, or were other people with him? Were you alone, or was anyone with you?

What if anything did you say to Mr. _____ when you showed him these photographs? Did you say anything else to him at this time?

When you showed these photographs to Mr. _____, did he identify any of them? How many photographs did he identify? Whom did Mr. _____ identify this photograph as being?

Officer, do you know the name of the man whose photograph was identified by Mr. _____ as being the man who robbed him on _____? What is that man's name?

Officer, do you see _____, the man whose photograph was identified by Mr. _____ as being the man who robbed him, in the courtroom today? Where do you see him?

ADVANCED PROSECUTOR TRAINING

I.F: THE LAW OF CONSPIRACY

Roger C. Spaeder

I. Definition

A. A combination of two or more persons to accomplish by concerted action a purpose either criminal or unlawful comes within the accepted definition of conspiracy, United States v. Hutto, 256 U.S. 524, 528 (1921); Pettibone v. United States, 148 U.S. 197, 203 (1893), as does an agreement to accomplish a lawful objective by unlawful means. Yates v. United States, 225 F.2d 146, 155 (9th Cir. 1955), rev'd on other grounds, 354 U.S. 298 (1957).

B. Since the essence of the crime of conspiracy is the agreement and not the commission of the substantive crime which is the object of the agreement, a conspiracy is punishable whether or not it succeeds in its objective. United States v. Rabinowich, 238 U.S. 78, 86 (1915); United States v. Abel, 258 F.2d 485, 489 (2d Cir. 1958), aff'd, 362 U.S. 217 (1960).

1. In fact, it is immaterial if the conspiratorial objective is actually impossible to attain. United States v. Ventimiglia, 145 F. Supp. 37 (D. Md. 1956), rev'd on other grounds, 242 F.2d 620 (3rd Cir. 1957).

2. Conspiracy to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. Pereira v. United States, 347 U.S. 1, 11 (1954); United States v. Rabinowich, supra at 85; United States v. Bradley, 421 F.2d 924, 927 (6th Cir. 1970); Sperdutto v. United States, 246 F.2d 729 (2d Cir. 1957).

3. The double jeopardy clause of the Fifth Amendment has consistently been held not to bar a conviction for a substantive offense after an acquittal on a conspiracy charge. E.g., Sealfon v. United States, 332 U.S. 575, 578 (1948).

4. Where a defendant has been acquitted of a conspiracy charge, subsequent conviction at another trial for the substantive offense is barred by res judicata or collateral estoppel only if the conspiracy acquittal involved an adverse determination "of the facts essential to conviction of the substantive offense." Sealfon v. United States, supra, at 578.

CONTINUED

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5. Even if some of the acts charged in the conspiracy count of an indictment are the same as those charged in substantive counts and even if the substantive offenses were committed in pursuance of the conspiracy, there is no merger of offenses. Dennis v. United States, 341 U.S. 494, 573-74 (1951) (concurring opinion); Pinkerton v. United States, 328 U.S. 640, 643 (1946); Cardorella v. United States, 375 F.2d 222, 224-25 (8th Cir.), cert. denied, 389 U.S. 882 (1967).

6. No matter how many repeated violations of law may have been contemplated, the conspiracy itself will still be a single offense. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied 405 U.S. 1040 (1972).

II. Elements of a Conspiracy

See 18 U.S.C. § 371 and 22 D.C. Code § 105(a); See also D.C. Bar Association Criminal Jury Instruction No. 4.92 (1972)

A. That two or more persons conspired to commit any offense, United States v. Dege, 364 U.S. 51 (1960); and

B. That the defendant(s) knowingly participated in the conspiracy, with the intent to commit the offense which was the object of the conspiracy, Ingram v. United States, 360U.S. 672, 678 (1959); and

C. That during the existence of the conspiracy at least one overt act was committed by one or more of its members in furtherance of the objective of the conspiracy. United States v. Offutt, 75 U.S. App. D.C. 344, 127 F.2d 336 (1942).

CAVEAT: Some conspiracy statues do not require an overt act. E.g., 21 U.S.C. § 846 (Conspiracy to Distribute Controlled Substances); 18 U.S.C. § 241 (Conspiracy Against Rights of Citizens); 18 U.S.C. § 1951 (Conspiracy to Interfere With Interstate Commerce).

III. Comments on Elements of a Conspiracy

A. The agreement need not be formal or explicit, and it is sufficient that there be a concert of action, with the parties working together with a common design, purpose and understanding. American Tobacco v. United States, 328 U.S. 781, 809-10 (1945). Indeed, a tacit understanding is sufficient. United States v. Paramount Pictures 334 U.S. 131, 142 (1948).

B. "Secrecy and concealment are essential features of successful conspiracy. The more completely they are acheived, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." Blumenthal v. United States, 332 U.S. 539, 557 (1947) (emphasis added).

1. It is not required that defendant know the number or identity of all his co-conspirators. United States v. Edwards, 366 F.2d 853, 867 (2d Cir. 1966), cert. denied sub nom. Jakob v. United States, 386 U.S. 908; Parness v. United States, 386 U.S. 919 (1967). But see United States v. Agveci, 310F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 954 (1963); United States v. Bruno, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939).

2. All the defendant need know is that the enterprise has a "scope" and that it requires for its success an organization wider than that which may be disclosed by his personal participaton. United States v. Edwards, supra.

C. The overt act need not be the crime itself. The overt act requirement, where such requirements exists by statute, is satisfied by merely showing that the conspiracy is at work. Yates v. United States, 225 F.2d 146 (9th Cir. 1955), rev'd. on other grounds, 354 U.S. 298 (1957). However, the overt act must be one which is committed in furtherance of the conspiracy, with the purpose of carrying the illegal agreement into effect. United States v. Hall, 109 F.2d 276 (10th Cir. 1946).

1. At common law, there was no necessity to prove an overt act in a prosecution for conspiracy. Fiswick v. United States, 329 U.S. 211 (1946).

2. Where an overt act requirement exists by statute, proof of one overt act by any member of the conspiracy is sufficient. Robinson v. United States, 93 U.S. App. D.C. 347, 210 F.2d 29 (1954).

3. A conviction will be sustained even where the overt act actually proved was not alleged in the indictment. United States v. Armone, 363 F.2d 385 (2d Cir. 1966). (N.B. There is some question whether other judges would follow the Armone decision.)

4. Venue -- A prosecution for conspiracy may be maintained in any district where an overt act was performed or where the agreement was made. Hyde v. United States, 255 U.S. 347 (1912).

IV. Conspiracy Statutes

A. The general federal conspiracy statute, 18 U.S.C. § 371, reads as follows:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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

B. In the District of Columbia, the general federal conspiracy statute (18 U.S.C. § 371) is supplemented by D.C. Code § 22-105a (1971), a local conspiracy statute which is prosecuted in the Superior Court. Note the "longarm" features of the statute:

§ 22-105a. Punishment of persons convicted of conspiracies to commit crimes--Proof--Conspiracies to commit crimes within or outside of the District.

(a) If two or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than $10,000 or imprisoned not more than five years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than five years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

(b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators pursuant to the conspiracy and to effect its purpose.

(c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an Act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if (1) such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein, or (2) such conduct would constitute a criminal offense under an Act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.

(d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an Act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.

V. Conspiracy Indictments in General

A. Requisite Plurality

The offense of conspiracy necessarily involves two or more persons, i.e., a person cannot conspire with himself. Morrison v. California, 291 U.S. 82, 92 (1933); United States v. Gordon, 242 F.2d 122 (3rd Cir.), cert. denied, 354 U.S. 921 (1957).

1. The conspirators may be husband and wife. United States v. Dege, 364 U.S. 51 (1960).

2. A corporation may be indicted as a conspirator, Joplin Mercantile Co. v. United States, 213 Fed. 926, 936 (8th Cir. 1941), aff'd, 236 U.S. 531 (1915); Alamo Fence v. United States, 240 F.2d 179, 181 (5th Cir. 1957), and may conspire with its officers and employees. Alamo Fence, supra.

3. Although at least two persons are required to constitute a conspiracy, one defendant may be indicted and convicted although the names of his co-conspirators remain unknown. Rogers v. United States, 340 U.S. 367, 375 (1951).

4. "Agent Provocateur"--Because of the necessity of an agreement between the conspirators, there can be no conviction of an individual for conspiracy if the other conspirator (presuming only two of them) is a Government agent who intends to frustrate the plan. United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907, 913 (1967); Sears v. United States, 343 F.2d 139 (5th Cir. 1965).

B. Bills of Particulars

Conspiracy indictments are frequently the subject of defense motions for bills of particulars. These motions usually include sweeping demands for discovery of the Government's evidence and, as such, are contrary to the underlying functions of bills of particulars. E.g., United States v. Bearden, 423 F.2d 805, 809 (9th Cir.), cert. denied, 400 U.S. 836 (1970); Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968); Hemphill v. United States, 392 F.2d 45, 49 (8th Cir.), cert. denied, 393 U.S. 877 (1968).

1. The function of a bill of particulars is to apprise the defendants of the crime charged and to enable them to plead double jeopardy to a later prosecution for the same offense. United States v. Birrell, 263 F. Supp. 113 (S.D.N.Y. 1967); United States v. Baker, 262 F. Supp. 657, 673 (D.D.C. 1966). Accordingly, a bill of particulars is not a device by which a defendant may compel disclosure of the Government's evidence in advance of trial, United States v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967), aff'd, 416 F.2d 107 (2d Cir. 1969); United States v. Kahaner, 203 F. Supp. 78, 84 (S.D.N.Y.), aff'd, 317 F.2d 459 (2nd Cir.), cert. denied, 375 U.S. 836 (1962); United States v. Lebron,

222 F.2d 531, 535-36 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Kushner, 135 F.2d 668 (2d Cir.), cert. denied, 320 U.S. 212 (1943); United States v. Nomura Trading Co., 213 F. Supp. 704, 707-8 (S.D.N.Y. 1963), or obtain minutia about the prosecution's anticipated proof or the theory of its case. Ray v. United States, 367 F.2d 258, 283 (8th Cir. 1966); United States v. Birrell, supra; United States v. Kelly, 254 F. Supp. 9 (S.D.N.Y. 1966); United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967).

2. Times and Locations of Overt Acts--The Government cannot be required to particularize the exact time, location, etc. of overt acts alleged in the indictment. See, e.g., United States v. Long, 449 F.2d 288 (8th Cir.)., cert. denied, Tocco v. United States, 405 U.S. 974 (1971) (motion for particulars denied where defendant requested exact times of alleged acts in order to establish alibis); United States v. Politi, 334 F. Supp. 1318 (S.D.N.Y. 1971) (precise locations of charged acts not discoverable); United States v. Lanelli, 53 F.R.D. 482 (S.D.N.Y. 1971) (details of creation of conspiracy, e.g., dates, times and places, are not discoverable by bill of particulars; United States v. White, 50 F.R.D. 70 (N.D. Ga. 1970) (particulars required only as a general location of acts charged in indictment); United States v. McCarthy, 292 F. Supp. 937 (S.D.NY. 1968) (specification of place and date of formation of conspiracy would unduly limit Government's proof at trial).

3. Evidentiary Details of Overt Acts--The Supreme Court has held that a motion for a bill of particulars seeking the details of overt acts alleged in a conspiracy count -- "which in effect sought a complete discovery of the Government's case in reference to the overt acts" -- is properly denied. Wong Tai v. United States, 273 U.S. 77, 82 (1927). To like effect, see United States v. Ford Motor Co., 24 F.R.D. 65, 70 (D.D.C. 1969) (Tamm, J.) where the court denied a similar request. In United States v. Landry, Criminal Case No. 1191-67, affirmed (No. 22,325), February 6, 1970 (D.C. Cir.), cert. denied, 398 U.S. 966 (1970), Judge Curran denied a similar request.

C. Severance of Conspirators

Generally, persons indicted jointly for crimes should be tried together. Brown v. United States, 126 U.S. App. D.C. 134, 375 F.2d 310 (1966), cert. denied, 388 U.S. 915; United States v. Kahn, 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015. This is particularly so where the proof will be extensive and numerous witnesses must be summoned. United States v. Kahn, supra; United States v. Lebron, 222 F.2d 531 (2nd Cir. 1965), cert. denied, 350 U.S. 876; United States v. King, 49 F.R.D. 51 (1970).

1. Protracted criminal trial involving multiple defendants or complicated issues or both, can be and have been fairly conducted. E.g., Butler v. United States, 317 F. 2d 249 (8th Cir. 1963)

(mail fraud prosecution of 30 defendants lasting approximately five months); United States v. Stromberg, 268 F.2d 256 (2nd Cir. 1959) (narcotics conspiracy prosecution of 19 defendants); United States v. Lebron, supra (sedition conspiracy prosecution of 13 defendants); Capriola v. United States, 61 F.2d 5 (7th Cir. 1932) (National Prohibition Act conspiracy prosecution of 63 defendants).

D. Multiple Conspiracies

See paragraph VII, A. infra.

VI. Evidentiary Issues in Conspiracy Cases

A. Circumstantial Evidence

The Supreme Court has held that the existence of a criminal conspiracy need not be proven by direct evidence; a common plan may be inferred from circumstantial evidence. Glasser v. United States, 315 U.S. 60 (142); Grant v. United States v. 407 F.2d 56, 57 (5th Cir. 1969); Tillman v. United States, 406 F.2d 930, 939 (5th Cir. 1969); William v. United States, 271 F.2d 703, 706 (4th Cir. 1959).

1. Indeed, the informal agreement present in most conspiracy cases must frequently be proven entirely by circumstantial evidence. King v. United States, 402 F.2d 289, 292 (10th Cir. 1968); United States v. Ragland, 375 F.2d 471, 477 (2nd Cir. 1967), cert. denied, 390 U.S. 925 (1968); Calderson v. United States, 196 F.2d 554, 555 555 (10th Cir. 1952).

2. The absence of direct proof of the agreement generally results from the secretiveness and complexity of modern-day conspiracies, particularly those involving narcotics. See Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Stromberg, 268 F.2d 256, 264 (2nd Cir.), cert. denied, 361 U.S. 863 (1959).

B. Co-Conspirator Exception to Hearsay Rule

In a conspiracy prosecution, a recognized exception to the hearsay rule permits as evidence against an alleged conspirator the declarations of his co-conspirators made in furtherance of the conspiracy and during its pendency. Campbell v. United States, 415 F.2d 356, 357 (6th Cir. 1969); Holsen v. United States, 392 F.2d 292, 293 (5th Cir. 1968), cert. denied, 393 U.S. 1029 (1969); Meyers v. United States, 377 F.2d 412, 418-19 (5th Cir. 1967), cert. denied, 390 U.S. 929 (1968).

1. Agency Theory--Generally, such declarations by one conspirator may be used against another on the theory that the declarant is the agent of the other. United States v. Lev, 276 F.2d 605, 608 (2nd Cir.), cert. denied, 363 U.S. 812 (1960); United States v. Mishkin, 317 F.2d 634, 637 (2d Cir.), cert. denied, 375 U.S. 827 (1963).

2. Post-Conspiracy Declarations--Since a conspiracy that has ended can no longer be furthered in any way, the declarations of one conspirator made after such a time may not be used against a co-defendant. Delli Paoli v. United States, 352 U.S. 232, 237 (1957); United States v. Hindmarsh, 389 F.2d 137, 148, (6th Cir. 1968).

3. Pre-Conspiracy Declarations--Conversations which antedate the conspiracy charged in the indictment are admissible if they show the beginning of the defendant's involvement in the criminal enterprise and his state of mind at the time. United States v. Pel Purgatoria, 411 F.2d 84, 86-87 (2d Cir. 1969).

4. Precondition to Admissibility--There must be independent evidence, or proof aliunde, of the conspiracy and the defendant's participation in it before the extra-judicial declarations of co-conspirators are admissible in evidence against that defendant. Glasser v. United States, 315 U.S. 60, 74 (1962); United States v. Stadter, 336 F.2d 326 (2d Cir. 1964), cert. denied, 380 U.S. 945 (1965); United States v. Pellegrine, 273 F.2d 570, 572 (2d Cir. 1960); United States v. Penny, 416 F.2d 850, 852 (6th Cir. 1969); United States v. Rizzo, 418 F.2d 71, 82 (7th Cir. 1969).

5. Standard of Proof--Before a jury may be permitted to consider other conspirators' hearsay utterances in furtherance of a conspiracy as a means of determining a particular defendant's guilt beyond a reasonable doubt, the trial judge must first conclude from the proof aliunde that the defendant in question has been shown to be a member of that conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances." United States v. Calaro, 424 F.2d 657, 660 (2d Cir. 1970); United States V. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

6. Jury Instruction on Declarations--If the trial court finds that the proof aliunde is sufficient, then the jury should be instructed to consider all the evidence, including the co-conspirators' declarations, in determining whether any defendant is guilty of conspiracy. The jury should not be instructed that they too must find sufficient proof aliunde. United States v. Baker, 419 F.2d 83 (2d Cir. 1969); United States v. Stromberg, 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 864 (1959); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968); United States v. Muccio, 373 F.2d 168 (2d Cir.), cert. denied, 387 U.S. 906 (1965).

   If the judge finds that the proof aliunde of the defendant's participation is not sufficient, the judge must instruct the jury to disregard the hearsay evidence, or if it was so large a proportion of proof as to render a cautionary instruction of doubtful utility, declare a mistrial on defendant's request. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

7. Co-Conspirator Hearsay Exception Not Affected by Bruton v. United States--In a joint trial, the Sixth Amendment right of confrontation is violated when a non-testifying co-defendant's confession inculpating the defendant is admitted into evidence, despite jury instructions to disregard it as to defendant's guilt or innocence. Bruton v. United States, 391 U.S. 123 (1968). The Circuit Courts of Appeals have specifically held that the ruling in Bruton does not invalidate the hearsay exception in conspiracy cases. United States v. American Radiator, 433 F.2d 174 (3rd Cir. 1970); Parness v. United States, 415 F.2d 346 (3rd Cir. 1969); Campbell v. United States, 514 F.2d 356 (6th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969).

C. Order of Proof

It has been held that the order of proof is within the discretion of the trial court and that consequently it is not reversible error if acts or declarations by co-conspirators are admitted before the existence of the conspiracy is established by independent evidence. United States v. Sansone, 231 F.2d 887, 893 (2d Cir.), cert. denied, 351 U.S. 987 (1956); United States v. Knight, 416 F.2d 1181, 1185 (9th Cir. 1969). The court may admit co-conspirators' acts or declarations subject to a motion to strike if independent evidence, or proof aliunde, fails to establish by a fair preponderance of the evidence, the conspiracy and defendant's participation. Parente v. United States, 249 F.2d 752, 754 (9th Cir. 1957). Such independent evidence may be circumstantial and may include the declarations of a conspirator insofar as they are admissible against him. Bartlett v. United States, 166 F.2d 920 (10th Cir. 1948).

D. Defendant's "Late Entry" Into Ongoing Conspiracy

A conspirator need not join a conspiracy at its inception. Each person joining a conspiracy is taken to adopt, and is bound by, the prior acts and statements made in furtherance of the common objective. Lile v. United States, 264 F.2d 278, 281 (9th Cir. 1958); United States v. Sansone, 231 F.2d 887, 893 (2d Cir.), cert. denied, 351 U.S. 987 (1956).

1. However, a defendant must have knowledge of the conspiracy and its essential objective for it is not sufficient merely to show that he furthered the conspiracy even through the commission of unlawful acts. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Avile, 274 F.2d 179, 190 (2d Cir.), cert. denied sub. nom. Genovese v. United States, 362 U.S. 974 (1960).

2. A showing of association alone is not enough to establish a conspiracy. Lacaze v. United States, 391 F.2d 516, 519 (5th Cir. 1968); Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969).

3. Each conspirator need not know the identity or number of all his confederates. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Crosby, 294 F.2d 928, 945 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

4. Once the existence of the common scheme is established, very little is required to show that the defendant became a party--"slight evidence may be sufficient to connect a defendant with it." Nye and Nissen v. United States, 168 F.2d 846, 852 (9th Cir. 1948), aff'd, 336 U.S. 613.

E. Evidence of Pre/Post-Conspiracy Acts

Acts of conspirators performed before or after the period of the conspiracy are admissible so long as the acts are probative of the conspiracy charged. The leading case on this point is Lutwak v. United States, 344 U.S. 604 (1953). See also United States v. Costello, 352 F.2d 848, 854 (2d Cir.), cert. granted on other issue, 383 U.S. 942 (1965); United States v. Bennett, 408 F.2d 888, 892 (2d Cir. 1969). For example, of such evidence, see Heike v. United States 227, U.S. 131, 145 (1913); United States v. Witt, 215 F.2d 580 (2d Cir.), cert. denied, 348 U.S. 887 (1954); Merrill v. United States, 40 F.2d 315 (5th Cir. 1930); Hood v. United States, 23 F.2d 472 (8th Cir.), cert. denied, 277 U.S. 588 (1927); Nixon v. United States, 289 F. 177 (9th Cir.), cert. denied, 263 U.S. 703 (1923).

F. Termination of Conspiracy By Arrest

The conspiracy is usually terminated upon the arrest of the central conspirators or upon the accomplishment of the criminal purpose. Grunewald v. United States, 353 U.S. 391, 401-02 (1957). The arrest of an individual conspirator, however, does not necessarily establish his withdrawal from the conspiracy as a matter of law. United States v. Borelli, 336 F. 2d 376, 388-90 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

G. Conspirator's Liability For Substantive Offenses

A party to a continuing conspiracy is responsible for a substantive offense committed by a co-conspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any actual knowledge of it. Pinkerton v. United States, 328 U.S. 640, 645-48 (1946); Roberts v. United States, 416 F.2d 1216, 1223 (5th Cir. 1969).

Requirements--The jury must be satisfied beyond a reasonable doubt: (1) that the substantive offense was in fact committed by one or more members of the conspiracy; (2) that the defendant whose guilt it is considering was then a member of the conspiracy; and (3) that the act which constituted the offense was done in furtherance of that conspiracy, before it may convict under this theory. See also United States v. Castellana, 329 F.2d 264 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966); Gradsky v. United States, 376 F.2d 993 (5th Cir. 1967).

VII. Special Problems in Conspiracy Prosecutions

A. Multiple Conspiracies

This is a very important problem which is largely beyond the scope of this article. In drafting conspiracy indictments, consideration should be given to whether the proof shows a single continuous conspiracy or a series of separate conspiracies. Whether a scheme is one conspiracy or several is primarily a question of fact as to the nature of the agreement. United States v. Dardi, 330 F.2d 316, 327 (2d Cir.), cert. denied, 379 U.S. 845 (1964); United States v. Varelli, 407 F. 2d 735, 746 (7th Cir. 1969).

1. A single agreement to accomplish an unlawful object does not cease to be a single conspiracy because it continues over a period of time, Braverman v. United States, 317 U.S. 49, 52 (1942), or because there exists a time gap in the proof or a change in the membership. United States v. Stromberg, 268 F.2d 256, 263-64 (2d Cir.), cert. denied, 361 U.S. 863 (1959); compare United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). There may be a single continuing agreement to commit several offenses by a multiplicity of means. United States v. Crosby, 294 F.2d 928, 945 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

2. In ascertaining whether there are separate conspiracies or one overall continuing conspiracy, the question is, in essence: what is the nature of the agreement? If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of a conspiracy, the agreement among all the parties constitutes a single conspiracy. United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Hutul, 416 F.2d 607, (7th Cir. 1969), cert. denied, 396 U.S. 1012 (1970). Frequently, however, where an indictment alleges a single continuous conspiracy, the claim will be made that the proof shows two or more separate conspiracies, and thus a prejudicial variance exists between the proof and the indictment. United States v. Russano, 257 F.2d 711, 716 (2nd Cir. 1958); Rocha v. United States, 288 F.2d 545, 553, (9th Cir.), cert. denied, 366 U.S. 948 (1961). Such a claim may, under the authorities, be disposed of in one of the following four manners:

   a. The claim of multiple conspiracies may be rejected. Blumenthal v. United States, 332 U.S. 539 (1947) (single conspiracy with multiple stages). See United States v. Tramaglino, 197 F.2d 928 (2d Cir.), cert. denied, 344 U.S. 864 (1952), and United States v. Etheridge, 424 F.2d 951, 963-65 (6th Cir. 1970).

   b. The appellate court may find that a single conspiracy was proved as to some but not all of the alleged conspirators, necessitating an initial determination as to whether those defendants not in the entire conspiracy

were properly joined because of their participation in one or more phases thereof. United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). See United States v. Varelli, 407 F.2d 735, 743 (7th Cir. 1969).

c. The court may find that the proof shows multiple conspiracies but that the variance is harmless error because no practical prejudice results to the accused therefrom. Berger v. United States, 295 U.S. 78, 84 (1935). See United States v. Sing Kee, 250 F.2d 236, 242 (2d Cir. 1957), cert. denied, 355 U.S. 954 (1958); United States v. Cohen, 145 F.2d 82, 89 (2d Cir. 1944), cert. denied, 323 U.S. 799 (1945).

d. A finding of multiple conspiracies may result in a determination that the proof was necessarily prejudicial to each defendant. In Kotteakos v. United States, 328 U.S. 750 (1946), where the Government conceded that the proof showed many agreements connected by one central figure and having distinct though similar illegal objects. The Court held that the variance was prejudicial to the defendants and reversed their convictions. The danger that exists in such variance is the transference of guilt in the minds of the jury from one conspiracy to another. Blumenthal v. United States, 332 U.S. 539, 559 (1947); Kotteakos v. United States, supra at 767. It has been suggested though, that proper instructions to the jury might mitigate an otherwise prejudicial variance and render it harmless. See United States v. Varelli, supra at 21. There is not such danger where one conspiracy is alleged and two are shown, when the defendant is proven to have participated in each conspiracy. Monroe v. United States, 234 F.2d 49, 53 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

3. Caveat on Multiple Conspiracies--This area of the law of conspiracy is not without its difficulties; attention should be given to the possibility of multiple conspiracies prior to indictment. Indictments may be framed to allege the overall conspiracy in one count with separate counts to charge the lesser included conspiracies. Such a procedure will simplify the drafting of jury instructions and will also reduce the risk of appellate reversal on a multiple conspiracies issue. In any event, one should not attempt to resolve a multiple conspiracies problem (or prepare jury instructions) without first reading carefully the leading cases on this subject---e.g., Kotteakos, Blumenthal, Borelli, Varelli, Monroe, and also United States v. Calabro, 467 F.2d 973, 983 (2d Cir. 1972); United States v. Vicars, 467 F.2d 452, 454 (5th Cir. 1972); United States v. Griffin, 464 F.2d 1352, 1357 (9th Cir. 1972).

B. The Myth of "Derivative Standing"

Defendants in conspiracy cases occasionally claim "derivative standing" to attack unlawful searches which involve co-conspirators. Such a proposition appears grounded in the notion that since each conspirator "stands in the shoes" of his co-conspirators, he may (solely by virtue of his status as a conspirator) vicariously assert the co-conspirator's Fourth Amendment rights. However, the law is plainly to the contrary. See, e.g., United States v. Bell, 457 F.2d 1231, 1239 (5th Cir. 1972); United States v. Wing, 450 F.2d 806, 810 (9th Cir. 1971), cert. denied, 405 U.S. 994 (1972); United States v. Conrad, 448 F.2d 271, 276 (9th Cir. 1971); United States v. Price, 447 F.2d 23, 30 (2d Cir.), cert. denied, 404 U.S. 912 (1971). See also Brown v. United States, __U.S.__ (No. 71-6193, decided April 17, 1973).

C. Concealment

Concelament cannot normally be the object of conspiracy. See Greenewald v. United States, 353 U.S. 391 (1957).

VIII. Instructions

A. See D.C. Bar Association Criminal Jury Instructions (1972).

1. No. 4.92, Conspiracy--includes overt act requirement.

2. No. 4.93, Conspiracy-Co-Conspirator Rule--should not be given. Instead, see United States v. Calaro, 424 F.2d 657, 660 (2d Cir. 1970); United States v. Baker, 419 F.2d 83 (2d Cir. 1969); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968).

3. No. 4.94, Conspiracy-Overt Act Rule--where overt act is required by statute.

B. See also Manual on Jury Instructions, 36 F.R.D. § 10.00 at 502-512 (1964).

ADVANCED PROSECUTOR TRAINING

I.G: ELECTRONIC SURVEILLANCE

E. Lawrence Barcella

I. Historical and Legal Background

A. At common law, "eavesdropping" was considered a nuisance, and often proscribed by "Peeping Tom" statutes.

B. Despite the advent of electronics, courts continued to treat the topic in light of common law considerations, i.e., a violation occurs only when there is a physical trespass into a constitutionally protected area. Olmstead v. United States, 277 U.S. 438 (1928).

1. Olmstead majority considered it crucial that conversations were tangible objects, and they felt that the Fourth Amendment only proscribed the seizure of tangible items; therefore, the Fourth Amendment did not apply to eavesdropping.

2. Olmstead rationale colored legal thinking for more than thirty years.

C. Congressional response to Olmstead was a statutory prohibition contained in §605 of the 1934 Federal Communications Act.

1. "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . "

2. §605 held to cover wiretapping by state or federal officers as well as by private persons. Nardone v. United States, 302 U.S. 379 (1937).

3. The Department of Justice and the FBI took the position that §605 did not prohibit wiretapping alone, only tapping followed by "divulgence," and, further, that it was not a "divulgence," when one member of the Government communicated to another, but only when he communicated outside the Government, e.g., sought to introduce the wiretap information into evidence. See Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195, 197-199 (1954).

D. The Olmstead "constitutionally protected area" approach was slow in eroding.

1. Goldman v. United States, 316 U.S. 129 (1942) (federal agent placed detectaphone against the wall of a private office).

2. Silverman v. United States, 365 U.S. 505 (1961) (use of "spike-mike" constituted trespass).

II. Warren Court approach to electronic surveillance

A. The Court's treatment of the use of "wired-up" undercover agents or feigned friends provides a road map to the Court's later electronic surveillance decisions.

1. On Lee v. United States, 343 U.S. 747 (1952) (informant carrying concealed transmitter).

2. Lopez v. United States, 373 U.S. 427 (1963) (agent carrying concealed recorder).

3. Osborn v. United States, 385 U.S. 323 (1966) (use of concealed recorder on informer after getting antecedent judicial approval).

4. Hoffa v. United States, 385 U.S. 293 (1966) (use of informant in defendant's premises not a Fourth Amendment violation).

B. Genesis of the current approach

1. Berger v. New York, 388 U.S. 41 (1967). Here the Court discarded implicitly certain findings in Olmstead, i.e., that a conversation does not come within the protective ambit of the Fourth Amendment. The Court now found that the Fourth Amendment does apply to eavesdropping and that warrant clause must be followed. While the Berger surveillance was based on a specific statute and preceded by antecedent judicial justification, the Court was unconvinced that a single recitation of probable cause here could give rise to round-the-clock sixty day surveillance. They found the following omissions unacceptable:

a. A lack of particularity of offense, property or conversation sought;

b. The surveillance was too lengthy for a single recitation of probable cause;

c. There was no stated termination date placed on the surveillance once the conversation sought was seized; and

d. There was not "notice" given, although the Court recognized the exigent circumstances might obviate notice.

2. The Court explicitly overruled Olmstead and Goldman in Katz v. United States, 389 U.S. 347 (1967). The Court, in rejecting the "constitutionally protected area" approach adopted the "expectation of privacy" approach. They further held that electronic surveillance must come within the strictures of the Fourth Amendment and that certain procedural requirements, such as those laid out in Berger, were necessary if wire tapping were to be accepted as a legitimate law enforcement investigative method.

III. Title III--a Congressional response to Berger and Katz

A. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 18 U.S.C. §§2510-2520 was an intensive effort, inter alia, to structure a rigorously limited system of wire surveillance and electronic eavesdropping for law enforcement use that comported with the constitutional demands of the Warrant Clause of the Fourth Amendment under the guidance provided by Berger and Katz. The Act specifically prohibits the use of any electronic surveillance unless the procedural dictates of the statute are complied with.

B. While the statute must be interpreted as a coherent whole, each section must be dissected if Title III is to be understood. Briefly, the statute allows legitimate electronic surveillance only by law enforcement officials subsequent to an Attorney General approved application being made to a judge, supported by an affidavit with a detailed probable cause showing.

1. 18 U.S.C. §2510 is the definitions portion of Title III, with three definitions being particularly noteworthy.

a. 2510 (2) defines "oral communication" as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. This is intended to reflect existing law and must be evaluated in light of all circumstances.

b. 2510 (1) defines "wire communications" to include all communications carried by a common carrier, in whole or in part, through our nation's communications network. The coverage is intended to be comprehensive.

c. 2510 (11) defines "aggrieved person" to mean any person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. This definition defines the class of persons entitled to invoke the suppression sanction of §2515 discussed below, through the motion to suppress provided for by §2518 (10(a)), also discussed below. Despite its broad language, it is intended only to reflect existing law. S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Alderman v. United States, 394 U.S. 165 (1969), adds one other constitutional requirement: a person whose telephone is tapped has standing even though requisites are absent. Moreover, an "aggrieved person" within the meaning of 18 U.S.C. §2518(10(a)), discussed below, must either be a defendant or a potential defendant in a criminal case. See Gelbard v. United States, 401 U.S. 41, 59-60 (1972). He must be "a party as such," S. Rep. No. 1097, supra, at 106 (1968), in a "trial, hearing or proceeding in or before any court." 18 U.S. C. §2518(10(a)). If an individual does not fall into this class, his "exclusive" remedy is a civil action for damages under 18 U.S.C. §2520, infra. See S. Rep. No. 1097, supra at 107;

cf. Alderman v. United States, supra, 394 U.S. at 174; In re Evans, 146 U.S. App. D.C. 310, 341-343, 452 F.2d 1239, 1270-1272 (1971, Wilkey, J., dissenting).

2. 18 U.S.C. §2511 expressed the general prohibition against electronic surveillance, except as provided for in the statute itself. The section delineates the criminal penalties for violation of Title III, and also carves out certain exceptions:

   a. 2511 (1) (d) provides for a penalty of five years and/or $5000 for violating Title III.

   b. 2511 (2) (a) exempts telephone company employees under certain circumstances within the course of their employment.

   c. 2511 (2) (c) and (d) allows for consensual monitoring as long as the person giving consent is a party to the intercepted communication, i.e., you cannot tap your own telephone or bug your home unless you are actually a participant in the conversation. See United States v. White, 401 U.S. 745 (1971). See Department of Justice requirements discussed below.

   d. 2511 (3) is the National Security exemption. If this section has any vitality, it is only in the area of foreign intelligence, not domestic intelligence. United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972). If these matters arise, they should be handled by Court in camera. This procedure is approved and explained in United States v. Lemonakis, U.S. App. D.C. ___, ___, 485 F.2d 941, 961-963 (1973).

3. 18 U.S.C. §2512 prohibits the manufacture, sale, possession or advertising of intercepting devices where the device is "primarily useful for the purpose of the surreptitious interception of wire or oral communications." Whether the design of the device renders it primarily useful for surreptitious listening is a jury question. United States v. Bast, D.C. Cir. No. 72-2132, decided January 25, 1974. Bast is also concerned with unlawful advertising of illegal electronic surveillance equipment.

4. 18 U.S.C. §2513 simply provides for the confiscation of intercepting devices.

5. 18 U.S.C. §2514 gives the Government the right to seek immunity for a witness who may possess evidence relating violations of Title III. The immunity given is testimonial and the procedural requirements are similar to 18 U.S.C. §6001 et seq. See Kastigar v. United States, 406 U.S. 411 (1972). Further discussion of immunity detailed below.

6. 18 U.S.C. §2515 imposes an evidentiary sanction to compel compliance with the other prohibitions of Title III. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, etc., where the disclosure of that information would be in violation of Title III. This provision must be read in light of §2518 (10)(a), discussed below, which defines the class entitled to make a motion to suppress.

7. 18 U.S.C. §2516 (1) outlines the Department of Justice procedures that must be followed if an application is to be made to a Federal judge. The authorization must be from the Attorney General or any Assistant Attorney General specially designated by the Attorney General. See United States v. Giordano, U.S. , 42 U.S.L.W. 4642 (May 13, 1974); United States v. Mantello, 156 U.S. App. D.C. 2, 478 F.2d 671 (1973), cert. denied, 42 U.S.L.W. 3647 (May 28, 1974).

   Subsections (a) through (g) outline the specific offenses for which interception may be used.

8. 18 U.S.C. §2517 authorizes the use and disclosure of intercepted wire or oral communications in specified circumstances; like §2515, it must be read in light of §2518, discussed below.

   a. §2517 (1) authorizes any investigative or law enforcement officer to disclose intercepted information to other law enforcement officers.

   b. §2517 (2) authorizes the law enforcement officer to use intercepted information in the official performance of his duties.

   c. §2517 (3) allows anyone who has received intercepted information, authorized by Title III, to use the information.

   d. §2517 (4) provides that privileged communications do not lose their privileged character simply because they are intercepted.

   e. §2517 (5) provides for the interception of evidence relating to other offenses than those contemplated in the original order. While this information may be passed on to other law enforcement officers before it can be used as evidence, judicial permission must be obtained.

   f. N.B. This substantially changes "divulgence" as defined by §605 of the 1934 Federal Communications Act as discussed above in I.C.

9. 18 U.S.C. §2518 is the heart of Title III. It sets out in detail the procedure to be followed in the interception of wire or oral communications, and embraces the demands of the Fourth Amendment.

   a. Paragraph (1) requires a written application for an authorization to intercept; this reflects existing law. See Fed. R. Crim. Proc. 41. This application must include the information described below:

      (1) Subsection (a) fixes responsibility by requiring the identity of the person making and authorizing the application to be set out. Misidentification of the person authorizing the application is not grounds for suppression, so long as the Attorney General or his special designate in fact approved the application. See United States v. Chavez, __U.S.__, 42 42 U.S.L.W. 4660 (May 13, 1974).

      (2) Subsection (b) requires a full and complete statement of the facts and circumstances relied on by the person making the application which shows, in essence, probable cause. These requirements reflect the constitutional command of particularity. Berger v. New York, supra, 388 U.S. at 58-60, Katz v. United States, supra, 389 U.S. at 354-356. United States v. Kahn, ___U.S.__, 42 U.S.L.W. 4245 (February 20, 1974) says that application must identify as persons whose conversations are to be seized only those who investigating agents have probable cause to believe are committing the crime under investigation.

      (3) Subsection (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or are to be too dangerous. Almost every motion to suppress filed in this jurisdiction challenges this requirement. However, the language is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime and must be read in a common-sense fashion. See United States v. Kahn, supra, 42 U.S.L.W. at 4249 n. 12. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques, general questioning under immunity grant, use of regular search warrants, and infiltration by informers or undercover agents. See Giancana v. United States, 352 F.2d 921 (7th Cir.), cert. denied, 382 U.S. 959 (1965).

      (4) Subsection (d) requires a statement of the period of time during which interceptions are to be made. It must be read in conjunction with paragraphs

4(e), 5, and 6, discussed below. Together they require that the duration of an interception not be longer than is necessary under the facts of the particular case. Where it is necessary to obtain coverage of only one meeting, that order should not authorize additional surveillance. Compare Osborn v. United States, 385 U.S. 323 (1966).

(5) Subsection (e) requires a complete statement regarding all previous applications concerning the same persons, facilities, or places, and the action taken by the previous judge. This section is designed to prevent forum-shopping, and any variance from its strictures may result in complete suppresion. In United States v. Bellosi, D.C.Cir. No. 73-2223 decided June 28, 1974, the court rejected the contention that subsection (e) was directed only at judge-shopping and affirmed the suppression order for failure to comply strictly with the requirement. The Government has failed in goodfaith to include prior application involving same person, even though in a totally unrelated investigation by a different law enforcement agency.

b. Paragraph (3) authorizes the judge to enter an ex parte order authorizing or approving the interception. The judge must first determine whether probable cause, as delineated in subparagraphs (a) through (d), exists.

c. Paragraph (4) sets out in subparagraphs (a) through (e) the requirements that each order authorizing or approving the interception must meet. Also contains a section for the benefit of the telephone company, so as to excuse them from any liability in most instances.

d. Paragraph (5) sets a maximum time limitation of 30 days for any order or extension.

(1) Minimization--the interception shall be conducted in such a way as to "minimize" the interception of communications not otherwise subject to interception. See United States v. James, D.C. Cir. No. 71-1168, slip. op. at 16-26, decided January 4, 1974, and cases cited therein, especially United States v. Focarile, 340 F.Supp. 1033 (D.Md.), aff'd sub. nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd, ___ U.S. ___, 42 U.S.L.W. 4642 (May 13, 1974). See United States v. Scott, D.C. Cir. No. 71-1702, decided June 27, 1974, vacating and remanding 331 F. Supp. 233 (D.D.C. 1971) for reconsideration in light of United States v. James, supra.

(2) Termination--the interception must terminate upon the attainment of the authorized objective.

N.B. When investigating a crime of a continuous nature, a single incriminating call does not help your objective, ergo the use of an interception is most viable in a conspiracy situation.

e. Paragraph (6) provides for periodic reports to the judge on the progress of the interception.

f. Paragraph (7) provides for an emergency procedure for the interception of communications.

(1) Rare situations--only the Attorney General may authorize an emergency intercept and the use of it is rarely granted.

(2) Application and order must still be complied with within 48 hours.

g. Paragraph (8) provides for accurate record keeping and custody of both pleadings and recorded intercepted conversations.

(1) Violations of this section are punishable by contempt.

(2) Subparagraph (d) places on the judge the duty of causing an inventory to be served by the law enforcement agency within 90 days of termination on at least the named targets. This reflects existing search warrant procedure. Fed. R. Crim. P. 41.

(3) Extremely important to maintain custodial integrity.

h. Paragraph (9) states that wire interception evidence cannot be used at trial or any other proceeding (except grand jury) unless at least 10 days notice is given to the parties.

i. Paragraph (10) is the remedial portion of Title III, allowing any "aggrieved person" (see III, B. 1. c. supra) to move to suppress the contents of any intercepted communication on three grounds:

(1) If the communication was unlawfully intercepted - "Unlawfully" means in violation of certain requirements of Title III as well as the Constitution. United States v. Giordano, supra, 42 U.S.L.W. at 4647. Suppression is warranted only for violation of those requirements "that directly and substantially implement the congressional intention to limit the use of intercept procedures..." Id. In Giordano, failure of the Attorney General or his special designate to authorize the application required suppression while in United States v. Chavez, __U.S.__, 42 U.S.L.W. 4660 (May 13, 1974), misidentification of the authorizing official, where the Attorney General had in fact given approval, was held insufficient to justify suppression.

(2) If the order of approval is insufficient on its face.

(3) If the interception was not made in conformity with the order of approval.

j. 18 U.S.C. §2519 simply provides for periodic reports to be made so that the efficacy of wire-tapping can be regularly reviewed.

k. 18 U.S.C. §2520 authorizes the recovery of heavy civil damages by those whose communications are intercepted in violation of Title III.

C. District of Columbia Interception of Communications Statute

1. 23 D.C. Code §§541-556.

2. Relation to Title III

a. Almost identical.

b. Must be construed as supplementing, not superseding, Title III. See 23 D.C. Code §556.

c. Certain privileged communications, i.e., physician, attorney, clergymen, marital, are treated somewhat differently than under Title III. A judge must determine what facilities or places are to be used in connection with conspiratorial activities characteristic of organized crime with strong effort to minimize interception of privileged communities. 23 D.C. Code §547(d).

d. For good discussion, see Rauh and Silbert, Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am. U.L. Rev. 252, 268-275 (1971).

IV. Related and Collateral Problems

A. Investigatory Stage

1. Pen Register--is a device attached to a given telephone line which records out-going numbers called from that particular line. United States v. Caplan, 255 F.Supp. 805, 807 (E.D. Mich. 1966).

a. Pen Register neither records nor monitors conversations; thus it does not constitute an interception and does not come within the ambit of Title III. United States v. King, 355 F.Supp. 523 (S.D.Cal.), rev. on other grounds, 478 F.2d 494 (9th Cr. 1973); S.Rep. No. 1097, 90th Cong., 20 Sess. 91 (1968).

b. Invaluable pre-intercept investigatory tool.

c. No definite standard or showing necessary to obtain a pen register; however, policy of this office, subsequently adopted by both courts, is that an order to install a pen register will only be issued upon submission of an affidavit demonstrating probable cause for its use.

2. Consensual Monitoring--where one party to conversation gives consent.

a. See 18 U.S.C. §2511 (2) (c) and (d) explained above.

b. United States v. White, supra, 401 U.S. 745 (1971) (non-witness informant carrying concealed transmitter).

c. On Lee v. United States, 343 U.S. 747 (1952) (informant carrying concealed transmitter).

d. Lopez v. United States, 373 U.S. 427 (1963) (agent carrying concealed recorder).

e. Rathburn v. United States, 355 U.S. 107 (1957) (police officer listening on extension telephone).

f. Prior Department of Justice approval necessary under certain circumstances. See D.J. Order No. 537-73, dated September 4, 1973, though generally approval of department head or his designee is sufficient.

