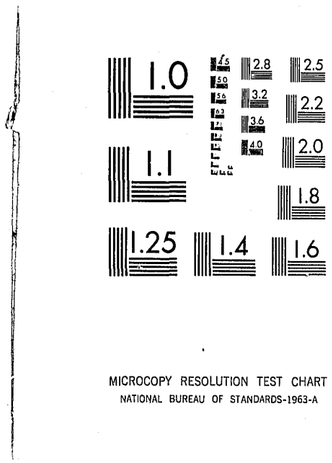

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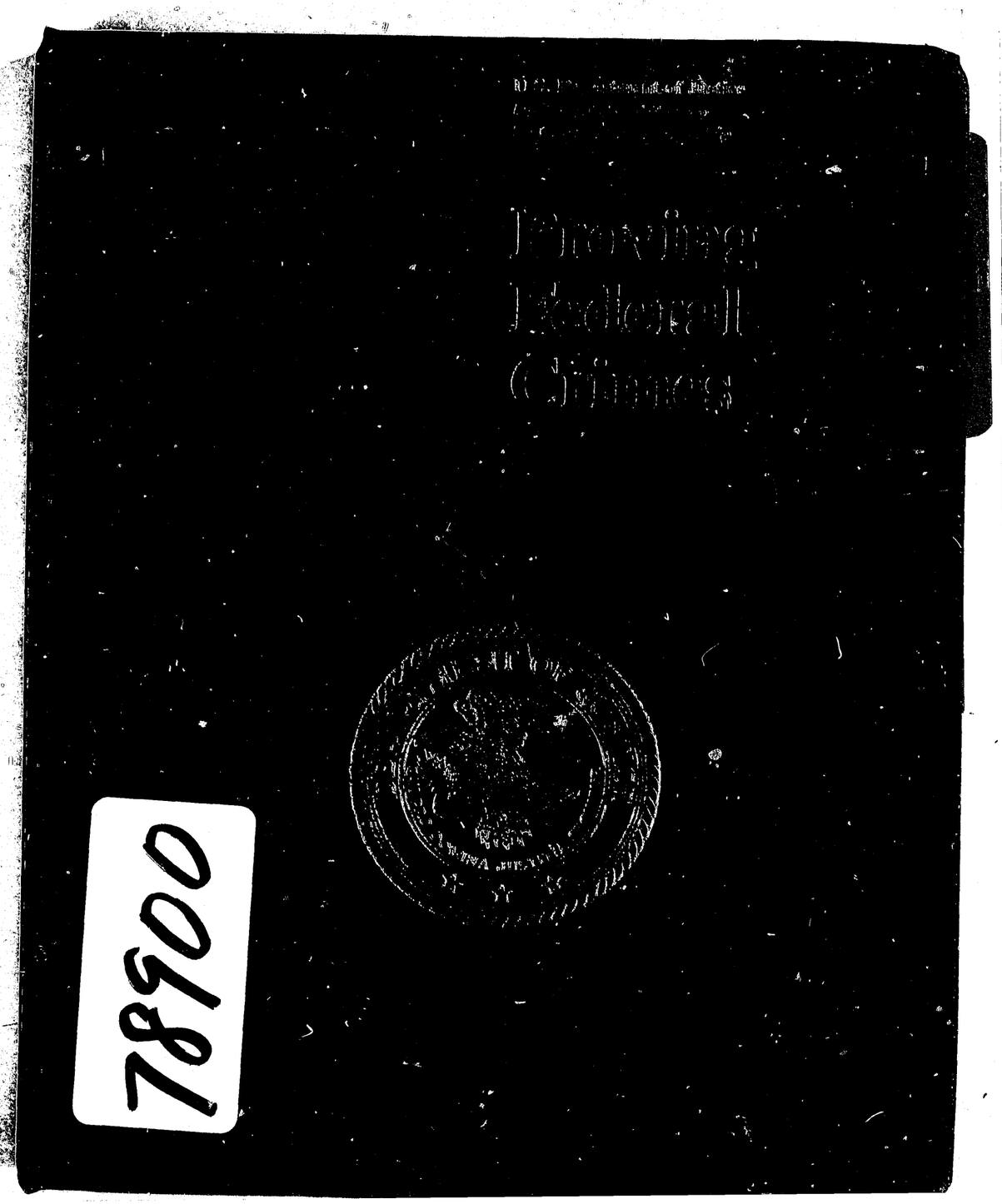

U.S. Department of Justice

United States Attorney
Southern District of Ohio

MF-1

Proving Federal Crimes

Written, Revised, and Edited by the Office of the United States Attorney for the Southern District of Ohio

James C. Cissell
United States Attorney

May 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Proving Federal Crimes

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PREFACE

Federal prosecutors thoughout the country have long relied on *Proving Federal Crimes* as a valuable and practical tool in the preparation and trial of criminal cases. This new edition makes substantial changes from the previous edition which will increase its usefulness even more.

In this new edition, the U.S. Attorney's Office for the Southern District of Ohio has realigned *Proving Federal Crimes* into two sections on procedure and evidence and has added several new chapters. Two more chapters have been reserved and will be available as soon as they are completed. One of the most important new features of this edition is the new loose-leaf format which permits regular updating in the light of new court decisions and other legal developments. As the Department of Justice brings increasingly complex criminal cases against increasingly sophisticated defendants in such areas as white-collar and organized crime, the need for concise and current legal resources like this new edition of *Proving Federal Crimes* will continue to grow.

The U.S. Attorney's Office for the Southern District of Ohio deserves the thanks of all of us in the Department for the time and effort and skill which they have devoted to this task. Building on the solid foundation constructed by the U.S. Attorney's Office for the Southern District of New York, which prepared the earlier editions, it has made a substantial contribution to the work of the Department. I would like to extend my personal congratulations to all who have worked on this project for a job well done.

Benjamin R. Civiletti
Attorney General

Washington, D.C.
May 1980

FOREWORD

Proving Federal Crimes is well recognized as a practical, ready reference manual for Federal Prosecutors. Great credit is due to the United States Attorney's Office for the Southern District of New York for the authorship of the previous editions beginning in 1954. It was with pride and pleasure that the United States Attorney's Office for the Southern District of Ohio volunteered to revise and update this valuable work. Like its predecessors, we do not intend this edition as a substitute for treatises in substantive law and evidence. The importance of this manual has always been as a starting point and its capacity to offer immediate authority when the courtroom need therefor arises.

Initially, we decided to expand the authorities cited to all circuits. More than 6,000 cases were reviewed. The huge volume of case law published in the past four years in areas untouched in prior editions prompted us to treat the topics Jeopardy and Mistrial, Prosecutorial Misconduct and Vindictiveness, and the Grand Jury as new chapters. Two chapters covering Joinder, Severance, and Consolidation and Jury Instructions have been reserved and will be distributed in the near future. For ease of use, an index has been added, and the selection of the permanent binder was made so that future revisions and updates will be accomplished through the removal of old and the insertion of new pages.

I am grateful for the opportunity to carry forward this work and am most appreciative of the great effort of the attorneys and secretaries who contributed to this revision. For the most part, each Assistant U.S. Attorney who volunteered to contribute did his or her section on personal time. In particular, I would like to thank Bernie Gilday, Chief of our Special Prosecutions Unit, for his enthusiasm, encouragement, and limitless hours from the first moment that I broached the possibility of this revision. Likewise, the commitment and contribution of Bob Behlen went far beyond his official duties as a research assistant.

The support of Bill Tyson, Director of the Executive Office for U.S. Attorneys and his fine staff also deserves mention. Finally, I would like to acknowledge the assistance of Joe Oberst and George Berry of the U.S. Government Printing Office in Columbus, Ohio.