B. Pre-trial and Trial Stages

1. Requests for disclosure of intercepted communications

a. 18 U.S. Code §3504 - "In any trial, hearing, or other proceeding in or before any court, grand jury. . . upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

b. "Party aggrieved" is generally a defendant with standing to challenge the alleged unlawful conduct. See Alderman v. United States, supra; H.R. Rep. No. 91-1549 at 51 (1970), see discussion above at III B.1.c.

c. Applies to acts of private citizens as well as acts of Federal or state officials--in both criminal and civil proceedings. S.Rep. No. 91-617, p. 154 (1969).

d. Imposes sanction of 18 U.S.C. §2515, in prohibiting 'unlawful act' evidence. Gelbard v. United States, 408 U.S. 41 (1972); In re Evans, 146 U.S. App. D.C. 310, 452 F.2d 1239 (1971). The sanction imposed is generally suppression of the intercept evidence, either in whole or in part.

e. Government is obliged to simply affirm or deny. Id.

(1) Check of investigative agencies' files made by contact with Organized Crime and Rackets Section, Criminal Division, Department of Justice.

(2) Check of indices takes two to six weeks.

2. Immunity

a. See Kastigar v. United States, supra, where the Supreme Court determined that "use-plus-fruits" immunity is constitutionally sufficient and "transactional" immunity grants are no longer necessary.

(1) "Use-plus-fruits" immunity means that the Government cannot use an individual's compelled testimony or the fruits--investigative leads--against that person in a subsequent proceeding. This, of course, does not cover false declaration or perjured testimony.

(2) "Transactional" immunity barred the Government from prosecuting an individual for any "transaction, matter or thing" as to which he testified.

(3) See Case Notes, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale Yale L.R. 171 (1972).

b. 18 U.S.C. §§6001-6003.

c. 18 U.S.C. §2514, discussed above.

d. It does not matter that witness to be compelled is a juvenile. In Re Grand Jury Proceedings (Diane Alexandra Raper), ___ U.S. App. D.C. ___, 491 F. 2d 42 (1974).

e. Prior to granting immunity, approval must be received from the Department of Justice. Requests are generally made through the General Crimes Section of the Criminal Division, who make appropriate inquiries of other Governmental investigative agencies to confirm that a grant of immunity will not undermine any on-going investigation. To insure against this, a form questionnaire must be submitted to the Department of Justice with an with an immunity request.

3. Voice Identification on Intercepts

a. Useful for both initial identification at grand jury level and subsequent trial identification. 70 A.L.R. 2d 955 (1970).

b. United States v. Mara, 410 U.S. 19 (1973) (Federal grand jury directive that witness furnish handwriting exemplars for identification, without preliminary showing of reasonableness, is not violative of Fourth Amendment).

c. United States v. Dionisio, 410 U.S. 1 (1973) (Compelling Federal grand jury witness to furnish voice exemplars for identification purposes, without preliminary showing of reasonableness, is not violative of Fourth or Fifth Amendment).

d. United States v. James, supra, slip. op. at 29-30 (Use of agent to testify re: identity from overheard conversations).

e. Use of testifying informant to identify voice is permissible, even if cross-examination on basis of knowledge of voice would reveal evidence of other crimes. Cf. McGautha v. California, 402 U.S. 183 (1971).

f. Counsel need not be present at voice identification. United States v. James, supra; compare United States v. Ash, 413 U.S. 300 (1973).

C. All electronic surveillance matters are to be coordinated through the Major Crimes Division of this Office.

V. Selected References

A. Appellee's Brief in United States v. James, D.C. Cir. No. 71-1168.

B. Senate Report 1097, April 29, 1968, accompanying Omnibus Crime Control and Safe Streets Act of 1968, 90th Cong., 2nd Session.

C. ABA Project on Standards for Criminal Justice, Electronic Surveillance (Approved draft, 1971).

D. Note, Wiretapping and Electronic Surveillances--Title III of the Crime Control Act of 1968, 23 Rutgers L. Rev. 319 (1970).

E. Schwartz, The Legitimization of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455 (1969).

F. Rauh and Silbert, Criminal Law and Procedure, D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am U.L.Rev. 252, 268-275 (1971).

G. Blakey and Hancock, A Proposed Electronic Surveillance Control Act, 43 Notre Dame Lawyers 657 (1968).

ADVANCED PROSECUTOR TRAINING

II.A: INTERVIEWING AND PREPARING WITNESSES FOR TRIAL

James L. Lyons

I. Introduction

No case is so strong that it requires no preparation; and no outcome so certain that a prosecutor can rely solely on a perusal of his case jacket before trial. Diligent preparation is the agelong key to successful prosecution. Seasoned prosecutors know that cases are not won by cross-examination or by closing argument; rather, they are won by a thoroughly prepared and properly presented case-in-chief. Whether the Government's case-in-chief is persuasive in the mind of the jury will depend in large measure on whether the prosecutor fully prepared his witnesses for trial. There is more than a grain of truth in the saying: "It is not the witness who fails the prosecutor, but rather the prosecutor who fails the witness."

II. Initial Witness Conference*

A. Preliminary Steps

1. Prior to his first meeting with the witnesses, the prosecutor should review carefully the case jacket, take the necessary steps to flesh it out, and familiarize himself with the elements of the crimes charged and any particular legal problems presented. (See Prosecutor Training Manual: Topic II.B, §IA2, 3).

2. Interview the officer in charge and go over the case with him in general terms.

   a. Inspect the M.P.D. Squad Jacket, e.g., homicide, sex, robbery, etc. Generally there is valuable information contained in the Squad Jacket that is not contained in the prosecutor's case jacket.

   b. Determine the existence and location of all Jencks Act materials. (See Pros. Trg. Manual: II.B. §IB3.)

   c. Determine whether the case presents any particular evidentiary or legal problems, e.g., search and seizure identification, Miranda, etc.

*Although much of the material discussed in this outline is applicable to witnesses in general, the emphasis is on the preparation of lay witnesses, particularly the complaining witness.

d. Discuss facts of the case and what witnesses are available to prove the elements of the crimes charged.

e. Find out from the officer what he knows about the witnesses in the case.

(1) Background of witnesses, employment, military service, etc.

(2) Weak points of witnesses, e.g., prior record, inconsistent statements to police, relationship to defendant, bias, prior mental problems, homosexuality, etc.

(3) Particular problems of witnesses, e.g., physical disability, reluctance to testify, poor memory, inability to express himself, etc.

(4) Any other information about the witnesses known to the officer.

f. Determine if there are any problems in locating the witnesses. If so, have the officer take action to track down the witnesses. (See Pros. Trg. Manual: Topic II.B, CIIA.) If a witness is out of state or some distance from court, be sure to contact him early regarding trial date and prepare the necessary forms for subpoenas and travel advances.

g. Determine what physical evidence is involved, the location of the evidence, and what witnesses are necessary to establish the admissibility of the evidence at trial.

3. As soon as possible after receiving the case jacket, the prosecutor should call the complaining witness (and other key corroborating witnesses) and introduce himself.

a. Explain to witness that an indictment has been returned regarding the crime of which he was a victim or to which he was witness and that you have been assigned to prepare the case.

b. Be solicitous of the witness:

(1) Find out from the witness his work and vacation schedule and when it would be convenient for him to discuss the case.

(2) Find out if witness has been threatened in any way or has any reluctance to discuss the case.

(3) Find out if witness has any special problem meeting with you, e.g., cannot get a baby sitter, has physical disability, etc. If so, make arrangements to alleviate the problem. This may require special arrangements with the police -- perhaps requiring them to act beyond the call of duty.

(4) Assure witness that he should not hesitate to call you about anything concerning the case. (Make sure to ask witness to notify you or your secretary of any changes in his address or telephone number.)

(5) Use this initial contact to show witness that you are concerned about the case and about him. This "personal touch" by the prosecutor will go a long way to establish a good rapport with the witness. Do not underestimate its value.

c. You may wish to use this early opportunity to advise the witness what to do if he is contacted by a defense investigator and asked to give a statement. A Government witness is free to decide whether to cooperate wit the defense prior to trial. Byrnes v. United States, 372 F. 2d 825 (9th Cir. 1964); however this decision must be free of coercion on the part of the prosecutor. Gregory v. United States, 125 U.S. App. D.C. 140, 369 F.2d 185 (D.C. Cir. 1966).

Tell the witness: "You may speak to a defense investigator or counsel if you wish, but you are not required to; the decision is entirely yours and I cannot advise you what to do (except that I cannot advise you not to). If you do decide to speak with the investigator or counsel, you should obtain a copy of anything you sign or initial."

The prosecutor should also inquire if the witness has already been contacted by an investigator or counsel and what was said.

B. Direct Preparation of Initial Witness Interview

1. Review all Jencks materials of all witnesses and look for: (a) any internal inconsistencies in a statement; (b) any inconsistency in the statement of a witness; and (c) any inconsistency between the statements of one witness to another witness.

2. Prepare an interview sheet for each witness, setting out any subject areas about which you intend to ask the witness. For example:

"W said at P-H transcript, p. 9, that robber was 'clean-shaven' but P.D. 251 says W reported robber had a goatee."

"W said at G.J. transcript, p. 16, that teller Jones was crouched down behind the counter when when robber ran out of bank but teller Jones say at G.J. p. 63, he saw robber make his getaway."

"According to Officer Smith, W served time in Lorton -- explore this with W."

"W said killer was wearing 'green tattered' shirt--make sure to show W shirt taken from defendant at time of arrest."

"W said in signed statement to robbery squad that robbery took '5 seconds' but other W's said robbery took '3-4 minutes'--explore W's concept of time."

3. Prepare xerox copies of all witnesses' Jencks materials.

4. Have all physical exhibits about which witness is to give testimony delivered to your office in advance of interview. Be aware of possible chain-of-custody problems.

5. If the number of witnesses in a case is such that it is not feasible to interview them all in one day or one session, try to set up interviews of groups of witnesses who have testimony about specific phases of the case, e.g., all bank tellers and police officers with whom tellers had contact during identification procedures; all witnesses concerned with the arrest of the defendant and the search of his car or premises; etc.

6. Make arrangement to have the investigating officer present at the scheduled witness interview.

   a. Never interview a witness unless a police officer or some other reliable third party is present.

   b. If you have to claim "surprise" at trial, failure to have a third party available to impeach the witness may result in your having to forego the impeachment. See United States v. Vereen, 139 U.S. App. D.C. 34, 429 F.2d 713 (1970); United States v. Porter, 139 U.S. App. D.C. 19, 429 F.2d 203 (1970).

III. The Initial Witness Conference: Some Suggestions for an Effective Interview

A. Preliminary Steps

1. Make sure that you and the witness and the investigating officer are not disturbed during the interview. Have your secretary hold all calls, unless an emergency.

2. Try to relax the witness.

3. Make the witness aware of your function as AUSA and what his relationship is to the case. Explain that the purpose of meeting is to find out just exactly what the witness knows. Impress upon witness your fairness and your desire to get the truth. For example you might say: "I will not try to put words in your mouth or tell you what to say. But I will ask you detailed questions to be sure all the facts are clear and to be sure that you are saying exactly what you mean."

4. At some time during the interview, give the witness a xerox copy of his prior statements and let him read them over to refresh his recollection. Some prosecutors prefer to do this prior to the interview to refresh recollection and avoid unnecessary inconsistencies. Time can often be saved by giving witnesses copies of their statements to review while they wait for you to interview them.

B. Conducting the Interview

1. As a general rule, begin the interview by asking the witness to tell you in his own words "what happened."

   a. Do not interrupt the witness during the narrative and avoid taking notes the first time through.

   b. Starting the interview by letting the witness tell his story in narrative form makes the witness more at ease. In addition, it allows you an early opportunity to evaluate the witness as regards his demeanor, his ability to recall, his mannerisms and speech habits, etc.

   c. During witness' narrative make mental notes of any inconsistency between story and witness' prior statements.

2. After the witness has given his narrative, the prosecutor should start focusing in on details. A suggested approach is to take the witness through his statement sentence by sentence, word by word. For example:

Statement: "On January 2, 1974, at approximately 10:30 a.m., I was working at my teller's cage at Riggs Bank when I noticed the man who later robbed me come through the front door and walk over to my cage. When the robber got to my window..."

Questioning: What day was January 2, 1974?

- tie date to a specific day of the week, Monday, Tuesday, etc.

- if possible, tie date to some event the witness remembers, e.g., it was day after New Year's, two days before my birthday, same day I went to doctor, etc.

How long has witness been employed at Riggs Bank?

- who is his supervisor?
- where did he work before?

What are witness' duties at Riggs Bank?

What time did he arrive at bank that morning?

Was it a slow morning?

- how many customers did witness wait on before robber came in bank?

- does witness remember any of those persons?

How many teller's cages are there at Riggs Bank?

- describe his teller cage.

- describe bank.

- go over diagram of bank

How far is teller's cage from front door of bank?

- test witness' perception of distance

What time was it when witness first noticed man coming into bank?

- how does witness estimate time?

What drew attention of witness to man coming through door?

Was man by himself when he entered?

Did witness notice anything unusual about man at that point, e.g., man's clothing, his facial characteristics, mannerisms, etc.?

Did witness keep eyes on man as he was walking over to cage?

Did witness notice anything unusual about way man walked?

Exactly what was witness doing as man was walking over to cage?

How long did it take man to walk over to witness?

- test witness' perception of time.

3. As you go through each sentence in the statement, "probe with particularity" every facet of the witness' story.

   a. Be on the alert for leads to other witnesses and other evidence that may strenghten your case-in-chief.

   b. Be on the alert for testimony and leads to other evidence that cut against the defendant's possible defenses, e.g., insanity, drunkenness, lack of malice, etc.

   c. Go over in detail any tangible evidence, photographs, documents or other demonstrative evidence connected with the witness' testimony. Ask the precise questions needed to establish an adequate foundation for the admissibility of the evidence. (In this regard, you might explain to the witness the need for the questions and the sometimes confusing legal terminology.)

d. Go through in detail any other statements given by the witness.

e. Go through in detail the circumstances surrounding the giving of each statement, e.g., when, where, by whom, etc.

f. Go through all statements and "iron out" all inconsistencies. If witness says robber was clean-shaven and P.D. 251 shows that witness reported robber as having a goatee, sit witness down with the officer who took the P.D. 251 and go over the inconsistency until it is explained -- e.g., error, oversight, excitement of the moment, nervousness.

(1) After the inconsistencies of one witness have been explained, you must be certain that any inconsistencies which exist between other witnesses are similarly explained.

(2) There is no excuse for permitting a witness to take the witness stand unprepared and unable to cope with questions directed at prior inconsistencies.

g. Go over with witness any problem area, such as witness' prior record, alcoholism, homosexuality, bias, etc. Explain to witness the necessity for probing these areas and be careful not to antagonize or unduly embarrass the witness .

At the same time, try to determine whether you must carry out the damaging information in your own examination, if so, explain this to the witness and why. Otherwise, tell the witness you will attempt to keep it out, but you must prepare him for cross-examination.

h. Go back over the statement as many times as necessary until you and the witness are confident that both you and he have a firm grasp of the facts about which the witness is to testify.

i. Get to know your witness and attempt to learn something about his background.

j. Keep your notetaking to a minimum. Attempt to develop your own code and interpose legal

judgments and your own mental impressions as you go along. Be cautious of creating unnecessary Jencks statements. See Saunders v. United States, 114 U.S. App. D.C. 345, 613 F.2d 346 (1963).

C. As a rule, it takes more than one session to properly prepare a complaining witness or key lay witness for trial. It is suggested that at the first session you concentrate on developing the facts about which the witness is to testify and on establishing a good rapport with the witness. Thereafter, in subsequent sessions, you can hone down the witness' testimony and prepare him for actual trial.

IV. Additional Witness Preparation: Visit the Scene of the Crime

A. Following your initial witness interview, you should, if possible, set up a meeting with your key witnesses at the scene of the crime.

1. Go over witness' statement as amplified by initial interview.

2. "Walk through" the offense as it actually happened.

a. Have witness show you exactly where each episode of the crime occurred.

b. Have witness demonstrate to you exactly how each episode of the crime occurred.

c. Tie down witness' testimony about measurements, time, distance, etc.

3. Go over all photographs, diagrams and tangible evidence related to the scene about which the witness is to testify.

4. After you have gone over the crime once, "walk through" it again.

B. Going over the offense with your witnesses at the scene adds immeasurably to the clarity, vividness and sureness of the witness' testimony at trial. It will make both you and your witnesses more confident at trial and it is well worth the extra effort.

V. Final Witness Preparation: A Suggested Approach

A. The final stages of witness preparation should focus in on preparing the witness for examination at trial. A suggested approach is as follows:

1. Explain to witness the importance of his testimony to the case and how there is nothing to be afraid of if he tells the truth.

2. Explain to witness the mechanics of a trial, e.g., where the judge, jury, and the other parties sit; how the witness will be introduced at voir dire and then will go with other witnesses to the witness room; then he will be called in to testify before the jury, sworn in by the clerk and that he should leave the courtroom after he has testified.

3. Explain to witness the procedure of direct examination, cross-examination, and redirect examination.

4. Explain to witness the necessity of making a good impression on the jury.

   a. Go over any irritating speech habits the witness may have, e.g., always repeating the question, constant use of "you know, you know," talking too fast, talking too slow, etc.

   b. Go over any irritating mannerisms the witness may have, e.g., holding hand over mouth, picking nose, running hand through hair, etc.

   c. Go over proper courtroom etiquette, e.g., how to dress for trial, "Yes, Your Honor," "Yes" instead of "Yeah," sitting up in chair, speaking in loud, clear voice, etc.

5. Explain to witness any testimony that under the applicable rules of law, he must not go into and why, e.g., defendant's prior record, initially meeting the defendant in jail etc.

6. Where appropriate explain to witness various evidentiary principles and how they will affect his testimony, e.g., hearsay rule, no opinion evidence, etc.

7. Explain to witness possible lines of questioning with which he may be faced on cross-examination, e.g., bias, prior inconsistent statement, etc.

8. Explain to witness that the easiest way to defeat cross-examination is by answering truthfully and simply, even though the answers may be harmful. Explain that you will explore the "harmful" answer on redirect examination and minimize or destroy its apparently harmful effect.

9. Advise the witness to:

   a. Listen to the question.

   b. Make sure he understands the question before he answers it. If he does not understand the question, he should say so.

c. Answer the question directly. Do not volunteer information.

d. Do not let defense counsel make him lose his temper. Answer him in the polite and direct manner and tone as he gave to questions propounded by the prosecutor.

e. Do not hedge or stall or argue with counsel.

f. Do not speculate. If he does not know the answer, say so. If he does not remember or recall a fact, say so.

g. Tell the truth.

B. After you have thoroughly instructed the witness, put him through direct examination as if it were the day of trial. (If possible, examine the witness in an empty courtroom or grand jury room.)

1. Begin your direct examination: "Sir please give us your full name," etc.

2. As soon as witness violates any one of the above rules, stop the examination and point out to him the violation and reemphasize the rule.

Examples:

"Mr. Jones, you are slouching in your chair. Remember, it is important to make a good impression."

"Mr. Jones, you answered that you first met the defendant several years ago after he had gotten out of Lorton. Remember, you cannot mention the defendant's prior record."

3. Continue on with the direct examination. Keep stopping the examination whenever witness violates a rule and keep pointing out the violation and reemphasizing the rules. After a while, the witness will get the idea and will remember the rules.

4. Go over <u>all</u> exhibits about which witness is to testify.

5. Prepare witness to lay foundation for "refreshing recollection" and "past recollection recorded." (See Pros. Trg. Manual: Topic II.B, § II D 5.)

6. If there are sensitive or evidentiary problem areas in a witness' story, develop and go over with the witness specific questions and specific answers to those areas.

C. Following Direct, Put the Witness Through Cross-Examination

1. Again, every time the witness violates a rule, stop the cross-examination and point out the violation and reemphasize the rule.

   Examples:

   "Mr. Jones, your answer was not responsive to the question. Just answer the question 'yes' or 'no.' Do not volunteer information."

   "Mr. Jones, you are speculating with that answer. If you do not know the answer to a question or cannot remember the answer to a question, say so."

2. Go over all inconsistent statements and all other weaknesses in the witness' testimony for which you have prepared him. Have witness prepared to give specific answers to certain lines of cross-examination.

3. Go over with witness standard defense ploys, e.g., have you talked with anyone about the case, are you getting a witness fee for appearing here today, etc.

4. With a particularly difficult witness in an important case, have another experienced Assistant cross-examine the witness.

   a. During his cross-examination of witness make several objections and explain to witness how he he is not to answer question until objection is ruled on by the judge.

   b. Show witness how you will protect him from an unfair, badgering cross-examination.

D. Redirect Examination

Areas which might be opened up on cross-examination can usually be anticipated. Accordingly, questions which might be asked on redirect examination should be framed and reviewed with the witness in as much detail and with as much care as were the questions on direct and cross-examination.

VI. Final Witness Preparation: Some Closing Suggestions

A. After you are satisfied that the witness is ready to take the stand, make sure the witness knows he is ready.

1. Explain to witness that he is as ready as he will ever be.

2. Give witness encouragement for his upcoming testimony.

3. Allay any last minute fears the witness may have about testifying.

B. Make final arrangements to insure that witness will be present at trial.

1. Make sure that every witness is properly served a subpoena. The best practice is to serve each witness personally in your office, or have a police officer serve him.

2. Make sure witness knows exactly where he is to be for trial and what time he is supposed to be there.

3. Explain importance of calling you are your secretary if for any reason witness gets delayed.

4. If necessary, have police officer bring witness to Court.

C. Explain to witness proper demeanor to exhibit in court building, e.g., hallways, elevators, etc. Prospective jurors may be watching. Emphasize that they should not talk about the case in the hallways or in the vicinity of the courtroom.

D. Explain to witness that after testifying he is not to leave the court without checking with you.

E. Go over any final questions the witness may have.

VII. Miscellaneous Problem Areas

A. Photographic identification

Show the witness photographs previously identified or line-up photos - this is one exercise in refreshing recollection, not a new identification proceeding.

B. Reluctant witness problems

C. Co-defendant testimony and related immunity problems

D. Child witness qualification problems

E. The elderly witness and related competency problems

F. Handling requests by witnesses for special favors

ADVANCED PROSECUTOR TRAINING

II. B: PREPARATION AND EXAMINATION OF EXPERT WITNESSES

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I. Introduction

The use of expert witnesses in criminal prosecutions in a manner that is understandable to the trial jury can have substantial impact upon the outcome of the case. The pretrial preparation of expert testimony must be painstakingly thorough and careful, with constant attention paid to possible weaknesses in the expert testimony which are likely to be probed on cross-examination. Diligence must be taken to prepare the expert's testimony in these areas so they do not appear to be weak spots. Care must be taken to insure that the expert's testimony throughout reflects implicitly that the expert proceeded objectively and fairly in making his examinations and in reaching his ultimate opinions with respect to the evidence he has examined. Attention must likewise be devoted by the prosecutor to insuring that the expert does not attempt to enunciate opinions which he is not scientifically capable of forming and does not omit making opinions which he is capable of forming.

The prosecutor should review the case carefully to determine whether expert testimony would be helpful and appropriate. The most common areas of expertise and available experts are the following:

Chemist for narcotics analysis and urine testing for alcohol
Fingerprint expert
Handwriting expert
Ballistics expert
Medical Examiner
Psychiatrists and psychologists
Police experts: narcotics value, pick-pockets, numbers game, con game
Blood and body fluids
Value of items stolen
Engineering and scientific testimony
Use of dogs in smelling drugs or other scents

One should not hesitate to fashion a unique expertise if it is factually supportable, relevant to your case and admissible. "[I]f experience or training enables a proffered expert witness to form an opinion which would aid the jury, in the absence of some countervailing consideration, his testimony will be received." Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637, 644 (1962). Thus it is within the discretion of the trial court to admit testimony of an experienced police officer regarding pickpockets, confidence games, skid-marks on the street and the like. United States v. Jackson, 138 U.S. App. D.C. 132, 425 F.2d 574 (1970); Bell v. District of Columbia, 218 A.2d 520 (D.C. Ct. App. 1966). See generally C. McCormick, Evidence §13 (1954); 7 J. Wigmore, Evidence §1923 (1940). United States v. Dellinger, 472 F.2d 340, 382-385 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973).

In Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923), the United States Court of Appeals for this Circuit set forth the standard by which questions of expert testimony based on new methods of scientific measurement are to be resolved. The Frye standard requires that "the theory from which the deduction is made be sufficiently established to have gained general acceptance in the particular field in which it belongs." 54 App. D.C. at 47, 293 F. at 1014. See also United States v. Addison & Raymond, decided June 6, 1974.

II. Preparation

A. In General

No matter what the field of expertise, the single most important ingredient in effective presentation of expert witnesses is preparation. The prosecutor who does his homework will not have cause to complain after the expert has left the witness stand. A prosecutor who is surprised by what his own expert says is a prosecutor who has not properly prepared.

While it may be convenient and perhaps tempting for lawyers to group all expert witnesses into one class, it must be remembered that each expert is an individual witness; thus, the prosecutor's questioning and manner of dealing with the expert in and out of court must adapt to each expert just as it must with lay witnesses. Each expert witness has his own special mannerisms, prejudices and idiosyncrasies which may detract from otherwise effective testimony; they cannot be ignored in preparation simply because the witness is an "expert." Some experts make excellent witnesses and others do not. An expert who is extremely knowledgeable in his own field but who has trouble articulating himself before a lay jury must be prepared by the prosecutor until he is able to communicate his opinions clearly and concisely in layman's terms. An expert who appears to reflect a cocky attitude must be made to realize that his demeanor needs an overhaul before the prosecutor can permit him to express his findings before the jury.

B. Preparing to Interview the Expert

Once the prosecutor has determined that there is expert testimony in the case he should first gather all reports from the investigators which reflect the examination and conclusions of the expert with respect to the evidence. If the investigators do not have the reports, they should be instructed to obtain them and turn them over to the prosecutor. All property reports, or other police reports dealing with the chain of custody of the evidence - both the questioned evidence, and the known exemplars evidence, if any - should also be assembled by the prosecutor at the outset. Once all reports concerning the evidence have been assembled, the expert should be invited to a witness interview. No witness interview with an expert should be attempted until the scientific reports have been studied, and the prosecutor has a general idea from police reports of the custody of the items the expert has seen.

The prosecutor is usually a layman in the field in which he desires to utilize expert testimony. Thus, to effectively discuss the subject matter, prepare the expert and present the expert as a witness, the prosecutor must himself master enough of the rudiments of the subject matter so that he has a basic understanding of the field. Ordinarily, however, he need not embark on an extensive effort to educate himself before discussing the expert's opinions with him. The expert himself will be glad to assist the prosecutor in understanding the basic information necessary for effective direct examination. The prosecutor should never feel embarrassed about asking the expert to explain in detail the scientific principles in his field. The prosecutor who fails to review these matters even if he thinks he knows the answers is not prepared to present the expert in court.

(In 1973 the Foundation Press published Scientific Evidence in Criminal Cases, by A. Moenssens, R. Moses, and F. Inbau. It is a good source of background for almost all specialized fields of expertise utilized in criminal prosecutions.)

C. The Witness Interview

The prosecutor should meet with the expert witness as early as possible in the preparation of the case for trial. Many experts are very busy and have commitments months in advance. The expert should be advised of trial dates as soon as possible and kept abreast of possible delays. Attention to these details builds good rapport with the expert and ultimately results in better testimony at trial.

Most experts upon request will gladly furnish a list of questions which will sufficiently qualify them and carry them through direct examination. The prosecutor should never be so lazy that he fails to prepare the expert witness using the suggested format as a guide but with his own additional clarifying questions. The expert will develop respect for thorough prosecutors and contempt for those who appear to try to cut corners. Respect by the expert for the prosecutor will show through during testimony and make the testimony itself more effective.

Each new piece of evidence which will be the subject of testimony must be carefully examined in the course of the expert witness' preparation. The circumstances of chain of custody - all dates, persons who received the property, where it was stored and how it was stored, who the property was returned to, who had access to it, etc. - must be thoroughly reviewed with the expert. All identifying marks on the evidence and on all containers must be located and specifically identified. The expert should be made to double-ckeck all dates and other chain of custody data with records kept in his lab to insure their accuracy.

The expert should be asked to compile all worksheets he may have used during his examinations, and have them available either in court or in the witness room in case he needs to refer to them during testimony. The prosecutor must examine these documents pretrial, and if necessary have copies made for himself of any materials he deems particularly important. The worksheets should be explained by the expert to the prosecutor during the witness preparation. In short, the prosecutor must familiarize himself with each aspect of the expert's handling and examination of the evidence. Neglect and short cuts will weaken the expert's effectiveness before the jury and in some instances may undermine otherwise valuable evidence.

When preparing to examine an expert, the prosecutor should ascertain the degree of scientific certainty of the expert's field; whether his conclusion is based upon a subjective judgment, or upon an objective test; and most importantly, how conclusive he can be as to the ultimate issue for which he has been called. Once the prosecutor has determined the strength or the weakness of the expert's expected testimony, he should once again analyze exactly why he desires to call him and exactly what he hopes to prove. If the expert appears to be strong and has based his opinion upon scientifically exact reasoning, the witness should stress that in his testimony. However, if the field does not lend itself to an exact identification, but rather, merely narrows the possible range of suspects, the import of that testimony should be represented objectively and should not be over or underportrayed to the jury. Such evidence still plays an important part in the circumstantial chain. Consequently, examination of the expert should clearly establish the limited, but relevant value of the expert's opinion.

D. Qualification of the Expert Witness

The first answers the jury hears from the expert on the witness stand pertain to his qualifications as an expert. The questions and answers must be concise and responsive. The expert should never be asked to state his "employment" but rather his "profession".

The prosecutor should be reluctant to stipulate to the expert's qualifications as an expert as it is usually impressive to the jury if the witness fully states his background. If defense counsel before the jury states that he will stipulate to qualifications the prosecutor should usually respond in the jury's presence that he desires the jury hear the qualifications.

In preparing the witness for qualification in court it is important that the prosecutor review with him periodicals and text materials in his field. Ordinarily, this subject should not be explored on direct examination, but the witness will be fully prepared to handle cross-examiation in this area. Failure to prepare on this subject may prove embarrassing if the witness is not alerted that he should brush up on the names and authors of basic texts in his field.

The accompanying transcript excerpts contain a basic format of the type of questions which should be asked in order to qualify an expert witness.

E. Exhibits and Demonstrative Evidence

During the final interview with the expert witness before trial the prosecutor must develop a smooth and effective format for the handling of exhibits in court. The sequence in which they will be used and numbered must be developed. The expert should know before he takes the stand how the exhibits will be marked and in what order they will be shown to him. Failure to carefully prepare in this area will inevitably lead to sloppy handling of the evidence before the jury. The presentation will look amateurish, and may even confuse the jury on substantive aspects of the testimony.

All evidence must be carefully examined. The contents of all lock sealed envelopes and containers must first be examined in the office with the expert. Lock sealed envelopes and other containers must never be opened for the first time in court with only faith and hope that they contain what they are supposed to.

Some expert witnesses should always use demonstrative techniques to illustrate their testimony; however, it is not mandatory that demonstrative exhibits be used with every expert. The prosecutor should fully discuss with the expert the pros and cons of using demonstrative charts. He should also discuss what types of of demonstrative charts would be suited for the particular case before deciding the best method. The prosecutor must weigh carefully how the demonstrative evidence should be used before the jury to gain optimum effect, and should carefully rehearse use of the charts before he examines the expert in court.

Fingerprint and palmprint examination testimony should always be the subject of a demonstration by the expert. Questioned document testimony should almost always be illustrated with a demonstrative chart. On the other hand, firearms identification and hair identification evidence may be areas where demonstrative evidence tends to confuse rather than clarify the expert's testimony because of distortions in the charts caused by the process of preparing the charts. Again, the prosecutor must decide whether to use demonstrative charts in each particular case based on the facts in each case and effect on the jury in each case.

Caveat: Occasionally an expert will be reluctant to prepare exhibits because he is lazy. The ultimate judgment must be the prosecutor's. If the prosecutor is not certain whether to use a demonstrative chart, he should discuss it with another prosecutor and then make his decision.

The prosecutor must direct the preparation of exhibits far enough in advance of trial so that the expert has ample time to prepare them. It must always be remembered that it takes time to prepare charts, and experts are generally busy people. There is nothing more aggravating to an expert than a last minute call by a prosecutor for demonstrative exhibits.

III. Cross-Examination of Experts

Occasionally, it will be necessary to cross-examine a defense expert. Effective cross-examination depends once again on preparation. This includes acquiring a knowledge of the expert's background in the field before going to court, and development by the prosecutor of an understanding of the field sufficient to enable him to intelligently challenge the expert's method(s) of examination and opinion(s). Mastery of the field by the prosecutor must be sufficient so that through the prosecutor's questioning the jury gains the impression that the expert is wrong in his conclusions.

The prosecutor's expert should be able to provide some information about the background of the defense expert and the areas of vulnerability in the expert's examination and opinion. The prosecutor's expert will also help in devising the questioning that will have the greatest effect in discrediting the defense expert. If the expert is from another jurisdiction, a telephone call to the prosecutor's office in the expert's home area can pay great dividends. Frequently, if the prosecutor digs long enough he will be able to obtain a transcript of the expert's testimony in a prior proceeding on the same subject matter. Such a transcript can be used effectively to expose contradictions and impeach the defense expert.

Location of publications written by defense experts can assist the prosecutor on cross-examination. A search through periodical indexes at the Library of Congress can disclose (1) helpful cross-examination materials, and (2) the fact that the defense expert has never published anything.

If the expert's qualifications are questionable, the prosecutor can request a voir dire on his qualifications prior to the expert being able to give any substantive testimony. If handled carefully, cross-examination of the expert out of the jury's presence may so undermine the expert that even if he is permitted to give substantive testimony the jury will disregard it. Of course, if he cannot qualify as an expert a motion to strike his testimony will lie.

The technique of voir dire on qualifications should not be undertaken if the expert is obviously qualified. The prosecutor's attack is better directed at the method of examination and validity of the opinion if the expert is basically a bona fide expert.

Noted texts in the field can be sometimes effectively used to challenge a defense expert. When this method of cross is employed, the prosecutor should be careful not to overcross on petty points, and should never cross by taking textual assertions out of context. Shoddy and dishonest attempts to cross-examine will usually be exposed by redirect and can only hurt the prosecutor's case. The prosecutor can be hard hitting but must also remember to temper his questioning with the appearance of fairness and objectivity toward the expert witness' assertions.

It is likewise important for the prosecutor to remember to end his cross-examination on a high spot, and not to attempt overkill on cross-examination. Overquestioning the witness will only serve to give the expert an opportunity to rehabilitate himself.

The prosecutor almost always will be able to determine the name and address of defense experts through informal discovery. However, if full informal discovery of expert witnesses and their reports is not possible, the prosecutor should never turn over any information about his own experts informally.

Rule 16 (c) of the Federal Rules of Criminal Procedure and Rule (16 (c) of the Superior Court Criminal Rules clearly give the Government a right to reciprocal discovery of expert testimony. This right should not be inadvertently abandoned by turning over names of Government experts and their reports before making certain that defense counsel will adhere strictly to reciprocity. In cases of doubt, the prosecutor should tell defense counsel to file a Rule 16 motion. Thereafter, in court and on the record, the prosecutor should make his own discovery request. Remember, the use of expert testimony is not a game between lawyers. It is rather a search for objective information to enable the jury to accurately decide the case. This can be a very effective public policy argument by the prosecutor for full discovery. See United States v. Carr, 141 U.S. App. D.C. 229, 437 F.2d 662 (1970).

IV. Examining the Document Analyst

A. General Approach

(See also Topic II.B.1, Part VII.)

The field of handwriting analysis is an exact science in which positive identification is sometimes possible. However valuable testimony may also include expert opinion stating that it is possible, probable, highly probable or possible that a particular individual wrote a questioned document. Handwriting experts are able to positively eliminate individuals as the writers of questioned documents. Handwriting experts are also able to testify that a particular individual has disguised his exemplars; this testimony is admissible in evidence as consciousness of guilt.

As may also be true with fingerprinting and hair experts, a questioned documents examiner may learn his field from experience and on-the-job training courses, and not through formal education. A college degree is not a pre-requisite to qualification of an expert documents examiner. (See IV. B infra.)

After the document examiner has been accepted by the court as a qualified expert the next line of questioning should encompass explanation by the expert of the different degrees of possible identification - possible, probable, highly probable, and positive. The questioning should then switch to establishment of chain of custody of the known and questioned documents. The documents examiner should not be called as a witness until after a stipulation as to prior chain of custody of these items, or testimony by chain of custody witnesses about these items has been presented before the jury. After the expert has identified the known and questioned writings for the jury, the prosecutor should move these items into evidence.

The prosecutor should then ask the following questions:

Q. Based upon your comparison of the known handwriting of Mr. _____ Government Exhibit No. _____ with the _____ (note used in bank robbery, etc.) Government Exhibit No. _____, do you have a professional opinion as an expert with respect to these exhibits?

A. Yes.

Q. What is that opinion?

After the expert has stated his opinion, the prosecutor should ask whether the expert has prepared a diagram for demonstrative purposes. The prosecutor upon receiving a positive answer should mark the chart for identification and move it into evidence after it is identified. The prosecutor should then request the court's permission to distribute copies of the demonstration chart to the jury. After the copies of the chart have been distributed to the jury the prosecutor should first have the expert explain the chart more fully as to what it contains. The expert should clearly explain that the chart is for demonstration only and does not contain all the known points that he relied upon in reaching his conclusions. Technical terms such as "cut outs" should be explained in layman's terms and pointed out on the demonstration chart. The prosecutor should then ask the expert using the chart, Government Exhibit No. ____, to please explain to the jury the reasons for his conclusion that the writer of the exemplars wrote the questioned documents.

B. Qualification of a Document Analyst

Following is a sample of qualifying questions used in the Hanafi Muslim murder case, United States v. Christian et al., Superior Court Criminal Nos. 47900-06-73:

Q. Sir, will you please state your name?

A. Mr. Barry Spittle.

Q. What is your profession?

A. I'm a Document Analyst.

Q. By whom are you presently employed?

A. I'm employed in a civilian capacity with the Metropolitan Police Department, assigned to the Questioned Document Laboratory, Washington, D.C.

Q. What is a Document Analyst?

A. A Document Analyst is a position in which an individual trains to study and analyze documents for the purpose of determining whether or not a given individual or named individual wrote a certain document. This work normally involves the study of of handwriting, handprinting, paper analysis, ink analysis and and various related questioned document problems.

Q. How long, have you been a Document Analyst?

A. I'm in my eighteenth year.

Q. When did you first start your training as a Document Analyst?

A. Beginning in 1956, I began training in this particular field with the Post Office Department, Postal Inspection Service, and I was assigned to the Scientific Identification Laboratory. I trained and qualified in that Laboratory.

Q. Now, can you relate at this time, sir, what training you received from the Scientific Identification Section of the Post Office?

A. At the time I went through my training program, they had a formal training program. There were two trainees. And the method of was to assign authoritative text books on the subject of questioned documents and various aspects of documents, assign those books for study. We were also assigned evidence from actual cases that were coming into the office. And, we received formal training from qualified analysts. Then we reached the point where we were able to start making our own examinations and rendering informal reports. And then our work was critiqued by a senior analyst. And then as we progressed in our training, the complexity of the work progressed to a point, after approximately three years, when we were considered qualified by our superiors, our Director.

Q. And, how often during those three years were you under direct supervision of a trained or experienced handwriting expert?

A. Practically every day, sometimes the entire day, depending on the particular case that I was working. We were always under some sort of supervision by superiors.

Q. Did there come a time, sir, when you first qualified as a Document Analyst in a court proceeding?

A. Yes, sir.

Q. When was that, sir?

A. To the best of my recollection it was in 1959 when I first took a case and presented it in a trial in court.

Q. Now, sir, at the termination of your three year training program, with the Scientific Identification Section of the Post Office, what did you then do?

A. Well, then I worked as a qualified analyst in that office and I stayed with the Post Office Department in Washington until 1962, at which time I was assigned as Assistant Director of a new laboratory being established in New York City. And in 1962 I went to New York City and stayed there for a period of three years, still with the Post Office Department.

Q. And, in that position, sir, did you perform examinations concerning handwriting and other questioned documents?

A. Yes, I did.

Q. At the termination of your position there, what did you then do?

A. I transferred from the Post Office Department to the Department of the Treasury, here in Washington, D. C., and that was in 1965, returning to Washington.

Q. And what position did you assume with the Treasury Department?

A. I was holding the position of Document Analyst, but with my years' experience I was in a senior capacity at that point.

Q. And, how long did you stay, sir, with the Treasury Department in that position?

A. Almost seven years -- until 1971.

Q. And, during those seven years, sir, what were your duties?

A. The same type of duties as a Document Examiner would have with any other agency. The evidence would vary depending upon the investigative jurisdiction of that department.

Q. And, sir, you stayed with the Treasury Department until what year?

A. 1971.

Q. And, in 1971, sir what new position did you take a that time?

A. I accepted a position with the Metropolitan Police Department in a civilian capacity, here in Washington, D.C.

Q. And, what type of position, specifically, was that?

A. A Document Analyst position, a Senior Analyst position.

Q. In your position, what are your specific duties?

A. Routinely I examine cases, some are relatively simple type cases, and being a Senior Examiner I would handle some of the more complex difficult cases that come into the office, and I testify in judicial proceedings regarding my examination.

Q. And, when you say, "handle these cases," what do you mean?

A. I mean conduct a scientific analysis of the evidence and report the conclusion or the findings in a formal manner and present them to the investigators.

Q. From the onset of your career as a Document Analyst, initially with the Post Office Department, what portion of your work day have you devoted to the duties involving handwriting analysis and other types of analysis associated with various documents?

A. The day normally consists of eight hours. I devote the entire eight hours to the analysis of documents.

Q. During the course of your career, have you had occasion to teach any courses with respect to the scientific identification of questioned documents?

A. Yes, I have.

Q. And, could you explain what those courses have been, sir?

A. Well, while with the Post Office, during the period that I was in Washington, D.C., which would have been from 1956 until 1962, the Post Office Department was engaged in a State Department program which was referred to as an AID program where foreign police officers, particularly police officers that were in the questioned document field, such as I was in, would come to this country and train for a period of six months to a year. And frequently I was assigned to instruct these officers in this formal training program. Sometimes I would handle the trainee or the foreigner for his entire period while he was in the laboratory, and then at other times I only handled certain aspects of his training. After the Post Office Department training, while with the Treasury Department, back here in Washington, on occasions I had gone to the training school that the Treasury Department has for their new agents, the

basic agent training school, and gave a two or three hour indoctrination to the field of questioned documents. Also, with the Treasury Department, for a period of about a year and a half to two years, I was a regular lecturer at the United States Secret Service Questioned Documents School, teaching various aspects of questioned documents examination. Since I have been with the police department, I do train police officers and detectives on a routine basis. I have classes of detectives and police officers at the new police academy.

Q. Have you testified in court as an expert in the field of scientific identification of questioned documents?

A. Yes, I have.

Q. Are you able to estimate, at this time, approximately how many times you have testified?

A. I have testified approximately two hundred and sixty times.

Q. Are, are you able to recall at this time, sir, the jurisdictions that you have testified in, as an expert in this field?

A. I have testified in practically every federal judicial district in the United States and I have testified in numerous state courts and lower courts and military courts-martial, in and outside of the United States.

Q. Have you testified in courts in this jurisdiction?

A. Yes, I have sir. Numerous times.

Q. And, in which courts?

A. I have testified in the United States District Court and in the Superior Court.

Q. Has your testimony as an expert in the field of scientific identification of questioned documents ever been rejected by any court?

A. No.

Prosecutor: Your Honor, at this time the Government would tender Mr. Spittle as an expert in the field of scientific identification of questioned documents.

V. Examining the Fingerprint Expert

(See also Topic II.B.1, Part III.)

The following questions provide a sample of the type of questions to ask a fingerprint expert, but the circumstances of the case and the personal style of the witness may require a different approach.

Q. Would you please state your name and your profession?

Q. What are the duties of a fingerprint examiner?

Q. How long have you been employed as a fingerprint examiner?

Q. Would you please state what training and experience you have had in the scientific field of fingerprint examination and comparison?

Q. Approximately how many fingerprint comparisons for identification purposes have you made?

Q. What is the basis on which an identification of a person by means of a fingerprint is made? (Here witness should outline science of fingerprints.)

Q. From you experience and knowledge of the science of fingerprint comparisons, can you tell us what type of an identification a fingerprint identification is? (Here witness should state it is a positive means of identification.)