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May 1980

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PART I

THE ACQUISITION, USE, AND MISUSE OF EVIDENCE

CHAPTER I
SEARCH AND SEIZURE

A. USE OF SEARCH WARRANTS

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment "protects people, not places." It protects a person's reasonable expectation of privacy against government intrusion. This may include places where the public has access such as a public telephone booth, *Katz v. U.S.*, 389 U.S. 347 (1967), a union office, *Mancusi v. DeForte*, 392 U.S. 364 (1968), or areas of a store open to the general public, *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319 (1979). The test of a legitimate expectation of privacy under the fourth amendment is (1) whether the individual has a subjective expectation of privacy, and (2) whether that expectation is one that society is prepared to recognize as "reasonable." *Smith v. Maryland*, 442 U.S. 735 (1979). It has been held no legitimate expectation of privacy is violated by a warrantless installation of a pen register on a telephone, *Smith, supra;* nor did the mere presence of non-owner passengers in a car bestow upon them a legitimate expectation of privacy in the car's locked glove compartment or the area under the seat, *Rakas v. Illinois*, 439 U.S. 128 (1979); nor did motel room occupants have a reasonable expectation of privacy against DEA agents eavesdropping from an adjoining room by pressing their ears against a connecting door, *U.S. v. Agapito*, _____ F.2d _____, 27 Cr. L. 2059 (2d Cir. 1980).

The fourth amendment is a limitation on the government. It does not require the exclusion of evidence obtained through a search or seizure by a private citizen acting on his own without government suggestion or participation. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *U.S. v. Roberts*, _____ F.2d _____, 27 Cr. L. 2025 (8th Cir. 1980); *U.S. v. Lamar*, 545 F.2d 488 (5th Cir.), *cert. denied*, 430 U.S. 959 (1977); *U.S. v. Newton*, 510 F.2d 1149 (7th Cir. 1975); *U.S. v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975).

Where there is a privacy right protected by the fourth amendment a search is reasonable if there is a search warrant supported by probable cause. Rule 41 of the Federal Rules of Criminal Procedure provides limitations and procedures for securing a search warrant.

1. PROBABLE CAUSE FOR SEARCH WARRANT

Rule 41(c) of the Federal Rules of Criminal Procedure states that a warrant may issue upon an affidavit sworn to before a federal magistrate or state judge if the magistrate or judge is satisfied that the affidavit reflects probable cause. The rule further provides that probable cause may be based upon hearsay evidence in whole or in part.

Probable cause exists where "the facts and circumstances within their [the agents'] knowledge, and of which they had reasonably trustworthy information ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief that ..." a crime has been or is being committed, and that seizable property can be found at the place or on the person to be searched. *Carroll v. U.S.*, 267 U.S. 132, 162 (1925); *Brinegar v. U.S.*, 338 U.S. 160 (1949). The word "probable" is less stringent than "more likely than not" or "by a preponderance." "[T]he words 'reasonable cause' are perhaps closer to what is meant." *U.S. v. Melvin*, 596 F.2d 492, 495 (1st Cir.), *cert. denied*, 100 S. Ct. 73 (1979). "'[R]easonableness' is the overriding test of compliance with the Fourth Amendment...." *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978). Although proof of criminal activity is not required, *U.S. v. Tasto*, 586 F.2d 1068 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979), more than mere good faith and suspicion are required, *Brinegar v. U.S.*, 338 U.S. at 176-177; *U.S. v. Taylor*, 599 F.2d 832 (8th Cir. 1979); *U.S. v. Williams*, 594 F.2d 86 (5th Cir. 1979).

The probable cause must be "present" or timely. A search warrant was held to have been issued without probable cause where the affidavit, based on information from a conversation overheard by an informant, did not disclose the date of the conversation, thus preventing the magistrate from determining whether the information was timely. *U.S. v. Salvucci*, 599 F.2d 1094 (1st Cir. 1979). Timeliness must be determined in the circumstances of each case. Information four-months-old may be timely, *U.S. v. Diecidue*, 603 F.2d 535 (5th Cir. 1979); or information six-months-old may be timely when combined with other information, *U.S. v. Williams*, 603 F.2d 1168 (5th Cir. 1979). If the probable offense is ongoing or a continuing one, the staleness prohibition does not apply. Also, contraband does not have to be currently located at the place described in the warrant if there is probable cause to believe that it will be there when the search warrant is executed. *U.S. v. Lowe*, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978).

Search warrants are directed at places, not persons. Once there is probable cause to believe that a federal crime has been committed, a warrant may issue for the search of any place there is probable cause to believe it may be the place of concealment of evidence of the crime, even though the owner is not culpable. *Zurcher v. Stanford Daily*, 436 U.S. at 558-559.

An affidavit that alleges facts based on the personal observation of the affiant sufficient to establish probable cause will support the issuance of a warrant. *James v. U.S.*, 418 F.2d 1150 (D.C. Cir. 1969); *U.S. v. Clancy*, 276 F.2d 617, 628 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961); *Overton v. U.S.*, 275 F.2d 897, 898 (D.C. Cir.), *cert. dismissed*, 362 U.S. 957 (1960). But personal knowledge is not essential for the issuance of a search warrant.

a. PROBABLE CAUSE ESTABLISHED BY HEARSAY

Under Rule 41(c)(1) of the Federal Rules of Criminal Procedure the affidavit supporting a search warrant may be based upon hearsay. The Supreme Court has established a two-pronged test to establish probable cause where hearsay is involved. The judge or magistrate must be informed of underlying circumstances or facts sufficient that he can make an independent determination of (1) the credibility of the informant, and (2) the reliability of the information. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969).

In *Aguilar v. Texas, supra*, the Supreme Court held that the affiants' statements that they had "received reliable information from a credible person and do believe that [narcotics] are being kept at the above described premises [for unlawful purposes]" were insufficient for the issuance of a warrant. The Court noted that there were two substantial omissions: the magistrate was not informed of any of the underlying circumstances from which the officer concluded that (1) the informant was "credible," and (2) his information was "reliable."

The credibility of the informant may be established by a recital of instances of his previous reliability, *U.S. v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978); *U.S. v. Dudek*, 560 F.2d 1288 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978), or by corroboration by the affiant's independent investigation of parts of the informant's story, *U.S. v. Williams*, 605 F.2d 495 (10th Cir.), *cert. denied*, 100 S. Ct. 276 (1979); *U.S. v. Rasor*, 599 F.2d 1330 (5th Cir. 1979); *U.S. v. Sclamo*, 578 F.2d 888 (1st Cir. 1978). Personal observation by the informant is sufficient to establish the reliability of the information. *U.S. v. Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *U.S. v. Viggiano*, 433 F.2d 716, 719 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). The fact that the informant was a government agent establishes a presumption of credibility. *U.S. v. Beusch*, 596 F.2d 871 (9th Cir. 1979). Likewise, the statement of the victim of a crime will be presumed credible, *U.S. v. Mahler*, 442 F.2d 1172 (9th Cir.) *cert. denied*, 404 U.S. 993 (1971), as well as that of an eyewitness to a crime, *U.S. v. Bell*, 457 F.2d 1231 (5th Cir. 1972). A statement against an informant's penal interest may provide a basis to credit the reliability of an informant, even if he is unidentified. *U.S. v. Harris*, 403 U.S. 573 (1971). *See also U.S. v. Hunley*, 567 F.2d 822 (8th Cir. 1977).

The credibility of the informer and the reliability of his information is satisfied if he has described criminal activity in sufficient detail. *U.S. v. Fried*, 576 F.2d 787 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978); *U.S. v. Swihart*, 554 F.2d 264 (6th Cir. 1977). The description in an agent's affidavit giving specific facts of the contents of an allegedly obscene magazine was more than a mere conclusion and was held sufficient for the magistrate to make his own determination of probable cause. *U.S. v. Sherwin*, 572 F.2d 196 (9th Cir. 1977), *cert. denied*, 437 U.S. 909 (1978).

Even though the informant's past reliability is sufficiently established, when the underlying circumstances from which the magistrate might have concluded that the informant's information was accurate, were not recorded in any manner, even though testified to under oath, the affidavit did not reveal the underlying circumstances and there was not sufficient probable cause. *U.S. v. Hittle*, 575 F.2d 799 (10th Cir. 1978). An affidavit for a search warrant, with or without an attached transcript of testimony taken under oath by the magistrate, cannot be bolstered. It stands or falls on its own four corners in the face of an attack. *U.S. v. Hittle, supra.*

Double hearsay may be used as a basis for a search warrant where each level of the hearsay meets the *Aguilar-Spinelli* test. For example, the affiant talked by phone with a narcotics investigator who received his information from a confidential informant who on many previous occassions had provided reliable information. *U.S. v. Williams*, 603 F.2d 1168 (5th Cir. 1979).