Q. Have you ever testified before as an expert in the field of fingerprint comparisons?

Q. Where? (Here, submit expert as qualified.)

After witness is qualified, establish chain of custody and then go into whether a comparison was attempted, and if so, what were results. Use exhibits to clarify and to buttress expert's opinion. It is sometimes effective to have the expert identify and describe point one on the latent and then point one on the known, and continue with that approach for all points of comparison shown by the exhibit. The crucial question on the opinion may be asked in the following manner:

Q. As a result of your comparison of Government's Exhibit No. ___, the known print, with Governments Exhibit No. ___, the latent print found at the scene of the (crime), and based upon your training and expertise, do you have an opinion as to whether the two prints were made by the same person?

A. Yes.

Q. What is your opinion as to whether _____ (defendant) left the print identified as Government's Exhibit No. ___(latent)? (Then use exhibits to explain it.)

VI. Examining the Hair Expert

Qualify the witness in the same manner as with any other expert, but do not go into details of hair identification at this point (degree of positivity and structure of hair) because of the lack of certainty in hair identifications. Instead, concentrate on the number of examinations

the witness has made, and the fact that this is his full time employment. Also establish use of comparison microscope techniques at this time. After he is qualified and has established chain of custody, the following questions are suggested:

Q. Did you examine the hairs (submitted to you or found by you on (items)), Government's Exhibits Nos. ___ and ___, and compare them with the hairs taken from (defendant), Government's Exhibits Nos. ___ and ___?

Q. As a result of your comparisons, and based upon your training and experience, did you form an opinion as to the similarity of microscopic characteristics of both the hairs found on the scene and those taken from (defendant)?

Q. What is that opinion?

A. I found that the set of hairs marked Government Exhibit No. ___ exhibited the same microscopic characteristics as those hairs taken from (defendant).

Q. Would you explain the sructure of a hair and what is meant by microscopic characteristics of a hair? (Here expert should explain about medulla, cuticle, and cortex and refer to the number of characteristics.)

Q. Mr. _____, can you tell us what type of identification hair identification is; that is, is it a positive means of identification, or not? (Witness should say it is not, but it limits the range of suspects.)

Q. Even though hair identification is not a positive means of identification, can you determine the race of the person from whom the hair came?

Q. Can you tell what part of the body the hair came from?

Q. (If have both head and pubic hairs)

Q. If you found a known and a unknown pubic hair to be similar, even though they may have come from different people, does that mean that the head hairs from those same two individuals would also exhibit similar characteristics? (Witness should explain why this is not so.)

Q. What significance, if any, is there to the fact that both the head and pubic hairs of (defendant) exhibited the same characteristics as both the head and the pubic hairs found at the scene?

A. In my opinion, the chances are small that the head hair from two different individuals could be similar. The chances that their pubic hair, forgetting about the head hairs, could be similar is equally as small. The fact that the unknown head and pubic hairs found at the scene are similar to the head and pubic hairs respectively of (defendant) increases significantly the chances that those hairs did come from the individual.

In short, by this approach the prosecutor can mitigate the fact that hair identification is not positive and, instead, stress the manner in which hairs can narrow down positively the possible range of suspects. The F.B.I. publication on hair identification is a good background source, August 1952 F.B.I. Law Enforcement Bulletin.

VII. Examining the Serologist

Serologists are usually highly qualified individuals who have had both a formal and work orientated education, and it is good to emphasize that when qualifying this type of expert. Following is a sample of questions used in United States v. Whalen, Superior Court Criminal No. 56141-72.

Q. Will you please state your name, sir, and spell your last name for the court reporter.

A. William Cronin (C-r-o-n-i-n).

Q. What is your profession?

A. I am a special agent with the Federal Bureau of Investigation; assigned to the FBI laboratory in Washington, D.C.

Q. Do you have any speciality at the bureau's laboratory?

A. Yes, sir.

Q. What is that?

A. I identify blood and other body fluids in connection with criminal matters.

Q. Is there any particular name given to your profession.

A. Forensic serology.

Q. Will you please describe what a forensic serologist is?

A. Serology is the study of the properties and use of serum. When this is applied in connection with criminal type matters, particularly with the identification of blood and body fluids in stain and encrusted material, it is known as forensic serology.

Q. How long have you been employed by the Federal Bureau of Investigation?

A. Approximately ten and one-half years.

Q. How much of that ten and one-half years has been spent in the field of forensic serology?

A. I arrived at the laboratory in September of nineteen hundred and seventy.

Q. When you arrived there at that time, did you begin working in serology?

A. Yes, sir.

Q. Prior to your joining the bureau, will you tell us what your educational background was?

A. Yes. I received a bachelor of science degree in biology from Manhattan College in New York City, New York. Thereafter, I took two years additional course work in the biomedical sciences at Flower (phoentic) Hospital in New York. I received a bachelor of laws degree from New York Law School.

Q. Now, after completing your time at Flower Medical, where did you go at that time?

A. I worked for a pharmaceutical company for approximately eight years and then joined the Federal Bureau of Investigation.

Q. During your employment at the FBI, can you tell us whether or not you have conducted examinations for blood substances?

A. Yes, sir, I have.

Q. Approximately how many such examinations would you say you have conducted of blood stains and of body fluid stains?

A. Many hundreds.

Q. What is your full time occupation?

A. To examine blood and body fluid in the laboratory.

Q. Out of the number of examinations you have conducted, give us an approximation of how many of those examinations are related to stains? Namely, stains on clothing of blood or body fluids, or stains on any other item of blood and body fluids.

A. I'd say about ninety-nine percent.

Q. Since you began work in serology, have you kept yourself abreast of this particular field of serology?

A. Yes, sir.

Q. Can you describe how you keep yourself abreast of the developments in the field of serology.

A. We constantly read the latest scientific magazines and periodicals and any other type of material that we can get our hands on in connection with forensic serology. Additionally, it is a rather closed field and word gets around when any new procedure is being brought out.

Q. Are there any magazines or periodicals pertaining to your particular field?

A. Yes, sir.

Q. What type of magazines are they?

A. They're laboratory magazines. One is known as a laboratory digest. That comes out every two months, and it lists the latest laboratory procedures. Also, there are other journals. The journal of the forensic society also is put out. That is put out on a quarterly basis, however, and that lists articles from various forensic scientists throughout the field, both in this country and abroad--the latest test procedures and evaluation.

Q. Do you know whether or not the bureau's laboratory maintains a library pertaining to books on your particular field?

A. The bureau library. Yes, sir, they do.

Q. And is that library kept current?

A. Yes, sir.

Q. And do you frequently use that library?

A. Yes, sir, I do.

Q. Besides working at the bureau full time as a serologist, have you had any other connections with this particular field in another manner?

A. Yes, sir, I have.

Q. Will you describe that, sir?

A. I lecture at George Washington University here in Washington in the graduate school of Science in connection with forensic serology.

Q. When did you start that?

A. Last September.

Q. Have you ever testified before as an expert in the field of forensic serology?

A. Yes, sir, I have.

Q. Approximately how many times would you say?

A. Oh, I'd say about 70 times.

Q. In what types of Courts?

A. Oh, 50 in local and state Courts throughout the country and 20 in Federal District Courts.

Prosecutor: Your Honor, at this time the Government would submit that Mr. Cronin is a qualified expert in the field of forensic serology.

Note: While this witness was being qualified, he was not asked details about his field of expertise because his testimony covered examination of stains for both semen and blood grouping. Consequently, in order to keep a continuity about his testimony, he was asked to describe each of those areas when he was asked about the tests he performed to determine each question.

Below are sample questions which deal with tests performed on an item of clothing to determine if semen was present:

Q. When you are asked to look for semen, what exactly do you do in the way of testing to determine if semen is present or not, and in giving that answer, will you also include basically what semen is made up of?

A. Well, as I said, semen is the male reproductive fluid, and it consists essentially of two portions: Seminal plasma which is a fluid portion and is a medium for the spermatozoa which are sperm cells--the male reproductive cells.

The semen consists of the fluid portion and the sperm portion. When we examine a stain for the presence of semen, we conduct certain chemical and microscopic tests -- certain chemical tests to determine two constituents of semen that are found in extremely high quantity. They are found in no other quantity in other body fluids other than semen, it is such a high quantity. Additionally, when we identify the sperm cells, which is done microscopically, that is a conclusive test for the semen. Sperm cells are found in no other body fluids, so when you find a cell microscopically, you know you have semen.

Q. What type of test do you conduct chemically in order to determine the body fluids that are indicated--that are not present in that quantity in any other body fluid?

A. We conduct two body fluid tests. The first is known as acid phosphatase. This is a test for the presence of the enzyme acid phosphatase.

Q. Can you tell us, from your experience--from your expertise, whether or not there are any body fluids secreted in the area of the vagina that contain acid phosphatase by a female?

A. Yes, I found it in vaginal fluid.

Q. In what quantity?

A. In small amounts. It doesn't give a strong positive reaction that you find as in semen.

Q. Just what type of reaction to the acid phosphatase test are you looking for?

A. It is a color type test. The color is very light with vaginal fluid in contrast to semen where it is a dark blue-black color.

Q. How do you conduct this acid phosphatase test?

A. The stain in question is examined. Generally there are some preliminary steps. You will find that semen is stiff to the touch. It will floresce under unltraviolet light. These are preliminary tests that I generally utilize to zero in on a stain as possibly being semen.

With respect to the acid phosphatase test, I take a small cutting from the stain in question; also a cutting from an unstained portion to be certain that there is nothing in the material, itself, on the stain that could possibly be producing a false positive reaction. These cuttings are added to two test tubes. Additionally, we run what we call a blank test. That is, we have a blank test tube in which we don't put any material. We just use our reagents in there. To be absolutely certain that none of the tubes are contaminated, the tubes in question will come from one batch.

Q. How close do you take your control to the stain that you are examining?

A. As closely as possible.

Q. Why?

A. Well, it is vital, not only for acid phosphatase determination but for possible blood grouping.

If you don't take an unstained control cutting as close to the questioned stain, you cannot tell with absolute certainty and surety whether or not any of your blood grouping tests

actually came from the blood or something in the material that the blood stain was on. You cannot take an unstained cutting from another area of the garment. It has to be in the immediate area of the stain in question. This is one of our control tests that we use. So that if my unstained control comes up positive, I know that there is possibly something interfering with the questioned stain, so therefore, I will not call that positive. It would not be sufficiently reliable.

Q. Going back to the acid phosphatase test in this case: Did you take the cutting from Government's Exhibit No. 16--the panties?

A. Yes, sir, I did.

Q. I'd ask that you look at this and indicate where on that particular item you took cuttings for the seminal identification.

A. (Complies with the request, indicating three areas.)

Q. Are there any markings on the area where you take cuttings from?

A. Yes; I mark them myself.

I took three cuttings for possible seminal stain. This cutting here (indicating) where I have marked with the 1-S in the crotch area of the panties. This area here (indicating) where I have marked 2-S still in the crotch area of the panties. And the third area in the upper back portion where I have marked 3-S.

Q. Now going to each one of those cuttings: Will you show us where your control cutting is? Go to 1-S first.

A. My control cutting is right here (indicating) marked--1-C for control.

Q. Now when you conducted the acid phosphatase test, will you tell us what results, if any, you got on the cutting from 1-S?

A. The test was positive.

Q. What do you mean by "positive test?" Will you describe the actual reaction that you get and what causes that reaction?

A. Well, as I said previously, it is a color reaction. What happens is that the acid phosphatase is an enzyme, and we take advantage of the fact that this enzyme has the ability to hydrolyze--to break up or split off, if you will, phosphoric acid esters, so therefore, if acid phosphatase is present, it will split up this phosphoric acid esters, leaving a reagent known a phenol (p-h-e-n-o-l).

We therefore, check for the presence of the phenol. If the phenol is present, you will get a dark blue-black color change.

Your unstained control cutting should be negative, that is, no color change. Your blank will also have no color change. Additionally, I use a known semen sample and run the same test procedure on that. That will have a color change, so I can compare my questioned stain with my known semen color plus the other--the unstained and the blank.

Q. When you conducted that test in this case, you indicated you got a positive reaction on 1-S; is that correct?

A. That is correct.

Q. What about 2-S?

A. I also got a positive reaction there.

Q. And 3-S?

A. That is right.

Q. Did you take any more cuttings on the panties to test for seminal stains?

A. No, sir, I didn't.

Q. After conducting the acid phosphatase test, did you conduct any other tests for semen?

A. Yes, sir, I did.

Q. What were they?

A. I conducted another chemical test which is known as a choline test. This is a chemical test to detect the presence of another constituent known as Choline (C-h-o-l-i-n-e).

Q. And what result did you get on this particular test?

A. The test was positive for the presence of choline.

Q. In one, two or three, or just one or two of them?

A. In all three cuttings.

Q. Now can you tell us, in your opinion, what the positive reaction on the choline test and the positive reaction on the acid phosphatase test indicates to you?

A. That indicates to me the possibility of semen existing in the stain. However, as I mentioned earlier, it is not a conclusive test. The only way you can positively identify semen as such is to identify the sperm cells which I did in this case in 1-S cutting.

Q. How did you do that?

A. I examined part of the solution from the choline test of cutting 1-S under a microscope and I observed intact sperm cells.

Q. What about 2-S and 3-S?

A. I did not find them there.

Q. What is your conclusion with the panties with reference to whether or not there is sperm, including seminal fluid and spermtazoa on them?

A. I identified semen in the crotch area of the panties.

Q. At what cutting?

A. 1-S.

Q. What about 2 and 3?

A. As I stated, I cannot conclusively testify that semen is present there. There is a possibility that it is. I cannot say that conclusively.

ADVANCED PROSECUTOR TRAINING

II.B.1: SERVICES AND FUNCTIONS OF LAW ENFORCEMENT AGENCIES IN CRIMINAL CASES

Lawrence T. Bennett
James N. Owens

SERVICES AND FUNCTIONS OF LAW ENFORCEMENT AGENCIES IN CRIMINAL CASES

Table of Contents

SERVICES AND FUNCTIONS OF LAW ENFORCEMENT AGENCIES IN CRIMINAL CASES

I. Introduction

On a daily basis, Assistant United States Attorneys deal with various law enforcement agencies and specialized divisions and sections within those agencies. The purpose of this outline is to familiarize Assistants with some of the scientific laboratory facilities and other services available to prosecutors in the preparation and trial of criminal cases, in addition to some of the General Orders of the Metropolitan Police Dement relating to searches, eyewitness identification and preservation of notes.

II. Metropolitan Police Department Firearms Examination Section

D/Sgt. George R. Wilson (626-2976)

A. Services Provided

1. Test Firing (e.g., CDW, PPW)

a. Test fire weapon with arresting officer present; arresting officer testifies at trial that he has witnessed test fire.

b. If weapon doesn't operate:

(1) Examiner will make report that weapon won't fire (indicates exact condition of weapon).

(2) If authorized by Assistant, Examiner will make minor alterations (e.g., file firing pin) and make second report indicating what's been done to make weapon operable. (Major alterations will not be made.)

c. Shotguns (especially sawed off) - because of high recoil in testing these, the amount of projectile mass (shot) is greatly reduced; however, a full charge of gun powder is used and the test satisfies the operability standard.

2. Microscopic Examination.

a. Firearms

(1) Can compare bullet or cartridge case with weapon.

(2) Examiners are qualified firearms experts for testimony in this area.

b. Tooling marks (e.g., screwdriver on door lock)

Examiners can perform these tests but are not qualified experts for testimony in this field. (FBI can supply expert testimony.)

3. Gunpowder Residues

a. On clothing - can determine dispersion to indicate muzzle to subject distance.

b. On hands - swabs sent to FBI or Treasury laboratories for neutron activation test for presence of antimony and barium.

4. Serial Number Restoration - At present time not done in Firearms Examination Section, but plan to do so in near future. (FBI performs necessary examinations).

B. Testimony

1. Experts for Court Testimony.

a. Sgt. John O'Neill

b. Tech. Raymond Vorhees

c. Tech. Bancroft L. Miller

2. Qualifications (general)

a. Firearms manufacturers' schools.

b. Seminars - Armed Forces Institute of Pathology, FBI, Treasury, Metropolitan Police Department.

c. Members of Firearm and Toolmark Examiners Association.

d. On the job.

(1) At least one year's experience before testifying.

(2) Several thousand microscopic comparisons.

e. Reference library maintained by Section.

C. General

1. Timing - amount of time required varies with complexity of case; new homicides require about two weeks, but in general, a minimum of a day or two is necessary.

Suggestion: contact section early to discuss what types of tests they can do, arrange exhibits and testimony, etc.

2. Other Agencies.

a. Firearms Examination Section works closely with the FBI and Treasury to effect examinations; MPDC is unequipped to handle. Firearms Examination Section can put an Assistant in contact with these agencies when necessary.

b. Outside labs - e.g., when defense counsel wants independent reexamination -- H.P. White Labs, Bel Aire, Maryland.

III. Metropolitan Police Department Fingerprint Examination Section

Mr. Ed Dion (626-2203)

A. Services Provided

1. Record Keeping - Identity of current offender is established and correlated with previous record through fingerprint records maintained in this section.

2. Examination - Latent prints taken from evidence are examined.

3. Evaluation - Comparisons of latent and inked prints (from records) made.

4. Testimony - Fingerprint technicians testify as experts in court.

5. Exhibits - Photo blowups of latent and inked prints prepared for demonstration purposes in court.

B. How To Use.

1. Analysis Requests

A police officer or an Assistant can request a latent print examination and comparison by completing Form P.D. 860. Upon analysis a report (P.D. 860-A) will be prepared which contains the following information:

a. who checked crime scene

b. who requested analysis

c. results of that analysis

d. what witness to call regarding any pre-trial hearings or court presentations.

2. Timing - The fingerprint examination section should be given as much lead time as possible to prepare evidence and testimony. A minimum of at least three working days should be allowed for the preparation of exhibits.

3. General

   a. Some print records in the fingerprint examination section are filed by type of offenses and locations of offenses, ages of suspects, etc. Information of this nature on the analysis request expedites the comparison process and allows comparisons to be made with latent prints which have been taken at scenes of similar offenses or at nearby locations.

   b. Often physical evidence in a case is not processed for comparative evaluation of latent prints. An AUSA should be on the lookout for the possibility of such supportive evidence and request analysis when appropriate.

   c. Occasionally, when a comparison of latent with inked prints proves negative, a defense counsel will be alert to this fact and try to use it to his advantage. Often, however, a reason for such negative results may be simply an inadequate latent lift (one smeared, or a latent that deteriorated over time or in particular environmental circumstances). In these cases, the Assistant can elicit such rebuttal testimony which can counteract the defense's use of a negative comparison.

IV. Metropolitan Police Department Mobile Crime Laboratory

Sgt. C. W. Kirk (626-2142, 3, 4)
Sgt. R. E. Reynolds (626-2142, 3, 4)

A. Services Provided

1. Mobile Crime Lab is field investigation Unit (on the scene);

   a. Photograph scene (B&W, color when necessary).

   b. Prepare diagrams of scene.

   c. Collect physical evidence.

   d. Preliminary field tests; collect latent prints, pertinent clothing, hair fibres.

2. Mobile Crime Lab maintains all files relating to crime scene investigation.

   a. The Mobile Crime Lab will investigate offenses involving homicide, sexual assault, serious assaults, robbery of financial institutions and death investigations.

   b. Crime scene investigations of burglaries, ADW, robberies, etc. performed by Crime Scene Search officers assigned to police districts.

   c. The investigator who was on the scene will know if Mobile Crime or Crime Scene Search officer did investigation.

   d. FBI personnel remove and process film from all bank surveillance cameras. Mobile Crime Lab collects all other evidence at robberies of financial institutions.

3. Mobile Crime operates as clearinghouse in sending evidence to other places to have tests performed (not the detective who handled investigation). Assistant should contact them for any special tests or to be sure there are no problems.

4. Mobile Crime Lab will prepare diagrams for trial, aerial photographs, blowups or photographs, etc.

B. General Information

1. Assistant should check that evidence he will want for trial has been properly processed by Mobile Crime Lab.

2. Files - Mobile Crime Lab maintains all files on investigations. Files contain, among other things, evidence reports indicating results of tests performed on evidence.

3. Timing - Contact Mobile Crime Lab as early as possible to make sure things are running smoothly. Where evidence must be sent to FBI, a month is generally required. At least a week is necessary to prepare aerial photos or blowups.

4. Other Agencies - Mobile Crime Lab works not only with Metropolitan Police, but on occasion with the FBI, the Alcohol, Tobacco, and Firearms Division of the Treasury Department (ATF), the Drug Enforcement Administration (DEA) Fire Marshals (arson cases), the U.S. Postal Service (checks, forgeries), and other agencies.

V. Metropolitan Police Department Communications Division

Off. John Bates (626-2718)

A. Services Provided

1. Radio Run Tapes - Tapes of radio communications are made and kept for three years. Transcripts of these tapes can be prepared by Officer Bates.

2. Telephone Call Tapes - Tapes of complaints received by phone are made and kept for only 60 days. Transcripts of these tapes can also be prepared.

B. How To Use

1. To Request Transcript - Assistant can request transcript by identifying CCR (Criminal Complaint) Number, date, time and location. The CCR Number is most important. It is also useful to indicate on the request what information is being sought as this can expedite getting the Assistant what he is looking for.

2. Lead Time - Allow 10 days for transcript preparation.

3. Communications keeps copies of transcripts which are prepared. If an Assistant loses a transcript, he should indicate that a transcript has already been made and that only a copy if necessary, not another transcription.

4. If absolutely necessary, the tapes themselves can be produced and played in court. This should be used only as a last resort since, in order to do this, the tape machine must be taken out of service and brought over to court.

VI. Metropolitan Police Department Modus Operandi Examination Section

Sgt. Thomas J. Tague (626-2757)

A. Services Provided

1. D.C. Jail Release Photos - All persons incorporated are photographed upon release. A file of these photos (B&W) is maintained, filed under both offense and name.

2. Nickname File - B&W mug shots filed by nicknames.

3. M.O. File - Color slides, full length, front view.

a. Taken every time person arrested for offense in which an M.O. may be significant: rape, robberies, CDW Gun, sex offenses, burglaries.

Additionally, all narcotics and prostitution arrests are included because of frequent connection with other types of crime.

b. Breakdown - The slides are catagorized by offense, race (black/white only), age and sex. Robberies are further broken down by type: holdup, fear, PBS and snatch.

Exceptions:

(1) All photos of Spanish persons are filed together regardless of offense; broken down by sex.

(2) Female impersonators are also filed together regardless of offense.

c. Color slides taken during processing at time of arrest.

d. Computer printout which contains data on everyone in M.O. file. Prepared from current data base.

e. Juveniles are placed in the M.O. file when the offense is homicide, rape or robbery.

4. Photographs of all MPD employees are maintained by the M.O. Examination Section.

5. Records are maintained of all viewings of files. (See Form PD-191.)

6. Black and white "mug shots" are not maintained by M.O. section. These photos are kept by Identification Branch. These are not taken every time someone is arrested, but rather, every five years.

B. How To Use

1. M.O. Section open 6 days per week. (Monday through Friday to 10 pm, Saturday to 4 pm.)

2. What can be provided in court?

a. Slides, projector, etc.

b. Testimony on how system maintained, etc., (has occasionally been used in robbery cases).

3. Court appearances.

a. Subpoena required.

b. On 15 minute call (Do not request them to come to court and wait -- only 4 officers in section).

c. Give as much notice as possible beforehand as to when they will be needed.

4. Equipment available.

a. Viewing room in police headquarters for life-size projection of slides (apparatus available also to make on-the-spot Polaroid prints of any desired slides).

b. Portable viewing apparatus.

(1) May be used with hospitalized victim.

(2) May be brought to Assistant's office.

VII. Metropolitan Police Department Questioned Documents Section

Mr. James Miller (626-2667)

A. Terms Used in Reports

1. Negative Category

a. Did not write.

b. Does not appear to have written.

c. Cannot be identified.

2. Postitive Category

a. Is identified as . . .

b. Is the writer of . . .

3. I don't know Category - Investigator's Guidance

a. Appears to be (anticipation of further exemplars and resubmission).

b. Does not appear to be.

c. Could be or may have written.

4. I don't know - Final Report

a. It is possible

b. It is probable.

c. It is highly probable.

This last is nearly an identification. It is usually qualified because there remains some small unexplained differences but it could form the basis for testimony.

B. Pre-Trial Preparation

1. Please Do Not

a. Call questioned document analyst for preliminary hearings or arraignments.

b. Call questioned document analyst for Grand Jury.

2. Please Do

a. Call at least 10 days prior to trial.

(1) Need to know counts.

(2) Need to know exemplars.

(3) Need to arrange for final exhibit.

b. Alert questioned document analyst of any change in trial date.

c. Send any dispositions.

d. Keep analyst on call - half hour notice.

e. Hold 10 minutes out for pretrial.

f. Keep qualification questions as suggested, unless particular reason for varying from pattern.

g. Ask to have analyst excused after testimony.

C. Purpose of Expert Testimony

This is to enlarge the vision and understanding of the triers of fact and to enable them to perform their functions intelligently. Expert testimony in the handwriting field has been accepted before the Federal Courts since 1913. 28 U.S.C. § 1731 provides: "The admitted and proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

D. Role of the Document Expert

Those engaged in the examination of questioned documents have a unique opportunity and a high responsibility for contributing to the continued favorable acceptance of documentary evidence. Properly prepared photographic enlargements, accompanied by well-reasoned testimony, will serve to promote confidence in those who utilize or rely upon this form of scientific proof.

1. Is a necessity.

2. Qualifying an Expert

   a. Insist on qualifying the expert. A stipulation of his qualifications by the defense might weaken the effectiveness of the expert's testimony. In the event of an appeal, the appellate court should be able from the transcript to know the qualifications of the expert.

   b. Experts generally present a list of qualifying questions to the prosecutor. When no questions are presented the prosecutor should develop the following points:

      (1) statement of his work or profession.

      (2) general education.

      (3) training.

      (4) time in the field.

      (5) previous court experience.

      (6) professional activities (lectures, teaching, writing, etc.).

      (7) membership in professional organizations.

   c. Direct Testimony
      Have the expert identify the exhibits, state his opinion, produce his exhibits, and then give him an opportunity to explain his reasons for the identification in his own way. After that testimony, if you feel that some point needs clarification or greater stress, you should ask specific questions.

3. In-Court Tests of the Witness

Most experts will try to avoid taking any tests on the stand for two reasons. First, an examination takes hours or even days, and to give an off-the-cuff opinion

in a few minutes is difficult and is in some cases unfair. Second, the tests suggested by defense counsel would necessarily be of a difficult or tricky nature, and in nearly all cases there would not be sufficient evidence to serve as the basis for an opinion. Object to the use of such test. In the event the court should order an expert to take a test, all exhibits should be identified beforehand, and the test should parallel the matter under consideration.

4. Cross-Examination

Be alert to unfair questions. Try to protect or aid the expert witness. See that he has an opportunity to fully explain his answers.

E. Examinations

1. The document analyst uses a variety of equipment and techniques in making this studies. Typically the expert uses magnifying glasses, microscopes, micrometers, typewriting and handwriting measuring plates, ultraviolet lamps, an infrared viewing device, and specialized photographic equipment and techniques.

2. Types of Examinations

a. Identification of handprinting.

b. Identification of typewriting

(1) the make and model of typewriter used to prepare a document.

(2) the identification of a particular typewriter as the one used to prepare a document.

c. Identification of checkwriters.

d. Identification of other machines that produce a printed record.

e. Detection of alterations and decipherment of original notes.

f. Determination of sequence of preparation of documents.

(1) the crossing of ink lines.

(2) crossing of ink lines and typewriting.

(3) writing that intersects notary seals or other impressions.

(4) writing across folds of paper.

(5) continuity or discontinuity of records supposedly made in sequence, such as minutes of a meeting.

g. Decipherment of indented writing.

h. Decipherment of charred (burned) documents.

3. Definition of a Document

In its fullest meaning, a document is any material which contains marks, symbols, or signs either visible, partially visible, or invisible that may presently or ultimately convey a meaning or message to someone. The document will usually be paper, but may be cloth, concrete, wood, plastic, or other substances.

4. Types of Questioned Documents

There is practically no limit to the kinds of documents that could be questioned, in whole or in part. Some of the more common ones are as follows:

a. Checks or money orders

(1) may be forged in their entirety.

(2) may be true name frauds; that is, the maker may deny that he prepared the document.

b. Credit cards and fraud buys

(1) genuine charges may be denied.

(2) stolen credit cards may be used.

(3) charge plates or sales slips may be altered.

c. Hotel and motel registration forms

d. Pawn slips - signatures on pawn slips used to connect seller with stolen property.

e. Drug records

(1) forged narcotic prescriptions.

(2) altered narcotic prescriptions.

(3) signatures in exempt narcotic register books maintained at all drug stores.

f. Motor vehicle records

(1) driver permits obtained by misrepresentation, for example, by using a change in name or date of birth.

(2) driver permits obtained by others.

(3) altered driver's licenses.

g. Suicide notes

h. Anonymous letters or notes

(1) obscene letters

(2) hold-up notes

(3) threatening letters

(4) extortion letters

(5) ransom notes

i. Gambling slips or tapes

j. Charred or burned documents

k. Miscellaneous documents - e.g., scraps of paper found at crime scene, on victim, or on suspects - telephone lists or address books.

5. Standard For Comparison

What is a standard? It is a known item that can be used to compare with something that is preliminarily unknown or not identified. Since most of the document analyst's work is handwriting identification, the standards are usually handwriting specimens of a suspect or a complaining witness or both. Of course, if the questioned matter is typewriting, then the standards would be specimens from one or more typewriters. If the amount on a check has been imprinted with a checkwriter, then specimens from a checkwriter would be needed to compare with that portion of the check.

Before a specimen can be accepted as a "standard", the investigating officer must prove the origin or genuineness of the specimen. A handwriting specimen is established as a standard in one of the following ways. Have it acknowledged:

a. By the writer when it is shown to him.

b. By testimony of a witness who saw the writing made.

c. By the testimony of a witness who is familiar with the subject's writing.

d. By requesting the subject to write the specimen to be used for comparison.

A typewriting specimen, checkwriting speciman rubber-stamp impression is considered as known by having the person who produced the speciman sign and date the document and indicate its source. source.

6. Handwriting Specimens - Requested

The handwriting specimens obtained from a person should be on the two handwriting cards that are available from the Handwriting Unit or the Check and Fraud Squad.

7. Handwriting Specimens - Collected

If specimens cannot be obtained from the suspect on the handwriting cards OR if specimens are obtained that are obviously disguised, then efforts should be made to procure other writings known to have been made by him. There follows some of the usual sources for collecting such specimens:

a. Bank signatuare cards, cancelled checks.

b. School papers; library records.

c. Employment applicatoins and tax withholding forms.

d. Credit applications.

e. Rental leases or agreements.

f. Motor vehicle applications and records

g. Line-up sheets (if ever arrested).

h. Parole, probation or jail records.

i. Letters, correspondence and greeting cards.

8. Typewriter Specimens

a. Be certain that the typed specimen repeats all the questioned material, or if the questioned material is quite long, have at least the equivalent of two fair-sized paragraphs repeated in the speciman.

NOTE: A sample of the keyboard ONLY is not enough.

b. Use a paper similar to that of the questioned document, if possible.

c. Have each specimen signed and dated by the typist and include the serial number and location of the machine.

9. Procedures For Collection/Preservation of Document Evidence

Police officers and other investigators should handle all document evidence with great care. Here are some DO's and DON'TS:

DO'S

a. If small enough, place document in envelope or protective covering document.

b. Consider the possibility of fingerprints being developed on the document.

c. Have handwriting examination made before document is processed for prints.

d. The office should make a written notation of the date, time, place, and from whom the document was received.

e. The officer should initial the documents for later identification: place initials in unimportant place, preferably in a corner or on the back of the document.

f. In all cases where burned or charred documents are found, the officer should call the Handwriting Unit for assistance before trying to collect the material.

DON'TS

a. The officer should not carry document in pocket or cap or fold or unfold the document.

b. The officer should not attempt to paste, glue, or tape together a torn or mutilated document. Rather, place pieces in envelope.

c. Do not staple.

d. Do not touch, underscore, or trace over any writing.

10. Method For Submitting Document Evidence

The submitting officer should complete PD-797 (request for examination) form. These forms are available in the Check and Fraud Squad and the Handwriting Unit. The form lists all necessary information and serves as a record of continuity of evidence and receipt for the documents. In addition to the form the investigator should:

a. Separate the questioned material and known material. Place the material in separate envelopes whether it is questioned or known.

b. Write a brief statement of the problem or state specifically what type of examination is requested.

c. Indicate whether the matter is routine, urgent, or whether any court action is expected and the date thereof.

When all the proper material is collected and submitted to the Handwriting Unit, the document analyst will make an examination, write a formal report of his technical findings, and will be prepared to testify in court if called upon to do so. Typically, the analyst will prepare photographic charts to illustrate his expert testimony.

11. Robbery "Hold-Up" Notes

a. Given top priority by section.

b. Mobile Crime will first photograph note - hand carry it to Questioned Document Examiners.

c. Immediate Examinations conducted.

d. Note when delivered to Latent Fingerprint Section for printing.

VIII. Metropolitan Police Department Court Liaison Branch

Inspector Claude Dove
Sgt. John J. Palko (626-2606)

A. Services Provided

1. Record the arrival and departure of all police officers having business in Superior or District Court.

2. Visit the various courts and the offices incidental thereto to observe the manner in which police officers present cases at pre-trial and trial.

3. Maintain a complete list of the assigned court days of each police officer. This list is utilized in determining the future court date of continued cases.

4. Inform proper Assistant United States Attorney of the inability of any police officer to make a scheduled court appearance due to sickness or other disability if no other officer is available to handle the assignment. Responsible for notifying all witnesses and defendants in continued cases.

5. Review case jackets in all cases concluded by disposition of no papers or nolle prosequi by Assistant United States Attorney or by court dismissal. The review is for the purpose of determining if the disposition of the case was the result of any inadequacy or improper action on the part of the officer(s) responsible for the presentation of the case.

B. How To Use

The Court Liaison Branch should be immediately notified upon an officer's non-appearance at a scheduled pre-trial or trial proceeding, including witness conferences. If the officer is not sick, disabled, or otherwise unavailable, he will be forthwith summoned to appear at the proceeding - (Most non-appearances are due to faulty notification). The Liaison Branch should also be informed if an officer does not properly assist in the preparation of a case for trial.

IV. Federal Bureau of Investigation

Mr. Frank Devine
Mr. Thomas Kelleher, Jr. (324-3569)

A. Services Provided

1. For scope of examinatory facilities, see "Handbook for Forensic Science, Federal Bureau of Investigation".

2. There exist some limitations in the facilities of the FBI, but lab will know where other sources are available.

3. As between FBI and Police, occasionally caseload considerations will determine where particular examinations are done.

B. How To Use

1. Examiners, technicians, or experts necessary to testify should be contacted by Assistant (Note that in Police cases where certain tests are run by the FBI, the Mobile Crime Lab will be responsible for handling the physical evidence).

2. Pretrial conference - Importance: can work out numerous aspects of case and testimony. Should be done well in advance of trial.

   a. Gives examiner notice of trial data.

   b. Gives examiner time to prepare charts, diagrams, etc., that can be used in presentation.

   c. Lets examiner know at what stage of case he will be used in order to facilitate use of his time (FBI should be on a 1-2 hour call basis).

   d. Examiner can provide qualifications sheet to give Assistant questions to qualify him.

   e. Examiner can explain what he can testify to. Note: These experts have often testified hundreds of times and can often, if asked, aid the Assistant in foreseeing problems.

3. Often a conference during the course of a trial can be useful, e.g., examiner may be able to give information that may help Assistant impeach an expert witness for the defense.

4. When an examiner is contacted by an Assistant, it will take about four to five hours to retrieve any reports of tests made by the examiner.

5. Other agencies FBI works with:

   a. DEA (Drug Enforcement Administration) Lab - handles bulk of drug cases.

   b. Smithsonian - examines unidentified remains of bodies to determine race, age, whether human or not.

   c. Armed Forces Institute of Pathology.

   d. Alcohol, Tobacco and Firearms Division (ATF) of the Treasury Department.

6. Sections of FBI laboratory

   a. Serology

   b. Microscopic Analysis

   c. Mineralogy

   d. Chemical Examinations

e. Glass Fracturers

f. Firearms Identification

g. Toolmark Identification

h. Wood

i. Metallurgy

j. Instrumental Analysis

k. Radiation Hazards

l. Explosives

m. Bomb Scene Searches

n. Photography

o. Document Examination

p. Shoe Print and Tire Tread Evidence

q. Cryptanalysis - Gambling - Translation Section

r. Radio Engineering Section

X. Drug Enforcement Administration, Scientific Services Division

Mr. Dick Frank
Chief, Operations Section (382-4393)

Mr. Jack Rosenstein
Lab Director, Mid-Atlantic Regional Lab (386-6011)

Mr. Roger Canaff
Forensic Chemist (386-4393)

A. Services Provided

1. Facilities

a. Regional Labs - Mid-Atlantic Lab provides laboratory analysis for police cases and routine work for DEA agents.

b. Special Research and Testing Lab (McLean, Virginia) - provides more complex types of scientific analysis.

2. MPD Cases - will make qualitative and quantitative analysis of controlled substances.

3. DEA Cases - in addition to qualitative and quantitative analyses, can also provide comparison analysis, vacuum sweeps and ballistic examinations (analysis of chemical content and tool marks on tablets/capsules to determine manufactuer).

4. Provide testimony of experts outside the agency (e.g., to rebut defense expert in marijuana case who testifies that there exists five subspecies and only one is proscribed by D.C. Code).

5. Preliminary Field Test - This is a rough test conducted by arresting officer which will merely establish probable cause. This determination is insufficient for trial of case where testimony as to qualitative and quantitative analysis is necessary.

B. How To Use

1. Cases in Superior Court - forensic chemists work on 30-45 minute call basis; usually notified when cases sent out of Assignment Office.

2. Cases in District Court - more complex usually and more notification is desirable.

3. Pre-Trial Conferences - Almost non-existent now but strongly suggested by DEA lab director. Can work out unusual problems and gives notice to chemist to allow preparation of schedule. (If possible 1-2 weeks notice before trial is desirable.)

4. Disposition or Destruction Notices - these should be provided by Assistant along with return of evidence when no longer necessary for case (e.g., when case "no-papered").

XI. Metropolitan Police Department General Orders

The Chief of the Metropolitan Police Department has promulgated numerous permanent directives and policies, called General Orders, which are intended to govern the conduct of the police in the performance of their duties. Assistants should be familiar with the contents of at least the following General Orders (See copies at end of this section):

A. MPD General Order 304, No. 7, Procedures For Obtaining Pretrial Eyewitness Identification (December 1, 1971).

B. MPD General Order 601, No. 2, Preservation of Potentially Discoverable Material (May 26, 1972).

C. MPD General Order 602, No. 1, Automobile Searches and Inventories (May 26, 1972).

D. MPD General Order 73, No. 56, D.C. Code Weapons Offenses, (February 27, 1973).

E. MPD General Order 304, No. 10, Police-Citizen Contacts, Stops, Frisks and Motor Vehicle Spot Checks (July 1, 1973).

GENERAL ORDER

SERIES	NUMBER	EFFECTIVE DATE
304	7	December 1, 1971

SUBJECT:
Procedures for Obtaining Pretrial Eyewitness Identification

DISTRIBUTION
A

ORIGINATING UNIT
PDD

The purpose of this order is to establish procedures to promote the reliability of eyewitness identifications by eliminating suggestive behavior and, more generally, to increase effectiveness in bringing investigations to a successful conclusion. This order consists of the following parts:

PART I Responsibilities and Procedures for Members of the Department

PART II Responsibilities and Procedures for Supervisory and Command Personnel

PART I

A. Return of Suspect to the Scene of the Crime for Identification.

1. If a suspect is arrested within 60 minutes of an alleged offense and within an area reasonably proximate to the scene of the crime, he shall be returned to the scene of the offense or the eyewitnesses shall be transported to the scene of the arrest for identification of the suspect.

2. Even if the suspect has a weapon or tools similar to that used in the commission of the alleged offense or proceeds similar to those taken in the alleged offense, police officers shall return the suspect to the scene for identification purposes. For example: There is a lookout for a robbery-holdup that has just occurred. One suspect was armed with a chrome-plated, .22 caliber pistol. Twenty minutes later and five blocks from the scene, an arrest is made of the holdup man who is found to be armed with a chrome-plated .22 caliber pistol. He shall be returned to the scene of the holdup or the witnesses shall be transported to the scene of the arrest for identification of the suspect.

3. When a suspect thought to have been injured while perpetrating a crime appears at a hospital or other place for treatment within 60 minutes of the offense, the eyewitnesses shall be taken to the hospital to make an identification. If an injured suspect appears for treatment later than 60 minutes after the offense and is not in critical condition, the eyewitnesses shall not be permitted to view the suspect, but may view the suspect's photograph as provided in part I, paragraph G of this order.

B. Critical Condition Viewings.

If a suspect is admitted to a hospital in critical condition

later than 60 minutes after the offense, eyewitnesses may be taken to the hospital to make an identification. In those cases where the victim of an assault is admitted to the hospital in critical condition, a suspect later arrested may be taken to the hospital for identification by the victim regardless of the time lapse between the offense and the arrest. For example: The victim of a robbery has been shot and is not expected to live. An arrest is made 2 hours later several miles from the scene of the shooting. The suspect may be taken to the bedside of the victim for identification if the victim is still in critical condition since the victim may die before a court-ordered lineup could be arranged.

C. Viewings at Police Facilities.

Regardless of the time of arrest, there shall be no identifications or lineups conducted at police facilities without the specific authorization of the United States Attorney's Office. For example: Officers investigating a Burglary I have broadcast a lookout and have requested the complainant to accompany them to the district station to view photographs of suspects suspected of other burglaries in the neighborhood. While at the station an arrest is made by another unit one-half hour after the offense was committed and only three blocks from the scene. There should be no identifications made at the station. The complainant should be driven either to the scene of the arrest or to the scene of the burglary to make an identification.

D. Presenting Suspect for Identification.

1. When presenting a suspect to the eyewitness for identification, police officers shall remain as neutral as possible consistent with their maintenance of custody and control over the suspect.

2. Police officers shall neither say nor do anything which will convey to the witness that the suspect has admitted his guilt, that property similar to that stolen has been recovered, that weapons similar to those used have been seized, or that the officer believes the suspect is guilty. For example: Do not tell the witness, "He's given us a full confession but we still want your identification." Do not display the proceeds of the crime by holding up the stolen wallet and saying, "He had your wallet but we haven't found your pocketbook yet."

3. When a suspect is returned to the scene of a crime for identification or when eyewitnesses are taken to the scene of the arrest, all witnesses shall view the suspect. To the extent practicable, each witness shall view the suspect independently, out of the immediate presence of the other witnesses. For example: There has been a holdup of a liquor store and the suspect was arrested a short distance away. When the suspect is transported back to the scene he should not be taken into the store area where the witnesses are gathered. Instead, each witness should be taken separately to the front of the store where the suspect is standing.

4. This order does not bar the accepted police procedure of transporting victims and eyewitnesses in police vehicles and cruising an area in which a crime has occurred in order to point out the perpetrator of the offense.

5. When an arrest is made of a subject which is based in part on the description of distinctive clothing, the arresting officer shall request the Identification Branch, Central Records Division, to take a color photograph of the prisoner. Transporting officers shall be alert to the possibility of prisoners exchanging clothing with other prisoners or discarding clothing prior to their being photographed at the Identification Branch. In appropriate cases, such clothing may also be seized as evidence in the case.

E. Spontaneous Remarks.

It is extremely important that the officer make written notes of any statements made by each witness viewing the suspect. In presenting a suspect to a victim or eyewitness, police officers shall be alert for spontaneous exclamations or excited utterances or other reactions by the witness since an officer can testify to these events in court and such testimony may enhance a subsequent in-court identification. These statements should be incorporated in the statement of facts of the case. For example: Upon viewing the suspect, the victim of a rape exclaims, "That's him. See the scar on his neck." This statement should be recorded verbatim on the statement of facts.

F. PD Form 725 (Spot Check Card).

Before any suspect is released for lack of witness identification, the circumstances of the incident, including the person's name and address, shall be recorded on the PD Form 725 to provide an official record for the department.

G. Use of Photographs for Identification Purposes.

1. The use of photographs for identification purposes prior to an arrest is permissible provided the suspect's photograph is grouped with at least eight other photographs of the same general description.

2. Adequate records of the photographs shown to each witness must be kept so that the exact group of photographs from which an identification was made can be presented in court at a later date to counteract any claim of undue suggestion and enhance the reliability of the in-court identification. This information shall be recorded in the statement of facts of the case.