An evenly divided Supreme Court left standing a lower court holding that a

statement taken in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), could not be used to establish probable cause for a search warrant, *Massachusetts v. White,* 439 U.S. 280 (1978).

To encourage the obtaining of search warrants by law enforcement officials, commonsense, not stringent or hypertechnical standards, is to be used in determining probable cause. *U.S. v. Williams,* 605 F.2d 495 (10th Cir.), *cert. denied,* 100 S. Ct. 276 (1979); *U.S. v. Middleton,* 599 F.2d 1349 (5th Cir. 1979); *U.S. v. Valenzuela,* 596 F.2d 824 (9th Cir. 1979). As the Supreme Court stated in *U.S. v. Ventresca,* 380 U.S. 102, 108 (1965):

> [A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

If a judge or magistrate is provided with sufficient information to enable him to make a considered judicial determination of probable cause, whether such determination is grounded upon the personal observation of the affiant or hearsay information secured by an informant, a reviewing court will pay substantial deference to that determination. *Aguilar v. Texas,* 378 U.S. at 111; *U.S. v. Brown,* 584 F.2d 252 (8th Cir. 1978); *U.S. v. Allen,* 588 F.2d 1100 (5th Cir.), *cert. denied,* 99 S. Ct. 2415 (1979).

However, a magistrate must not "serve merely as a rubber stamp for the police." He must be neutral and detached in deciding whether there is sufficient cause to justify issuance of a search warrant. *U.S. v. Ventresca, 380 U.S. at 109; U.S. v. Ford,* 553 F.2d 146 (D.C. Cir. 1977). In *Coolidge v. New Hampshire,* 403 U.S. 443, 449-53 (1971), although applicable state law authorized the attorney general, who was actively in charge of the investigation and later was to be chief prosecutor at the trial, to issue a search warrant, the Court held that the practice violated the fourth amendment. In doing so, the Court refused to consider the state's contentions that the attorney general did, in fact, act as a neutral and detached magistrate and that the state's showing of probable cause was so substantial any magistrate would have issued the warrant in question. The Supreme Court also has held that, when a town justice authorized a search warrant and then accompanied the police in its execution and ordered certain items to be seized, it was "difficult to discern when he was acting as a 'neutral and detached' judicial officer and when he was one with the police and prosecutors. ..." *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 328 (1979). *See also Connally v. Georgia,* 429 U.S. 245 (1977).

b. FALSE STATEMENTS IN AFFIDAVIT

There is a presumption of the validity of the affidavit supporting a search warrant. If a defendant wishes to challenge the probable cause for a search warrant by claiming there were false statements in the affidavit supporting the warrant, he must make a substantial preliminary showing that: (1) the false statement was made knowingly and intentionally, or with reckless disregard for the truth; and (2) the allegedly false statement is necessary to the finding of probable cause. If the defendant establishes these two points, a hearing must be held. To mandate such a hearing, however, the attack must be more than

conclusory, and it must be supported by more than a mere desire to cross-examine. The defendant must point out specifically, with supporting reasons, the portion of the affidavit claimed to be false, accompanied by an offer of proof including affidavits or otherwise reliable statements of witnesses or a satisfactory explanation of their absence. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard can be only that of the affiant, not of any nongovernmental informant. Furthermore, no hearing will be held if the affidavit is still sufficient for probable cause without the false statement.

At the hearing, the defendant must establish by a preponderance of the evidence that a false statement, made knowingly and intentionally or with reckless disregard for the truth, is included in the affidavit. Then, only if the affidavit is insufficient to establish probable cause without the false material, will the search warrant be voided and the fruits of the search excluded. *Franks v. Delaware,* 438 U.S. 154 (1978); *U.S. v. Axselle,* 604 F.2d 1330 (10th Cir. 1979); *U.S. v. Licavoli,* 604 F.2d 613 (9th Cir. 1979); *U.S. v. House,* 604 F.2d 1135 (8th Cir. 1979); *U.S. v. Young Buffalo,* 591 F.2d 506 (9th Cir.), *cert. denied,* 99 S. Ct. 2178 (1979).

Ambiguity of statements does not constitute recklessness or an intent to deceive. *U.S. v. Lyon,* 567 F.2d 777 (8th Cir. 1977), *cert. denied,* 435 U.S. 918 (1978). Erroneous assumptions in an affidavit made by a federal agent from information he had received did not amount to reckless inclusion of false statements in his affidavit. *U.S. v. Smith,* 588 F.2d 737 (9th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979). An informant, whether paid or not, is not a government agent whose perjury would vitiate a search warrant so long as the affiant accurately represented what he was told. *U.S. v. Barnes,* 604 F.2d 121 (2d Cir. 1979); *U.S. v. Abramson,* 553 F.2d 1164 (8th Cir.), *cert. denied,* 433 U.S. 911 (1977).

2. PARTICULARITY OF DESCRIPTION

The fourth amendment requires that a search warrant "particularly" describe: (1) "the place to be searched," and (2) "the persons or things to be seized." General exploratory searches are forbidden. *Stanford v. Texas,* 379 U.S. 476 (1965). But the Supreme Court has interpreted this provision to require only that the description be "such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. U.S.,* 267 U.S. 498, 503 (1925). Thus, in *Steele,* where a building having two different addresses was used as one unit, a warrant listing one address was held sufficient to authorize a search of the entire building.

A "test for determining the sufficiency of the description of the places to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched." *U.S. v. Gitcho,* 601 F.2d 369 (8th Cir.), *cert. denied,* 100 S. Ct. 148 (1979); *Kenney v. U.S.,* 157 F.2d 442 (D.C. Cir. 1946). Where the address on the warrant is a building which contains a number of apartments but the name on the warrant enables the officers to determine which apartment is intended, the description has been held sufficient. *U.S. v. Campanile,* 516 F.2d 288 (2d Cir. 1975). Probable cause must be shown to search each specific apartment, however, and a warrant naming an entire building containing four apartments has been struck down. *U.S. v. Hinton,* 219 F.2d 324 (7th Cir. 1955).

On the other hand, the search of a two-unit building was upheld where the officers had reason to believe it was a single-family dwelling and upon discovering the separate occupancy ceased searching the second unit. *U.S. v. Davis*, 557 F.2d 1239 (8th Cir.), *cert. denied*, 434 U.S. 971 (1977). Also, a warrant directed to the "entire premises" was upheld even though the building was a rooming house, where there were no separate entrances, doorbells, mailboxes, or other indicia by which the police could reasonably know that the building was a multiple dwelling. *U.S. v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978). Specifying by mistake the wrong city in the body of a search warrant was not fatal where the correct address and city were listed in the affidavit and the caption of the search warrant. *U.S. v. Avarello*, 592 F.2d 1339 (5th Cir.), *cert. denied*, 100 S. Ct. 87 (1979).

The degree of specificity required for a warrant may vary depending upon the circumstances. It has been held that a warrant authorizing the search of persons and/or baggage being met at the airport by named person on specific date was sufficiently definite where the agent had probable cause to believe cocaine was being delivered, but could not ascertain the identities of persons arriving or get a description of the baggage. *U.S. v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978).

The items to be seized must be particularized. "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. U.S.*, 275 U.S. 192, 196 (1927). *Accord, Stanford v. Texas*, 379 U.S. 476, 486 (1965). Open-ended or general warrants are prohibited. Where the warrant specified two allegedly obscene films and also authorized seizure of similar items on the premises, it was held the warrant left it entirely to the officials conducting the search to decide what was obscene. The fact that the local justice participated in the search did not cure the warrant's defect. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). The particularity requirement was violated where the warrant authorized seizure of all records, including patient files, relating to fraudulent Medicare and Medicaid claims because there was no time limitation or description of the records to be seized and the agents—without guidance to distinguish *bona fide* records from fraudulent records—seized all of the records in the doctor's office. *U.S. v. Abrams*, 615 F.2d 541, 26 Cr. L. 2509 (1st Cir. 1980). Warrants were likewise defective where all illegal recordings were to be seized, without differentiating these from the rest of the inventory. *Montilla Records of Puerto Rico, Inc. v. Morales*, 575 F.2d 324 (1st Cir. 1978). *See also U.S. v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