3. Each witness shall view the photographs independently, out of the immediate presence of the other witnesses.

4. When an arrest is made following a photographic identification,

the officer handling the case in court shall request an Assistant United States Attorney to obtain a court order to require the defendant to appear in a lineup.

H. Court-Ordered Lineups.

1. Officers are reminded that the court may issue two types of lineups:

a. Wade Order - when a subject is involved in one particular offense at one location.

b. Allen or Adams Order - when the subject is suspected of being involved in more than one particular offense and not necessarily at the same location but with similar modus operandi.

2. It is the officer's responsibility to make sure he obtains the proper order.

3. Officers bringing cases before the courts for presentation shall discuss all aspects of the case with the Assistant United States Attorney or Corporation Counsel concerning identification. It should be determined at the first appearance in court if a lineup is appropriate in the case. At this time, the names of all witnesses and complainants involved in the case shall be given to the court.

4. When a suspect arrested in one case is thought to be responsible for other unsolved crimes of a similar nature and involving the same modus operandi, the officer handling the unsolved criminal case shall request an Assistant United States Attorney to obtain a court order (Allen or Adams type order) to require this suspect to stand in a lineup to be viewed by witnesses in these unsolved criminal cases. The officer shall not permit the witnesses of the unsolved case to attempt to make an identification by attending the suspect's arraignment or preliminary hearing in court. Officers, when requesting the above type orders (Allen or Adams), shall bring with them and present to the Assistant United States Attorney all available police reports of the cases in which they wish to have the suspects viewed. They shall supply to the Assistant United States Attorney all names of witnesses in these cases and the times, dates, and locations of offenses.

5. The officer handling the case shall execute a summons (PD Form 30) for each witness who will attend the lineup. The officer shall note on the summons his own name, the type of offense, the location of the offense, the date of the offense, the date and time of the lineup, and the location of the lineup. The witnesses shall be directed to bring the summons with them when attending the lineup. On the date of the lineup, the officer handling the case in court shall contact the detective sergeant in the Major Violators Branch, Lineup Section, prior to 1600 hours and provide him with all requested information concerning the case, including the names of witnesses who will appear and the names of the suspects which the witnesses are to view.

6. Court-ordered lineups will be held in the Criminal Investigations Division Lineup Room, Room 3106, located on the third floor of police Headquarters. The officer handling the case in court shall be present and shall be responsible for having the witnesses present for all court-ordered lineups.

7. Lineups for adult Negro males are held every Tuesday, Wednesday, and Thursday evening. The officer handling the case in court shall report to the Lineup Room, Room 3106, by 1830 hours, at which time a PD Form 140 (Court Attendance Slip) shall be executed. All witnesses shall be directed by summons to report to the Lineup Room by 1900 hours.

8. In those cases where a lineup is appropriate for a juvenile, the officer handling the case in court shall contact the Corporation Counsel's Office, Family Division, for an appropriate time and date. He shall also contact the Youth Division to arrange to have a member of that unit present during the lineup.

9. Lineups for all other suspects shall be specially scheduled through the Lineup Unit, Major Violators Section. The officer handling the case in court shall contact that unit to establish a date and time for such a lineup. The witness's summons shall reflect the time and date agreed upon. Special lineups will be conducted during the 0800 to 1600 hour tour of duty in the Criminal Investigations Division Lineup Room. Special lineups are for all white males, all females, and any other subject who, because of an outstanding feature, could not be placed in a regular lineup on Tuesday, Wednesday, or Thursday evenings. Some outstanding features would be excessive height, weight, age, or any feature which would tend to create a partial lineup.

10. The officer requesting this special lineup shall give all the pertinent information as to the subject to be viewed including name, sex, color, race, height, weight, and any outstanding features this subject may have. This information enables the Lineup Unit to create a fair and impartial lineup for this subject to stand in.

11. All information concerning lineups and special lineups can be obtained from the Lineup Unit, Major Violators Section.

12. Counsel for a suspect appearing in a lineup will not be given the names of the witnesses who will view the lineup in the case involving his client, nor will any prior description of the suspect given to the police be made available to him by police officers.

13. Witnesses shall view the lineup one at a time. If more than one witness to a particular crime is present, each shall view the lineup separately and independently. Witnesses should not converse or otherwise communicate with the other witnesses after viewing the lineup until the last witness in the case has viewed the lineup.

I. United States Attorney.

The United States Attorney's Office shall be responsible for notifying the defendants, the defense counsel, and for having an Assistant United States Attorney present at all court-ordered lineups.

PART II

A. Notification of Defense Counsel.

The supervisor, Lineup Unit, Major Violators Section, shall inform the counsel for a suspect appearing in a lineup of the date, time, place, and nature of the offense prior to the beginning of the lineup.

B. Instructions Regarding Lineups.

Prior to the beginning of the lineup, the official in charge will instruct all witnesses, police officers, and defense counsels as to the procedure of the lineups and the responsibilities of all parties.

Jerry V. Wilson
Chief of Police

JVW:TCN:mrr

GENERAL ORDER

SERIES	NUMBER	EFFECTIVE DATE
601	2	May 26, 1972

SUBJECT:

Preservation of Potentially Discoverable Material

DISTRIBUTION: A

ORIGINATING UNIT: OGC

Recent court decisions establish for Government investigative agencies, including this department, a duty to preserve all material which constitutes, or might constitute, evidence, or might otherwise be pertinent in a subsequent criminal judicial proceeding. The purpose of this order is to establish guidelines for the preservation of all such evidence, not presently required to be preserved pursuant to existing departmental orders, which may be required to be produced in such a proceeding. This order consists of the following parts:

PART I Responsibilities and Procedures for Members of the Department

PART II Responsibilities and Procedures for Supervisory and Command Personnel

PART I

A. General.

In addition to materials which are required to be preserved pursuant to existing departmental orders, such as fingerprints preserved by the Identification Branch, or items which are required to be turned over to the Property Clerk and listed on the property book, members of the department shall preserve all potentially discoverable material, including any such material which might prove favorable to an accused.

B. Definitions.

Potentially discoverable material includes, but is not necessarily limited to, such items as tangible documents, reports, tapes, transcripts of tapes, and photographs. The following are examples:

1. Any written statement made by a witness, defendant, or co-defendant, and signed or otherwise adopted or approved by him;

2. Any stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by a prospective witness or defendant which is recorded contemporaneously with such oral statement;

3. Any notes taken by a member of the department which are a substantially verbatim recital of an oral statement made by a prospec-

tive witness or defendant which are recorded contemporaneously with the making of the oral statement;

4. Any results or reports of physical or mental examinations, or of scientific or medical tests or experiments, made in connection with a particular case, or copies thereof, which are in the possession of or have been turned over to a member of the department; members of the department who request outside agencies to conduct any such tests shall request that the results of such tests be turned over to the department, and if they are, shall preserve such results in accordance with the terms of this order;

5. Any photographs, photograph books, papers, documents or tangible objects which are relevant to a particular case;

6. All other materials which reasonably may be expected to be relevant in a criminal judicial proceeding. Any doubt as to whether a particular item may be relevant and therefore preservable shall be resolved in favor of preservation pursuant to the terms of this order.

C. Procedures and Explanations.

1. All potentially discoverable material, not otherwise required to be preserved according to existing departmental orders, shall be maintained in an investigative jacket or case folder when practicable. Each investigative jacket or case folder shall be preserved in a secure file cabinet.

2. All potentially discoverable material, not otherwise required to be preserved according to existing departmental orders, which cannot practicably be maintained in an investigative jacket or case folder (or if no investigative jacket or case folder exists) shall be placed in an envelope or other appropriate container. The container shall be logged in a control book kept for the purpose. The entry in the book shall be given a control number. This number shall be placed on the envelope or container and shall also be noted in the investigative jacket or case folder (if any) as a reminder that the material has been safeguarded. The investigative jacket or case folder shall also indicate the location of the container. The container shall then be turned over to the unit's administrative lieutenant who will maintain it in a secure file cabinet kept for this purpose.

3. All potentially discoverable material required to be preserved pursuant to the terms of this order shall be preserved until the particular criminal case to which the material may be relevant is finally concluded. If no criminal judicial proceeding has been initiated, the material shall be preserved for a period of three years from the date such material was first obtained.

4. To ensure the integrity of investigative jackets and case folders, potentially discoverable material which becomes part of an investigative jacket or case folder shall be preserved until the entire investigative jacket or case folder is disposed of.

5. This order is not intended to limit the use of potentially discoverable material. This material may be used as necessary.

> e.g. Photographs and photograph books may be used for identification purposes as outlined in General Order No. 304.7. This order anticipates that a record of the photographs shown will be preserved in an investigative jacket or case folder, and that the photograph book will be preserved in an appropriate file cabinet.

6. This order does not anticipate that new or consolidated facilities must be provided where existing facilities and procedures conform to the requirements of this order.

7. This order supplements any existing departmental orders not inconsistent with the provisions herein. In cases of inconsistencies, the provisions of this order shall control.

Part II

Elemental Commanders or Directors.

Commanding officers shall initiate procedures to ensure that all potentially discoverable material is preserved in the manner prescribed in paragraphs IC of this order so that such material may be readily located and produced if necessary.

Jerry V. Wilson
Jerry V. Wilson
Chief of Police

JVW:KLC/GMA:mj

GENERAL ORDER

SERIES	NUMBER	EFFECTIVE DATE
602	1	May 26, 1972

SUBJECT

Automobile Searches and Inventories

DISTRIBUTION

A

ORIGINATING UNIT

PDD

The purpose of this order is to establish the policy and procedures governing searches and inventories of vehicles. This order consists of the following part:

PART I Responsibilities and Procedures for Members of the Department

PART I

A. Searches.

A search is an examination of a person, place or thing with a view toward discovery of weapons, contraband, instrumentalities of a crime, or evidence. It is to be distinguished from an inventory. A search of an automobile can be classified in one of the following categories:

Searches connected with an arrest.

Searches not connected with an arrest.

1. Searches Connected With an Arrest.

a. No Probable Cause to Believe Evidence Is in the Vehicle.

(1) General Rule.

If a full custody arrest is made of a subject in a motor vehicle and the officer does not have probable cause to believe that the vehicle contains fruits, instrumentalities, contraband, or evidence of the crime for which he has been arrested, only those areas which are within the immediate control of the defendant (the area from which the arrested person might gain possession of weapons or destructible evidence) at the time of his arrest may be searched incident to that arrest. The search shall be conducted in the presence of the defendant. (The scope, time and place of the search shall be governed by part I, paragraphs A1a(2) and A1a(3) of this order).

Examples of searches with no probable cause are:

(a) Carrying a Dangerous Weapon. An officer making a routine traffic stop observes a pistol in the glove compartment which was opened by the driver as he reached for his automobile registration. The driver is arrested for carrying a dangerous weapon. Only those areas of the interior of the vehicle within the driver's immediate control at the time of his arrest should be searched because there is no probable cause to believe there is other evidence of the offense for which he was arrested in the vehicle.

(b) Full Custody Traffic Arrest. An officer arrests a driver of a vehicle for driving after revocation. Before he is transported to a district station, those areas of the vehicle within the immediate control of the defendant at the time of his arrest should be searched. However, areas beyond his immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband, or evidence of the offense of driving after revocation.

(2) Scope of the Search.

The arresting officer may search all areas of the vehicle which are within the immediate control of the defendant at the time of his arrest, including those areas from which he might gain possession of a weapon or destructible evidence. If items discovered during his limited search give the officer probable cause to believe that fruits, instrumentalities, contraband, or other evidence of a crime is in the vehicle, then those areas of the vehicle which could physically contain such evidence shall be searched. An example of the scope of the search is:

An officer arrests a driver of a vehicle for driving after revocation. A search under the driver's seat, incident to the arrest, reveals a bottlecap cooker and syringe. The officer may now search

CONTINUED

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the entire vehicle since there is probable cause to believe that other implements of a crime may be in areas of the vehicle beyond the immediate control of the defendant.

(3) Time and Place of the Search.

If a full custody arrest is made of a subject in or near a vehicle and the officer does not have probable cause to believe that fruits, instrumentalities, contraband, or evidence of the crime for which the arrest was made may be found in that vehicle, the limited search of that vehicle incident to the arrest shall be conducted at the time and place of the arrest within the immediate presence of the defendant.

(4) Plain and Open View Rule.

Nothing in this order should be construed to limit the authority of an officer to seize any item which he observes in plain and open view (including items observed in plain view at night by means of a flashlight) beyond the immediate control of a subject, if the officer has probable cause to believe that such item constitutes fruits, instrumentalities, contraband, or evidence of a crime.

(5) Non-Custodial Arrests.

Traffic violators who are asked to accompany an officer to a district station (e.g., nonresident traffic violators who commit moving violations) and are not placed under full custody arrest shall not be searched and their vehicles shall not be searched unless an officer reasonably suspects the violator to be armed, in which case the subject may be frisked for weapons.

b. Probable Cause to Believe Evidence Is in the Vehicle.

(1) General Rule.

If a full custody arrest is made of a subject in a motor vehicle or of a subject in close proximity

to a motor vehicle who has just departed from or is about to enter a vehicle, and the arresting officer has probable cause to believe that the vehicle contains either fruits (e.g., stolen goods), instrumentalities (e.g., tools used in a burglary), contraband (e.g., narcotics, sawed-off shotgun), or evidence (e.g., clothing worn by a robber) of the crime for which he was arrested, the vehicle shall be searched. (The scope, time and place of the search shall be governed by part I, paragraphs A1b(2) and A1b(3) of this order). Examples of probable cause searches are:

(a) Vehicle Used in Robbery. An officer has observed a vehicle described in a lookout for a robbery holdup which occurred 1 hour earlier, in which two men wearing ski masks and carrying pistols obtained an undetermined amount of money. After arresting the two occupants of the vehicle, the entire vehicle should be searched at the scene of the arrest since the officer has probable cause to believe that the money obtained and the pistols and ski masks used in the robbery may be hidden in areas within and beyond the immediate control of the suspects.

(b) Sale of Narcotics From Vehicle. A plain-clothes officer arrests a subject in or near a vehicle. He has had the subject under observation for the previous hour for the sale, from the vehicle, of narcotics to individuals who approached the vehicle. All areas of the vehicle should be searched since the officer has probable cause to believe that a supply of narcotics remains in other areas of the vehicle, such as the trunk or glove compartment.

(2) Scope of the Search.

When an officer arrests a subject in or near a vehicle and he has probable cause to believe that vehicle contains fruits, instrumentalities,

contraband, or evidence of the crime for which the arrest was made, only those areas of the vehicle which could physically contain that evidence shall be searched. Examples of the scope of the search are:

(a) Vehicle Used in Burglary. An officer has stopped a vehicle for a traffic spot check and has been informed by the dispatcher that the vehicle has been reported as being used in a burglary which occurred a few hours earlier in which a portable television set was stolen. Since it is generally known that most burglaries are effected by means of small tools, easily concealed, all areas of the vehicle may be searched for such tools, unless the officer has specific information that entry was gained in a manner other than by use of a small tool. In such a case, only those areas of the vehicle which could physically contain the portable television set or the object used to enter the premises may be searched because they are the only areas for which the officer has probable cause to believe that fruits, instrumentalities, or evidence of the crime for which the arrest has been made may be contained.

(b) Vehicle Containing Large Object Used in a Homicide. A vehicle is stopped, pursuant to a lookout, for a suspect wanted in connection with a homicide in which the deceased was struck with a tire iron which the assailant was seen carrying toward the vehicle. The officer should not search the locked glove compartment because the large object could not be contained in such a small space. The trunk, however, should be searched for the object. If, however, there is some other missing item of evidence (e.g., a bloodstained glove of the suspect), the locked glove compartment may be searched if there is probable cause to believe that the item is in the possession of the suspect or in the vehicle at the time of the arrest.

(3) Time and Place of Search.

The search of the vehicle shall be conducted as soon as the prisoner is placed in secure custody and ordinarily at the scene of the arrest. It is not necessary to keep the prisoner near the vehicle during this type of search. In those exceptional cases where it is not practical to conduct a search of the automobile at the scene of the arrest, the vehicle shall be removed to a police facility or other area where the search shall be conducted as soon as possible. In those cases where the search is conducted at a place other than the scene of the arrest, an officer shall remain with the vehicle to ensure a continuous chain of custody prior to the search. Examples of exceptional cases where search may be delayed are:

(a) Keys to Locked Area not Available. When the search of a locked trunk or glove compartment of a vehicle is not possible at the scene of the arrest because keys are not available, the officer shall notify the Auto Theft Section and request that a set of keys be sent to the location to which the vehicle has been taken. If keys are not available, instructions shall be obtained from the Property Division as to the method to be used in opening the locked trunk or glove compartment. No search warrant is required, but the search shall be conducted as soon as possible.

(b) Hostile Crowd or Inclement Weather. When an officer believes it would be advisable to remove a vehicle from a public location prior to searching it because a hostile crowd has formed or because the weather is inclement, the vehicle may be taken to the nearest police facility and searched promptly without a warrant.

(4) Search Warrant.

When an officer arrests a subject in or near a vehicle and he has probable cause to believe that the vehicle contains fruits, instrumentalities, contraband, or evidence of the crime for which the subject is arrested, all those areas of the automobile which can contain such evidence shall

be searched without a search warrant. In those exceptional cases where the search is not completed at the scene of the arrest and the vehicle is removed to a police facility or other area, the search shall be completed, as soon as possible, without a search warrant. In cases where there is adequate time to obtain a search warrant prior to the arrest of a subject in a vehicle, a warrant shall be obtained for the search of the vehicle. One example of the necessity for a search warrant is:

> Adequate Time to Obtain Search Warrant Before Making Arrest in Vehicle. A subject has been under surveillance for several days because of the officer's suspicion that he is selling stolen property from his vehicle. If probable cause to arrest is gathered and the decision is made to obtain an arrest warrant for the subject, a search warrant for the vehicle should also be obtained because there is adequate time to do so.

2. Searches Not Connected with an Arrest.

General Rule. If an officer has probable cause to believe that a parked, unoccupied vehicle, whether locked or unlocked, contains fruits, instrumentalities, contraband, or evidence of a crime, all those areas of the vehicle which can contain such evidence shall be searched without a search warrant if the vehicle appears to be in such operational condition that it can be moved or easily rendered movable by minor repairs. If, however, a vehicle does not appear to be movable and there is adequate time in which to obtain a search warrant, such warrant shall be obtained prior to entering the vehicle. One example of such a search is:

> An officer has been informed by a citizen that he observed a person place a sawed-off shotgun in the trunk of a vehicle one-half hour earlier. The citizen gives his name and address and accompanies the officer to the vehicle, which appears to be operational except for a flat rear tire. The officer may immediately search the trunk of the vehicle without a search warrant because he has probable cause to believe that the shotgun is in the trunk of the vehicle and the vehicle may be easily rendered movable by a minor repair. If, however, the vehicle has been completely stripped, including the wheels, the officer should obtain a search warrant prior to searching the trunk of the vehicle.

B. Inventories.

An inventory is an administrative process by which items of property are listed and secured. An inventory is not to be considered or used as a substitute for a search. Automobiles coming into the custody of the police department shall be classified for purposes of this paragraph relating to inventories in one of the following five categories:

Seizures for purposes of forfeiture.

Seizures as evidence.

Prisoner's property.

Traffic impoundments.

Non-criminal impoundments.

The officer's right to inventory an automobile and the time and scope of any such inventory depend upon the category into which it is classified.

1. Seizures for Purposes of Forfeiture.

a. Narcotics. When an officer has probable cause to believe that a vehicle has been used to transport illegally possessed narcotics, he shall take the vehicle into custody and classify it as a seizure for purpose of forfeiture only if both of the following conditions exist:

(1) A substantial amount of drugs is involved.

(2) The owner of the vehicle (not necessarily the user of the vehicle) is a significant drug violator.

No seizure under this paragraph shall be made without approval of an official of the Narcotic Branch. If a vehicle used to transport illegally possessed narcotics cannot be seized under this paragraph, it may not be inventoried unless it can be classified and inventoried under another section of part I, paragraph B of this order. An example of seizures based on narcotics violations is:

An officer stops an automobile and observes a glassine envelope containing a small amount of a substance which he has reason to believe is heroin in plain and open view on the floor boards. The

driver (who is the owner of the vehicle) is arrested for illegal possession of narcotics. The officer contacts an official of the Narcotics Branch and is informed that because the driver has no previous narcotics record and the amount of narcotics seized is not substantial, the vehicle may not be seized for purposes of forfeiture. It may be classified, however, as prisoner's property pursuant to part I, paragraph B3 of this order and inventoried to the extent allowed under the rules contained in that paragraph.

b. Gambling. When an officer has probable cause to believe that a vehicle is being or has been used to conduct illegal gambling activities, it may be seized for purposes of forfeiture, irrespective of the age, value, or condition of the vehicle.

(1) Authorization. No seizure under this paragraph shall be made without approval of an official of the Gambling and Liquor Branch.

(2) Examples of Seizures for Purposes of Forfeiture Based Upon Gambling Violations.

(a) Vehicle Used by Numbers Runner. After surveillance, officers develop probable cause to believe that a person is a numbers runner and that a vehicle which he owns or used has been used to conduct the numbers operation. The officers obtained an arrest warrant and a search warrant for his vehicle. When the officers execute the arrest warrant during one of the runs, the defendant's vehicle may be seized for purposes of forfeiture if such seizure has been approved by an official of the Gambling and Liquor Branch.

(b) Arrest for Possession of a Numbers Slip. On a routine traffic stop an officer observes in the driver's wallet a single numbers slip and arrests the driver for its possession. If the evidence indicates that the driver was simply a person who placed a numbers bet rather than one who was involved in conducting a gambling

operation, the vehicle may not be seized for purposes of forfeiture.

c. National Firearms Act Violations. When an officer has probable cause to believe that a vehicle has been used to transport a firearm possessed illegally under the National Firearms Act (49 U.S.C. SS 781-788), he shall follow the procedures contained in General Order No. 601.1 in determining whether the vehicle shall be seized for purposes of forfeiture under the Act.

d. Procedure. An officer who seizes an automobile for purposes of forfeiture shall completely inventory the contents of the automobile immediately upon its arrival at a police facility. The scope of that inventory shall be limited by the rules provided in part I, paragraph B6 of this order. Upon completion of the inventory the officer shall obtain instructions from an official of either the Narcotic or Gambling and Liquor Branch or from an agent of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, relating to appropriate further processing of the vehicle.

2. Seizures as Evidence.

When an officer has probable cause to believe that a vehicle is a fruit, instrumentality, or evidence of a crime, he shall take the vehicle into police custody and shall classify it as a seizure as evidence

a. Examples of Seizures as Evidence.

(1) Homicide in an Automobile. A citizen is shot to death in an automobile. After appropriate on-the-scene processing by the Homicide Section, the vehicle shall be seized as evidence because it is evidence and, in addition, may contain evidence of the offense.

(2) Vehicle Used in an Offense. Two days after a bank robbery an officer locates an automobile which has been described by witnesses as the getaway vehicle. Whether or not an arrest has been made in the case, the vehicle shall be seized as evidence because it is an instrumentality of the offense of bank robbery.

NOTE: Although whenever there is either a moving or a parking traffic violation the vehicle involved is technically evidence of

that offense, vehicles shall not be seized as evidence simply because they were involved in relatively minor traffic offenses. However, if a vehicle has some evidentiary value beyond the fact that it was used to commit a minor traffic offense it shall be seized as evidence.

b. Procedure. An officer who seizes a vehicle as evidence shall completely inventory the contents of the vehicle immediately upon its arrival at a police facility, provided that such an inventory will not damage or destroy any evidence contained therein. The scope of that inventory shall be limited by the rules provided in part I, paragraph B6 of this order.

c. Release of Vehicle. Vehicles seized as evidence shall not be released to any person until the appropriate prosecutor has signed the proper release form indicating that the vehicle is no longer needed as evidence. In cases where a prosecutor is unavailable and application of this rule would result in hardship to an innocent party, verbal authorization may be obtained by telephone from an Assistant United States Attorney on emergency duty for the month or from any other available Assistant United States Attorney.

3. Prisoner's Property.

When a person is arrested in an automobile which he owns or has been authorized to use and the vehicle cannot be classified under part I, paragraph B1 or B2 of this order, that vehicle shall be classified as prisoner's property. One example of prisoner's property is:

Robbery Suspect. A liquor store owner has been robbed by a single assailant who fled on foot. Ten days after the offense the defendant is arrested on a warrant in an automobile. Since there is no basis for seizing the automobile either as evidence or for purposes of forfeiture, the automobile shall be classified as prisoner's property.

a. Disposition of Prisoner's Property. A vehicle which is classified as prisoner's property shall be disposed of in any lawful manner in which the person arrested directs. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to indicate his request in writing. An example of disposition of prisoner's property is:

Robbery Arrest. In the robbery example above, the defendant is accompanied by his wife at the time of his arrest. If the defendant so requests, his wife shall be permitted to drive the vehicle from the scene of the arrest. If the defendant is alone at the time of arrest and requests that the vehicle be lawfully parked pending notification of his wife, the request shall be honored, so long as he indicates his request that the vehicle be so parked in writing.

b. Initial Procedure. If a vehicle classified as prisoner's property is disposed of so that it is not taken to a police facility, it shall not be inventoried in any way. If it is necessary to take such a vehicle into police custody, the vehicle shall be taken to a police facility or to a location in front of or near a police facility. Immediately upon arrival at the police facility the arresting officer shall remove from the passenger compartment of the vehicle any personal property which can easily be seen from outside the vehicle and which reasonably has a value in excess of $25. After removing such property, if any, the officer shall make sure that the windows are rolled up and the doors and trunk are locked. Any property so removed shall be brought into the police facility and appropriate entries and returns made in accordance with General Order No. 601.1. No other inventory or search of the vehicle shall be made at this time.

c. Procedure After 24 Hours. If a person authorized by the prisoner or the prisoner himself, upon his release, does not claim the vehicle within 24 hours of the time that the prisoner was arrested, a complete inventory of the contents of the automobile shall be made by the arresting officer or an officer designated by an official. The scope of that inventory shall be limited by the rules provided in part I, paragraph B6 of this order.

4. Traffic Impoundments.

Only those vehicles which, pursuant to section 91 of the D.C. Traffic and Motor Vehicle Regulations, are taken into police custody and placed on police department property or at a location in front of or

near a police facility shall be classified as "traffic impoundments." Vehicles classified as traffic impoundments shall be inventoried only in accordance with part I, paragraphs B4d and B4e of this order. If a vehicle is not placed on police department property or near a police facility, it is not a traffic impoundment and shall not be inventoried or searched in any way.

a. Non-impounded Vehicles. Except as provided in part I, paragraph B4c below, whenever an officer causes a vehicle to be moved pursuant to the traffic regulations, the vehicle shall, if possible, be moved to a location on a public street as close to the original location as possible, consistent with prevailing traffic conditions.

b. Procedure in Non-impoundment Situations. Vehicles moved but not taken to a police facility or to a location in front of or near a police facility shall not be classified as traffic impoundments and shall not be inventoried or searched in any way. However, the officer who caused the automobile to be moved shall make sure that the windows of the automobile are rolled up and, if possible, the trunk and doors are locked before he leaves the vehicle. In all cases where a vehicle is moved without the knowledge of the owner, the Teletype Branch shall be notified in accordance with General Order No. 601.1. An example of a non-impoundment situation is:

> Illegal Parking on Main Arteries During Rush Hour. Illegally parked vehicles are disrupting the flow of traffic on a main artery during rush hour. The vehicles should be moved to a location as close to the original location as possible, consistent with prevailing traffic conditions. The vehicle shall not be inventoried or searched in any way.

c. Impoundments in Exceptional Circumstances. Only in exceptional circumstances shall the vehicle be impounded for traffic violations and taken to police property or to a location in front of or near a police facility. Examples of exceptional circumstances are:

(1) Large Amounts of Personal Property in Plain View Within the Automobile. A vehicle is unlawfully

parked on Constitution Avenue during rush hour. Large amounts of clothing and a number of suitcases are in plain view on the back seat of the automobile. In order to protect the citizen's property, the automobile shall be impounded and towed to a police facility or to a location in front of or near a police facility.

(2) Outstanding Traffic Warrants. A vehicle is unlawfully parked in front of a fire hydrant. A WALES check discloses that there is a traffic arrest warrant outstanding for the registered owner in addition to 10 unpaid traffic tickets. The vehicle shall be impounded and taken to a police facility or to a location in front of or near the police facility. The vehicle shall not be released to the citizen until collateral in the appropriate amount for the outstanding and present violations is posted.

In these circumstances, the vehicle may also be immobilized by use of a boot or other immobilizing device. If a vehicle is immobilized, rather than impounded and brought to a police facility, the vehicle shall not be inventoried in any way.

d. Procedure in Impoundment Situations Upon Arrival at Police Facility. Immediately upon arrival at the police facility, the impounding officer shall remove from the passenger compartment of the vehicle any personal property which can easily be seen from outside the vehicle and which reasonably has a value in excess of $25. After removing such property, if any, the officer shall make sure that the windows are rolled up and, if possible, that the doors and trunk are locked. Any property so removed shall be brought into the police facility and appropriate entries and returns made in accordance with General Order No. 601.1. No other inventory or search of the vehicle shall be made at this time. An example of an impoundment situation upon arrival at a police facility is:

Large Amounts of Personal Property in Plain View Within the Automobile. In the example above relating to large amounts of clothing and suitcases

within the automobile, the officer shall remove the clothing and suitcases from the automobile immediately upon arrival at the police facility. He shall not examine the glove compartment, search under the seat, or make any other search at this time. The windows shall then be rolled up and the vehicle locked. Appriate entries and returns shall be made in accordance with General Order No. 601.1.

e. Procedure in Impoundment Situations After 24 Hours. If a vehicle which has been impounded is not claimed by the registered owner or a person authorized by the registered owner within 24 hours of the time that the vehicle was impounded, a complete inventory of the contents of the automobile shall be made by the impounding officer or an officer designated by an official. The scope of that inventory shall be limited by the rules provided in part I, paragraph B6 of this order.

5. Non-Criminal Impoundments.

When an officer takes a vehicle into police custody because there is reason to believe that it is abandoned, part of the estate of a deceased person, property of an insane person or a person taken to the hospital, or property turned over to the police at the scene of a fire or disaster, he shall classify it as a non-criminal impoundment.

Procedure. Since the vehicle may be in police custody for an undetermined period of time, an officer who impounds a vehicle as a non-criminal impoundment shall completely inventory the vehicle immediately upon its arrival at a police facility. The scope of that inventory shall be limited by the rules provided in part I, paragraph B6 of this order.

6. Scope of Inventory.

Whenever an officer has a right to inventory a vehicle pursuant to this order, the officer shall examine the passenger compartment, the glove compartment, whether or not locked, and the trunk, whether or not locked. Any items of personal property which reasonably have a value in excess of $25 shall be removed from the vehicle and placed in secure custody. All items so removed shall be listed and recorded on a property return as provided in General Order No. 601.1. Any container such as

boxes or suitcases found within the vehicle shall be opened and any item of personal property found in such containers which reasonably has a value in excess of $25 shall be listed and recorded separately. Immediately upon completion of the inventory, the officer shall make sure that the windows are rolled up and the doors and the trunk are locked.

Jerry V. Wilson
Chief of Police

JVW:mj

213

CIRCULAR

SERIES	NUMBER	EFFECTIVE DATE
73	56	February 27, 1973

SUBJECT:

D.C. Code Weapons Offenses

DISTRIBUTION: A

ORIGINATING UNIT: OGC

EXPIRATION DATE: December 31, 1973

A review of cases presented to the United States Attorney's Office during the last nine months indicates that a large number of weapons prosecutions have been no papered or nolle prossed. In some of these cases, the unsuccessful prosecution was the result of insufficient and inadequate preparation of prosecution reports. Other cases indicate that the original arrests should not have been made because all the elements of the particular offense were not present. The purpose of this circular is to stress the need for including in prosecution reports all the facts and circumstances which support each required element of any weapons offense. Additionally, each particular weapons offense under the D.C. Code will be analyzed and necessary elements will be outlined. No arrest for a weapons offense, or for any criminal offense, should be made unless the arresting officer can articulate specific facts which support each required element of the offense. No case should be brought to the United States Attorney for papering unless those specific facts, supporting each required element of the offense, are contained in the prosecution report.

1. D.C. Code § 22-3204 (1967) -- Carrying a dangerous weapon or carrying a pistol without a license. This is the most difficult of the weapons statutes to apply correctly in the field because it contains many elements, all of which must be present to support a successful prosecution. The statute provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. [Second sentence relating to punishment omitted].

The statute pertains to two categories of weapons: "pistols" and "other dangerous weapons." That part of the statute dealing with pistols is discussed first:

A. Carrying a pistol without a license (CPWL) -- required elements:

1. Carrying. The person to be charged must carry the pistol, as that term is herein defined. The carrying element is satisfied if a person physically carries the pistol on his person or if it is contained in some object, such as a purse, which he is carrying. Also, the carrying requirement is satisfied if the pistol is in such proximity to a person as to be within his convenient access or reach, so long as he knows of its presence. For example, it is sufficient if a person is operating a motor vehicle and knows that a pistol is located under the operator's seat or in the glove compartment. Either type of "carrying" satisfied the requirement of the statute.

   A frequent problem in connection with the CPWL statute occurs in cases where a pistol is found in an automobile occupied by more than one person. When one of the occupants has physically carried the pistol, as defined above, he alone should be charged with CPWL, since the other occupants cannot also physically carry that pistol. On the other hand, when none of the occupants actually carried the weapon, in order to support a valid charge under the statute the arresting officer must be able to articulate facts -- and must incorporate those facts in his prosecution report -- demonstrating that the weapon was within the convenient access or reach of each person charged, and that each person charged knew of the presence of the weapon. In a situation where a pistol is recovered in a vehicle, unless possession of the pistol is clearly established or admitted, all individuals in the vehicle reasonably having access to the weapon may be charged and each such charge will ordinarily be papered by the United States Attorney's Office.

   Members of the Force are reminded of the provisions of General Order No. 601.1, Part I, Section Q, which require all recovered firearms to be processed for latent fingerprints. Although that order provides that such processing is to be accomplished by the Firearms Identification Section, it is proper for weapons recovered in most of the cases covered by this circular to be processed by appropriately trained Crime Scene Search Officers.

2. Intent. There is no requirement that the weapon be carried with the specific intent to use it unlawfully against another person, or that it be so used. The fact that a

person knowingly carried the pistol is sufficient.

3. Dangerousness. The weapon must be dangerous. The statute prohibits carrying of a deadly or dangerous weapon. For purposes of the pistol prohibition, therefore, the weapon must be capable of firing bullets at the time it is recovered. Thus, the pistol must be test fired and a certificate to that effect must be obtained. Because of this requirement carrying the following weapons is not a violation of this statute:

   a. blank guns
   b. starter pistols
   c. toy guns
   d. antique pistols unsuitable for use as firearms
   e. pellet guns, except those that are clearly dangerous in that they can expel projectiles with great force over extended distances
   f. gas guns
   g. pistol replicas
   h. any other inoperable pistols

   Possession of any of these listed weapons with intent to use unlawfully, may constitute a violation of D.C. Code § 22-3214 (1967) (discussed below), but may not be the basis of a valid charge under section 3204.

4. Capability of being concealed. The statute does not require that the weapon be concealed; it need only be of such a size that it is "capable of being concealed." Naturally, all operable pistols and other reasonably small weapons meet this requirement. Unaltered shotguns or rifles, however, do not unless they are in fact concealed under a coat or in some other manner.

5. Licensing. It is not a violation of the CPWL statute if the carrier is licensed to carry a pistol. Therefore, a certificate that the person charged was not licensed to carry a pistol in the District of Columbia must be obtained. A license is not the same as a registration certificate. Even if a pistol is properly

registered, it may not be carried outside the carrier's home or place of business unless he is licensed by the Chief of Police. There are very few such licenses in existence at the present time.

B. Carrying a dangerous weapon (CDW) weapons other than operable pistols -- required elements:

1. Carrying. In order to be charged, a person must "carry" (as that term is described in the preceding section) a dangerous weapon.

2. Intent. The fact that a person knowingly carried the weapon, as described in the preceding section, is sufficient. There is no specific intent requirement.

3. Dangerousness. The weapon must be dangerous. An operable pistol is necessarily a dangerous weapon. Other weapons may or may not be considered dangerous depending on the circumstances which existed at the time the "weapon" was carried. Knives, for example are not necessarily dangerous weapons and may be lawfully carried tools. The carrying of a knife, without more, is not a violation of the CDW statute. If an officer charges CDW for the carrying of a knife, razor blade, or other similar item, he must be able to articulate, and his prosecution report must contain, facts demonstrating the circumstances under which the officer classified the device as a "dangerous weapon." Some circumstances which may tend to show the required element of danger are:

   a. time and place (e.g., late hours in known high crime areas).

   b. alteration of the item (e.g., a hawk-billed linoleum knife is not normally a dangerous weapon; but if it has been altered to open 270 degrees, it may, if other factors are present, constitute a dangerous weapon).

   c. actions of defendant in connection with, or statements concerning, his carrying of the weapon (e.g., a person carrying a steak knife in his pocket, without more, has not violated the CDW statute; but if

that person brandishes the knife, or makes statements to witnesses that he intends to use it in an unlawful manner, his actions may fall within this statute and others).

In short, officers must be aware that the mere "carrying" of an item which has some reasonable utility other than as a weapon is not a violation of the CDW statute, and should not be charged, unless the carrying is accompanied by a set of circumstances which the officer can articulate tending to show danger.

4. Capability of being concealed. The weapon must be capable of being concealed (as described in the preceding section).

C. Exceptions (applicable to both CPWL and CDW).

1. Home or place of business. No person can be charged with a violation of section 3204 occurring in his home, place of business or on other land possessed by him. A person is allowed to carry, either concealed or not, weapons falling within the statute, including operable pistols, within these protected places.

However, a person's place of employment is not necessarily a "place of business" for purposes of the exception. Employees of offices, stores and factories do not have a place of business under this statute and are in violation of the section if they carry dangerous weapons therein. An owner or manager may carry a dangerous weapon at his place of business; his employees may not, except that one person who is specifically designated by the owner or manager to carry a weapon during his absence from the business may do so.

2. Occupation. The provisions of section 3204 do not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law enforcement officers whether or not on duty. They also do not apply to members of the Army, Navy, or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty.

> Uniformed members of the General Services Administration Federal Protective Service and General Services Administration Guards are not law enforcement officers. They may, however, be authorized to carry a weapon while on duty on Federal property. All other building guards, private detectives, members of the police reserve corps, etc., are not law enforcement officers and are prohibited from carrying a weapon unless licensed by the Chief of Police pursuant to D.C. Code § 22-3206 (1967) or commissioned as a special police officer pursuant to D.C. Code § 4-115 (1967).
>
> Commissioned special police officers are permitted to carry a weapon only at their place of duty, between two separate places of duty if so assigned, or to and from home if the individual does not deviate and he has been assigned two or more places of duty.
>
> Non-uniformed General Service Administration investigators may be authorized to carry a weapon when on duty or when on a duty-connected travel status.

II. D.C. Code § 22-3214(a) (1967) -- Possession of Certain Dangerous Weapons. This is the simplest of the weapons sections. It is a straight possession statute, and simple possession of any of the items named below is sufficient to justify a charge under the section. The statute provides in part:

> No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, or any instrument or weapon of the kind commonly known as a blackjack, sling shot, sand club, sandbag, switchblade knife, or metal knuckles, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms . . .
>
> The remainder of the statute lists persons who are exempt from its provisions. Unless he falls within one of these named exceptions, anyone possessing any of the named items under any circumstances anywhere may be charged with a violation of this section. No special or specific intent is necessary.
>
> The only word of caution concerns the element of "possession."

The term "possession" under this statute is somewhat broader than the term "carrying" as used in cases arising under section 22-3204. Possession may be either "actual" or "constructive." A person is in actual possession of a weapon if he carries it physically on his person or if it is contained in some object, such as a brief case, which he is carrying. A person is in "constructive" possession of a weapon if he is in a position to exercise reasonably immediate control over it. Since "possession" is broader than "carrying," a person may be charged with possession of a sawed-off shotgun under this section even if the weapon is contained in the locked trunk of his automobile; on the other hand, no charge under section 22-3204 would be valid for a pistol contained in a locked trunk, since that section is narrower and the pistol, not being immediately accessible to the operator, cannot be said to be "carried."

In all the weapons statutes discussed in this circular except section 22-3204 (CPWL and CDW), the controlling element is the broader concept of "possession." Only in cases in which either CPWL or CDW is charged must the officer be able to testify that the person charged either directly carried the weapon or "carried" it in such a way that it was immediately accessible to him.

III. D.C. Code § 22-3203 (1967) -- Unlawful possession of a pistol.

Under this statute certain classes of persons are prohibited from possession of a pistol under any circumstances anywhere. As to those persons, section 3203 is a straight possession statute, and simple possession of a pistol, without more, constitutes a violation of the section. The prohibited classes of persons are:

1. Drug addicts
2. Persons previously convicted anywhere of a felony
3. Persons previously convicted of violation of D.C. Code § 22-2701 (1967) (soliciting for purposes of prostitution) and § 22-2722 (1967) (keeping a bawdy or disorderly house).
4. Persons previously convicted of any of the D.C. Code weapons sections, D.C. Code §§ 22-3201-16 (1967).

It should be remembered that the exceptions relating to home and place of business contained in section 3204 do not apply to section 3203. Drug addicts or previously convicted felons, for example, are guilty under this section even if such persons possess pistols in their homes or places of business.

IV. D.C. Code § 22-3214(b) (1967) -- Possession of certain weapons with intent to use unlawfully against another. This weapons statute specifically requires more than simple knowing possession of a dangerous weapon. Also required as a necessary element of the offense, in addition to knowing possession, is the specific intent to use the possessed weapon unlawfully against another person. Simple knowing possession of one of the named weapons in this statute, without more, is not sufficient for either arrest or conviction. The statute provides:

> No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than three inches, or other dangerous weapon.

An officer making an arrest under this section must be prepared to state facts which show (1) that the offender "possessed" one of the named weapons, or an "other dangerous weapon", and (2) that when he possessed the weapon he committed certain acts or stated certain words which indicate that at that time he had the specific intent to use that weapon in an unlawful manner against another person.

Many objects, not necessarily dangerous, can become so if they are possessed in such a manner as to indicate an intention to be used unlawfully. Where the officer can state facts indicating such use or intent, the normally non-dangerous object can become an "other dangerous weapon" within the meaning of this statute. A knife with a blade of less than three inches, a broken bottle or a sharp tool used normally for lawful purposes can be "dangerous weapons" under the statute if accompanied by acts or words which show the required intent. For example, a carpenter may lawfully possess a screwdriver. If he uses the screwdriver to attack another person, however, the screwdriver becomes a dangerous weapon and the possesser has violated this section and may be charged.

As stated above, an officer making an arrest under this section must include in his prosecution report, and must be prepared to state,

facts which show (1) either that the possessed weapon was one of the named weapons or the circumstances which made him conclude that the possessed object was an "other dangerous weapon" and (2) an intent by the possesser to use the weapon unlawfully against another person.

Jerry V. Wilson
Chief of Police

JVW:GMA:fsp

GENERAL ORDER

SERIES	NUMBER	EFFECTIVE DATE
304	10	July 1, 1973

SUBJECT:

Police-Citizen Contacts, Stops, Frisks, and Motor Vehicle Spot Checks

DISTRIBUTION: A

ORIGINATING UNIT: OGC

The purpose of this order is to establish policies and procedures of this department governing police-citizen "contacts," stops, frisks, and motor vehicle spot checks. Policies and procedures concerning arrests and searches connected with arrests are not covered. This order is intended to promote public safety and to safeguard members of the department from injury, while insuring that invasions of personal privacy of members of the public will be held to a minimum. This order consists of the following part:

PART I Responsibilities and Procedures for Members of the Department

PART I

A. Contacts.

Conduct by an officer which places him in face-to-face communication with an individual under circumstances in which the individual is free to leave if he wishes is considered a "contact." Contacts may be initiated by an officer when he reasonably believes that investigation of a situation is justified. The standard for a police-citizen contact is not "probable cause," "reasonable suspicion, or any other specific indication of criminal activity.

1. Initiating a Contact.

An officer may initiate a contact with a person in any place in which the officer has a right to be. It is difficult to define precisely such places. Generally, they may include: (1) areas of government-owned or possessed property normally open to members of the public; (2) places intended for public use, or normally exposed to public view; (3) places to which the officer has been admitted with the consent of the person empowered to give such consent; (4) places to which the officer may be admitted pursuant to a court order (such as an arrest or search warrant); (5) places where the circumstances require an immediate law enforcement presence to protect life, well-being, or property: and (6) places in which the officer may effect a lawful warrantless arrest.

2. Conduct of Contacts.

Persons "contacted" may not be detained against their will or frisked. They may not be required to answer the officer's

questions or in any way respond to the officer if they choose not to do so. The officer may not use force or coercion to attempt to require citizens to stop or respond. If they refuse to cooperate, they must be permitted to go on their way; however, if it seems appropriate under the circumstances, they may be kept under surveillance. Since a contact is not a stop or an arrest and the person contacted may be innocent of wrongdoing of any kind, officers should take special care to act in as restrained and courteous manner as possible.

B. Stops.

A "stop" is the temporary detention of a person for the purpose of determining whether probable cause exists to arrest that person. A stop occurs whenever an officer uses his authority to compel a person to halt, or to keep him in a certain place, or to require him to perform some act (such as walking to a nearby location where the officer can use a radio, telephone, or call box). If a person is under a reasonable impression that he is not free to leave the officer's presence, a "stop" has occurred.

1. Basis for Stop.

If an officer reasonably suspects that a person has committed, is committing, or is about to commit any crime, he has the authority to stop and detain that person for the purpose of determining whether or not probable cause exists to arrest that person. The officer may exercise that authority in any place in which he has a right to be as such places are defined in part I, paragraph A1 of this order.

2. Reasonable Suspicion.

The term "reasonable suspicion" is not capable of precise definition; it is more than a hunch or mere speculation on the part of the officer, but less than the probable cause necessary for arrest. Reasonable suspicion is a combination of specific and articulable facts, together with reasonable inferences from those facts, which, in light of the officer's experience, would justify a reasonable officer in believing that the person stopped had committed, was committing, or was about to commit a criminal act.

The following list contains some of the factors which may be considered in determining whether "reasonable suspicion" exists:

a. Detained Person's Appearance. Does he generally fit the description of a person wanted for a known offense? Does he appear to be suffering from a recent injury, or to be under the influence of alcohol, drugs, or other intoxicant?

b. Detained Person's Actions. Is he running away from an actual or possible crime scene? Is he otherwise behaving in a manner indicating possible criminal conduct? If so, in what way? Were incriminating statements or conversations overheard? Is he accompanied by companions who themselves are "reasonably suspicious"?

c. Prior Knowledge: Does the officer know if the person has an arrest or conviction record, or is otherwise reasonably believed to have committed a serious offense? If so, is it for an offense similar to the one that is suspected to have just occurred, or about to be committed?

d. Demeanor During a Contact: If the person responds to inquiries during a contact, does he give evasive, suspicious, or incriminating replies? Is he excessively nervous during the contact?

e. Area of the Stop: Is the person near the area of a known offense soon after its commission? Is the area known for criminal activity, particularly for the kind of crime the person is believed to have committed, be committing, or be about to commit?

f. Time of Day: Is it a very late hour? Is it usual for persons to be in the area at that time? Is it the time of day during which criminal activity of the kind suspected usually occurs?

g. Police Training and Experience: Does the person's conduct resemble the pattern or modus operandi generally followed in particular criminal offenses? Does the investigating officer have experience in dealing with the particular kind of criminal activity being investigated?

h. Source of Information: If the officer relies on information supplied by another person, what kind of person was involved? Was he a regular informant, a witness, or a victim of a crime? Is he known by the officer? Does the officer reasonably believe him to be reliable? Was any of the information obtained corroborated by the officer?

3. Citing Justification for Stop.

Every officer conducting a stop must be prepared to cite the particular factors which supported his determination that "reasonable suspicion" was present. The record of the stop made pursuant to part I, paragraph E of this order, shall contain all factors relied on, whether or not they are specifically described in part I, paragraph B2.

Example 1: In the early morning hours, an officer on patrol receives a broadcast that a homicide has just occurred at a stated location. A general physical description of the suspect is given, and he is said to be wearing a dark jacket. Soon afterwards in the vicinity of the homicide the officer observes a man

generally fitting the broadcast physical description, but not wearing a dark jacket. The officer stops the man. This is a proper stop and the officer's "reasonable suspicion" is justified, based on the person's appearance, the area of the stop, and the type of crime under investigation.

Example 2: The police receive an anonymous tip that a named person is selling narcotics from his apartment in a specific building. The apartment manager confirms that the person resides there. Officers then occupy an apartment directly across the hall from the suspect, and observe a man previously arrested for a narcotics violation enter the apartment. When he exits shortly thereafter, officers "stop" him. Although probable cause to arrest and consequently to search does not exist, the "stop" is lawful because the officers' "reasonable suspicion" is justified as a result of the informant's tip and subsequent observation of suspicious, partially corroborating circumstances.

4. Police Conduct During a Stop.

Proper justification for a stop does not permit unreasonable conduct during the stop. In determining whether a "stop" is reasonable and therefore lawful, every phase of the stop and subsequent detention will be considered and therefore must be conducted in a reasonable manner.

a. Duration of a Stop: A person stopped pursuant to this order may be detained at or near the scene of the stop for a reasonable time not to exceed ten minutes. Officers shall detain a person only for the length of time (not to exceed ten minutes) necessary to obtain or verify the person's identification, or to obtain an account of the person's presence or conduct, or a report of the offense, or otherwise determine if the person should be arrested.

b. Explanation to Detained Person: Officers shall act with as much restraint and courtesy as possible under the circumstances. The officer shall identify himself as a law enforcement officer as soon as practicable after making the stop. At some point during the stop the officer shall, in every case, give the person an explanation of the purpose of the stop. The explanation need not be lengthy. The record of the stop made pursuant to part I, paragraph E of this order, shall briefly note the fact that the officer gave the person an explanation for the stop, and the nature of that explanation.

c. Rights of Detained Person: The officer may direct questions to the detained person for the purpose of obtaining his name, address, and an explanation of his presence

and conduct. The detained person shall not be compelled to answer questions, or to produce identification documents for examination by the officer.

d. Effect of Refusal to Cooperate: Neither refusal to answer questions or to produce identification by itself establishes probable cause to arrest, but such refusal may be considered along with other factors as an element contributing to probable cause if under the circumstances an innocent person could reasonably be expected not to refuse.

5. Effecting a Stop and Detention.

Officers shall use the least coercive means necessary under the circumstances to effect a stop and to detain a person. The least coercive means, depending on the circumstances, may be a verbal request, an order, or the use of physical force.

6. Use of Physical Force.

An officer may use only such force as is reasonably necessary to carry out the authority granted by this order. The amount of force to effect a stop and detention shall not, however, be such that it could cause death or serious bodily harm to the person stopped or detained. This means that an officer may not use his service revolver, mace or baton to effect a stop and detention. If the officer is attacked or circumstances exist that create probable cause to arrest, the officer may use the amount of force necessary to defend himself or effect an arrest.

7. Stopping Witnesses Near the Scene of a Crime.

An officer who has probable cause to believe that any felony or misdemeanor involving danger to persons or property has just been committed and who has a reasonable belief that a person observed near the scene of such offense may have knowledge of value to the investigation of the offense may order that person to stop. The primary purpose of the brief stop authorized by this section is the obtaining of the witness' identification so that he may later be contacted by the officer's agency or the prosecutor (More extensive interviews with willing witnesses are, of course, authorized under the "contact" sections of this order.). Officers shall use only the minimum amount of force necessary to stop a potential witness in order to obtain such identification; the amount of force shall not be such that it could cause death or serious bodily injury.

C. Frisks.

A frisk is a limited protective search for concealed weapons or dangerous instruments. Usually, it occurs during a "stop" and consists of a pat-down of the individual's clothing designed to determine

the presence of weapons and other dangerous objects.

1. Basis for a Frisk.

An officer may frisk a person (male or female) whom he has stopped if he reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself or others. The frisk may be conducted at any time during the stop, so long as the necessary "reasonable suspicion" has appeared.

2. Reasonable Suspicion to Support a Frisk.

"Reasonable suspicion" to support a frisk is more than a vague hunch and less than probable cause. If a reasonably prudent law enforcement officer under the circumstances would be warranted in believing his safety or that of other persons in the vicinity is in danger because the individual may be carrying a weapon or dangerous instrument, a frisk is justified.

The following list contains some of the factors which may be considered in determining whether reasonable suspicion to support a frisk exists:

a. Person's Appearance: Do his clothes bulge in a manner suggesting the presence of any object capable of inflicting injury? Do other physical characteristics, like demeanor, suggest the possibility that he may be carrying a weapon?

b. Person's Actions: Has he made a furtive movement, as if to hide a weapon, as he was approached? Is he nervous during the course of the stop? Are his words or actions threatening?

c. Prior Knowledge: Does the officer know if the person has an arrest or conviction record for weapons or other potentially violent offenses? Does the person have a reputation in the community for carrying weapons or for assaultive behavior?

d. Location of Incident: Is the area known for criminal activity--is it a "high crime" area? Is it so isolated that witnesses to an attack on the officer would be unlikely?

e. Time of Day: Is the incident taking place at night? In the officer's judgment will darkness make an attack more likely, or more difficult to defend?

f. Police Purpose: Does the officer suspect that the person stopped may have been involved--or be about to become involved--in a serious and violent offense? An armed offense?

g. Companions: Has the officer stopped a number of people at the same time? Has a frisk of a companion of the suspect revealed a weapon? Does the officer have sufficient immediately available assistance with regard to the number of subjects he has stopped?

3. Citing Justification for Frisk.

Every officer conducting a frisk must be prepared to cite the specific factors which supported his determination that "reasonable suspicion" to support a frisk was present. The record of the frisk required pursuant to part I, paragraph E, shall contain all factors relied on, whether or not they are specifically described in part I, paragraph C2.

4. Frisk Procedure.

A frisk authorized under this order shall be limited to the seeking of possible weapons or dangerous instruments. The authority to frisk shall not be used to conduct full searches designed to produce evidence or other incriminating material. Full searches of persons conducted without adequate probable cause to arrest are illegal and are specifically prohibited by this order.

a. If the person is carrying an item immediately separable from his person, such as a purse, shopping bag, or briefcase, it shall be taken from him. The officer shall not search inside the object, however, but shall place it at a safe distance out of the person's reach for the duration of the detention. If during the detention something occurs which makes the officer reasonably suspect the possibility of harm should he return an unsearched item without first inspecting it, he may briefly inspect the contents in order to determine if the item contains a weapon or other dangerous object. The officer must be able to articulate the factors on which he relied in inspecting the contents of the item, and shall note such factors on the record of the frisk required by part I, paragraph E.

b. The officer shall begin the frisk at the area of the person's body or clothing most likely to contain a concealed weapon or dangerous instrument and shall limit the frisk to a pat-down. Outer clothing, such as overcoats and jackets, may be opened to allow a pat-down directly on shirts and trousers, provided that the initial frisk of the outer clothing precludes a sufficient patting-down to determine adequately if a weapon is concealed under the outer clothing.

c. The officer shall not reach inside the person's clothing or pockets during a frisk, unless the officer feels something that reasonably may constitute a weapon or dangerous instrument. In such event, the officer may reach inside that portion of the person's clothing to uncover the article that was felt. Although objects such as keys, change, envelopes, and other papers may be detected as a result of the frisk, an officer has no authority to require their removal from the person's clothing prior to an arrest because they are not likely to constitute or be used as weapons or dangerous instruments.

d. An officer may also take steps to secure those areas that the detained person could reasonably reach during the detention if the officer reasonably suspects that the person might obtain an object from such an area and attempt to harm the officer.

e. If, in the course of a frisk, the officer feels an object which he believes could reasonably be used to harm him or others, he may take whatever action is necessary to examine the object and to secure it for the duration of the detention.

Example: While approaching a suspect, an officer observes him thrust his hand into his left front pants pocket, and withdraw it. The suspect is asked for identification, and says he has none. The officer runs his hand over the pants pocket and feels a soft lump. The officer's actions to this point are proper. He then reaches into the pocket. This action is improper, since the officer could not, from these facts, reasonably believe the soft lump was a dangerous weapon or instrument.

5. Discovery of Weapon Lawfully Possessed.

If a frisk discloses a weapon, the possession of which is licensed or otherwise lawful, the officer shall secure it out of the suspect's reach for the duration of the detention. Ammunition may be removed from any firearm, and the weapon returned in a manner that insures the officer's safety.

6. Discovery of Incriminating Evidence.

a. If, while conducting a frisk, an officer feels an object which he reasonably believes to be a weapon or dangerous instrument, he may reach into the pocket, waistband, etc., and remove that weapon. If, while in the process of removing what is believed to be a weapon, the officer discovers other items which are contraband, instrumentalities, or evidence of a crime, he may lawfully

seize the items. These items may be considered in determining whether probable cause exists to arrest the person. If as a result an arrest is made, a full search of the person is proper.

b. Nothing in the preceding paragraph authorizes "searches" for incriminating evidence without probable cause. Officers shall at all times understand that the authority to "frisk" does not constitute authority to "search" and that full searches conducted without adequate probable cause to arrest are improper and prohibited.

7. Situations may occur where the officer possesses sufficient information, from a citizen, informant or otherwise, which simultaneously gives him a reasonable basis for a stop and a reasonable belief that the person to be stopped is armed. In such a situation, a frisk is justified immediately upon confronting the individual. If the officer reasonably believes he knows the location of the weapon, he may immediately reach inside the person's clothes or pockets to remove the weapon without a previous "frisk."

Example: A police officer is informed by a citizen that a person is sitting in the front passenger seat of a specific automobile with a pistol in his waistband. The officer approaches the car and observes a person generally fitting the description sitting in the front seat passenger side. The officer immediately reaches into the waistband of the man's trousers and recovers a pistol. Whether or not the pistol was actually recovered, the officer's actions are proper.

D. Spot Checks of Motor Vehicles.

D.C. Code s 40-301(c) (1967) provides that, for the safety of the public, every motor vehicle operator is required to obtain a permit and have that permit in his immediate possession while operating a vehicle in the District of Columbia. The operator is further required to exhibit the permit to any police officer upon demand. Because of these requirements, officers are authorized to stop motor vehicles at random to determine if an operator has in his possession a valid operator's permit. This procedure is commonly known as the "spot check." It applies only to motor vehicle operators. "Spot checks" of pedestrians conducted on a random or any other basis are illegal. Except for valid arrest situations, pedestrians may be stopped, detained or otherwise confronted only in accordance with the provisions of this order.

1. Basis for a Vehicle Spot Check.

There is no requirement that the officer have "probable cause," "reasonable suspicion," or any other specific indication that

the driver does not possess a permit. "Spot checks" of motor vehicles may be conducted on a random basis.

2. Duration of Spot Check.

A person stopped pursuant to vehicle spot check authority may be detained for a reasonable time, usually not to exceed ten minutes. Officers shall detain the operator of a vehicle only for the length of time necessary to obtain and verify the operator's permit and the vehicle's registration. Such verification includes obtaining from the dispatcher a WALES check.

3. Effecting a Spot Check.

Officers shall use the least coercive means reasonably necessary under the circumstances to effect the spot check. The amount of force to effect a spot check shall not, however, be such that it could cause death or serious bodily injury to the occupants of the vehicle or other persons.

4. Conduct During Spot Check.

a. While verifying the operator's permit and registration, officers may utilize any information obtained and any proper plain view observations made in determining whether reasonable suspicion or probable cause has developed. Vehicle spot check authority by itself, however, does not give the officer the right to search or frisk a vehicle operator or passenger, nor the authority to require the operator to answer any questions or perform any actions, except as directly related to the existence and validity of the operator's permit and vehicle registration.

b. Vehicle spot check authority is a valuable tool in assuring that only properly licensed and qualified persons operate motor vehicles on District of Columbia streets. It has no other justification, however, and shall not be used to investigate other possible criminal offenses or as a means to support other police-citizen encounters not specifically authorized under one or more sections of this order.

Example: An armed robbery is reported in which two males, generally described, have recently escaped by automobile. Officers may not conduct a series of "spot checks" of all vehicles occupied by two males in an effort to locate persons who may fit the description of the alleged robbers. A vehicle containing two males may be stopped, however, pursuant to other sections contained in this order, if the specific standards prescribed in those sections are met.

c. Vehicles, of course, may be stopped for violations of traffic or motor vehicle code regulations, even if minor, without regard to spot check authority.

5. Explanation to Detained Person.

Officers shall act with as much restraint and courtesy as possible under the circumstances during a vehicle spot check. The officer shall give each motorist spot checked a printed form explaining the purpose and necessity for the procedure. These forms shall be signed by the issuing officer and given to the motorist at the time the officer obtains the operator's permit and vehicle registration.

E. Record Keeping.

Members of the force shall maintain records of all stops, frisks, and motor vehicle spot checks and may maintain records of other police-citizen contacts, consistent with the following rules. Such records serve to insure the proper exercise of law enforcement authority and enhance an officer's ability to reconstruct at a later time events which occurred before and during such an incident.

1. Forcible Stops (Para. B) and Frisks (Para. C).

Whenever any force is used to stop a person pursuant to part I, paragraph B of this order, or whenever any frisk is conducted pursuant to paragraph C, regardless of whether or not an arrest follows, a PD Form 253 (Incident Report) shall be made containing all pertinent details of the incident, including all factors relied upon in determining that the stop or frisk was justified. The PD Form 253, including the central complaint number, shall be forwarded to the Identification and Records Division.

2. Vehicle Spot Checks (Para. D).

Whenever a vehicle is stopped under motor vehicle spot check authority pursuant to part I, paragraph D of this order, in addition to the form explaining the purpose of the spot check which is to be given to the motorist, the officer conducting the vehicle spot check shall complete a PD Form 76, which shall be forwarded to his commanding officer.

3. Non-Forcible Stops (Para. B).

Whenever a person is stopped pursuant to part I, paragraph B of this order, without the use of force, the stop shall be recorded on a PD Form 76, which shall contain all pertinent details of the incident including all factors relied upon in determining that the stop was justified. The PD Form 76 shall be forwarded by the reporting officer to his commanding officer.

4. Contacts (Para. A).

Contacts pursuant to part I, paragraph A, need not be recorded in any way unless required by the officer's commanding officer. If, for purposes of present or future investigations, the officer desires to note any information obtained, he may do so by completing the PD Form 76.

5. Maintaining Records.

All records made pursuant to this order shall be preserved in accordance with the provisions of General Order No. 601.2 (Preservation of Potentially Discoverable Material).

6. Use of Such Records.

Records made pursuant to this order may be used only for a bona-fide law enforcement purpose or for defense of civil or administrative actions brought against a member of the department or the department itself. Such records may not be disseminated to persons or agencies outside this department except with the express approval of an official of the rank of lieutenant or above.

Jerry V. Wilson
Chief of Police

JVW:GMA:rrj

ADVANCED PROSECUTOR TRAINING

II. C: OPENING STATEMENT AND CLOSING ARGUMENT

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I. Opening Statement

A. Purpose

1. To acquaint the jury with the facts of your case.

2. To convince the jury of the defendant's guilt before you have called your first witness.

3. To gain the trust and confidence of the jury.

B. Requirements

1. The opening statement must cover every element of the crime charged. Failure to do so could result in a judgment of acquittal.

   a. Simply read a copy of the indictment or a representative count in a multiple-count indictment.

   b. If you only paraphrase the indictment, be sure to say that the offense occurred within the District of Columbia in order to establish venue.

C. Preparation

1. Know your case cold -- every aspect of it.

2. Draft an outline of the incident at issue in a natural chronology, i.e., pre-incident activity of defendant (and complainant if crime against person); incident; investigation; arrest; lab work, etc.

3. Memorize all major witnesses' names, crucial dates and times.

4. Memorize a standard lead-in comment to the jury which you will repeat in every case. This gives you confidence, settles you down and gets you started.

5. Where appropriate or helpful, and if permitted by the court, identify those items of demonstrative evidence (charts, diagrams, photographs, etc.) you will use in your opening and have them marked for identification on the record before you begin your opening statement.

6. Know what each witness will say.

a. Nail down his story and present to the jury only those portions about which you are certain.

b. Know how he will use the demonstrative evidence to sponsor his testimony.

7. Anticipate defenses such as self-defense, mistaken identity, intoxication, etc. Never tell the jury what the defense will be, but weave into your opening facts which tend to weaken that defense.

8. Where they are otherwise likely to be used to significant advantage by defense counsel, identify the weak points in your case and defuse them as subtly as possible by mentioning and discounting them during the opening.

a. For example, when you have a victim who is a prostitute, a drunk, a convicted felon, or a paid informant, explain that fact to the jury and explain that like every other citizen he has a right not to be robbed.

b. Another example is a violent crime where the weapon has not been recovered. Mention this first and explain to the jury the reason why--time span between offense and arrest.

9. Rehearse the opening in its entirety at least once.

D. Techniques

1. Begin with your standard lead-in.

2. Read the indictment with conviction.

3. Present your case chronologically.

4. Where appropriate or helpful, and permitted by the court, use the charts, graphs, etc., that your witnesses will refer to.

5. Refer specifically only to that evidence which you are confident is admissible or that you know you can produce. This is most important. A good example is Bob Shuker's opening statement in the Hanafi Muslim murder case. He was specific about the fact that murders had occurred, cause of death, where bodies were found, etc., but very general about planning of conspiracy, who did what to whom, etc. - because he did not know whether Price, a co-defendant who was granted immunity, would testify for the Government.

6. Resolve any doubt about the admissability of evidence in a pretrial hearing.

7. Project yourself as enthusiastic, confident and thoroughly convinced of your case.

8. Be as dramatic as your personality will comfortably allow. The jury expects to be kept interested. Keep things moving from the start, and choreograph the presentation of your case with this in mind.

9. Remember that you are presenting a statement, not an argument.

   a. Repeat in varying ways the strength of your case.

   b. Speak in short, simple phrases and in language that the jury can understand. Avoid big words, you are not arguing in the Court of Appeals.

   c. Where appropriate and permitted by the court, hold up tangible items of evidence and discuss them with the jury.

   d. Modulate your voice so that you can stand back away from the jury box and be heard.

   e. Cast your eyes across the panel -- do not single out individual jurors.

10. Give as detailed an opening as you can consistent with what you know will develop during your case-in-chief.

   a. Tease the jury by withholding some details and inviting them to "stay tuned" to hear it all:

      Example: "Before throwing her down on the ground, he . . . well, she will tell you what he said."

   b. In a circumstantial evidence case, you must be detailed. In a straight-forward case based on direct evidence, you can be more concise.

E. Don'ts

1. Don't raise the matter of lesser-included offenses with the jury.

2. Don't talk about what the defense may do.

3. Don't read your opening, but don't hesitate to refer to your outline and don't try to hide it.

4. Don't belabor telling the jury what you are about to do--do it.

5. Don't keep cautioning the jury that what you are telling them is not evidence. Let the judge instruct them.

6. Don't promise to call specific witnesses. Say "The Government may call some or all of the witnesses identified during voir dire." Don't refer to what each individual witness will say, for he may not say what you expect. Give a coherent, chronological narrative.

II. Closing Argument

A. Significance

1. You can turn a case around with a good closing.

2. This is the only opportunity during a trial to give a full narrative account of the case as it unfolded before the jury, tying all the evidence together in a neat, logical compelling package -- an unbridled opportunity to persuade.

B. Preparation

1. Pretrial

a. Set up a casebook with a section for each phase of the trial, including closing argument. Record your thoughts on closing from the time you interview your first witness.

b. Identify instructions important to your case and draft a simplified explanation of them using analogies, e.g., aiding and abetting, circumstantial evidence.

2. Trial

a. Source material for closing

(1) Defense opening statement

(2) Examination of defense witnesses

(3) Prosecution rebuttal evidence

(4) Outline of prosecution opening statement

(5) Case notebook

(6) Daily copy in protracted case or specially ordered transcript where important.

b. Go over instructions with the court and counsel before argument and submit or request those which can tie in the law with your theory of the case. Prepare to stress those instructions in argument and refer in argument to specific language which jury will hear from the judge in instructions.

3. Time of Argument

a. Approach bench and request time to prepare.

(1) In protracted case, ask for an overnight recess.

(2) In simple case, request at least a short break.

b. Always seek to have argument, instructions and beginning of deliberations on same day.

4. General Organization of Argument

a. Don't begin until you have reacquainted yourself with everything that transpired during the course of the trial.

b. Prepare a topic outline of the case as it developed before the jury.

(1) Begin and sometimes end with a catch-phrase. Where that is impossible, at least focus on a crucial event which has dramatic appeal.

(2) Recount the events of the entire trial.

(3) Reemphasize the nature of the charges and demonstrate how you have satisfied every element of proof required.

(4) Identify those elements in your case with which the defendant took issue and support them with:

(a) affirmative evidence from your case-in-chief;

(b) gains made during cross-examination;

(c) rebuttal evidence.

5. Actual Presentation

a. Preliminary matters

(1) Display all exhibits on the prosecution table.

(2) Set up your demonstrative evidence so that everyone can see it.

(3) Determine the time limitations imposed on you and allocate a portion for rebuttal.

(4) Address the court and then the jury. ("May it please the Court, Ladies and Gentlemen of the Jury. . .")

b. Technique and elements of style:

(1) Whenever possible, take the jury back into the case with a poignant comment attributable to one of the witnesses or a statement by the defendant himself.

Example: Mrs. Ammidown - "Please don't kill me, I have a 12-year-old son and he means all the world to me."

(2) When defendant is technically guilty but jury is sympathetic due to severity of possible sentence, explain that judge sentences and he's heard every mitigating factor they have.

(3) Try to engender sympathy for the Government's side of the case, particularly the victim in a crime of violence.

(4) Style is a matter of breathing life back into a case which has become stale.

(a) Be as dramatic as your personality will allow.

(b) Don't hurry your presentation.

(c) Don't worry about how the argument will read.

(d) Don't stand too close to the jurors.

(e) Don't look any one particular juror in the eye -- they become self-conscious and stop listening--cast your eyes over whole panel.

(f) Hold up important exhibits and recount the testimony which makes them significant.

(g) Weave into your argument crucial facts demonstrated in charts, photos, graphs, etc.

(h) Invite the jury to request all the exhibits when they adjourn to deliberate.

(i) Remember that it is not enough to be right; you must sell your case to the jury.

(j) Develop such a personal rapport with the jury that you make it hard for them to disappoint you.

(k) Discuss the case with the jury -- don't lecture them.

(l) In a protracted case where you have daily copy, read verbatim from the record to demonstrate the accuracy of your argument.

(m) Begin to accumulate a reserve of standard phrases and sayings which you can weave into almost any argument.

(n) Assume the role of both prosecutor and witness and dramatize an examination which points up a weakness in the defense case.

(o) Above all else, convince the jury that you are convinced.

(p) Everyone has his own style--you have to find yours.

(q) Don't hesitate to borrow another's approach or pet phrases if you are comfortable with them.

C. Rebuttal

1. Take copious notes during defendant's argument and rebut defense counsel's closing argument point-by-point.

2. Emphasize those points which the defense does not confront.

3. Never waive rebuttal.

4. Avoid rehashing evidence which is not contested by the defense.

5. Always end rebuttal with an appropriately phrased request for a guilty verdict.

6. In advance of argument, attempt to anticipate the defense theory in closing argument and the points which defense counsel will attack. Consider alternative possibilities for rebuttal.

D. Don'ts

1. Don't get hung up on the Don'ts. Argue the case freely.

2. Use common sense and avoid the following:

a. Referring to what you believe or in any way expressing your personal opinion. Effective use of rhetorical questions may obviate this problem.

b. Reference to objects not in evidence or matters held inadmissible.

c. Reference to the defendant's failure to take the stand.

d. Equating the defendant's behavior with that of, for example, Adolph Hitler or Jack the Ripper.

e. Use of the word "liar."

3. Don't ramble. Use only as much time as is really necessary.

III. Reading List

A. Law Review Articles

ABA Standards for Criminal Justice, "The Prosecution Function and the Defense Function" (approved Draft, 1971)

Altschuler, "Courtroom Misconduct By Prosecutors and Trial Judges," 50 Texas L. Rev. 629 (1972)

Braun, "Ethics in Criminal Cases: A Response," 55 Geo. L. J. 1048 (1967)

Bress, "Standards of Conduct for Prosecution and Defense Function: An Attorney's Viewpoint," 5 Am. Crim. L. Q. 23 (1966)

Freedman, "Professional Responsibility of the Prosecuting Attorney," 55 Geo. L. J. 1030 (1967); 3 Crim L. Bull. 544 (1967)

Singer, "Forensic Misconduct by Federal Prosecutors," 20 Ala. L. Rev. 2277 (1968)

Vess, "Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument," 64 J. Crim. L. 22 (1973)

B. Books

Stein, J., Closing Argument - The Art and The Law (1969)

C. Some Significant Cases (in addition to those found in your Trial Manual)

United States v. Jones, 140 U.S. App. D.C. 1, 433 F. 2d 1107 (1970). Improper, but not reversible error, for prosecutor to imply that the defendant was a liar. This case lists a series of cases dealing with the legitimate bounds of the prosecutor's closing statement. See, 140 U.S. App. D. C. at 2 n. 5, 733 F.2d at 1108 n.5.

United States v. Phillips, 155 U.S. App D.C. 93, 476 F. 2d 539 (1973). During his closing and rebuttal arguments, the prosecutor sought to draw an analogy between the crime charged and those involving Sirhan Sirhan, James Earl Ray, Richard Speck and Jack Ruby. The court held that these arguments were so highly prejudicial as to require reversal.

United States v. Hawkins, 156 U.S. App. D.C. 259, 480 F.2d 1151 (1973). Convictions reversed where prosecutor compared the defense of insanity to other infamous crimes where that defense had been raised and rejected (Sirhan Sirhan, Jack Ruby, Ammidown, Timm and Caldwell). He also referred to the actions of Hitler and Napoleon in his rebuttal argument.

United States v. Whitmore, 156 U.S. App. D.C. 259, 480 F.2d 1151 (1973). Although not in evidence, prosecutor deliberately put information and an affidavit stating that the defendant was selling heroin before the jury by suggestion and insinuation. Conviction for possession of heroin with intent to distribute reversed.

Turner v. United States, 135 U.S. App. D.C. 59, 416 F.2d 815 (1969). Though critical of the prosecutor's references to Capote's "In Cold Blood" and the Dillinger case in rebuttal, the court did not think them so prejudicial as to require reversal. The prosecutor had made such references in order to rehabilitate the Government's witness who was himself a criminal.

United States v. Parker, 136 U.S. App. D.C. 97, 419 F.2d 679 (1969). Harmless error where prosecutor, in closing argument, implied that Government had undisclosed incriminating evidence since on rebuttal, he made a fair, full and adequate disclaimer that the Government had no incriminating evidence that had not been introduced.

Bradley v. United States, 136 U.S. App. D.C. 339, 420 F.2d 181 (1969). When defense failed to call a witness who would plead the privilege against self-incrimination, it was improper for prosecutor to comment, in effect suggesting other reasons for the witness' absence, e.g., that his testimony would be harmful to defense or that there was no such potential witness.

United States v. Carter, ___ U.S. App. D.C. ___, 482 F.2d 783 (1973). Cross-examination of the defendant brought out prior convictions in a manner not testing credibility but suggesting present guilt. Held, reversible error despite limiting instruction.

United States v. DeLoach, D.C. Cir. No. 73-1194, decided March 1, 1974. Court expressed strong disapproval of the prosecutor's use of the terms "executions" and "assassinations" and of his reference to the victim as having been "shot down like a dog in the street."

Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968). Although not reversible error, it was improper for the prosecutor, in closing, to say that the defendant's testimony was a "lie" or "fabrication."

United States v. Hayward, 136 U.S. App. D.C. 300, 420 F.2d 142 (1969). Conviction of first degree murder and CDW reversed. Improper for prosecution to refer to paucity of prosecution witnesses and to imply that the reason so few witnesses were forthcoming was because of intimidation by defendant and his family. There was no evidence of such intimidation.

United States v. Jenkins, 140 U.S. App. D.C. 392, 436 F.2d 140 (1970). Prosecutor improperly referred to defendant as a "teenage hoodlum walking the streets of Washington. . . ." The court said the trial "was for rape, not for being a hoodlum." Conviction affirmed.

United States v. Jones, __ U.S. App. D.C. __, 482 F.2d 747 (1973). Conviction for manslaughter affirmed, although the court did not condone the prosecutor's use of the term "executioner" in reference to the defendant. Also, the court held that statements concerning a witness' vaciliation had elements of truth but could have been misleading; however, they constituted harmless error. Finally, the prosecutor said that he personally disbelieved the defendant. The court said that this misconduct was not "so persistent and prejudicial" as to warrant reversal.

United States v. Jaqua, 485 F.2d 193 (5th Cir. 1973). Conviction for resisting and assaulting an officer of the Border Patrol reversed and remanded. References to defendant's "prior history of criminal activity" and his "record and background" in prosecutor's closing argument compounded the original error of permitting interrogation of defendant about prior assaults which had no similarity to the offense charged.

United States v. Miller, 478 F.2d 1315 (2nd Cir. 1973). Defendant complained that prosecutor appealed to jury's "law and order" prejudices in his opening statement by asking the jury to do him, the prosecutor, "a favor" by "being fair to the public interest in law enforcement; that is, be fair to yourselves." The court called the remark ill-conceived but affirmed, saying it was directed primarily to the jurors' role as representatives of the general public and not part of a broader scheme to inflame the jury.

United States v. McCarthy, 473 F.2d 300 (2nd Cir. 1972). Harmless error for prosecutor to comment in summation upon failure of defendant to bare his arms to the jury so they could see his tatoos.

United States v. Gorostiga, 468 F.2d 915 (9th Cir. 1972). Prosecutor did not exceed legitimate bounds of final argument in asserting that defense had taken a "Perry Mason" like approach.

United States v. Cummings, 468 F.2d 274 (9th Cir. 1972). Reversible error for prosecutor to outline procedures involved in getting a case before a judge and jury, i.e., grand jury investigation and returning of an indictment, in his closing argument.

United States v. James, 151 U.S. App. D.C. 304, 466 F.2d 475 (1972). Prosecutor's reference to defendant as a "monster" in closing argument was not so inflammatory as to amount to plain error.

United States v. Kilpatrick, 477 F.2d 357 (6th Cir. 1973). Reversible error for prosecutor to make reference to defendant's refusal to testify -- prosecutor said that it was defense counsel's responsibility "to try to prove his man innocent."

United States v. Tropeano, 476 F.2d 586 (1st Cir. 1973). Prosecutor in this closing said:

> "Do you recall that I said in my opening statement perhaps improperly, it is not a very nice story? - because I believe that is true, it is not a very nice story. It is a story that happened."

The court said it regretted the form but did not find it so directly indicative of the prosecutor's personal belief of defendant's guilt as to require reversal. They said the lesson to be learned was: "I believe" is a dirty verb.

United States v. Stevenson, 138 U.S. App. D.C. 10, 424 F.2d 923 (1970). Prosecutor advised the jury that if they believed defendant's testimony, then they must conclude that the police officers are "out-and-out liars." Though not a "model of restrained comment," it does not give rise to plain error.

United States v. Brawner, 153 U.S. App. D.C. 1, 471 F.2d 969 (1972). Prosecutor's closing argument which attempted to discredit the projective mental test given to defendant by psychologist was unfortunate but not reversible error.

ADVANCED PROSECUTOR TRAINING

II. D: DIRECT AND REDIRECT EXAMINATION OF WITNESSES

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I. Concept of Direct Examination.

A. Role of prosecutor.

1. Akin to a movie director. Must prepare your witnesses and manage testimony and other evidence in order to present a simple, orderly, and comprehensive version of events.

2. Prosecutor must project correct image, "counsel for the people," and not a persecutor. Assistant United States Attorney must appear competent, tough, yet a gentleman. He is the vehicle for the victims of crime to get the facts before the jury.

B. Effectiveness of prosecutor.

1. Successful direct examination is a product of both pre-trial witness preparation and mastery of basic trial skills.

2. Jury must believe prosecutor has complete confidence in and knowledge of the facts of his case, and guilt of the defendant. Assistant United States Attorney must secure his position in courtroom as controlling force during the trial.

3. Prosecutor must develop his own type of examination of his witnesses(es) which best fits his personality, yet is consistent with satisfactory results.

II. Courtroom Demeanor During Direct Examination.

A. Dress.

1. Assistant United States Attorney should appear as a dedicated, serious, dependable, underpaid, public servant.

2. Assistant United States Attorney's appearance should not attract attention. Avoid "flashy" clothes. Jury must pay attention to your facts not your clothes.

3. Emphasis on dress is practical, not an ideological point.

B. Rapport with jury.

1. Begin to develop rapport with jury as soon as they arrive in courtroom. Initial appearance and impression is of great importance. Appear confident, competent, and in control when examining your witness.

2. Appear organized to jury. Make sure counsel table is as clear as possible with only essential materials on it.

3. Exhibits should be arranged in an easily accessible manner in the order you intend to use them. Don't let disorganization disrupt your direct examination and irritate jury.

4. Establish eye-contact with jury at outset. Defendant may hesitate to look at them because he knows he is guilty. You are not.

5. Always rise when jury enters and leaves courtroom. They will appreciate this showing of respect.

6. Jury should feel that Assistant United States Attorney is just "doing his job" in presenting his case and that he has no grudge against defendant. Your demeanor should reflect this or jury may begin to sympathize with the defendant.

7. Occasionally glancing at jury during examination of your witnesses will help you determine whether jurors understand the witness and whether they are accepting his testimony. Have witness repeat answer if it appears jury is having trouble hearing. Jury will appreciate this.

C. Rapport with your witnesses.

1. Foundation is built during pre-trial witness interviews.

2. Always stand while questioning your witness and treat him with the respect he may or may not deserve. No matter how despicable your witness, in front of the jury he is always treated as a gentleman.

3. Position yourself in courtroom (generally at the rear far end of jury box) so witness will be speaking to the jury, and witness, not you, will be focus of attention.

4. Direct witness to speak in loud, clear voice (see Topic II. A: Interviewing and Preparing Witnesses for Trial for detailed comments).

5. Ease witness into testimony. Begin with background questions. i.e., employment, marital status, duration in District of Columbia. This may help calm nervous witness and at same time let jury know that witness is from community and one of them.

6. Keep good eye-contact with witness. A cold stare or stern facial expression may jolt a reluctant witness into closer cooperation, or a poor witness to search his mind for those crucial additional facts.

7. Never show surprise or anger to the jury. No matter how upset you are with your witness for "spinning you" on the stand or forgetting important details, keep calm, cool, and collected, or jury will realize something is wrong with your case.

III. Techniques of Direct Examination of Government Witness.

A. Introduce the witness through background information.

Never ask witness background information in front of jury unless you asked him at pre-trial. Failure to do this might result in the following:

Assistant United States Attorney: "Sir, before you moved to the District of Columbia last year and took the job at the 'Little Tavern' where did you work?"
Witness: "I worked for ten years as a prison guard on a black chain gang crew in Natchez, Mississippi."

B. Witness should tell story in narrative form and in chronological order.

1. This is how ople normally relate events and makes it easier for jury to follow.

2. Don't interrupt witness during narration though he may leave out important details. This may confuse and upset jury who hears your opening statement and has been been eagerly awaiting to hear from the witness.

Exception: You should interrupt witness to guide his testimony if he strays significantly off point or enters forbidden areas.

C. Use of witness outline

1. After pre-trial witness interview, Assistant United States Attorney should reduce to writing all major questions to be asked witness.

2. Avoid holding outline in hand during questioning. Jury must see Assistant United States Attorney as completely knowledgeable of his case. Leave notes accessible on counsel table for guidance.

3. Asking "court's indulgence" and returning to counsel table will produce the following results:

a. Allow Assistant United States Attorney to see what questions he forgot to ask.

b. Give Assistant United States Attorney time to think of new questions.

c. Give jury time to allow important facts to sink in.

d. A great "stall tactic" to allow Assistant United States Attorney to clear his head if problem arises.

4. Written outline is a must since you must present sufficient evidence on all elements of crime. Failure to ask your witness essential question on direct can be fatal. You may never get another chance if alert defense cousel sees your mistake and decides not to cross-examine knowing he has a Motion for a Judgment of Acquittal (MJOA) in the bag.

D. Remember, most witnesses and jurors are not well educated. Avoid big words, speak clearly, slowly, and in simple terms so everyone can be understood.

E. Don't assume jury knows anything about anything.

1. Have witness explain that the defendant's "hog" means his Cadillac and that "stuff" means narcotics and that "heat" means pistol.

2. Don't think that you are insulting jury's intelligence by asking these questions. You are not. Do it diplomatically. "Sir, just for the record, please explain what you mean by 'The man put his heat on the Dude, took his stuff, and split in the hog.'"?

3. You may be in trouble on MJOA with the judge if the correct terminology is not in the record.

F. Your witnesses should be prepared for Assistant United States Attorney's "signals."

1. "What if anything else happened then, Mr. Smith?"-- Witness should realize he has forgotten an important fact.

2. "Is your present recollection exhausted as to this particular fact?" -- Witness should realize you are laying foundation for refreshing recollection.

G. Leading questions should be avoided.

1. Learn several different ways to ask non-leading questions: Who? What? Where? When? How? Use "Why?" only when you are certain of the answer.

2. If defense counsel objects jury might believe you are putting words in witness' mouth which may result in jury giving less credence to his testimony.

3. You may lead child witness or one who is nervous or suffering from other disability.

H. In crucial areas of interrogation repeat the witness' testimony for emphasis.

1. "After you told Officer Jones that you were positive that the defendant, Mr. Smith, was the robber, what did you do?"

2. "After the defendant, Mr. Smith, told you that he had robbed the liquor store, where did you take him?"

3. Don't echo witness' answers otherwise. Judge may see through your tactics and jury may hold it against you.

I. If witness falls apart on direct, curtail his examination to lessen damage. Rescue witness by focusing questions on specific facts you need out and get him off stand.

J. If direct and cross-examination of witness raise problems you did not foresee and next witness may be killed on cross, revise order of witnesses in an attempt to put "safe" witness on until recess if called. There is no rule against "talking" to witness who has not yet been called to testify in order to inquire into trial matters that have come to your attention for the first time through the testimony of other witnesses and for which you have therefore not prepared; do not however, discuss with witness what previous testimony was.

K. Do not over-try your case in chief.

1. A locked case can be lost by an Assistant United States Attorney's "overkill." Jury may become suspicious and wonder why Assistant United States Attorney is going to such lengths to prove simple case. Additional evidence which looked good in office may backfire on stand.

2. Don't bow to court pressure telling you how "not to over-try" your case. Use your own judgment.

3. Example: If you get a good positive courtroom identification by witness with (or without) additional testimony as to on-scene identification, eliminate testimony about questionable photo or lineup identification. Not every defense counsel will explore an imperfect photo or lineup identification.

L. Make a clear record.

1. Remember you have "cold" record on appeal.

2. Have witness always refer to exhibits by number, people by name not pronoun (he, she, the dude) and distances in feet, not "from here to the window."

3. Don't win at trial and lose on appeal.

IV. Use of physical exhibits on direct examination.

A. Jurors love to see physical evidence. Use it to your advantage.

B. Use of physical evidence may enable witness to repeat crucial points of testimony and create indelible impression in jurors' minds. For example:

1. "Sir, with the Court's permission, would you please step down from the stand and place an X on Government's Exhibit Number 2 in evidence: the diagram of the interior of your apartment, where the defendant was standing when he placed the shotgun to your head and threatened to pull the trigger."

2. Assistant United States Attorney: "Sir, can you identify Government's Exhibits Numbers 1 through 4?"
Witness: "Exhibit Number 1 is an old tan wallet which the defendant grabbed from my pocket. My dad gave me the wallet before he died last year. Exhibit Number 2 is my Medicare card which was in the wallet. Exhibit Number 3 is my retirement check which was in the wallet. Exhibit Number 4 is a gold watch which I received after retiring from thirty years service with the Post Office which the defendant snatched off my wrist."

C. You can intensify jury's interest in case by withholding or exhibiting exhibit as circumstances warrant.

D. Assistant United States Attorney, not trial judge, should be first one to request that the physical exhibits be published to the jury.

1. Jurors are anxious to see exhibits close up and your request will be appreciated by them.

2. Manipulate timing of publishing of items to jury in order to give yourself time to rest and plan next strategy in presenting your case in chief.

E. When possible leave "interesting exhibits" in open and exposed to jurors' view after they have been identified.

Caveat--It is reversible error intentionally to leave inflammatory objects (bloody clothing) in full view of jury after relevance has passed.

F. Do not overuse charts or photos.

1. Jury can become confused.

2. A good witness may become a disaster if he has trouble understanding diagram or photo. Defense counsel may convince jury that if he becomes confused when trying to visualize the interior of his apartment on a chart, he could be confused about other things and his testimony should be discounted.