The Court upheld the seizure of incriminating documents under a warrant containing a long list of particular items relating to Lot 13T followed by the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." *Andresen v. Maryland*, 427 U.S. 463 (1976). In that case, the Court said that it was not a general warrant, and in context authorized a search only for evidence relevant to the crime of false pretenses and Lot 13T. A warrant authorizing a search for evidence of various crimes "which facts recited in the accompanying [33-page] affidavit make out," has been upheld. *In Re Search Warrant Dated July 4, 1977, Etc.*, 572 F.2d 321, 326 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

A generic description may be used in a warrant where there is reason to believe a large collection of similar contraband is on the premises to be searched, and a method to differentiate contraband from the rest of the inventory is set out, *U.S. v. Cortellesso*, 601 F.2d 28 (1st Cir. 1979), or where more than a general description would be impossible as "white string, brown paper, corregated *(sic)* paper...." which were materials found in the vicinity of an explosion, *U.S. v. Davis*, 589 F.2d 904, 906 (5th Cir.), *cert. denied*, 99 S. Ct. 2178 (1979).

3. EXECUTION OF SEARCH WARRANT

a. WHO MAY EXECUTE WARRANT

Under Rule 41(c) of the Federal Rules of Criminal Procedure a search warrant shall be directed to a law enforcement officer. Pursuant to 18 U.S.C. §3105, it may be executed by: (1) the person to whom the warrant is directed, (2) any officer authorized by law to execute a search warrant, or (3) some other person aiding a person under (1) or (2) who is present and acting in execution of the warrant. Execution of a search warrant by an unauthorized person renders the search illegal. *U.S. v. Martin*, 600 F.2d 1175 (5th Cir. 1979).

Under 18 U.S.C. §3105, unnamed federal agents may aid other federal agents who are named in the warrant, *U.S. v. Hare*, 589 F.2d 1291 (6th Cir. 1979); state officers may participate with federal agents executing a federal warrant, *U.S. v. Echols*, 577 F.2d 308 (5th Cir.), *cert. denied*, 440 U.S. 939 (1979); *U.S. v. Lee*, 581 F.2d 1173 (6th Cir. 1978); and federal agents may assist state law enforcement officers in executing a state search warrant, *U.S. v. Martin*, 600 F.2d at 1182. However, a federal agent who has the time and probable cause to obtain a search warrant for explosives cannot validate his warrantless search for explosives by assisting a state narcotics officer who is searching for narcotics under a proper search warrant. These are two simultaneous but distinct searches. *U.S. v. Sanchez*, 509 F.2d 886 (6th Cir. 1975).

b. WHEN MUST SEARCH WARRANT BE EXECUTED

Rule 41(c) of the Federal Rules of Criminal Procedure further directs an officer to serve a warrant within 10 days and "in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." Rule 41(h), defines the term "daytime" as "the hours from 6 a.m. to 10 p.m. according to local time."

Searches which began at 8:12 p.m., *U.S. v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), and at 9 p.m., *U.S. v. Lustig*, 555 F.2d 737 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978), have been held to be daytime searches. A case, decided before Rule 41(h) defined "daytime" as 6 a.m. to 10 p.m., held that a search begun in the afternoon which continued after nightfall qualifies as a daytime search. *U.S. v. Joseph*, 278 F.2d 504 (3d Cir.), *cert. denied*, 364 U.S. 823 (1960).

Where a state judge did not explictly authorize a night search, but the warrant was issued at night and the preprinted forms stated and the issuing judge understood that it was to be executed immediately, it was held to be a permitted nighttime search within the requirements of Rule 41(c). *U.S. v. Sturgeon*, 501 F.2d 1270 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974). In similar circumstances, another circuit has disagreed with this holding, noting that Rule 41 requires an explicit authorization justified by reasonable cause for a night search; but, since this was a procedural matter rather than a constitutional right, in the circumstances of the particular case, that violation of the rule did not require suppression of the evidence. *U.S. v. Searp*, 586 F.2d 1117 (6th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979).

Pursuant to 21 U.S.C. §879, search warrants involving drug offenses require "no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time." *Gooding v. U.S.*, 416 U.S. 430, 458 (1974).