3. Pre-trial witness preparation is a must. Pick selected witnesses to testify about charts or photos.

Example: During pre-trial witness conference you realize that elderly robbery victim will appear extremely confusing to jury if he has to explain chart which depicts interior of his apartment. Withhold chart until after victim has testified and been excused. Let next witness, the investigating detective or other eye-witness, use chart as visual aid to explain to jurors place where robbery took place. Thus defense counsel has lost chance to discredit robbery victim's ability to perceive.

V. Use of courtroom demonstrations.

A. On direct examination courtroom demonstrations are very effective if they work.

1. Reenactment of defendant's conduct should be practiced to highlight its probative aspect.

2. Attempt a description of demonstration for purposes of preserving record on appeal.

3. Avoid scientific demonstrations unless you are sure it will work. Perry Mason may never have to worry but you should. A bad demonstration can easily destroy your case and credibility; e.g., don't request the defendant to slip on the robber's hat found at the scene unless you know it will fit.

VI. Stipulations on direct examination.

A. These can be used to your tactical advantage.

1. If many documents are involved in case you can get stipulation to authenticity, etc. This prevents boring the jury.

2. Chain of custody can often be fouled up in live testimony. Holes in case can be plugged with stipulation.

3. Remember, don't assume pre-trial that stipulation will be forthcoming (e.g., chain of custody of body in murder case). Prepare morgue attendants and place on call.

B. Get defense counsel to let you read all stipulations (favorable and unfavorable) to jury.

1. If they are favorable, your tone of voice and pauses on certain phrases may prove advantageous.

2. If unfavorable, your reading the stipulation shows you are not trying to hide anything.

VII. Objectives of redirect examination.

A. Reestablishing the credibility of your witness. Introduce prior consistent statement or ask witness to explain inconsistency in statements or testimony. Your success in this endeavor will be a direct result of witness preparation.

B. Clearing up confusion in witness' answers on cross. Take witness back to pattern of questions asked on direct in an attempt to get witness back on right track and jog his memory.

C. Expanding and enlarging upon direct testimony where cross-examiner has opened the door to new territory.

D. Effective rehabilitation of a witness can be achieved in certain instances through the testimony of different witnesses such as a third party to whom the witness made a prior consistent statement.

E. Avoid holding back questions for use on redirect. Cross-examination may be such that "held back" testimony will not be proper on redirect. Furthermore, to bring out information originally on redirect when it could have been brought out on direct can have appearance of being an after-thought and thus not significant; or worse, as appearing to be manufactured or created to shore up the damage done on cross.

ADVANCED PROSECUTOR TRAINING

II. E. CROSS-EXAMINATION OF WITNESSES

Robert S. Bennett

I. General Considerations

A. Determine Objectives of Cross-Examination and the Manner to Achieve These Objectives.

1. Have a definite objective in mind with regard to each witness. For example, is it your intention to discredit the witness and discredit the defendant's case, or are you going to use the witness to corroborate certain aspects of the Government's case? Always think in terms of your final argument.

2. What was the effect of the witness' direct testimony? Has he hurt your case? If so, how has he hurt your case? If the witness has not hurt your case it may be advisable to forego any cross-examination.

3. If the witness appears to have been truthful in his testimony, determine if any cross-examination is approparite. Ask if you can better deal with the witness' testimony in your final argument rather than by cross-examination. If you decide to cross-examine such a witness, your best approach may be to elicit from him facts which will corroborate the Government's case.

4. What are the weak points in the witness' testimony? Has the witness lied about any matter about which he testified? What has the witness omitted in his testimony? Has the witness testified as to details which no reasonable person could be expected to remember?

5. You should determine if you should use a hard-sell or a soft approach in cross-examining the witness. For example, if the defendant's mother testified, it may be advisable to treat her gently and elicit from her the fact that she is obviously concerned about her child. This approach might provide an effective basis for a final argument to the jury to the effect that the mother is a nice lady who is obviously trying to help her son, but whose loyalty is misplaced. As a general rule a juror will identify with the witness. Accordingly, a juror usually objects to an attorney who "pushes a witness around." On the other hand, a witness who is flippant and who is openly hostile to the attorney is not liked by the jury. Accordingly a more aggressive hard-sell approach may be effective as to such a witness. While the witness is testifying on direct, see if you can gauge the jury's reaction to him.

6. Analyze the type of witness as to personality traits. Is he loquacious? Does he exaggerate? Does he understate? Does he take every opportunity to help the defendant by volunteering statements

which are unresponsive to the questions asked? For example, if the witness exaggerates, try to get him committed to a position which no juror could possibly believe.

7. Always ask leading questions on cross-examination.

B. Select Vehicle of Impeachment

1. Show witness is untruthful. Do not take the position that a witness is a liar unless you can prove it. It is usually better to take the position that a witness is unreliable, biased or mistaken. Human instincts are such that a juror is more willing to conclude that a witness is mistaken, biased or unreliable rather than to brand a witness as a perjurer.

2. Show witness is not credible because he is biased, unreliable, not qualified, and/or mistaken. For example, show:

a. Lack of opportunity to observe or hear about matter as to which he testified

b. Witness exaggerates or understates

c. Poor memory

d. Inability to accurately describe what he sees and hears

e. Witness is biased because of:

(1) relationship of parties

(2) interest in outcome

(3) fear; pressure

f. Witness is impressionable - gullible

g. Prior record

h. Witness' testimony is inconsistent with previous testimony or statement

II. Use of Prior Statements On Cross-Examination

A. Use of Prior Inconsistent Statements to Impreach: Principles

1. Get witness committed to position.

2. Ask witness if he ever gave a different version.

3. Impeach with prior statement.

a. Lay foundation as to time, place, circumstances. Where statement signed, get witness to identify signature

b. Mark statement as an Exhibit

c. Confront with prior statement

d. Determine admissibility in evidence of prior statement. See, Williams v. United States, 131 U.S. App. D.C. 53, 403 F.2d 176 (1968); Gordon v. United States, 344 U.S. 414 (1953).

e. A Miranda barred confession may be used to attack defendant's credibility - Harris v. New York, 401 U.S. 222 (1971). Similarly testimony of a defendant on a motion to supress can be used to impeach. See United States v. Simmons 390 U.S. 377 (1968).

f. Be prepared for follow-through, e.g., policeman who heard statement or who secured signed statement

B. Use of Prior Inconsistent Statements to Impeach: Technique

Written Report Signed By Witness [Contradiction]

1. Now, Mr. [name], you stated that [testimony] on direct examination, did you not?

2. Did you ever give a different version of that [incident, description, etc.]?

3. You did talk to [name of person who recorded statement] after the incident, didn't you?

4. That was on [date]?

5. And [name] and [name] were present, were they not?

6. And they recorded what you stated, didn't they?

7. And you read what they wrote and then signed it, didn't you?*

8. Was that report accurate?

9. And was it a reliable statement of what you observed or heard concerning the case?

10. Would it be fair to say that it was made with the facts fresher in your mind than they are today?

*If it is unsigned, question should be asked committing the witness to adoption of the report, i.e., whether he read it, whether he remained silent after he read it, or it was read to him, whether it was meant at the time to be an accurate account of the events described therein.

-Your Honor, may this document be marked as Exhibit ___ for identification.

11. I show you Exhibit _____ for identification and ask you if this is your signature?

12. And that is the document you read and signed on [date], is it not?

13. Now, directing your attention to [line], [page], you stated at that time that [contradiction], did you not?

14. That is contrary -- directly contrary -- to what you are saying now, is it not?

15. You're not asserting that your recollection of those events is better now than it was [length of time] after?

16. Then your testimony on direct examination was not entirely accurate, was it?

17. Before I go further, Mr. [name], are there any other inaccuracies in the testimony you gave this morning?*

Written Report Signed by Witness [Additional Piece of Damaging Information in Trial Testimony]

Repeat Questions 1 through 12.

13. Now, Mr. [name], when you made that statement [or report] which you had in front of you, you were not trying to counsel any information, were you?

14. You were attempting to be as accurate as you could, weren't you?

15. You certainly attempted to include in the statement [or report] the facts you considered important in this case, didn't you?

16. You knew the purpose of such a statement, didn't you?

17. You knew when you made this statement [or report] that it would be used and relied upon by other people who were not present at [time and place of offense]?

18. And that such people would learn about what happened from what you said in the report?

*Where the witness acknowledges his signature but claims not to remember or having given the statement, pursue in detail the fact that he signed it and/or initialed it and that he was instructed to read it carefully before doing so. Regardless of his answers, the police officer who took it can establish the circumstances surrounding the taking of the statement and the witness' knowledge of its contents.

19. You also knew that you would probably testify in this case?

20. And that the trial would be a considerable period of time after [the date and time of the offense]?

21. And you knew that you could utilize this statement [or report] to refresh your recollection before testifying today [if witness is police officer or professional]?

22. In fact, you did read this statement [or report] prior to testifying today, didn't you?

23. This would certainly be a good reason for including in the statement [or report] as much of what actually occurred that night as possible, wouldn't it?

24. I show you, Mr. [name], Exhibit _____ for identification and ask you, Sir, whether anywhere in that statement [or report] there is mentioned that [fact omitted]?

25. Didn't you think if it happened, that it was important that [fact omitted]?

26. You didn't mention it in any other statement [or report or testimony]?

28. Today, for the first time, we hear about this matter, is that right?

29. *Your training includes report writing?

30. *You are taught to include the important facts of a transaction in such a report?

31. *If something of evidentiary significance actually occurs, do you usually fail to include it in your statement [or report]?

32. *Only in this case, is that right?

Oral Inconsistent Statement by Witness

1. Now, Mr. [name], you stated that [testimony] on direct examination, did you not?

2. Did you give a different version [incident, description, etc.]?

3. Did you have occasion to discuss this case with [name]?

4. That was on the [day] of [month]?

*Questions 29, 30, 31 and 32 are appropriate where a professional person such as a policeman or private investigator is testifying.

5. In [place]?

6. And present at that conversation were [name] and [name]?

7. You discussed the events to which you testified today, isn't that right?

8. You didn't try to hide or falsify anything during that conversation, did you?

9. You didn't lie to [name]?

10. He wasn't discourteous to you, was he?

11. He didn't in any way coerce or threaten you, did he?

12. And you tried to be as accurate about what you said as you could, didn't you?

13. Now, on that date, did you say to [name] that [the facts constituting contradiction]?*

Prior Testimony Given By Witness

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 give 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", pursue the line of inquiry as outlined in footnote to II. B. 17. Ultimately, you will have to call the court reporter on rebuttal. The reporter should bring with him his original notes or stenographic pad unless counsel will stipulate to the authenticity of the transcript.

*The inconsistent statement must have been made to some third person or in the presence of some third person. Counsel is probably precluded from introducing or asking about a prior statement made to him alone unless he is willing to become a witness and thereby withdraw from the case.
United States v. Porter, 139 U.S. App. D.C. 19, 429 F.2d 203 (1970); United States v. Vereen, 139 U.S. App. D.C. 34, 429 F.2d 713 (1970).

C. Use of Prior Statement To Refresh Recollection*: Principles

1. Lay foundation -- time, place, circumstances, recollection exhausted.

2. Mark as Exhibit.

3. Present to witness, and ask him to read it and ask if it refreshes recollection.

4. Ask witness what his independent recollection is without reference to statement.

NOTE: Any document can be used to refresh recollection even if not prepared by witness. Thus a particular document may be used to impeach. See, Young v. United States, 94 U.S. App. D.C. 62, 214 F.2d 232 (1954).

D. Use of Prior Statement To Refresh Recollection Technique

1. Mr. Witness, directing your attention to [date], what [information desired]?

2. Do you recall making a statement to Mr. Doe?

Mr. Clerk, will you mark this document as Exhibit __ for identification.

3. Would that statement refresh your recollection?

4. At the time you made the statement, was it true and accurate?

5. And was it made shortly after the transaction?

6. I show you Exhibit ____ for identification, and ask you whether that is the statement to which you referred?

7. How do you recognize it?

8. Will you read it to yourself?

9. Now, having examined Exhibit ____ for identification, do you have an independent recollection, without reference to the statement, of what occurred on [date]?

*While this technique is more often used on direct examination of your own witness than on cross-examination, it sometimes is used as cross. It is included here to demonstrate the distinction among impeaching with a prior inconsistent statement, refreshing recollection and past recollection recorded. Moreover, some judges require you to attempt to refresh recollection before impeaching, and refreshing is always a prerequisite to the use of past recollection recorded.

NOTE: If the witness' recollection is not refreshed after confronting him with the memorandum, or statement, and counsel has established (a) that the memorandum was made by him, (b) that it was made contemporaneously with the occurrence in question, and (c) that at the time of its making it was considered by him to be true and accurate, the document can be offered in evidence, or the witness can read directly from it.

E. Use of Statement As Past Recollection Recorded

1. Lay foundation -- time, place, circumstances, recollection exhausted and not refreshed. Statement can come in evidence if you show:

a. Writing made by witness

b. Writing made contemporaneously with the occurrence in question

c. At time made it was considered true and accurate

2. Witness can read from it or move into evidence.

III. Sources of Impeachment Material

A. MPD Forms 163, 251, running resumes.

B. Line-up sheets.

C. Police and FBI records.

D. Bail Agency Interview records.

E. School records.

F. Employment/personnel records.

G. Court records.

H. Transcript of court proceedings.

I. Statements taken on behalf of defendants. But, see United States v. Wright 489 F. 2d 1181 (1973).

NOTE: The holding of Wright does not apply in Superior Court and, with the proper foundation, such statements may be obtainable, at least when the witness has referred to them in preparing for his testimony.

J. Previous probation reports.

K. Jail records.

IV. Cross-Examination of Character Witness

A defendant's character is not an issue unless he chooses to make it so. The leading cases dealing with character testimony are Michelson v. United States, 335 U.S. 469 (1948); United States v. Lewis, ___ U.S. App. D.C. ___, 482 F.2d 632 (1973); United States v. Fox, 154 U.S. App. D.C. 11, 473 F.2d 131 (1972); Awkard V. United States, 122 U.S. App. D.C. 165, 352 F.2d 641 (1965); Shimon v. United States, 122 U.S. App. D.C. 152, 352 F.2d 449 (1965).

A. An example of proper character testimony is as follows:

1. Do you know the defendant?

2. How long and in what circumstances?

3. Do you know others in the community who know the defendant?

4. Have you had an occasion to discuss with [redacted] his reputation for [truth and veracity or peace and good order]?*

5. What is that reputation?

NOTE: The witness is not permitted to express his own opinion nor is he permitted to testify as to specific incidents of good conduct.

B. Proper cross-examination is as follows:

1. Who were the people you discussed his reputation with?

2. Date, time and place of those discussions?

3. What was said?

4. Did you hear that defendant was arrested for _____?

*The scope of cross-examination of a defendant's character witnesses, particularly his knowledge of particular events concerning the defendant, is governed strictly by the scope of the witness' testimony on direct. If the witness has testified only about the defendant's reputation for veracity, the particular event must be relevant to that quality. The same rule holds true if the testimony was restricted to reputation for peace and good order, sometimes called reputation as a law-abiding citizen. The event must be logically relevant to the characteristic in issue and its revelation must not be too prejudicial when balanced against its probative value. Arrests are considered more prejudicial than convictions since the issue of guilt has not been resolved.

Since the defendant's veracity at the time of trial is the issue where veracity is put in issue inquiry into knowledge of events occurring up to the time of trial is considered relevant. The defendant's reputation for peace and good order, on the

(cont'd)

V. Cross-Examination of Alibi Witness

Your approach to the alibi witnesses will depend on the alibi and the relationship of the witness to the defendant. The following lines of inquiry might be productive:

A. Where more than one alibi witness testifies, a cross-examination which goes into great detail as to the incident and what occurred before and after it will often reveal substantial inconsistencies. On the other hand the testimony of the witnesses may be so similar, even as to minute details, that the jury will conclude that the alibi is a phony.

B. Ask the witness when he first heard about the arrest? The trial? That he would be a witness? How was he contacted? What information was given him and by whom? If a witness first heard of the arrest long after the occurrence, he will be hard put to explain how he is able to give the details he gave on direct examination. If the witness testifies that he was aware of the arrest shortly after it occurred, inquiry into the area as to why he didn't come forward can be most productive.

C. The following are possible areas of exploration with the alibi witness:

1. How long has the witness known defendant?
2. What is nature of their relationship?
3. How often did witness see defendant prior to incident?
4. Subsequent to incident?
5. Details of these meetings.
6. When did witness last see defendant?
7. How did witness find out about case?
8. When and under what circumstances was he asked to be a witness?
9. How does he remember date in question?
10. What did he do day before? Day after?

other hand, is considered relevant only up to the time of the offense; hence inquiry concerning events occurring after that date, though relevant to that characteristic, is not usually permitted. However, when the character witness has attested to the defendant's reputation for peace and good order to the date of trial, the door has been opened to inquiry about events occurring in the interim. In regard to either characteristic, events may be considered too remote in time to be relevant.

These rules are subject to the flexibility of the judge's discretion. Consideration of all the circumstances, balancing prejudice against probative value, may permit inquiry ranging beyond the limits of these rules or restrict it even further. United States v. Lewis, ____ U.S. App. D.C. ____ 482 F.2d 632 (1973).

11. What was defendant doing?

12. What was he wearing?

13. Who was he with?

14. Who else was present?

15. When did other(s) come, leave?

16. What did they do when they were there?

17. Ask details as to what things happened at particular time -- how does witness fix time?

D. Impeachment through prior inconsistent statements, prior record, bias, etc.

VI. Cross-Examination of Defendant in Self-Defense Case

A. General Objectives

The prosecutor should focus on one or more of the following objectives:

1. The scientific evidence reveals that the killing could not have occurred as the defendant contends.

2. There was "bad blood" between the parties.

3. Defendant was not in danger of death or bodily harm.

4. Defendant used unnecessary and unreasonable force.

B. Sources of Information Leading To Rebuttal of Defendant's Theory

1. Autopsy-Medical Examiner's Report.

2. Mobile Crime Unit Report.

3. Property Returns.

4. Scientific reports re: hair, clothing fibers, firearm and ballistics, fingerprint analysis.

5. Photographs and diagrams of scene.

6. Eyewitnesses and other traditional sources of evidence.

C. Cross-Examine Defendant on Following:

1. Tie defendant down as to details of occurrence re: was there a struggle; position of defendant and victim prior to incident, during incident and post-incident; what was said and done by each of them prior to, during and after occurrence; distance between

defendant and deceased at time of shooting; angle of bullet; how gun or knife was being held; description of movement of knife hand; number of shots; how many thrusts of knife; where did bullets enter; where and how many times did defendant strike victim with knife; what happened to victim after first shot or first knife wound; did victim have weapon; where is weapon; why didn't defendant take weapon or tell police about it?

2. Get defendant to describe the location of the defendant and victim in relation to various objects at the scene. Was defendant or victim near an exit? Did defendant have available to him a less dangerous instrument with which he could defend himself - a chair, etc?

3. Where did defendant get weapon? Did he have it with him? If so, why? Did he expect trouble? If he always carries gun or knife - why does he do so?

4. What was respective age, size and weight of defendant and victim? What was state of sobriety of defendant and victim? Was escape route closer than where defendant got weapon? What objects other than gun or knife were available to defendant to protect self?

COMMENT: A few examples of how scientific evidence may be used to rebut the defendant's theory of self-defense are as follows:

If you can get a defendant to describe in great detail that a violent struggle took place in an apartment, you will be able to destroy that theory if you have in your possession photographs taken by Mobile Crime immediately after the offense, which shows the apartment in basically good order. If the defendant contends that there was not physical contact between himself and the victim, scientific testimony showing that hair fibers from the victim's clothing were found on the defendant's clothing, or vice versa, would be very damaging to the defendant's case. If the defendant testifies that he shot the victim after he was knocked to the ground and the victim was standing over him with a knife, it would be most damaging to the defendant's case if the medical examiner's testimony was that the bullet traveled in a downward direction rather than in an upward direction. Or the coroner's report may show that the victim's blood indicated he was intoxicated at the time of the incident. This could be the basis of an effective prosecution argument that the defendant could have handled an individual in a drunken condition without the necessity of killing him.

VII. Federal Rules of Evidence

The following proposed provisions of the Federal Rules of Evidence, enacted by the House of Representatives on February 7, 1974, and now pending before the Senate, will (if passed) alter some of the traditional rules contained in this outline. They should be considered in that light and with an understanding that

some judges apply them. However, where the District of Columbia Code specifically covers a rule of evidence or procedure, it may continue even after passage of the Federal Rules.

Rule 104, Preliminary Questions

(a) Questions of admissibility generally.-- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

* * *

(d) Testimony by accused.--The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

Rule 405. Methods of Proving Character

(a) Reputation.--In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.--In cases in which character or a trait of character of a person is an essential element of charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 410. Offer To Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty

Except as otherwise provided by Act of Congress, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

Rule 501. General Rule [as to Privileges]

Privilege is governed by the principles of common law as interpreted by the Courts of the United States in light of reason and experience.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.--The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.--For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding

of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.--Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.--The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule 611. Mode and Other of Interrogation and Presentation

* * *

(b) Scope of cross-examination.--Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

* * *

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matter not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interest of justice so requires, declaring a mistrial.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.--In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.--Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 614. Calling and Interrogation of Witness by Court

(a) Calling by court.--The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

* * *

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

(18) Learned treatises.--To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

* * *

(22) Judgment of previous conviction.--Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

* * *

Rule 804. Hearsay Exceptions: Declarant Unavailable

* * *

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a disposition taken in compliance with law in the course of the same or another proceeding, if the party against who the testimony in now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examinition.

[Federal Rules of Evidence, H.R. 5463, as it passed House of Representatives on February 7, 1974.]

VIII. Reading List

Glick, Impeachment by Prior Convictions: A Critique of Rule 6-01 of the Proposed Federal Rules of Evidence, 6 Crim. L. Bull. 330 (1970).

Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125 (1973)

Schmertz and Czapanskiy, Bias Impeachment and the Proposed Federal Rules of Evidence, 61 Geo. L. J. 257 (1972).

Spector, Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence. 1 Loy. U.L.J. (Chicago) 247 (1970).

ADVANCED PROSECUTOR TRAINING

II. F: THE HEARSAY RULE

John G. Gill, Jr.

THE HEARSAY RULE

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Note: The Proposed Federal Rules of Evidence were passed by the House of Representatives on February 7, 1974, and are now pending before the Senate. Accordingly, they do not now have the force of the law. However, many judges find the rules persuasive and rely upon them in their evidentiary rulings.

On June 14, 1974, the Board of Judges of the Superior Court of the District of Columbia voted unanimously that the Superior Court not adopt the proposed Rules of Evidence. As a result of this decision, traditional common law principles and existing case law will continue to be applied by Superior Court Judges in making evidentiary rulings, although some judges may look to the proposed rules for guidance.

THE HEARSAY RULE

I. Rationale

The factors upon which credibility of witnesses depends are perception, memory, narration and sincerity. To enable the jury properly to evaluate a witness' credibility and whether he possesses those four qualities, the law insists that a witness be under oath, be personally present at trial and be subject to cross-examination. Most hearsay is excluded because it is a statement made not under oath and out-of-court by a person not present in court and therefore not subject to cross-examination as to his memory, perception and ability to accurately narrate.

II. Definition

While most authorities feel the field of hearsay is far too extensive for one all-encompassing definition, the following simplifications have been attempted:

A. Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters therein, and thus resting for its value upon the credibility of the out-of-court asserter. C. McCormick, Evidence §246 at 584 (1972).

B. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence. Rule 63, Uniform Rules of Evidence.

C. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801 (c), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

D. The author of this outline finds the following a useful capsule definition:

> Hearsay is the statement of an out-of court asserter offered for the truth of the matter contained therein.

III. Exceptions

A. Some matters which are hearsay by definition are nevertheless admissible as exceptions to the hearsay rule. The exceptions have two common characteristics:

1. Necessity - unless the hearsay statement is admitted, the facts will be lost.

2. Trustworthiness or reliability - where circumstances guarantee that the statement is accurate and there is either no motive to falsify or falsification would be easily detected.

B. Cases

1. G. & C. Merriam Co. v. Syndicate Publishing Co. 207 F. 515, 518 (2d Cir. 1913) (L. Hand, J.).

2. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 397 (5th Cir. 1961) (Wisdom, J.) - A 1901 newspaper article was admitted to prove that houses had been damaged by fire in that year. "It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discertion."

3. United States v. Kearney, 138 U.S. App. D.C. 328, 420 F.2d 170 (1969) (Leventhal, J.) - Statement made by police on day after he was shot and on day before he died was within penumbra on both spontaneous utterances and dying declarations of hearsay rule. "The event was close enough in time to support the likelihood of accurate recollection, and to mitigate the possibility that truth was undercut by speculation or fabrication . . . . We cannot say that the trial judge's finding, that the evidence is fundamentally reliable, is erroneous. [The] statement was made under circumstances that conform to the general policies underlying the exceptions to the hearsay rule."

C. Proposed Federal Rules of Evidence

The proposed rules submitted to Congress contained identical provisions in Rules 803 (24) and 804 (B)(6) to the effect that courts could admit any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House Judiciary Committee deleted these provisions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." See H.R. Rep. 93-650, 93d Cong., 1st Sess. at 5-6 (Nov. 15, 1973).

TESTIMONY AT A FORMER HEARING

I. Where the declarant is unavailable, his testimony at a former hearing is admissible in evidence as an exception to the hearsay rule under the following conditions:

   A. Where the testimony at the former hearing was under oath.

   B. Where the testimony at the former hearing was subject to cross-examination by the present party opponent or by one who had an identical or like interest to cross-examine. (Sometimes a third requirement of reasonable opportunity to cross-examine is stated; however, this is usually implied in B.)

II. This exception to the hearsay rule should be distinguished from:

   A. Prior testimony to prove perjury (which is not hearsay).

   B. Prior testimony to show motive to murder the witness (state of mind exception to the hearsay rule).

   C. Prior testimony to refresh recollection (not hearsay).

   D. Past recollection recorded (a separate exception to the hearsay rule treated infra).

   E. Prior testimony used to impeach a witness (not substantive evidence but only for purposes of impeachment).

III. What Constitutes Unavailability?

   A. Death.

   B. Insanity.

   C. Illness.

   D. The exercise of any privilege.

   E. In many jurisdictions, but not all, being beyond the subpoena power of said jurisdiction, but only when all reasonable efforts have been utilized without success to obtain the presence of the witness.

   F. Inability to locate individual after diligent search.

IV. As previously noted, every exception to the hearsay rule has two characteristics: reliability and necessity.

   A. Here the testimony is necessary because of the unavailability of the witness.

   B. Here the testimony is reliable because the witness was under oath and subject to cross-examination.

V. Does the admission of former testimony violate the confrontation clause of the Sixth Amendment:

Amendment:

> "That in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him"?

A. Prior to 1787, the hearsay rule had been in existence in the Anglo-Saxon jurisprudence for over 100 years and the "former testimony exception" had been well established. Thus, as with all exceptions to the hearsay rule, the confrontation clause is not violated merely because the out-of-court declarant is not in court.

B. The former testimony is introduced in defendant's presence and only in circumstances where the witness is now unavailable but was available at one time. See California v. Green, 399 U. S. 149 (1970). There is no violation of the confrontation clause where the witness is actually unavailable and where no different result is likely to have occurred if the witness, in fact, had appeared.

A witness may be considered "unavailable" if present but has a lapse of memory or asserts his Fifth Amendment privilege. California v. Green, supra.

VI. Identity of Parties

This requirement should really be phrased as identity of motive to cross-examine.

A. The fact that an additional party is involved in the subsequent hearing has no bearing.

B. A person in privity, such as a successor in interest or a partner, satisfies the requirement of identity of parties.

C. There is no need for mutuality. Thus, the identity order goes to the party against whom it is being offered and not the party who offers it. This is a change from the common law view. Today this situation often arises where the defendant cross-examines witnesses during a criminal prosecution and then that testimony is used against him in a subsequent civil case by an insurance company or other plaintiff.

VII. Even though the party against whom the testimony is offered was not a party or was not in privity with the party in the first suit, it is admissible against him in the second hearing so long as someone with an identical motive cross-examined the witness. (This situation arises in class actions where many members of the class do not appear but the identical interest is represented through counsel who do appear.)

VIII. Identity of Issues

This requirement goes to the adequacy of the opportunity to cross-examine. This requires something less than substantial identity of issues. It means that there must have been an adequate motive to cross-examine or to test the subject matter now sought to be introduced.

IX. Type of Tribunal

So long as there is an oath and an adequate opportunity to cross-examine, it matters not that the previous tribunal was legislative, administrative or even in the form of a deposition. Furthermore, it does not matter whether the previous court or tribunal had jurisdiction to hear that case in the first place.

X. How does one prove former testimony?

A. By stipulation with opposing party.

B. Any first-hand observer may testify about his unaided memory of the testimony. See Meyers v. United States, 84 U.S. App. D.C. 101, 171 F.2d, 800, cert. denied, 366 U.S. 912 (1949). (Of course, the witness must have an adequate memory of the previous testimony.)

C. One may call the court reporter and refresh his recollection with his notes.

D. One may call the court reporter and put the testimony in under another exception, past recollection recorded, discussed infra.

E. Where by statute the court reporter has an official capacity, any transcript he has prepared comes in under the exception for official written statements.

XI. The Proposed Federal Rules of Evidence state that the following is not excluded by the hearsay rule if the declarant is unavailable:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Rule 804 (b)(1), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

PAST RECOLLECTION RECORDED

I. This exception permits a written document to be introduced into evidence subject to the following conditions:

A. That the contents of the document are based upon first-hand knowledge of the person testifying in court.

B. That the document must have been made or acknowledged at or near a time of the events recorded therein when the witness' recollection was fresh.

C. The witness in court must testify that even upon reviewing the document he has no adequate independent memory of the events recorded therein.

D. The witness must be able to swear that he made the document and that everything he said in the document is true.

II. Caveat - Past recollection recorded is often confused with the refreshing of a witness' recollection and some case law even states that if a witness' recollection cannot be refreshed, the document is inadmissible. See Shimabukuro v. Nagyma, 78 U.S. App. D.C. 271, 140 F.2d 13 (1944) and Washington v. W.V. & M. Coach Co., 250 F. Supp. 888, 890 (D.D.C. 1966) (witness had read the memo and would have corrected it if it had failed to reflect the facts accurately).

III. Many judges will require that the witness' memory be exhausted before permitting past recollection recorded to be admitted. This view is archaic and much criticized by McCormick. Support for the contrary view is found in Rule 803 (5), Proposed Federal Rule of Evidence, infra, since it requires only that a witness not have "sufficient recollection to enable him to testify fully and accurately." This is a much more logical and reasonable requirement than forcing the witness to exhaust his memory.

IV. Another progressive aspect of this exception to the hearsay rule is the so-called "cooperative report." Although little case law can be formed to support this theory, it is nevertheless sound. The problem arises when A witnesses the events and immediately accurately reports them to witness B who accurately writes the events down. At trial, neither witness A nor witness B has any independent recollection of the events witnessed which are in issue; however, both can swear that they told or wrote the truth and did it accurately. In these circumstances and with this foundation, no reason exists to prevent this cooperative report from being received as if only one person were involved. This situation commonly occurs with police officers who are partners: one does the witnessing, the other prepares the reports.

V. As previously noted, past recollection recorded must be distinguished from refreshing a person's recollection with a document. In refreshing a person's recollection the witness testifies that he has no further memory of the incident and the attorney asks him if any document will refresh

his recollection. Upon receiving an affirmative response, the lawyer shows the witness the document and asks him to read it to himself. After the witness reads the document, the attorney asks him if that document has refreshed his recollection to the events about which he is testifying. Having received another affirmative response, the attorney may then ask the witness to testify as to his refreshed recollection without reference to the writing.

VI. Proposed Federal Rule 803 (5) states that the following "recorded recollection" is not excluded by the hearsay rule even though the declarant is available as a witness:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party. Rule 803 (5), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

BUSINESS RECORD EXCEPTION
(Federal Shopbook Rule or Regularly Kept Records)

I. 28 U.S. Code, § 1732, provides:

Records made in regular course of Business; Photographic copies.

(a) In any court of the United States and in any court established by an Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence, and available for inspection under direction of the court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

A. The authentication of and foundation for admitting business records are one and the same. The keeper or custodian of the records must be brought to court to identify the records, to state that they were made in the ordinary course of business and to state that it is the ordinary course of the business to make such records.

B. The business record exception allows one to circumvent one or more levels of hearsay in every case by bringing only one witness - the custodian - to Court.

1. Usually records consist of an "entrant" making the records based on the report of a "reporter" who witnessed the event. There may be one or more reporters as long as each reporter has a business duty to report.

2. Business duty - The Johnson v. Lutz (253 N.Y. 124, 170 N.E. 519 (1930)) requirement - Every level of the business record exception requires a business duty.

a. Custodian of the records automatically has a business duty if he qualifies.

b. Almost always the entrant has a business duty or he would not be compiling business records.

c. The problem comes in with the reporter; e.g., a police officer making a report of a traffic accident. The police officer did not witness the accident but arrived on the scene and garnered his report from the witnesses and participants in the accident. In this situation a custodian of the police records has a proper business duty, the entrant (the officer who made the report) has a business duty; however, the people on the scene have no business duty to report so the report does not qualify as a business record, even though there may have been a legal obligation on the part of the witnesses to tell the police officer the facts of the accident.

(1) Keep in mind that, if there is a business duty on the part of the reporter, the report is admitted. In many instances police reports are proper business records, e.g., booking procedures, property inventories and records of the facts of an arrest. The police officer compiling these records has a duty to report the information and to record it, and the police department has a duty to store the records.

(2) Piggy-back Exception - Often when one has the Johnson v. Lutz exception, i.e., duty to record but no duty on the part of witnesses to report, one may have records admitted as long as one can find an independent hearsay exception on the part of those reporting.

For example, in the accident situation, if one of the parties makes a party admission or any witness on the scene makes a declaration against interest, one can bring the custodian to court. The first level of hearsay, the recorder or entrant hearsay problem, is thus obviated by the declaration against interest or admission or some other exception, e.g., excited utterance, eliminates the need for calling a reporter.

3. Another requirement is that the ordinary business of the company be one in which said business usually systematically engages, Palmer v. Hoffman, 318 U.S. 109 (1943). Palmer involved a railroad wreck wherein the train driver, pursuant to Massachusetts statute, filed a report about an accident two days after the accident. The engineer died prior to trial and the defense attempted to introduce this report as a record made in the ordinary course of business. The Supreme Court said that the business of the railroad was railroading and not litigating or having accidents, and it declared this report inadmissible as not having been made in the ordinary course of business. While Palmer v. Hoffman has not been specifically overruled, it has been emasculated by lower federal courts, and some commentators today believe it is confined to railroad accidents.

   Other Federal cases have interpreted Palmer v. Hoffman as being restricted to reports made in the course of business but anticipating litigation. They read Hoffman as excluding any report made in anticipation of ligitation since it is assertedly untrustworthy, but these courts nevertheless admit such reports if they can find an increment of reliability. For example, if the report is prepared by an investigator or doctor for the plaintiff, the report cannot be offered by the plaintiff but may be offered and introduced by defendant presumably for the same reasons that admissions may be received. Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D. N.Y. 1965).

C. Medical Records and Hospital Records - Hospital records likewise are admissible under the business record exception to the hearsay rule. However, it must be noted that not all such records may come in under the Federal Shopbook Rule. As a general rule, records which require subjective judgments upon the part of the hospital personnel or doctor will be excluded. In the leading case of Lyles v. United States, 103 U.S. App. D.C. 22, 28, 254 F.2d 725, 731 (1957), cert. denied, 356 U.S. 961 (1958) it was held that expert psychiatric opinions expressed

in hospital reports may not be admitted under the Federal Shopbook Rule. See also New York Life Insurance Company v. Taylor, 79 U.S. App. D.C. 66, 147 F.2d 297 (1944); Polisnik v. United States, 104 U.S. App. D.C. 136, 259 F.2d 951 (1958); and Whittaker v. United States, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960). But medical statements in hospital records as to the existence of conditions about which doctors would not normally disagree may be admitted. See Washington Coca Cola Bottling Works v. Tawney, 98 U.S. App. D.C. 151, 233 F.2d 353 (1956). In addition, test results of slides of sperm taken from rape victims have been held admissible under the Federal Shopbook Rule. See Gass v. United States, 135 U.S. App. D.C. 416 F.2d 767 (1969); and Wheeler v. United States, 93 U.S. App. D.C. 159, 211 F.2d 19, cert. denied 347 U.S. 1019 (1954). Such slides are placed in the same category as cardiograms, electroencephlograms, blood tests, clinical charts, etc. When admitted under the Federal Shopbook Rule, it is apparently unnecessary for the Government to establish a chain of custody in the handling of the slide or other medical objects.

D. The English Rule - In England, New Hampshire, and Delaware, oral reports in the ordinary course of business by those having a business duty to report qualify under the business record exception. Here, of course, one must produce a person who actually heard the report or to whom the report was transmitted in the supervisory chain at the business. This view does not seem to have been tested in the District of Columbia and probably would be rejected.

II. Proposed Federal Rules of Evidence. Rule 803 (b) of the Proposed Federal Rules provides that the following is not excluded by the hearsay rule even though the declarant is available as a witness:

> Records of Regularly Conducted Activity - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, profession, occupation, and calling of every kind. Rule 803 (6), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

Also see Proposed Federal Rule 803 (7) which, in substance, states that the absence of entry in any record kept in accordance with the provisions of the above rule constitutes admissible evidence to prove non-occurrence or non-existence of a matter, if a report or record would regularly be made about the matter.

PRIOR IDENTIFICATION

I. As previously indicated, a prior consistent statement by a witness is technically hearsay. Accordingly, this hearsay exclusionary rule should prohibit the introduction of previous identification whether on the scene, at the lineup or by way of photographic identification. Even more should the rule normally exclude the police officer's testimony as to these prior identifications. A hearsay exception thus exists in order to admit prior identifications where identification is an issue in a case. See 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), cert. denied, 394 U.S. 964 (1969).

A. The person making the identification must be present at the hearing. In other words, a robbery case involving an identification issue could never be tried on the basis of police officer testimony as to the pre-trial identifications made by the complaining witness. This is probably due more to the Sixth Amendment right of confrontation than to any requirements of the hearsay rule or limitations upon this exception.

B. N.B. One cannot prove the identification through the testimony of a police officer when the identifying witness reneges his or her pre-trial identification in the courtroom.

ADMISSION OF PARTY OPPONENT

I. This exception to the hearsay rule consists of words, acts or writings of a party opponent, or his predecessor in interest or representative, offered as evidence against him.

Caveat - All admissions are against interest, but it is very important for purposes of the hearsay rule not to confuse party admissions with declarations against interest. Declarations against interest which are treated infra have many more technical requirements than party admissions and it is recommended that the term admission be restricted to party admission, and declaration against interest be used for the exception which involves others than parties.

II. The theory of admissibility of party admissions as an exception to the hearsay rule is based on the presumptive reliability of statements emanating from the opponent in the trial since they show what he thinks of his case and he would not make these statements were they not true. Further, he is usually present in court to take the stand and refute or modify the alleged admission. Note: In a criminal case every act or statement or confession of the defendant is a party admission.

III. The requirements for this exception to the hearsay rule are as follows:

A. The declarant must be a party to the law suit.

B. The statement must be offered against him and not by him in his favor.

C. The party must be competent to testify or make such admission.

1. Competency means the minimum requirements of competency, ability to observe, remember and narrate.

2. Any mental defect or drunkenness short of the minimum qualification can be explained by the party opponent when he takes the stand.

D. Note that there is no need for the following:

1. No need for first-hand knowledge. (A statement against his interests in the form of a factual statement is admissible against him because he is presumed to have investigated; however, a statement in the form of hearsay, that is, "others have told me," does not qualify as an exception. In the first situation, even though redirect examination or cross-examination might bring out that the party had no first-hand knowledge of the incident, the statement is admissible.) The admission need not be against his interest at the time it is made. Thus, if a defendant makes a statement favorable to his cause at the time, and it later turns out to be unfavorable at the time of trial, it is admissible.

3. There is no need for unavailability, but admissions can be introduced against the defendant if he happens to be available at trial.

4. Admissions in the form of opinion are not excluded under the opinion rule. E.g., if after an automobile accident one driver jumps out of his car and says to the other, "I was negligent, or "I am liable," this conclusion is admissible against a party even though it would otherwise be improper opinion and invade the province of the jury.

IV. There are also the following types of admissions:

A. Formal admissions - By pleadings or by pre-trial discovery proceedings or by stipulations in a case.

B. Representative admissions - While usually an agent or servant is hired to work and not speak for the party in cases, where there is a power of attorney or the specific authority to speak for the party, representative admissions are proper. E.g., One partner makes representative admissions for the other in the course of running the firm's business or winding up the firm's business.

C. Co-Conspirator Admissions

1. In a conspiracy prosecution, a recognized exception to the hearsay rule permits as evidence against an alleged conspirator the declarations of his co-conspirators made in furtherance of the conspiracy, or indeed any joint venture, and during its pendency. See Campbell v. United States, 415 F.2d 356, 357 (6th Cir. 1969). Holson v. United States, 392 F.2d 292, 293 (5th Cir. 1968), cert. denied, 393 U.S. 1029 (1969); Myers v. United States, 377 F.2d 412, 418-419 (5th Cir. 1967), cert. denied, 390 U.S. 929 (1968).

2. Preconditions to admissibility

a. These must be independent evidence of the existence of the conspiracy or joint venture and of the defendant's participation in it.

b. The declaration must have been made while the joint venture was continuing, and

c. The declaration must have constituted a step in the furtherance of the joint venture.

D. Co-obligors can make admissions for each other if they have identical interest.

E. Joint tenants can admit against each other with respect to their property, but co-tenants cannot.

F. Statements about property by prior owners are admitted against present owners when the prior owner is in privity and had an identical interest with respect to the property.

V. Implied admissions (Admissions by Conduct).

A. For admission purposes, if a party calls a particular witness in one law suit, that party adopts the testimony of such witness for admission purposes in all future law suits.

B. Vicarious admissions occur when a party says, "whatever he tells you is true," or "whatever my records say is accurate."

VI. Admissions by Silence or Adoptive Admissions

"He who is silent is deemed to consent." When a statement or accusation is made in the presence of a party, who would naturally be expected to deny it if untrue, his silence is circumstantial evidence that he believed that the statement or accusation was true. See Spart v. United States, 156. U.S. 51, 56 (1895); United States v. Lemonakis, ___ U.S. App. D.C. ___, ___ 485 F.2d 941, 948-949 (1973); United States v. Harris, 141 U.S. App. D.C. 253, 437 F.2d 686 (1970); Kelley v. United States 99 U.S. App. D.C. 13, 16, 236 F.2d 746, 749 (1956); McUin v. United States, 17 App. D.C. 323 (1900); Martinez v. United States, 295 F.2d 426 (10th Cir. 1961); United States v. Kelly, 119 F. Supp. 217, 221-222 (D.D.C. 1954); United States v. Anthony, 145 F. Supp. 323 (M.D. Pa. 1956); Harrison v. United States, 281 A.2d 222, 224 (D.C. Ct. App. 1971); Thomas v. Stote, 488 S.W. 2d 777 (Mo. 1972).

Even if the party makes an equivocal or evasive response, the incident can be used as circumstantial evidence. His failure to deny the accusation in these circumstances constitutes the adoptive admission. The requirements of this tacit or adoptive admissions theory are as follows:

A. Statement must be made in defendant's presence.

B. Within his hearing.

C. He must have understood it.

D. The statement must have embraced acts that were within defendant's knowledge and understanding.

E. Defendant must have been physically able to speak.

F. Defendant must have been psychologically at liberty to speak.

G. The statement and circumstances must have naturally and logically called for a reply.

NOTE: The Miranda rule makes this tacit or adoptive admission theory inapplicable to any and every custodial arrest situation.

NOTE: A classic example of this adoptive or tacit admission arose in the trial of a defendant charged with the shooting of Senator Stennis. United States v. Marshall, Criminal No. 267-73. There the Government produced a witness who came upon the defendant arguing with his wife. During the argument the wife said to the defendant words to the effect, "You're the one who shot Senator Stennis." The defendant responded to the effect of "You're crazy," or "Be quiet woman, he might be a cop," referring to the witness. This was allowed into evidence as being an equivocal response to a statement which would have called for a denial on the part of any reasonable person who had not shot Senator Stennis.

VII. Proposed Federal Rule of Evidence 801 (d) (2), rather than calling party admissions an exception to the hearsay rule, classifies them as non-hearsay* and therefore admissible:

Admission by Party Opponent - The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Rule 801 (d)(2), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

*With respect to many facets of the hearsay rule, there exists an ongoing debate among authorities as to whether a certain type of out-of court statement is non-hearsay or an exception to the hearsay rule. Whether or not a thing is non-hearsay or an exception is of absolutely no practical significance in the courtroom. Accordingly, the author of this outline favors limiting the classifications of out-of-court declarations which are non-hearsay and expanding exceptions to the hearsay rule. This is merely a matter of personal convenience and is thought to be the way most judges regard hearsay.

DECLARATIONS AGAINST INTEREST

I. General Requirements:

A. The out-of-court declaration must state facts against the speaker's pecuniary or proprietary interest, or, stated another way, the declaration itself must create evidence that would endanger the speaker's pocket book or property.

B. The declarant must be unavailable at trial.

II. A special need exists for this type of evidence because the speaker is unavailable at trial, and trustworthiness is present because common experience is that one does not endanger his pocket book or property by statements that are not true.

III. Unlike the party admission requirements, declarations against interest require that:

A. The declaration be against interest of the speaker at the time it is made.

B. At the time of trial the speaker must be unavailable, and

C. The speaker have personal knowledge.

IV. At common law this exception was restricted to direct statements about pecuniary or proprietary matters. For example, "I don't own that piece of property;" "the boundary of my real estate is there at that tree;" "I am indebted to X in the amount of $500;" "X no longer owes me any money."

V. So-Called American View

During the 19th century, American courts expanded this exception to include any statement acknowledging facts that would give rise to tort liability and hence unliquidated damages. E.g., "I'm sorry I ran through the red light; the accident was all my fault." Also under the American view statements against pecuniary interest can be used to frustrate certain types of defenses. E.g., in a contract matter, the defendant's statement, "It's broken now, I should sue him, but it was in perfect order for six months after he installed it," would be used by a plaintiff to frustrate a defense of lack of consideration.

VI. Penal Interest

Illogically, but traditionally, the common law since 1844 (Sussex Peerage case and American courts since Donnelly v. United States, 228 U.S. 243 (1913)) has held that statements against penal interest do not constitute an exception to the hearsay rule. The theory is that a defendant charged with a serious case may bring in his friends and relatives in an attempt to create a reasonable doubt by merely saying that they heard others confess to the crime. In Donnelly, Justice Holmes thought that this rule was unreasonable when there were circumstances pointing to the truth

of the out-of court confession. Also, a minority of courts in the United States, among which are included Maryland and Virginia, permit a statement against penal interest in a criminal case but only when there is circumstantial evidence aside from the out-of-court statement pointing to the fact that that third person might have committed the crime. See also United States v. Harris, 403 U.S. 573, 583-585 (1971) (informant's tip credited because it was an extrajudicial statement against penal interest).

VII. The Proposed Federal Rules not only adopt the admissibility of statements against penal interest but go so far as to include and admit statements against societal interests. Proposed rule 804(b) (3) states that statements against interest are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to criminal liability, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not within this excpetion. Rule 804 (b)(3), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

VIII. Declarations containing both self-serving and dis-serving facts.

Courts have adopted three ways of dealing with declarations that combine some self-serving and some dis-serving facts. One should be aware of all three methods in order to argue for or against admissibility of such a statement.

A. The contagion of trustworthiness - Under this theory, if any part of the statement is dis-serving, the entire statement is admissible.

B. Severability - Under this theory, the court is asked to cut up the statement and admit only the dis-serving part.

C. Which interest preponderates? - Under this theory, the court is called upon to make an ad hoc preliminary finding as to whether the statement as a whole was in the interest of the declarant or against the interest of the declarant at the time it was made. This analysis rests heavily upon the court's view of the declarant's motive in making such a statement. If the motive was a self-serving one, the statement is included.

CONTINUED

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DYING DECLARATIONS

I. Rationale

A. Necessity - The declarant is unavailable because he is dead.

B. Reliability - A person who is about to face his Maker will not lie.

II. Requirements -

A. At the time of the statement, death must be certain and impending and the declarant must have abandoned all hope of living.

B. At the time the evidence is offered, the declarant must be dead.

NOTE: It is not a requirement that he die from the wound administered by the person on trial or that he even die from that same illness; he just must be dead at the time of trial.

C. Dying declarations can be used only in homicide prosecutions. Thus, these declarations are admissible only in trials for first-degree murder, second-degree murder, manslaughter and negligent homicide.

D. Further, dying declarations are admissible only in trials where the defendant is being tried for the killing of the declarant. E.g., in the leading case where a marauder shot a man and his wife but was on trial only for the murder of the husband, the dying declaration of the wife identifying the defendant as the assailant was held to be inadmissible.

E. Finally, dying declarations are admissible only insofar as they relate to the circumstances of the killing or the events immediately preceding it. Thus, dying declarations cannot relate to previous quarrels or events other than those directly leading up to the wounding in issue.

III. Dying declarations are admissible on behalf of the accused within the above limits as well as for the prosecution.

IV. The law requires first-hand knowledge and enforces the opinion rule with respect to dying declarations. However, since the declarant cannot be in court to give the underlying facts upon which his opinion may have been based, the courts usually relax this rule and, if it appears from the whole that despite the form used by the declarant, he had personal knowledge or underlying facts support his opinion, the statement is admitted.

V. In the District of Columbia, whether or not a declaration qualifies as a dying declaration is a matter of preliminary fact to be found from the court and (unlike a few other jurisdictions) the jury is not involved in any way in the determination of the admissibility of a dying declaration vel non.

VI. The Proposed Federal Rules of Evidence do away with most of the limitations upon dying declarations. Proposed Federal Rule 804 (b) (2) states that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Statement under belief of impending death. - In a prosecution for homicide or in a civil action or proceeding a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances or what he believed to be his impending death. Rule 804 (b)(2), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

Thus, all but the impending death requirement seem to be abolished and dying declarations will be admissible in all criminal prosecutions and in civil cases.

VII. See United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d. 170 (1969) setting out the so-called District of Columbia "penumbra rule" (discussed infra). As previously noted, in Kearney the United States Court of Appeals, on the facts before it, found some but not all elements of a dying declaration, and some but not all elements of excited utterance; found enough reliability and necessity to admit the statement of the deceased into evidence.

EXCITED UTTERANCES

I. This exception to the hearsay rule has two elements:

A. The declaration must have been made under the stress of excitement produced by a startling event.

B. It must have been uttered before the declarant had time or opportunity to reflect or fabricate.

II. There is no requirement of unavailability.

III. The criticism of this exception to the hearsay rule is that the exciting event which promotes reliability also prevents an adequate ability to observe; thus, this type of evidence can be discredited by showing that the very excitement allowing its admission prevents adequate observation.

IV. The declaration must relate to the immediate facts of the exciting occurrence. But see Murphy Auto Parts Co. v. Ball, 102 U.S. App. D.C. 416, 249 F.2d. 508 (1957), discussed infra under District of Columbia penumbra theory.

V. The time element is a big problem with this exception. By far the overwhelming majority of cases preclude the admissibility of utterances which have happened more than five minutes after the exciting event. However, some courts extend the period and one Iowa Court, in an extreme and questionable opinion, admitted the statement of a wife that her husband had tried to kill her after she had struggled for fourteen hours through the woods in a snow storm at night and knocked on the nearest neighbor's cabin door. See State v. Stafford, 237 Iowa 780, 23 N.W. 2d 832 (1946).

In Beausoliel v. United States, 71 App. D.C. 111, 107 F.2d 292 (1940), a minor's utterance was considered exciting and thus admissible after six hours. While the Court's opinion in Beausoliel does not state the time span, it appears from the facts at trial that six hours elapsed between the sexual assault and the exciting report. Some, however, might distinguish that case on the ground that in sex cases a prompt complaint and corroboration requirements have independent admissibility over and above the excited utterance doctrine.

VI. While first hand knowledge is required and opinions are prohibited, courts are liberal in letting in the form of a statement, as they are in dying declarations.

VII. Rule 803 (2) of the Proposed Federal Rules of Evidence seems to restate common law requirements and might abrogate any expansion of the doctrine of Murphy Auto Parts Co. v. Ball, supra.

> Excited Utterance - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Rule 803(2), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

STATE OF MIND EXCEPTIONS

I. Where relevant, declarations indicating a certain mental state are admissible as exceptions to the hearsay rule. If relevant, out-of-court declarations are permitted to show:

A. Intention.

B. Purpose.

C. Design

D. Motive.

E. Assent.

F. Knowledge.

G. Belief.

H. Affection.

I. Desire.

J. Ill will.

K. Fear.

L. Submission.

II. Special reliability is found in:

A. Spontaneity - Evidences a then-exciting mental state.

B. Sincerity - If the judge finds circumstances not indicative of sincerity, the evidence is inadmissible. In making this ruling, the judge has the duty to determine whether the declarations were self-serving. The main consideration is whether the statement is ante litem motam, i.e., before the litigation or the question arose. For example, the statement of a person charged with homicide that he loved his wife dearly is of much greater significance if made while his wife was still alive and before she was shot than at the time the police are hauling him off to the precinct or charging him with homicide for killing his wife.

C. While the declarant need not be unavailable, his statement is admissible because of the special necessity for this type of evidence in that the law (especially the criminal law) attaches so much legal significance to one's mental state which can easily change at the time of trial.

III. Three types of declaration of mental state are important:

A. Declarations of present mental or emotional state are usually admissible. Here the only requirement is that they be relevant. Many declarations of mental state could possibly have a direct and emotional effect upon a jury but have no logical relation to the mental element of the crime at issue. If irrelevant, they are not admissible.

B. Declarations of intention offered to show subsequent acts of the declarant. This is one of the most conceptually difficult areas of the hearsay rule. Many authorities believe that the Supreme Court of the United States grafted a new exception onto the hearsay rule when it decided the case of Mutual Life Insurance Company v. Hillmon, 145 U.S. 285 (1892). There, where the identity of a body was at issue, the court permitted the insurance company to introduce into evidence certain letters of the person alleged to have been deceased. The letters stated, "I expect to leave for Wichita on or about March 5 with a certain Mr. Hillmon." The Supreme Court admitted the evidence saying

> The letters. . .were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention. 145 U.S. at 295-296.

Thus, the declaration of a state of mind was admitted as circumstantial evidence that the declarant actually carried out his intentions.

Although much criticized, the leading California case People v. Alcalde, 24 Cal. 2nd 177, 148 P.2d. 627 (1944) can be extremely useful in a homicide prosecution. There the murder victim stated, "I am going out with Frank tonight." That statement constitutes a significant part of the State's evidence in convicting Frank of a brutal murder of the declarant. Justice Traynor dissented and many commentators agree with him that, while the statement could be used to show the carrying out of her intention by the declarant it could not be used to show what Frank did. Regardless of this criticism, the Hillmon rule as applied in Alcalde represents a significant tool for the prosecutor. The rationale of these cases recently was accepted without question by District Judge Oliver Gasch in United States v. Herman Johnson, Criminal No. 288-70, judgment and commitment filed January 10, 1972, a circumstantial abortion-murder case where the deceased girl's statement, "I am going to get an abortion," was introduced against the defendant.

C. Declaration of state of mind to show memory or belief as proof of previous happenings - The limits of Mutual Life v. Hillmon are found in Shepard v. United States, 290 U.S. 96 (1933). In that case, the defendant, a physician at Ft. Riley, Kansas, was charged with poisoning his wife. At trial the dying wife's statement, "Dr. Shepard has poisoned me," was admitted into evidence. The Government, on appeal, attempted to justify the admissibility of this statement as state of mind showing that the mere fact that she made the statement was circumstantial evidence of what actually had happened previously. The Supreme Court rejected this argument as follows:

> [Mutual Life Insurance Company v. Hillmon] marks the high-water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
>
> The testimony now questioned faced backwards and not forward. This, at least, it did in its most obvious implications. What is even more important, it spoke of a past act by someone not the speaker. 290 U.S. at 106.

Thus, there exists no state of mind exception to the hearsay rule for memory evidencing belief as proof of past happenings.

For a lengthy treatment of this exception, see United States v. Brown, ____ U.S. App. D.C. ____, ___ F. 2d. __ (Dec. 1973).

DECLARATION CONCERNING BODILY OR PHYSICAL CONDITION

I. This exception to the hearsay rule can be separated into three categories:

A. Declarations of Present Bodily Feelings, Symptoms and Condition

These statements are admissible to prove the truth of the declarations as an exception to the hearsay rule.

1. Special reliability is found in the spontaneous quality of the declarations.

2. Necessity is found in that no one can describe the physical condition better than the person presently suffering it.

3. As with the state of mind exception, totally self-serving and non-spontaneous declarations are inadmissible.

4. This exception does not include statements of past pain or physical condition.

B. Declarations of Bodily Feelings, Symptoms and Conditions Made to a Physician Consulted for Treatment

Because of the special reliability that is presumed when one goes to a doctor for treatment of a medical problem, his statements about the history of the accident, the type of impact, his immediate feelings at the time of or after the accident and his feelings from the time of the accident or incident up until the time of treatment are admissible through the testimony of the doctor.

The courts refuse to admit out-of-court statements which concern causation, liability, fault or matters which are not strictly necessary for treatment.

C. Declarations of Bodily Feelings, Symptoms and Conditions Made to a Physician Employed Only to Testify

The majority of courts prohibit the physician employed to testify from recounting what was told him by the patient. His testimony is, thus, restricted to objective findings and he cannot relate the stated subjective symptom of the patient. The courts feel that when trial is imminent and one consults a doctor primarily for his testimony and not for treatment, the patient's statements are likely self-serving.

II. In this area the Proposed Federal Rule 804(4) states that the following is not excluded by the hearsay rule even though the declarant is available as a witness:

> Statements for Purposes of Medical Diagnosis or Treatment - Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptons, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Rule 803(4), Proposed Federal Rules of Evidence, H.R. 5643 (1974)

NOTE: The Proposed Federal Rules purport to do away with the requirement that the statements be made to a physician. In theory they could be made to an ambulance attendant, nurse or even a layman who was sent to summon medical aid.

OFFICIAL WRITTEN STATEMENTS

I. A common law exception to the hearsay rule exists for written statements of public officials when the officials have the duty to make such written reports and when the reports are based on first-hand knowledge of facts.

II. This area is largely covered by statute today.

In the Federal Courts 28 U.S.C. §1733 constitutes a specific exception for records and papers of the United States:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the original thereof.

III. Authentication

Whenever a document is involved, there is an authentication problem. Rule 44 of the Federal Rules of Civil Procedure sets forth the requirements for authentication of any official record. Many times, however, there are separate statutes with respect to proper authentication. Whenever faced with an authentication problem, one should study 28 U.S.C. §§1731-1745. Rule 27 of the Federal Rules of Criminal Procedure makes Rule 44 and authentication rules in any statute applicable to criminal proceedings. 14 D.C. Code §§ 501-507 set out guidelines for authentication for the District of Columbia which are generally similar to Rule 44 of the Federal Rules of Civil Procedure.

In the Superior Court, Rule 27 of the Criminal Rules governs the question of authentication. It modifies the federal rule by explicity setting forth Superior Court Rule of Civil Procedure 44, which deals with the manner of proving official record. This rule facilitates practice by eliminating the necessity of cross-referencing. Rule 27 of the Superior Court Criminal Rules reads as follows:

> (a) Authentication
>
> (1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such

officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in paragraph (a)(1) of this rule in the case of a domestic record, or complying with the requirements of paragraph (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

IV. There is a special trustworthiness because a person who has an official duty is expected to be both honest and accurate. The requirement of necessity is satisfied, not because of unavailability, but because the volume of work faced by such public officials would make it impractical for him to testify every time one of these documents is offered in evidence.

V. The term "official duty " is generally interpreted liberally. E.g., clergymen are public officials for purposes of marriage certificates; physicians are public officials for purposes of death and birth certificates.

VI. In this area, there is generally a relaxation of the first-hand knowledge requirement. E.g., doctors' certificates usually can be evidence of time of death and cause of death, even though the doctor is merely repeating what others have told him. The law is narrower with respect to opinions. E.g., the document cannot prove suicide as opposed to homicide or accidental death: the official or the doctor must be brought into court and qualified to give an opinion about the manner in which death occurred.

VII. Judgments

Previous judgments are generally admitted under the following rules:

A. A civil judgment on the same matter is inadmissible in a subsequent criminal case.

1. Because of the different standards of proof, a person can be found liable in a civil action where he should logically be found not guilty in a criminal action.

2. Despite any instruction that reasonable doubt is required in the subsequent criminal action whereas only a preponderence of evidence was necessary in the civil action, the previous finding invades the province of the jury in a subsequent criminal case.

B. Where there has been a previous criminal case, however, the same considerations are reversed. Because of the higher standard in the criminal case, courts have permitted the criminal conviction to be introduced in the subsequent civil proceeding with its lesser burden of proof.

1. Here a problem arises with regard to misdemeanors where one forfeits collateral or enters a guilty plea merely to dispose of the matter.

2. Thus, courts and rule-makers have struck a compromise in admitting only felony convictions and excluding misdemeanor convictions. The theory is that a defendant has a greater motive and interest to defend fully against a serious crime.

3. While the law in the District of Columbia is not clear, some federal courts have gone so far as to say that the previous criminal conviction is binding the parties in subsequent civil litigation involving similar issues. U.S. F. & G. Co. v. Moore, 306 F. Supp. 1088, 1094-95 (N.D. Miss. 1969).

4. The model code of evidence admits any judgment finding a person guilty of a crime or misdemeanor. The uniform rules of evidence limit it only to previous convictions for felonies.

5. Proposed Federal Rule 803 (22) provides that judgments of previous convictions are not excluded by the hearsay rule even though the declarant is available as a witness. It reads as follows:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. Rule 803 (22), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

COMMERCIAL AND SCIENTIFIC PUBLICATIONS

I. There is an exception to the hearsay rule (usually statutory) for commercial publications and trade journals. The theory of this exception is that if the business world relies on the publication, there is sufficient trustworthiness for admissibility.

II. A special need exists for this exception because a party would have to produce an expert at considerable expense who would likely refer back to the publications.

III. Proposed Federal Rule of Evidence 803 (17) provides that market reports and commercial publications are not excluded by the hearsay rule even though the declarant is available as a witness:

> Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. Rule 803 (17), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

DECLARATIONS OF PRESENT SENSE IMPRESSIONS

I. This exception to the hearsay rule is the most modern one and is thoroughly accepted only in Texas. Under this exception declarations are admissible when made concerning an event, whether or not exciting, but made at the very time the event was happening. The values or reliability in this exception are:

A. No memory problem.

B. No time for reflection or fabrication.

C. The statement is usually made to another who is also a witness to the event and has opportunity to check the accuracy of the statement against what he saw, and,

D. Unlike excited utterance, there is no strain, nervousness or confusion necessarily engendered by the event.

II. This exception is considered here because it has been adopted by Rule 803 (1), Proposed Federal Rules of Evidence, where provides that present sense impressions are not excluded by the hearsay rule even though the declarant is available as a witness:

> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Rule 803 (1), Proposed Federal Rules of Evidence, H.R. 5463 (1974).

Since the requirements of this exception necessitate the testimony of another witness who was present, it is questionable whether there is enough necessity for such evidence to be an exception to the hearsay rule.

OTHER EXCEPTIONS TO THE HEARSAY RULE

I. Learned Treatises

Although, heretofore, generally limited to use during cross-examination, the Proposed Federal Rules, Rule 803 (18) classified learned treatises as an exception to the hearsay rule on the following conditions:

A. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him during direct examination.

B. It must relate to history, medicine or other science or art.

C. It must be established as reliable authority by

1. Admission of a witness.

2. Expert testimony.

3. Judicial notice.

D. If admitted, it may only be read into evidence but not received as an exhibit.

II. Statements and reputation as to pedigree and family history

Statements about dates and places of birth and death of members of a family and facts about marriage, dissent, relationship, etc. Whether individual statements of a family member or traditional reputation within the family, such declarations are admitted as an exception to the hearsay rule. Similarly, contemporary records in the family, such as within a family bible or on a tombstone are admissible even though authorship cannot be established.

Out-of-court statements:

A. Must be made by a family member or one intimately associated with the family.

B. Must be ante litem motam (before the controversy arose).

C. Must be made without apparant motive to deceive.

D. Need not be first-hand knowledge.

E. The declarant must be unavailable.

III. Recitals in ancient writings

The ancient document rule is perhaps the best known means of self-authentication. The recitals therein constitute a separate and distinct exception to the hearsay rule.

A. The document must

1. Be 30 years of age or older.

2. Come from its place of proper custody.

3. Be free from suspicious appearance.

4. In some jurisdictions, if the document is a deed or will possession must have been given and taken under the instrument.

5. Recite first-hand knowledge.

B. Recitals in ancient deeds - Recitals of facts or the happenings of events or the taking of possession of property in ancient deeds or dispositive instruments constitutes a separate exception to the hearsay rule akin to recitals in ancient documents; however, with this exception there is no need for first-hand knowledge.

IV. Reputation

Reputation as to location of boundaries of land is admissible

A. If it is ancient (over a generation),

B. If it antedates the controversy.

C. Reputation of facts of public or general interest is admissible as an exception to the hearsay rule if:

1. The facts date back more than a generation, and

2. Are widely accepted in the community. This last rule is adopted in Proposed Federal Rule of Evidence 803 (2) which provides that reputation concerning boundaries or general history is not excluded by the hearsay rule even though the declarant is available as a witness.

> Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

V. "Local Exception"

The so-called "local exception" to the hearsay rule was recognized in United States v. Harris, 141 U.S. App. D.C. 253, 258 437 F.2d 686, 691 (1970). It provides that a hearsay statement is admissible where it appears that the defendant was himself present at the time the out-of-court statement was made.

N.B. See Proposed Federal Rules of Evidence, 803 and 804, for a checklist of exceptions. These rules include all of the exceptions contained herein with minor additions.

DISTRICT OF COLUMBIA "PENUMBRA RULE"

In Murphy Auto Parts Co. v. Ball, 102 U.S. App. D.C., 416, 249 F.2d. 508 (1957) Chief Justice (then Circuit Judge) Burger found that an out-of-court statement was admissible because it had some of the elements of an excited utterance and some of the elements of a party admission or declaration against interest. The facts of the case did not support all of the elements of any one of these exceptions to the hearsay rule; however, because the statement incorporated a number of factors from each of the exceptions, the Court felt it to be properly received into evidence.

Similarly in United States v. Kearney, 136 U.S. App. D.C., 328, 420 F.2d. 170 (1969), Judge Leventhal found that statements made by a wounded police officer on an operating table just prior to his death did not qualify as either a dying declaration or an excited utterance. However, because the statements had certain aspects of a dying declaration and certain other aspects of an excited utterance, the statement was admitted having sufficient reliability and necessity to make the hearsay exclusionary rule inapplicable.

Based on these cases, whenever a prosecutor has an out-of-court statement which does not fulfill all the requirements of some exception to the hearsay rule, but which contains aspects of two or more exceptions to the hearsay rule, the Assistant should be able to reasonably argue that the out-of-court statement should be admitted based on the authority of the Murphy and Kearney cases. In other words, those cases should be read as indicating that the law of the District of Columbia permits any out-of-court statement into evidence as long as there is sufficient reliability and necessity for the statement regardless of whether or not all of the classic elements of an exception are met.

MISCELLANEOUS PROBLEM AREAS

I. Out-of-Court Utterances Which are Not Hearsay

While no one can appreciate the scope and breadth of the hearsay rule without knowing its exceptions, one can list a number of out-of-court utterances which are neither exceptions to the hearsay rule nor hearsay. Note that many of these forms of "non-hearsay" discussed here are quite similar to certain exceptions to the hearsay rule discussed supra.

A. Verbal Acts

Any out-of-court statement or writing that forms the basis (or very heart) of the cause of action or crime at issue in the case. This is sometimes called "legally effective language" or "language to which the law attaches duties and liabilities." Examples of this non-hearsay are as follows:

1. Examples in civil cases

   a. Oral and written contracts

   b. An offer or an acceptance in a contract action.

   c. A revocation of the same.

   d. Language, whether oral or written, which forms the basis of a libel or slander suit.

   e. A will.

   f. A deed.

   g. An insurance policy.

2. Examples in criminal cases

   a. The previous testimony in a perjury prosecution.

   b. The citizen's complaint in a false complaint to the police or prosecutor.

   c. The writing on a check or document in a forgery or uttering prosecution.

Note: Whether or not an out-of-court utterance or document qualifies as a verbal act which is non-hearsay is determined by relevancy. Once the utterance or writing is determined not to be relevant in the case, it is inadmissible both on grounds of relevancy and hearsay.

B. Parts of Verbal Acts

Sometimes the observing of an action alone is legally meaningless without the accompanying statement or language which is made or used contemporaneously with the action. For example, the act of handing over of money is meaningless without language accompanying such act; i.e., the handing over could be a loan, payment of a debt, bribe, bet, gift or the result of a robbery threat. Thus, words accompanying such handing over are admissible as parts of verbal acts. This is very close to the idea of res gestae and to the theory of admissions both of which are considered later. For instance, in the area of making a gift the words, "I want you to take this and keep it forever," have a much more distinct legal meaning than "hold this for a few minutes." This form of non-hearsay could also include words spoken during the commission of a crime: "This is a stickup" (robbery case); "I've waited months to have this chance to kill you" (first-degree murder case); "Take that and that and that" accompanying a stabbing (malice in a second-degree murder case).

C. Utterances and Statements Offered to Show Effect on Hearer or Reader

Many crimes or torts or contractual relations depend upon reasonableness, malice, premeditation, evil intent, specific intent, etc. Thus, when a person's state of mind is in issue, out-of-court statements or writings are admissible as non-hearsay in order to prove the person's reasonableness, knowledge, evil intent, etc. (This is sometimes also considered to be an exception to the hearsay rule, the state of mind exception.)

D. Insanity

When insanity or competency is in issue, verbal conduct is admissible. For example, statements tending to show the existence of hallucinations, delusions which are characteristic symptoms of most forms of mental disorder are admissible as non-hearsay. It is helpful to keep in mind, however, that the statement, "I am insane," when insanity is the issue in the case, is hearsay because it encompasses the heart of the issue. On the other hand, a statement tending to show insanity circumstantially, e.g., "I am Henry, the Eighth," would be non-hearsay.

E. Negative Results of Inquiries

Although a police officer or a witness cannot testify about information received from others, either a police officer or a witness can testify that he made a thorough investigation of or inquiry about circumstances where the existence of a fact would likely be found and that he found no evidence of the existence of that fact. For example, as an alibi, a defendant tells the police that he was with X at the time the crime in question was

committed, the police officer conducts a thorough investigation in all the places that X would likely be found and can find absolutely no information with regard to the existence or whereabouts of X. The negative results of this investigation are admissible to discount or disprove the credibility of the defendant's alibi defense. This is non-hearsay because of the necessity of the proof and the difficulty of proving a negative through direct testimony.

II. Implied Assertion Problem

A. Assertive Conduct

Whenever a person rather than speaking, points out something, shakes his head yes or no or depicts other conduct which substitutes for language, this is known as assertive conduct and is just as much hearsay as an utterance or document.

B. Non-Assertive Conduct

Conduct which is non-assertive can provide inferences very helpful to a case. For example, to establish that a robbery was taking place by intimidation, testimony that a bank teller was pale and shaky is not considered to be hearsay.

C. Implied Assertion

Perhaps the biggest problem of all occurs when party seeks to get the benefit of an out-of-court assertion by introducing evidence of conduct. This type of implied assertion is usually not objected to, not appreciated by the judge, and is admitted in evidence daily without any discussion of the problem.

The classic case is Wright v. Doe and Tatham, 1837. There the issue was whether John Marsden was competent to make a will. The proponent of the will sought to introduce numerous letters containing discussions of important business matters in order to provide an inference that, because the authors of these letters treated the testator as being competent in these important business affairs, he must have been competent to make a will. All of the authors of the letters were unavailable as witnesses and the court held such letters were hearsay. In effect, the court said that the conduct by the authors of the letters in treating the testator as a competent person was an implied assertion which had the equivalent of hearsay evidence.

Other examples of implied assertions which are hearsay are:

1. Evidence that a ship captain, who is not present in court, took his family for a ride on a ship when the seaworthiness of that ship is an issue.

2. Proof that an insurance company has paid the amount of a policy as evidence that an accident happened.

3. Proof of payment of a wager as evidence of the happening of the event on which the wager was based.

4. Precautions taken by a family to show that a person involved was a lunatic.

5. Evidence that a person was elected to high office as evidence of his sanity.

6. The conduct of a physician in permitting a sick person to make a will on the issue of competency.

III. Prior Consistent Statements

Although the relevancy objection against prior consistent statements is most often controlling on the issue of admissibility, there is also a hearsay objection. A classic example is a defendant testifying: "I'm innocent and six months ago when the police arrested me on this charge I told them I was innocent." His telling the police that he was innocent is a self-serving prior consistent statement. Although he is in court under oath, his demeanor can be observed, and he is subject to cross-examination, testimony about his prior statements is inadmissible hearsay since the jury cannot now observe his demeanor at the time, six months ago, he told the police he was innocent. Additionally, the prosecutor during cross-examination is unable to reconstruct the circumstances of the out-of-court prior consistent statement. This characterization of a prior consistent statement as hearsay is much criticized and probably limps a little when one attempts to fit it into the classic hearsay rationale.

Although some authorities read Proposed Federal Rule of Evidence 801 (c) as stating that the prior consistent statement is not hearsay, the author of this outline feels that Proposed Federal Rule 801 (d) makes clear that prior consistent statements are to be excluded as hearsay unless the prior consistent statement is admitted to rehabilitate the charge of recent fabrication, to explain a prior identification (see prior identification as an exception to the hearsay rule) or, in redirect, to rebut the effect of a prior inconsistent statement brought out during cross-examination.

ADVANCED PROSECUTOR TRAINING

II. G: THE INSANITY DEFENSE

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The authors wish to acknowledge the major contribution made by Assistant United States Attorney Victor W. Caputy, Chief of the Training Unit. The first six sections of this paper are drawn largely from materials developed by Mr. Caputy.

THE INSANITY DEFENSE

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*It is intended that this paper be supplemented with appropriate excerpts from transcripts of actual cross-examinations of psychiatrists and psychologists. Among the most useful are the examination of Dr. Mosher and Dr. Rappeport by former United States Attorney Harold H. Titus, Jr., in United States v. Billie A. Bryant, Earl J. Silbert in United States v. Eros Timm & Lawrence Caldwell, Criminal No. 1420-71; and the examination of Dr. Stammeyer by Assistant United States Attorney Robert A. Shuker in United States v. James L. Cockerham, Criminal No. 1666-70.

THE INSANITY DEFENSE

I. Introduction

Few prosecutors are medical doctors. Fewer still have additional training in psychiatry. Ordinarily it would be impossible for a prosecutor to become sufficiently learned with respect to psychiatry and psychology to enable him to "mix it up" with the expert on his own ground. In most cases it would be unwise to do so. The secret of cross-examining experts is to remember that the jury is not made up of individuals who understand the labels and sophisticated analyses that go into expert judgments. As a general proposition the prosecutor is much better advised to identify with the jury during the course both of his preparation and his examination of a psychiatrist. Apparent ignorance of psychiatric jargon and methodology can be one of the prosecutor's most sophisticated tools. It is because of such ignorance that the prosecutor, like the jury, must inquire as to (1) precisely what it is from which the defendant does not suffer; (2) each specific basis for the psychiatrist's judgment that he suffers from something; (3) each manifestation of the defendant's illness which the psychiatrist finds; and (4) the source of each item of information on which the psychiatrist relies and the reasons, if any, for crediting each such source.

Detailed questioning with respect to the bases of the psychiatrists' diagnosis will uncover in the normal case that the vast majority of the information on which the psychiatrist rests his diagnosis has come from the defendant. Rarely is it corroborated by outside sources. Even more rarely are corroborative facts derived from any source which is arguably objective. Once it is established that each basis of the psychiatrist's diagnosis may or may not be valid and that the psychiatrist can say no more than that he believes it to be true, the effective undermining of his conclusions has begun. Moreover even where the psychiatrist has corroborated the information on which he relies he will normally be compelled to admit that most symptoms, existing alone, do not support the diagnosis at which he has arrived.

Such a specific examination coupled with a full knowledge of all prior psychiatric reports, the psychiatrist notes, the facts of the Government's case and of the defendant's life, will normally be sufficient for the skillful prosecutor to destroy any psychiatric opinion in a case in which reasonable psychiatrists would disagree.

II. Pre-Trial Preparation

No one can successfully examine a skilled psychiatrist without the proper trial preparation. The preparation should include the following:

A. Study of all Prior Psychiatric Reports*

This does not mean merely a study of the defense psychiatrist's report to the Court and the conference report at St. Elizabeths.

*Recent cases make it mandatory that, as a first item of business pursuant to a commitment under 24 D.C. Code §301 (a), the prosecutor check with the hospital concerning the use of thorazine and/or other anti-psychotic drugs (Notes, §10).

It must include every piece of paper in the St. Elizabeths file. In this regard it is important to note that the psychological files are kept separate from the general psychiatric profile. Similarly, the nursing notes, which can be of invaluable assistance, are filed separately at St. Elizabeths. Equally important are those records and reports which may exist concerning psychiatric diagnoses of the defendant made prior to the criminal trial in which you are engaged. Remember that such reports need not necessarily come from mental institutions. The military, for example, often does such work-ups as do juvenile detention facilities, jails, etc. In theory St. Elizabeths will determine the existence of any such reports and request them from the appropriate authorities. In practice, such requests may not be made and if made, may not result in St. Elizabeths receipt of such material. If the hospital does not have these reports and materials from other institutions, you should get these materials, copy them, study them and make sure your own witnesses review them. All prior reports must be carefully studied.

The prosecutor should maintain close contact with these professionals, but avoid making ex parte representations of their opinions or findings to the court or defense counsel where they may affect the defendant's decision to plead. See United States v. Morgan, ___ U.S. App. D.C. ___, 482 F.2d 786 (1973), mandate amended and enlarged, ___ U.S. App. D.C. ___, 491 F.2d 71 (1974).

B. Interview of All Witnesses

To the extent possible, all professionals who have examined the defendant should be examined by the prosecutor prior to trial whether or not each will be called as a witness. This is appropriate because (1) not all observations of such professionals are recorded in the reports you will find in the St. Elizabeths file or elsewhere, and (2) each individual doctor will often have had access to less information than is compiled by the time you have prepared the case for trial. In this latter connection it is imperative to note that one can often improve the case at the outset by giving to St. Elizabeths all that information which is relevant to its inquiry before a decision is reached; if information later becomes available to you, that should be made available to the doctors so that if it has any impact on their opinion you can establish that prior to trial. Depending on the quantity and quality of such changes you may want to suggest that supplemental reports be filed. Additionally, depending on the importance of the case and the time available, interviews with the nursing staff and others who have observed the defendant's behavior, such as prior employers, can be invaluable.

C. Presentation of All Facts of the Case

Never stipulate the facts of the case. For instance, a jury will in fact decide the sanity question based on its reaction to those facts and not to psychiatric testimony (Notes, §12 and infra, p.18).

In any event, one of the most valuable sources of psychiatric cross-examination is derived from the defendant's actual conduct during the course of and immediately prior to and following the crime charged. It provides a literal gold mine of information which can later be used to cross-examine a psychiatrist who suggests that under certain circumstances he would expect the defendant at act in a particular way. Thus one should make an attempt to ascertain what the defendant did on the day before the crime, the day of the crime and after the crime up to and including the arrest and booking. This examination should focus not only on the acts the defendant performed but on his demeanor, facial expressions, statements made by him, voice, tone, bodily movements, etc.

D. Investigation of the Defendant's Past Life

You should make it a point to interview persons familiar with the defendant's conduct over the last several years. Such interviews, however, should normally be conducted with people who are likely to be objective. Co-workers who are not close friends, employers, and others whom the defendant has met in both social and business capacities without forming particularly close ties are often good sources of information. Similarly, as suggested above, the defendant's military record can provide valuable information. In the same vein, all records from any prior incarcerations of the defendant should be examined. Such records, by describing jobs the defendant held, his performance thereof, general deportment, interests, hobbies and other activities can be of valuable assistance in cross-examining a psychiatrist who draws conclusions based purely on what the defendant says about himself.

III. Cross-Examination of the Defense Psychiatrist

This examination should be extensive and detailed despite attempts by the Court to cut it short. It should inquire into:

A. The Doctor's Qualifications

The psychiatrist's or psychologist's professional qualifications are, of course, brought out on direct examination as a predicate for the Court's designating such witness as an "expert". In the normal case this is an area from which the prosecutor is well advised to stay away. On the other hand early cross-examination of the witness' qualifications prior to the substantive testimony can sometimes be effective. The purpose of such examination will normally not be to show the witness is not an expert, but rather to demonstrate at the earliest possible point that the expert's qualifications are limited. Early cross-examination before the doctor is accepted as an expert by the Court can also, under appropriate circumstances, shake up the psychiatrist at the outset of his testimony and make him more restrained on direct examination than he might otherwise be.

This technique is most often successfully employed where, on examination by defense counsel, the doctor has not indicated that he is a diplomate in psychiatry. A diplomate is one who has completed three years residency in psychiatry and then practiced for

two years in that field and submitted himself to a board of specialists for a series of oral and clinical examinations. Passing such an examination yields a certificate from the American Board of Psychiatry and Neurology recognizing the individual as a diplomate--a specialist in psychiatry. The proper way to begin such examination is to ask the doctor to explain what a diplomate is, and then to ask him if he is one and, if not, why not.

It is also sometimes effective to utilize cross-examination with respect to a foreign-trained psychiatrist regarding his qualifications. This examination, aside from yielding useful information with respect to differences in curricula and to the doctor's experience in this country, can be usefully employed to highlight the impact of cultural differences on individual behavior and attitudes and on the doctor's diagnosis.

B. The Manner In Which the Psychiatrist Became Engaged In the Case

It is unwise to push too hard the fact that the doctor is being paid for services performed. It is equally unwise to leave the jury in the dark about how the psychiatrist became involved in the case. Normally, he will have been approached by defense counsel, and he will be paid at a fixed hourly rate for the work that he does. There is nothing the matter with that in itself, but it can yield useful information and background against which to test, for example, the number of cases in which the doctor is called upon to conduct exams and the number of interviews which the psychiatrist has had with the defendant in your case.

C. The Doctor's Prior Practice in Criminal Cases

One should establish from the psychiatrist the general nature of his private practice, the extent of his involvement in prior criminal proceedings, whether he has been employed by the Government or defense (if previously employed by the Government that would normally be brought out on direct examination). One inquires at ones own risk as to the conclusions the doctor has reached in prior cases. Generally the best advice is to stay away from that question unless one has information in that regard and knows what the answer will be. Obviously, where a doctor has always testified for the defense or has almost invariably found the existence of mental illness and/or productivity that fact can be extremely helpful with the jury. Similarly, adding a "professional witness" flavor is helpful in undermining the doctor's credibility.

D. The Doctor's Pre-Examination Preparation

Before discussing the doctor's first interview with the defendant, merely establish with him the time and place at which it occurred. At that point it is wise to back up and ask the doctor precisely what preparation he engaged in for that examination. Pin him down on each report that he read. The average doctor will have done

little but talk to the defense lawyer. In such a case this line of inquiry is devastating. On the other hand if the doctor did his homework you need to know exactly what was done and this information can be useful. With respect to every person from whom the doctor has gotten information, elicit precisely what he was told. A full and detailed analysis of every fact the doctor had at his command prior to the time he started talking to the defendant should provide useful background against which one may assess the relevance and value of the questions the doctor chose to ask during his examination. Remember, a partial purpose for establishing what the witness "knew" before he saw the defendant is to be able to contrast such "facts" with contrary proven or provable facts and/or the defendant's statements to the doctor during the course of the interview.

At the end of this phase of the examination, inquire of the doctor what impression, if any, he had formed with respect to the defendant's mental condition prior to the time that he met him. This is a "no-lose" proposition. Whatever answer the doctor gives, one should be able to return to it later in other contexts and use it against him.

E. The First Examination

At the outset, establish who arranged the examination, where it took place and at what time, who was present and how long the examination took. The total length of this and any other exams may be sufficent to destroy the value of the doctor's opinion when compared to much lengthier observation by other doctors. In indigent cases, however, legal problems lurk in this area of inquiry (Notes, §10). Against this background, establish that the defendant knew the nature of the charge, the purpose of the examination and the reason the doctor was there.

1. Establish with certainty that the defendant does not have organic brain damage.

   Ask whether the doctor has caused tests to be performed to determine the existence of organic brain damage. If not, why not? If so, what did the results show? If no such tests have been performed (as is often the case) determine whether the presence of organicity can be determined from psychological tests (usually it can). Determine whether the doctor is familiar with the tests administered. Establish conclusively whether the doctor has reason to believe that the defendant suffers from organic brain damage. Only after this should you turn to the first personal interview, for it is only at this point that the jury understands that the doctor's diagnosis is not medical-(physical) but rather will be based on his impressions of statements and acts which do not lend themselves to scientific testing.

It is crucial to establish at the outset of this inquiry that the doctor's examination is broken down into two parts: (1) what the psychiatrist observes; and (2) what the psychiatrist hears. These segments of the examination are often referred to as the subjective and the objective. First get the doctor to concede that the examination may, for descriptive purposes at least, be broken into these two segments.

2. Objective examination

Crucial to questioning on the objective phase of the exam is the separate identification of each aspect of the defendant's appearance and/or demeanor which were regarded as significant. Most doctors will not immediately answer this question. Rather they will begin telling you things that the defendant said. To be effective you must force the doctor to answer the question asked in this and all other areas. One reason for beginning with the objective phase of the examination is to put you in a position so that you can educate the doctor early to the fact that he must answer the questions as asked -- for example, "You do understand the difference, do you not, Doctor, between hearing something and seeing something?...All right, we will talk later about what you said and the defendant said. Right now I want you to describe for us one by one each thing you saw in the examination which was significant to you in arriving at your diagnosis. Tell us the first one."

With respect to each item the doctor saw, you must inquire specifically whether he regarded that item as significant (if not, ask him why he mentioned it) and, if so to describe what impact if any it had on his diagnosis. You also want to inquire what in the doctor's opinion produced each such appearance. It is difficult to describe in the abstract the kind of questioning which may be used. A few examples, however, may be helpful:

a. Flat affect

The doctor says that the defendant's "affect" was flat. Ask him to describe precisely what he means by "affect". Ask him what the significance of the defendant's flat was. Ask him what produced such affect in the defendant.

The problem with most things the doctor observes at such an examination is that they are often produced by tension -- and one can ask if in serious criminal cases tension generated might not well come from the normal person's realization that if they do not convince the doctor they are mentally ill they are going to jail.

b. Inappropriate affect

Often doctors will testify that the defendant smiled a lot and otherwise acted inappropriately. Close examination will normally cause him to say that such inappropriate behavior is produced by pressure in this defendant because of his abnormal mental condition. If that is true, then the doctor should admit that at all times of pressure the defendant should act inappropriately and probably exhibit the same symptoms. This kind of questioning can be invaluable because normally the defendant will not have giggled his way through the armed robbery, appeared nervous at the time of the rape or scratched himself all over at the time he was fleeing from the police, being arrested or booked.

Many "objective" phenomena which are significant to the doctor such as sloppy dress, eye-wandering, nervous movements, etc. will be regarded as insignificant or ludicrous by a jury which has often observed just such reactions in people they believe to be "normal". Other items will be primarily useful, not for the information itself, but to allow later use of each such fact by contrasting it to the defendant's behavior at the time of the crime and other relevant times.

3. Subjective Examination

a. what the doctor asked

The balance of the examination is based on what the doctor asked the defendant and what the defendant told the doctor. Before getting into what the defendant has said, try and force the doctor to describe seriatim what he asked the defendant. In a philosophical and legal sense one must always remember that the question involved is the defendant's mental state at the time of the crime. It is amazing how few doctors in fact focus on the period of time just before and just after the crime. It is helpful to get the doctor locked in with respect to the questions he asked at an early point in time so that one can later be in a position to indicate his lack of concern for the crucial time periods.

b. What the defendant said

Next, the time has come to ask what the doctor heard at the examination. This examination should be extensive. It should elicit each statement which the doctor found to be significant with respect to the diagnosis he ultimately made. Always ask the doctor if he believed what the defendant told him in each of these instances. Crucial in this regard is the question of whether such information has been tested for its veracity. With respect to any statement the doctor finds significant, one should ask the doctor how he determined whether the statement was true and ask what impact if any it would have on his opinion were the statement proven to be untrue.

c. When the doctor drew conclusions

Ask the doctor at what point if any during the course of the interview he formed an impression with respect to the defendant's mental illness. Having ascertained that answer ask him how definite the impression was and then establish the length of time between the formation of the first impression and the doctor's final conclusion. At some point you will want to establish each new item of information which the doctor received between his first impression and his final conclusion.

d. The expert's notes

At some point during the examination of the psychiatrist, usually just before lunch or just before the close of the day, you must ask the psychiatrist what notes if any he took at the first interview and any subsequent interviews and what drafts if any of his report were made. Then get those notes. If they do not exist, establish what happened to them. Before the doctor has an opportunity to think of what he wrote down, inquire of him what he put into the notes. Did he attempt to record the most significant things that occurred during the course of the examination? If not, why did he choose to write down the insignificant things and not the most important things? If he tells you he wrote down the most important things, you will normally, by examining those notes, be able to exclude several bases for his conclusion as having been regarded as unimportant by the doctor himself. The doctor's

notes, if obtained, provide a gold mine for future cross-examination. A comparison of his notes with his report, both for omissions in the report and conflicts between the report and the notes, can be extremely effective.

e. Subsequent examinations

In addition to the above analysis, be sure to establish why the doctor felt a second (or more) examination to be necessary and at what point in time he reached (i) a tentative diagnosis, (ii) a final diagnosis, and (iii) what happeded in the interim to confirm his tentative diagnosis.

F. Those Aspects of the Defendant's Personality Which Were or Appeared to be Normal

1. Was in good contact;

2. Was oriented as to time, place and circumstances;

3. Has a normal I.Q.;

4. Suffers from no memory impairment;

5. Appears to have normal comprehension;

6. Was capable of maintaining his attention span;

7. Spoke in a coherent manner;

8. Has no history of hallucinations or delusions;

9. Has no history of bizarre behavior;

10. Gave responsible answers to questions.

Most litigated cases involving insanity defenses rest on a doctor's diagnosis of personality disorder. A study of the Diagnostic & Statistical Manual and conferences with experienced Assistants and/or doctors will provide meaningful bases on which to cross-examine the doctor with respect to the severity of the particular diagnosis in your case. At a minimum, one should establish that there are degrees of mental illness, that the most serious is a psychosis and that the defendant is not suffering from such an illness.

In establishing the positive aspects of the defendant's condition, write each such aspect on the blackboard as soon as the doctor testifies to it. Most judges will permit this procedure and will allow the blackboard to remain staring the jury in the face for the rest of the case. Their concentration on a visual recordation of the doctor's statement that the defendant has a fine I.Q., memory, was in good contact,

is well oriented, etc. can be an extremely helpful psychological device. Note: these questions too are most effective if asked right before lunch or right before a break for the day.

G. The Starting Point of the Illness

Having established the illness which the doctor claims the defendant has, one should inquire at what point the onslaught of the illness began, i.e. in childhood, ten years ago, five years ago, etc. Then determine how the doctor fixes that point in time. Inquire into manifestations of the illness prior to the crime. Interestingly, many of those doctors take the position that the illness may have existed for years and yet the crime in question may be the first time the defendant has engaged in anti-social, or criminal behavior.

H. The Defendant's Condition at the Time of the Crime and the Question of Causation

Ultimately, the most crucial phase of the examination concerns the link between the defendant's illness and the crime in question. What specifically triggered the defendant to do what he did? When one knows in detail the doctor's reasoning in this regard, one is well prepared to search for prior instances where the same causative factors were present and the defendant reacted in what appeared to be acceptable ways. In this connection we note, without delving into it in detail, that the mental illness in question may really be for purposes of the case, not so much the underlying illness but a "psychotic episode" caused at the time of the crime. When that is the case it is crucial to determine when the psychotic episode began, how long it lasted and what caused it to begin and end. As with the more general question of mental illness, merely getting answers to these questions and following up on them can prove extremely embarrassing to the psychiatrist.

Prosecutors often forget that the doctor's opinion only has significance insofar as it relates to the defendant's mental condition at the time of the crime. Crucial to that determination are the thoughts, feelings, acts and emotions of the defendant in time periods just before and just after the crime. Force the psychiatrist to concede that this is true and then demand that he provide for you detail by detail precisely what the defendant said he did for a period some twenty-four hours before and after the crime. Where the psychiatrist has no information in this regard ask him whether that is because he did not ask the defendant or the defendant did not remember. If he did not ask the defendant, why not? If he did ask the defendant, why didn't the defendant remember? In either event get him to admit that the absence of such information is significant and that, therefore, at least some information he would regard as significant was not available to him at the time he reached his diagnosis. This same technique is of course to be applied with respect to each item of information which the doctor is forced to admit that he did not have in arriving at his diagnosis.

A final note on that part of the examination which focuses on the time period surrounding the crime: Any honest doctor will concede that determining a defendant's mental condition at a particular time becomes progressively more difficult as that point in time becomes less proximate to the examination. Get this concession, force the doctor to explain why it is true and finish by asking whether the doctor would not have preferred to examine the defendant right after the event. This also normally creates a no-lose situation--either the doctor refuses to admit this and therefore appears biased or he does admit it but has not taken the trouble to find out (from someone other than the defendant) exactly what the defendant did and said on that day and at arrest.

I. Miscellaneous

1. Free choice

As a matter of law the defendant need not establish that he had no free choice at the time of the crime. As a matter of fact, the psychiatrist's diagnosis will normally suggest the absence of free choice at the time of the crime. Where that becomes a predicate for the diagnosis, it is subject to attack and the vitiation of that diagnostic predicate can end the defendant's opportunity with the jury.

Always be sure to ask the doctor whether he has an opinion within the bounds of reasonable medical certainty as to whether the defendant had a choice to commit the crime or not commit the crime. An obvious line of inquiry is opened where the doctor says the defendant did have such a choice. A negative answer also produces profitable areas of inquiry. At what point in time did the defendant lose his freedom choice? Did he have the power that morning to choose to stay in bed or get out of bed? To have breakfast or not have breakfast? To walk or take the bus? To go to work or not go to work? To work efficiently or not work efficiently? To have lunch or not have lunch? To walk to the bank or ride to the bank? To take a gun or not take a gun? To go in the front door or in the side door? To go up to the first teller or the fifth teller? To write out the hold-up note or not write a note? To run away from the crime or walk away? To have his get-away car waiting or not have it waiting? And so on.

It is at this juncture that the classic question is normally asked--is it your opinion that the defendant would have committed this crime if a police officer were standing there at the time? While recent court decisions (Notes: §2) may prohibit asking that specific question, the concept embodied in the question is one that should clearly be explored. Especially is this so in light of

the Brawner decision applicable in District Court not (as of this writing) in Superior Court. Under Brawner it is not simply the fact that the defendant's behavior resulted from a mental disease or defect that entitled him to an N.G.I.; instead the jury must find that he lacked substantial capacity to control his behavior so to obey the law.

Talking about free choice is conceptually very close to talking about causation and the ability to "appreciate wrongfulness or to conform to the requirements of the law" (for problems encountered in exploring this area, see Notes, §7). The doctor will normally have testified that the defendant's conduct was triggered by anxiety, stress or a traumatic event. One should identify other points in time at which the defendant was similarly affected. For example, an arrest will normally create both anxiety and stress and the circumstances of it may well be a traumatic event. By identifying several other such points in time one can establish that the defendant when confronted with similar stimuli would sometimes shoot and sometimes not shoot, or sometimes rape and sometimes not rape. Under these circumstances it is fair to ask the doctor what the probability is that the defendant will act in a certain way while under stress, etc. This line of inquiry, like the more general inquiry under free choice, often produces a psychiatric witness who is suddenly confessing (explicitly or implicitly) that he has never really thought through the implications of his conclusion that a particular act was in fact caused by a particular stimulus.

2. Drugs and alcohol*

Very often psychiatrists will weave the use of drugs and alcohol into their concepts of causation. Their use does not constitute a defense per se. They may constitute an explanation for the triggering of anti-social behavior in the defendant. In this connection it is imperative that the prosecutor establish that the original taking of the drugs and/or alcohol was voluntary. Where that is done, the prosecutor can later argue effectively that the defendant voluntarily and knowingly created the "trigger" and is therefore "responsible."

3. Malingering

Malingering is a phenomenon encountered with some frequency in insanity cases, and the prosecutor should be alert to the possibility of malingering in every case.

*Notes, §§ 17, 22.

In certain types of mental illness (e.g., schizophrenia) it is very difficult for a psychiatrist to determine whether particular behavior is a manifestation of a mental disease or simply malingering.

No psychiatrist (or other human being) can be certain that a person he interviews is telling him the truth. Thus the question of whether a defendant malingered can never be answered categorically by an honest man. If, in addition, there is specific evidence on malingering, this area of inquiry can end any doubt about the case's resolution.

IV. Cross-Examination of the Psychologist

The basic principals of cross-examining a psychologist are identical to those employed in cross-examining a psychiatrist (Notes, §§ 6, 8). In terms of implementing those principles, however, it is necessary to focus at least part of the examination of the psychological tests which were done. Crucial to such examination is the production of such tests in court. With regard to psychological tests, Ziskin, in "Coping with Psychiatric and Psychological Testimony" (1970) contains an approach to cross-examination. (For the use of texts in the course of cross-examination, see Notes, § 9.) Successfully attacking the psychological tests or the psychologist's evaluation of them can result in destroying the insanity defense. This is so because the psychiatrists will invariably admit that they relied in part on the test results and the psychologist's interpretation of their significance. In addition to taking apart the tests piece-by piece and showing that the reliability of many tests is open to some question (See Notes, §§ 3, 6, 8), you should ask the following questions:

You are not a medical doctor - is that correct?

You are not a psychiatrist?

Where did you see the defendant?

Who administered the tests, you or an intern? If aministered by the intern, ask: Who decided what psychological tests were to be given, you or the intern?

Were you present throughout the entire period of time that the intern administered the tests?

Did you observe each test and each part of the test, as it was given?

Was he psychotic then?

Was the fact that the defendant was about to be tried on a serious charge taken into consideration by you?

May not a person pending trial on serious charges fake the tests?

What efforts did you make to determine if the defendant was malingering during the tests?

Who interpreted the tests, you or the intern?

Depending on the experience of the psychologist and on who interprets the tests one may ask: Does not the validity of tests depend upon the skill of the examiner, the place where given (must be quiet) and the attitude of the person examined?

Are not psychological tests meaningless unless interpreted by an expert?

Are not psychological tests used as an aid by psychiatrists?

If a St. Elizabeths psychologist, one may ask: Were you at the diagnostic staff conference? At the diagnostic conference did you report and explain the results of the tests administered by you or under your supervision?

V. Cross-Examination of the Lay Witness

In this jurisdiction lay witnesses are allowed to express an opinion as to whether a defendant is mentally ill or not mentally ill (Notes, §4). Since they are lay witnesses, however, it is the facts on which they rely which are much more important than the opinion expressed. The most difficult choice in cross-examining a lay witness is to determine whether that examination should be extremely limited or should attempt to undermine the testimony of the lay witness by going into all the facts about which he or she has testified. Normally, unless the prosecutor can prove that the witness has lied or exaggerated, it is wise (and certainly less dangerous) to limit the questioning to:

A. Establishing that the witness loves the defendant (mother/wife/brother/sister) or is a close friend of the defendant;

B. That the witness realizes that this is the defendant's only defense;

C. That prior to the arrest the witness never attempted to induce the defendant to obtain psychiatric assistance.

The above three items would normally nullify the testimony of the lay witness. The problem with going into detail with respect to the facts about which the lay witness testifies is that such testimony supplies the corroboration which the psychiatrist's diagnosis had not had to this point. Thus, such cross-examination may only exaggerate the importance of such facts and work to the disadvantage of the Government.

VI. Direct examination of a Government Expert

The following is an outline of questions (with appropriate responses) which suggest the appropriate avenues of inquiry in the direct examination of a Government psychiatrist. It is to be emphasized, however, that the most

difficult task faced by the prosecutor is preparing his own psychiatrist for cross-examination. Be sure that your psychiatrist knows all those facts about which you asked the defense psychiatrist for the defense lawyer will often decide to ask the same questions.

Name; Profession?

How long on St. Elizabeths Staff?

In what capacity?

Educational Background; Experience?

Diplomate? Define it.

How many examinations conducted to determine presence or absence of mental illness, disease?

Testified in Court - how many times?

Have you ever testified a defendant you examined was of unsound mind, or suffering from mental illness, disease, defect?

Do you know a person named; - Do you see him here in the Courtroom? Point him out please.

May the record show, if the Court please, that the witness has identified the defendant.

Was the person whom you have just identified a patient in St. Elizabeths Hopsital?

When was he admitted to the hospital?

Did there come a time when he was discharged from the hospital?

When?

Tell Court and jury what if anything took place after defendant was admitted to St. Elizabeths Hospital.

-Seen by staff psychiatrist who takes his history, makes an evaluation of his appearance, records his reaction and responses in the interview.

-Given a physical examination, laboratory studies are made.

-Is assigned to a Ward.

.Instructions are given to attendants to make observations, make notes of conduct particularly anything unusual that they may observe.

-Defendant receives a battery of examinations.

. Psychological Tests.

. Where indicated - special examinations, neurological, X-rays, electro-encephalogram.

-Interviewed again - maybe a number of times.

- Case study prepared by psychiatrist to whom case is assigned. It includes all pertinent material relevant to the patient--both present and past--obtained from the defendant, family, relations, previous institutions, service records--army, navy, etc.

-Then, in some cases, a staff conference on the patient may be held.

Tell the Court and jury what a staff conference is.

When was the staff conference held?

Where was it held?

Who conducted it?

Who, if anyone, was present at the staff conference?

At the staff conference - did you have the benefit of the psychological tests, and ward notes concerning the defendant, if any?

How long did the staff conference last?

Was the defendant present?

A. Yes.

Was the defendant present the entire period of time?

A. No.

What, if anything, took place out of the defendant's presence?

At the staff conference, tell the Court and jury what happened, if anything?

-The psychiatrist should testify that the defendant was: (1) oriented in all spheres; (2) in good contact and aware of the proceedings; and (3) there was no unusual behavior, etc.

-At this point you may want to particularize what the doctor took into consideration.

-On the basis of all that you took into consideration, the defendant's stay at the hospital, the ward notes, the psychologicals, the history, your own personal examination, do you have an opinion, based upon reasonable medical certainity whether the defendant was suffering from any mental illness, disease or defect on (date of crime)?

A. Yes.

-What is that opinion?

A. That he was without mental disorder (i.e., without mental illness, disease) or defect.

-Will you relate in detail, for the Court and the jury the basis for your opinion?

Where possible, get the doctor to conclude, based on all material studied and persons interviewed (including the defendant), that the defendant has no symptoms of mental illness which are present in sufficient degree or intensity to warrant a diagnosis of mental illness. In cases where mental illness is reasonably clear the prosecutor should, of course, concentrate on the lack of any causal connection between the illness and the commission of the crime.

VII. Final Argument*

The technique for final argument varies depending on whether the case has been bifurcated. As a general proposition in a non-bifurcated case, the Government will have the opportunity to argue first and last. There the key to successful final argument is to stress the Government's facts in the opening argument and touch upon the insanity defense only to the extent necessary to protect yourself from the defense lawyer staying away from it to preclude your arguments with respect to insanity in rebuttal. In the bifurcated case, the practice varies from judge to judge, and some have held that, on the insanity issue (where the burden of proof is on the defendant), the defense argues first, the Government second and the defense is allowed rebuttal. Others have held that the Government argues first and the defense argues second; and that is the end.

To the extent one has control over the situation, the non-bifurcated trial is better from the Government's point of view. The following is a brief discussion of the techniques to be employed in the two kinds of trials and some of the problems that may be involved.

*Notes, §§ 13-16.

A. Non-Bifurcated Trial

In a non-bifurcated trial the Government's first responsibility is to prove beyond a reasonable doubt that the defendant committed the crimes charged. That fact, of course, is never forgotten by a prosecutor but the case is often argued as though that were not the primary burden. The ideal way to paint the background against which to successfully argue, is to begin and end by stressing the overwhelming strength of the Government's case. If the evidence clearly points to the defendant, one can conclude the opening phase of argument by telling the jury that, given this evidence, what could the defendant possibly say? How could he possibly avoid the damning implications of the Government's case. Answer? No way -unless he was crazy. And there you have it. That's the defense that you have heard in this case -- the only defense which could have been presented given the weight of the Government's case*. Against that background you are already ahead when you turn to the insanity defense; absent such background, the converse is true.

In non-bifurcated trials the primary argument on the insanity defense should stress the strong points of the Government's case on insanity. In the first place, it should be stressed that the defense bears the burden of proof. Have they borne that burden? What does the evidence show? The defendant went to St. Elizabeths Hospital. He stayed there for a period of 30-60 days. He was observed on the ward by experienced professional personnel. He was examined on several occasions by doctors X and Y. He attended a staff conference at St. Elizabeths. At the staff conference the doctors discussed the results of their separate interviews with the defendant, and they interviewed him together. Additionally, they had available to them the psychological tests which were done and had the benefit of the psychologist's statements with regard to those tests. They also heard from the head of the nursing staff and had available to them the nursing notes which recorded the defendant's behavior during his stay in the hospital. On the basis of all that information (and any other information which the doctors had) the staff at St. Elizabeth's unanimously concluded that the defendant was suffering from no mental illness.

What did the defense say with respect to this evidence? They concluded that the defendant suffered from a mental illness and that that caused the crime. On what basis? The defendant did not suffer from any organic brain damage. The defense doctor's diagnosis rested almost entirely on his observations of the defendant and what the defendant told him. What did

*There are problems with this approach where the Court has sua sponte raised the insanity defense against the wishes of the defendant. (Notes, §§ 18-20).

this show? The defendant was in good contact; he was oriented as to time, place and circumstance; he had a normal I.Q.; he suffered from no memory impairment; he had normal comprehension and attention span; he spoke in a coherent and responsive manner.

After having established the positive aspects of the defendant's mental condition, just touch lightly on the problems with the defense diagnosis which were uncovered on cross-examination. For example, it is often possible to point specifically to what the doctor relied on in the course of his objective examination -- for these most often will be things which will be regarded as insignificant by the jury. Touch on what information the doctor did not have at his disposal at the time he arrived at his diagnosis. Suggest, if the evidence permits it, that the doctor, having arrived at his diagnosis, would not change his mind no matter what new evidence was brought to his attention. Close with a strong statement of the facts of the Government's case showing that these facts indicate the conduct of a calculating criminal. Always save some of your best salvos on the psychiatric testimony for rebuttal.

B. Bifurcated Trial

The approach to arguing insanity in a bifurcated trial should be very similar to that outlined above except that all insanity arguments obviously have to be brought out in the first and only argument. It is still best to stress the facts of the Government's case both at or close to the outset and at or close to the end of the argument. Whether the jury decides that the defendant is insane may well turn on their reaction to the defendant's conduct at the time of the crime. The conduct is an excellent measuring stick against which one may assess his later claim of insanity. Where you have the same jury hearing both parts of the case, as is normal in the District of Columbia, beware of repetition.

The rebuttal or complete argument on insanity should follow the same general outline as that followed during the course of cross-examination. The doctor's conclusions with respect to symptomatology must be tested against (1) the defendant's conduct before, during and after the crime; (2) the defendant's conduct at other times in his life; and (3) the defendant's obvious motivation to malinger. The doctor's reliance on "symptons" which exist in "normal" individuals and the use of psychological test responses can be effectively ridiculed by juxtaposing them with more compelling evidence of the defendant's other "normal" behavior (but see, Notes, §§ 3, 8d).

In arguing the insanity question in a bifurcated trial, it may be helpful to stress to the jury, subtly if possible, that they should vote to "reaffirm" their recently rendered verdict of guilty on the merits--the idea being that the insanity defense now raised by the defendant is in essence a request of the jury to completely abandon its presumably difficultly wrought verdict of guilty on the merits.

VII. Notes and Problems For Discussion

It is obvious from the preceding discussion that insanity is one of the most complicated areas which a prosecutor will encounter. To facilitate meaningful discussion of this subject and to provide a framework for analysis, we have included the following notes and problems for discussion.

1. In United States v. Brawner, 153 U.S. App. D.C. 1, 471 F.2d 969 (1972) (en banc) the D.C. Circuit adopted a modified version of §4.01(1) of the Model Penal Code of the American Law Institute similar to that adopted by other federal circuit courts of appeal. The new rule for trials in the Federal District Court as adopted in Brawner states:

> a. "A person is not responsible for criminal conduct if at any time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."
>
> b. The court retains the definition of mental disease or defect adopted in McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (en banc 1962) ("A mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially affects behavior controls")*.

The District of Columbia Court of Appeals has not yet decided whether or not it will adopt the Brawner rule for the Superior Court. See Hughes v. United States, 308 A.2d 238, 242 n. 12 (D.C. App. 1973). Thus, at present, the Superior Court still applies the rule set forth in Durham v. United States, 94 U.S. App. D.C. 288, 214 F.2d 862 (1954) which states: "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The Durham rule also includes the McDonald definition of "mental disease or defect" as set out above. See also, Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957) (product means "but for" test); Douglas v. United States, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956) ("Right-wrong" and "irresitible impulse" tests not abrogated by Durham rule).

Other than providing for a different jury instruction (Compare Alternative Instructions A and B included in Instruction 5.07 "Insanity," Criminal Jury Instructions for the District of Columbia 2d Ed. 1972) at pp. 221-226), does the change from the Durham rule to the Brawner rule affect in any significant way the kind of cases that will be allowed by the court to reach the jury and/or the trial tactics of a prosecutor combatting an insanity defense? If so, how?

2. In Brawner, supra 153 U.S. App. D.C. at 23, 471 F.2d at 991, the Court stated:

*In addition, the Court opened the question of the applicability of a "diminished capacity" defense in the Federal Court in this jurisdiction. See Notes, §20.

> "The question is not properly put in terms of whether... [the defendant] would have capacity to conform in some untypical restraining situation -- as with an attendant or policeman at his elbow. The issue is whether he was able to conform in the unstructured condition of life in an open society, and whether the result of his abnormal mental condition was a lack of substantial internal controls."

In light of this would it be proper for a prosecutor to ask a psychiatric witness whether or not the defendant would have attacked the victim had a police officer has been present at the time of the defense? See Brawner, supra, 153 U.S. App. D.C. at 26, 471 F.2d at 994 (". . . the Government and defense may present . . . all possible relevant evidence bearing on cognition, volition and capacity"). This issue was unresolved in United States v. Ausby, D.C. Cir. Nos. 72-2202 and 73-1122, the court holding that the admission was not plain error.

3. In Brawner, supra, 153 U.S. App. D.C. at 35-36 n.77, 471 F.2d at 1003-1004 n. 77, the prosecutor made the following argument:

> "Now, another one, you remember on the same test, that drawing test, the doctor said he had ten of those little things and they had squiggles and lines and angles, and he was asked to draw, ten of them separately. And the doctor said he rotated one. And I said, well, what was the significance of that? Well the significance is that it shown there is organic brain damage. That is a very hard indicator of organic brain damage. Why organic brain damage? He said he meant structural damage, something physically wrong with the brain, a part missing, a dead cell, something like that, a lesion in the brain.
>
> "And I asked the doctor how many of them did he rotate, how many did he rotate 90 degrees, and I think he said it was, how many out of those ten? - one. That is a hard indicator, that is a hard indicator of organic brain damage.
>
> "Ladies and gentlemen, then we came to that ink blot, and the doctor said, well, the usual thing about that was those anatomical things or maybe the same things in those little drawings, these little ink blots. And all, they are just blots of ink. Is a man crazy when he sees them? And how about that last one, that rocket one? He says he sees a rocket going off.
>
> "I asked him: Doctor, was there any rocket fired during that period of time that might stick in a man's brain and might suggest it to him? The doctor doesn't know. But there is something explosive about a personality if he sees a rocket on a little ink blot.
>
> "Well, ladies and gentlemen, there is not much I can say about that; I am not an expert. You heard the expert on the stand and he testified about that.
>
> "But I can say one thing: that it is a jury decision. It is your province. It is your function to take that evidence and weigh that evidence and decide whether what that doctor said as far as you are concerned made any sense at all."

The Court commented unfavorably on the prosecutor's argument in the following terms:

> "It is unfortunate that the prosecutor's summation incorporated as an approach to the projective tests; 'After all, they are just blots of ink.' The prosecutor, who speaks in court in behalf of the public interest, has a responsibility to refrain from know-nothing appeals to ignorance. The prosecutor is not free to offer his opinions and attitudes on matters of expert knowledge, even in camouflaged form. The prosecutor was free to adduce appropriate expert testimony, on direct or cross-examination, to attack the validity of such tests or perhaps to adduce limitations on their value and significance. However, in this trial the prosecutor's cross-examination was not oriented in that manner but sought rather to probe the basis for the expert's conclusion, and his use of the tests. That was an entirely permissible course, particularly since the witness agreed that interpretation of the tests involves a subjective evaluation, over and above the underlying training and expertise of the expert. But there was neither testimony adduced on cross-examination, nor testimony of a prosecutor's witness, to support a disparagement of the very concept of projective tests, as based on mere ink blots," (153 U.S. App. D.C. at 36, 471 F.2d at 1004).

Was the prosecutor's "sin" one of inadequate foundation, bad choice of terminology, was his whole approach "improper"? Could the prosecutor have made his point effectively to the jury without incurring the wrath of the Court of Appeals?

4. The defendant puts on a lay witness to support his insanity defense. What, if any, are the limits of the lay witness' testimony and how far can the witness go in giving a psychiatric opinion? See United States v. Schappel, 144 U.S. App. D.C. 240 245 n. 10, 445 F.2d 716, 719 n. 10 (1971); Naples v. United States, 120 U.S. App. D.C. 123, 130, 344 F.2d 508, 515 (1964); Instruction 5.08, "Insanity -- Evaluation of Testimony," Criminal Jury Instructions for the District of Columbia (2d Ed. 1972) at pp. 227-228.

5. The defendant puts on a medical doctor who is not a psychiatrist to support his insanity defense. What, if any, are the limits on the scope of the witness' testimony? How should he be cross-examined? See United States v. Ashe, 155 U.S. App. D.C. 457, 465, 478 F.2d 661, 669 (1973).

6. The defendant puts on a psychologist to support his insanity defense. Clearly he may be a competent witness on the issue of criminal responsibility. See Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637 (1962) (en banc). Are ther, however, limits to the scope of his expertise? See United States v. Schappel, 144 U.S. App. D.C. 240, 244 n. 11, 445 F.2d 716, 720 n. 11 (1971). If so, what are these limits and how can they be brought home to the jury?

7. Is it "proper" to ask the expert witness whether or not, as a result of mental disease or defect, the defendant, at the time of the criminal act, lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law? See Brawner, supra, 153 U.S. App. D.C. at 14-15, 38-39, 471 F.2d at 982-983, 1006-1007.

In the Superior Court, under the Durham rule, may the expert give an opinion phrased in terms of whether the accused's unlawful act "was the product of his mental disease or defect" or was "caused by his mental disease or mental

defect"? Compare Washington v. United States, 129 U.S. App. D.C. 29, 390 F.2d 244 (1967), with Harried v. United States, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967).

8. a. Is the following cross-examination by a prosecutor of a psychologist regarding the defendant's reponse to the Rorschack Test proper and/or effective?

> "Q. And when you also indicated that he had what you called an explosive personality, was that based partly on the fact that one of these ink blots he said looked like a rocket going up or a rocket doing something?
>
> "A. That was one of the indications; yes sir.
>
> "Q. What, Doctor, is the connection between, if you can tell us a little more specifically, an explosive personality. . . and the fact that he looks at an ink blot and he says that looks like a rocket going up?
>
> "A. It seems to me that in people who have a general awareness that there are certain tensions, certain factors, certain explosive potentials within their character makeup or within their psyche that they cannot attribute to their own self identity tend to see, tend to project movement, explosive sorts of movement into inanimate objects. It seems like something on the basis of empirical observations meaning that people who have this sort of character makeup, or this sort of symtomatology do these sorts of things. They project tension into inanimate objects.
>
> "Q. So if a person looked at an ink blot and said that is looked like a soldier and he was fighting, would you also tend to draw the conclusion from that that the person likes wars? Things like that?
>
> "A. I could imagine a context in which that might happen. I wouldn't say it is at all comparable to this.
>
> "Q. If you say a figure which looked like a girl, for example, would you conclude, for example, that that person likes girls?
>
> "A. Not necessarily.
>
> "Q. What is the difference between seeing a girl and seeing a rocket?
>
> "A. I don't know, except the fact that more research has been done on one than the other. If I were to say that the number of girls that people see in cards has something to do with whether or not they like girls, it just wouldn't be meaningful. It doesn't strike me that it would add anything to the field.
>
> "Q. That wouldn't be meaningful but it would be meaningful if you saw the rocket exploding or shooting up in the air?

"A. Yes, sir. I think anything that can be used in terms of a differential diagnosis, anything that can be used to predict human behavior in terms of capacity for explosiveness is an important characteristic to do and people have done research on this area. I am sure that many people would agree that it is an important sign."

b. Evaluate the effectiveness and propriety of the following prosecutor's argument (and underlying cross-examination) regarding the use of intelligence tests.

> "Now, you will remember the psychologist said that the defendant came out dull-normal on those intelligence tests, and we dealt with that verbal one, and what were some of the words he used? One of the ones was define the word 'breakfast.' And you will remember the defendant said it was food in the morning, I think, some words to that effect. And the doctor said, no, that didn't deserve full credit. Full credit only comes if you say first meal of the day. You have got to have an abstract notion, not just you own expertise, but an abstract notion.
>
> "Well, ladies and genetlmen, you remember the conclusion that he drew from that. He drew a lot of conclusions. He drew the conclusion that his man didn't think on an abstract level. He drew the conclusion that somehow somewhere this man's thinking was impaired.
>
> "Then you will remember I asked him 'Well, what grade level did the achieve, doctor?' and it turned out it was either the sixth or eighth.
>
> "Then I asked him does that have anything to do with it. He answered, oh, yes, but really, the basic cause has more to do with his mental condition."

c. Wasn't the message the prosecutor was sending to the jury in the above situations something like this:

> "While I have conceded this man's qualifications as an expert, and while to be sure he is on the staff of a Government hospital, either his expertise lies in a subject that is no more meaningful in a courtroom than astrology or else he is grossly misreading the responses the defendant made on the battery of psychological tests. For you and I -- anyone of common sense -- can see that nothing of significance can be inferred from, for example, what a person says he sees in an ink blot. And we know that when a person says that 'breakfast' is 'food in the morning, eggs and things,' that's entitled to as much 'credit' as saying that it is 'the first meal of the day.' Why, you and I might give just the answers that the defendant did; and on that sort of 'evidence' the doctor would call us deranged."

Is such an approach "proper"?

d. "[B]y requiring the witness to describe in isolation the most minute 'symptoms' on which the diagnosis rests -- the defendant's answer to a particular question or reaction to a particular ink blot -- the prosecution may succeed in making these symptoms seem trivial or commonplace." United States v. Leazer 148 U.S. App. D.C. 356, 460 F.2d 864 (1972) (Bazelon, C.J. concurring). Judge Baxelon has termed this approach -- fractionating a complex diagnosis and deflating it piece by piece -- as "know-nothing appeals to ignorance." Brawner, supra, 153 U.S. App. D.C. at 69, 471 F.2d at 1037.

e. Assuming the psychologist is your witness how can you combat the cross-examination described above? Cf. United States v. Schappel, 144 U.S. App. D.C. 240, 242 n. 4, 445 F.2d 716, 718 n. 4 (1971); cf. United States v. Alexander, 152 U.S. App. D.C. 371, 400-05, 471 F.2d 923, 952-957, cert. denied sub nom., Murdock v. United States, 409 U.S. 1044 (1972).

9. Is it effective in certain kinds of cases to cross-examine experts from texts such as the one quoted below? If so, in what kinds of cases? Is this approach risky? What are the mechnaics of cross-examining from a text book or other published material?

> Ziskin, "Coping With Psychiatric and Psychological Testimony, 113, 116 (1970), quoting from the Sixth Mental Measurements Yearbook by Arthur R. Jenson, Associate Professor of Educational Psychology and Associate Research Psychologist, Institute of Human Learning, University of California:
>
> "It may be stated as a general principle that the most crucial reliability is that of the end product of the test which is the case of the Rorschach usually consists of a verbal description of personality characteristics baased on a global evaluation of all aspects of the subject's protocol. Contrary to the usual claim of Rorschachers that this global interpretation is more reliable or more valid than any of the elements upon which it is based, such as the scores and various derived combination and indices, a systematic search of the literature has not turned up a single instance where the overall interpretation was more reliable than the separate elements entering into it."

10. In an indigent case are there many problems in cross-examining a defense psychiatrist in an effort to show that the psychiatrist's opinion is entitled to little weight because the psychiatrist had less opportunity to observe the defendant than did the hospital's psychiatrists? See United States v. Schappel, 144 U.S. App. D.C. 240, 445 F.2d 716 (1971); United States v. Chavis, 155 U.S. App. D.C. 190, 476 F.2d 1137 (1973).

11. Are there problems presented by the fact that the defendant received tranquilizers or other medication while at the hospital for observation or during the trial itself? See United States v. Bennett, 148 U.S. App. D.C. 364, 460 F.2d 872 (1972).

12. What mechanical problems are presented by the defendant's offer to stipulate to the facts of the crime in order to litigate only his defense of insanity? See United States v. Brown, 138 U.S. App. D.C. 398, 428 F.2d 1100 (1970). What are the tactical considerations? See United States v. Cockerham, 155 U.S. App. D.C. 97, 476 F.2d 542 (1973).

13. Section 207(6) of the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, 24 D.C. Code §301 (j) places the burden upon the defendant asserting insanity as a defense to prove this defense by a preponderance of the evidence. Is this statute applicable to U.S. Code crimes?

Cf. United States v. Greene, D.C. Cir. No 72-1130, decided Oct. 4, 1973. Is defense counsel entitled to rebuttal argument since he has the burden of proof? Are any other issues or tactical considerations presented by the presence of inconsistent burdens of proof in a single case?

14. Is it proper for defense counsel to argue to the jury that the defendant is sick and thus should be in a hospital not a penitentiary? How do you respond to such an argument?

15. Is it proper for the defense counsel or the prosecutor to ask the expert whether the defendant's illness is treatable? If not, can this question be approached in a manner that would make it acceptable?

16. How far can the defense counsel or the prosecutor go in arguing to the jury as to the effect of a verdict of not guilty by reason of insanity? See 24 D.C. Code §301(d)(2) (1970 as amended); Brawner, supra, 153 U.S. App. D.C. at 28-30, 471 F.2d at 996-998; Lyles v. United States, 103 U.S. App. D.C. 22, 254 F.2d 725 (en banc) (1957) cert. denied, 356 U.S. 961 (1958); Instruction 5.11, "Effect of a Finding of Not Guilty By Reason of Insanity," Criminal Jury Instructions for the District of Columbia (2d Ed. 1970) at p. 232. Compare Instruction 2.71, "Possible Punishment Not Relevant," Criminal Jury Instructions for the District of Columbia (2d Ed. 1970) at p. 62. What are the tactical considerations?

17. What is the relationship between chronic alcoholism and insanity? See, e.g., Salzman v. United States, 131 U.S. App. D.C. 393, 405 F.2d 358 (1968); King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1966).

18. Should the prosecutor handle the insanity defense in any different manner where the Court raises the insanity defense sua sponte against the wishes of the defendant? Cf. Whalem v. United States, 120 U.S. App. D.C. 331, 346 F.2d 812 (en banc), cert. denied, 382 U.S. 862 (1965).

19. (a) The cases often state that bifurcation must be raised by the defendant (Parman v. United States, 130 U.S. App. D.C. 188, 399 F.2d 559, cert. denied, 393 U.S. 858 (1968)) and that the defendant carries the burden of demonstrating the need for bifurcation. Higgins v. United States, 139 U.S. App. D.C. 331, 401 F.2d 396 (1968). Despite these statements does the prosecutor risk reversal on appeal if an inexperienced defense attorney fails to raise the issue when he should have? See Ashe v. United States, 138 U.S. App. D.C. 358, 427 F.2d 626 (1970).

(b) "[T]he trial court does not abuse its discretion in refusing bifurcation where the defendant does not present a substantial defense both on the merits and on the issue of responsibility." United States v. Bennett, 148 U.S. App. D.C. 364, 370, 460 F.2d 872, 878 (1972).

(c) Would the following colloquy require a mistrial in a unitary trial?

"Q. Doctor, what makes you believe the defendant does not have a mental illness?

"A. Well, one factor is the way he described the planning that preceded his killing of Mr. Jones."

See United States v. Bennett, 148 U.S. App. D.C. 364, 371 n. 24, 460 F.2d 872, 879 n. 24 (1972); 18 U.S.C. §4244 (1970).

(d) The defendant charged in a brutal sex murder raises alibi and insanity defenses and moves for a bifurcated trial before two separate jury panels. Cf. Parman v. United States, 130 U.S. App. D.C. 188, 399 F.2d 559, cert. denied, 393 U.S. 858 (1968). What are the best arguments against this motion?

20. (a) In Brawner, supra, 153 U.S. App. D.C. at 30-34, 471 F.2d at 998-1002 the Court recognized for the first time in this jurisdiction a doctrine that permits the jury to consider a defendant's abnormal mental condition as tending to negate a specific mental state required for a particular crime without absolving him of all criminal responsibility.

(b) Does this doctrine of "diminished capacity" apply to crimes other than first degree murder? Cf. United States v. Bryant, 153 U.S. App. D.C. 72, 80-81, 471 F.2d 1040, 1048-1049 (D.C. Cir. 1972); Note, Keeping Wolff from the Door: California's Diminished Capacity Concept, 60 CALIF. L. REV. 1641 (1972). Does the automa commitment provision of 24 D.C. Code §301(d) apply to a defendant acquitted by reason of "diminished capacity"? If not, are you entitled to so inform the jury?

(c) If the defense of "diminished capacity" is raised, is the defendant entitled to a bifurcated trial? If so, how does "diminished capacity" work in a bifurcated trial? See Louisell & Hazard, Insanity As a Defense: The Bifurcated Trial, 49 CALIF. L. REV. 805 (1961).

21. The defendant moves in open court for appointment of an independent psychiatrist after the hospital's doctors split two to one in favor of the defendant's sanity. What is your response? See 18 U.S.C. § 3005A (197); United States v. Chavis, 155 U.S. App. D.C. 190, 476 F.2d 1137, on rehearing subsequent to remand, ___ U.S. App. D.C. ___, 486 F.2d 1290 (D.C. Cir. 1973).

22. What is the relationship between the insanity defense and narcotics addiction? See, e.g., United States v. Moore, ___ U.S. App. D.C. ___, 486 F.2d 1139 (1973); Gaskins v. United States, 133 U.S. App. D.C. 288 410 F.2d 987 (1967).

23. What are the considerations to be weighed by the prosecutor in deciding whether or not to contest an insanity defense? Is it "proper" for a prosecutor to require that the defense attorney not contest the issue of the defendant's Bolton hearing as a condition of not contesting the insanity defense?

24. The defendant has been found incompetent to stand trial. What are the considerations in deciding whether or not to seek civil commitment? See Jackson v. Indiana, 406 U.S. 715 (1972). Cf. McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) (confinement for observation). The office policy

regarding Jackson v. Indiana was set forth in a memorandum from Earl J. Silbert on August 16, 1972 and reaffirmed in a memorandum on January 28, 1974. See Appendix to this outline.

25. What arguments are presented by the Washington instruction that is required to be read in the presence of the jury to the first psychiatrist or psychologist to testify as an expert witness where the defense of insanity has been raised? See Instruction 1.13, "Instruction to Expert Witness in Cases Involving the 'Insanity Defense'", Criminal Jury Instructions for the District of of Columbia (2d Ed. 1972) at pp. 17-19.

26. How would you rebut the following argument by defense counsel:

> "Dr. Williams premised his conclusion on the fact that this man had had what we might call a rotten social background. Now we know that most people survive rotten social backgrounds. But most people are not now here at this time on trial. The question is whether the rotten social backgound was a causative factor and prevented his keeping controls at that critical moment. . . .
>
> "At the critical moment when he stepped back in the Little Tavern restaurant and he was faced with five whites, with all of his social background, with all of his concepts, rightly or wrongly, as to whether white people were the bogeymen that he considered them to be, the question at this moment is whether he can control himself. That is the only question. Now you can expand it out, but the only question is not the question of how you label what he had. If you label it mental disease or not. But the real question is whether he had control of himself. Now you have got to take the trip back through his lifetime with him and look at the effect that his lifetime had on him at that moment and determine whether he could control himself or not." [United States v. Alexander, 152 U.S. App. D.C. 371, 407 n. 100, 471 F.2d 923, 959 n. 100, cert. denied sub nom., Murdock v. United States, 409 U.S. 1044 (1972), 923, 959 n. 100 (D.C. Cir. 1973)].

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Form DJ-150
(Ed. 4-26-65)

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : ALL TRIAL ASSISTANTS
District Court Felony Trial, Major Crimes, Superior Court Felony Trial, Superior Court Misdemeanor Trial

DATE: January 23, 1974

FROM : EARL J. SILBERT
United States Attorney

SUBJECT: Mental Competency Procedures Required By Jackson v. Indiana

I am reissuing the attached memorandum of August 16, 1972 so that all of you will be familiar with the procedures to the followed by Assistants in this office under the Supreme Court's decision in Jackson v. Indiana.

Attachment

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

TO : All Criminal Trial Assistants, District Court and all Felony Trial Assistants, Superior Court

DATE: August 16, 1972

FROM : Earl J. Silbert
Principal Assistant U.S. Attorney

SUBJECT: Procedures required as a result of Jackson v. Indiana

In Jackson v. Indiana, 40 L.W. 4615 (June 7, 1972), the Supreme Court held:

> That a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

It should be obvious that the holding in Jackson could have serious ramifications in controlling the incompetent defendant's liberty unless we are fully prepared to operate properly when confronted by such a defendant. Consequently, every trial assistant who encounters a defendant whom the psychiatrist declares to be incompetent shall proceed as follows:

1. Upon receipt of the diagnosis of incompetence, the Assistant shall order all records from the diagnosing source (hospital or psychiatrist) and examine them thoroughly to determine whether the diagnosis of incompetence is in fact sound and has been based on all of the available, relevant data. The Assistant shall also thoroughly discuss the diagnosis and the psychiatrist, to determine whether this diagnosis of incompetence is so sound that the Assistant would be unable to defeat it by proper cross-examination in court.

2. If the Assistant is then certain that the court will find the defendant incompetent, the question of prognosis becomes paramount. The ability of a a psychiatrist to determine whether a defendant's incompetence is permanent or transient is highly suspect. Since the psychiatrist's examination will have been of short duration, and since that examination was aimed at diagnosis, and no sustained treatment program will have been implemented it is a virtual certainty that no prognosis can be accepted at this point as being valid. Therefore, when a defendant has been found incompetent the Assistant shall insist that the defendant be committed to Saint Elizabeths Hospital on an experimental treatment basis so that a valid prognosis can be made. Once there has been an adequate and reasonable time period in which to carry out a treatment program (a year would appear to be a reasonable time for such an experimental treatment program for a defendant charged with a felony, three months for misdemeanors), the court should make a finding on the question of whether there is substantial probability that the defendant will recover his competence in the foreseeable future.

   a. On the inquiry into competence, the possibility of competence under medication should be explored by the hospital and by inquiry by the Assistant of the psychiatrist. If the defendant would be competent under drugs, we should be prepared to try him in that condition.

3. If, after the experimental treatment period, the court will find that the defendant will not recover his competence within the foreseeable future, the Assistant shall contact Oscar Altshuler in Special Proceedings for purposes of initiating civil commitment proceedings under 21 D.C. Code, §§ 501 et seq.

4. If the defendant is civilly committed, the criminal charges shall nevertheless be kept open, Assistants should be aware that the court in Jackson clearly indicated that it was not reaching the issue of the possible propriety of dismissal of criminal charges

against an incompetent accused merely because of his incompetence. See Slip op. at pp. 23-25. Thus, we must strenuously resist any suggestion by either the court or defense counsel that dismissal of criminal charges would be appropriate merely because the defendant is unlikely to regain competence. There is clearly no authority in Jackson or in any other Supreme Court or case in this jurisdiction for such a ruling.

Moreover, any motion by the defendant to dismiss for want of a speedy trial should be opposed on the ground that the delay in the trial is attributable neither to the government nor even the court. In most misdemeanor cases, if the defendant remains incompetent for a year, then consideration should be given to dismissal of the charges by our office. For felony charges, a much larger period is appropriate, a period which depends primarily on the nature of the charge, i.e., first-degree murder as contrasted with unauthorized use.

5. In cases in which an incompetent defendant is civilly committed, it will be necessary to have periodic examinations to determine competency as long as the criminal charges remain open. Accordingly, there should be an order entered in the criminal case requiring a report from the hospital concurring the defendant's competency every six months.

6. In cases in which an incompetent defendant is not civilly committed and therefore is released under Jackson v. Indiana, the criminal charges are to be kept open. An order should be entered in the criminal case, however, requiring a periodic outpatient examination by the Office of Forensic Psychiatry every six months to determine whether the defendant has regained competency and if not, whether there has been a deterioration which would make him dangerous and therefor civilly committable.

END