A search warrant has been sustained which was not served for nine days because the agents were waiting for the defendant to return to his apartment. They had information that he was using the apartment only as a plant to repackage heroin and wished to wait until he was at the apartment so that they could be sure that the alleged contraband was present. *U.S. v. Dunnings*, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970).

c. MANNER OF ENTRY TO SEARCH

An officer serving a search warrant at a house, absent exigent circumstances, must announce: (1) the authority under which he is acting, and (2) the purpose of his call. If he is refused admittance to the premises after such announcement, he may enter forcibly. 18 U.S.C. §3109; *U.S. v. Woodring*, 444 F.2d 749 (9th Cir. 1971). Merely opening an unlocked door is a forced entry. *Sabbath v. U.S.*, 391 U.S. 585 (1968). In *Miller v. U.S.*, 357 U.S. 301, 304 (1958), because "[t]hey did not expressly demand admission or state their purpose for their presence," an arrest was held unlawful when officers responded "police" in a low voice to the defendant's inquiry, "Who's there?," and then broke into his home when the defendant quickly attempted to close the door. All evidence seized as a result of the unlawful arrest was inadmissible.

Although 18 U.S.C. §3109 does not apply to warrants executed by state officers only, their conduct must be reasonable within the meaning of the fourth amendment, and "to some extent" the requirements of 18 U.S.C. §3109 "... have been incorporated into the Fourth Amendment." *U.S. v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *U.S. v. Valenzuela*, 596 F.2d 824 (9th Cir. 1979).

If the agent does announce his authority and purpose, exigent circumstances may justify his breaking-in, even though he has not been refused admittance, when the agent heard someone yell, "It's the cops," and running, where there was concern about destruction of evidence, *U.S. v. Carter*, 566 F.2d 1265, 1267-1268 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978); and the same reason many justify an entry simultaneously with the announcement of identity and purpose, *U.S. v. Jackson*, 585 F.2d 653 (4th Cir. 1978). But when the agents turned a door knob and plunged into the living room before they had intended to enter, and there were no exigent circumstances, the evidence was inadmissible. *U.S. v. Pratter*, 465 F.2d 227 (7th Cir. 1972).

Forcible entries without announcement of purpose and a refusal of admittance have been approved where: (1) there would be danger to the officer, (2) there would be danger of flight or destruction of evidence, (3) in situations where a victim or some other person is in peril, or (4) where it would be a "useless gesture" such as when the persons within already knew the officers authority and purpose. *U.S. v. Wylie*, 462 F.2d 1178 (D.C. Cir. 1972); *Ker v. California*, 374 U.S. 23, 39 (1963); *U.S. v. Artieri*, 491 F.2d 440 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974); *U.S. v. Mapp*, 476 F.2d 67, 75 (2d Cir. 1973); *U.S. v. Manning*, 448 F.2d 992, 1000-1002 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971).

In *U.S. v. Nicholas*, 319 F.2d 697, 698 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963), narcotics agents went to the defendant's apartment to arrest the defendant. When they informed his wife of their identity at the door she threw herself at one of the officers and screamed, "Police." The agents then entered the apartment, observed the defendant throw narcotics out of the window, and arrested him. The court held that "the agents had no opportunity to announce their purpose and

were justified in believing that [the wife] had jumped to the conclusion that the agents were present for the purpose of making an arrest, thus making an announcement a useless gesture." Notice has been held unnecessary where "arresting officers could be virtually certain that the person denying entrance knew their identity and purpose." *U.S. v. Singleton*, 439 F.2d 381, 385-386 (3d Cir. 1971).

If no one is present, it is not necessary to give notice, and the search can be conducted in the absence of the occupant. *U.S. v. Brown*, 556 F.2d 304 (5th Cir. 1977); *Payne v. U.S.*, 508 F.2d 1391 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975); *U.S. v. Gervato*, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973).

The requirement of announcement of authority and purpose has also been held inapplicable when the agent's entry was not forcible or was obtained with the consent of the occupant. A ruse may not violate §3109, *U.S. v. Beale*, 445 F.2d 977 (5th Cir. 1971), *cert. denied*, 404 U.S. 1026 (1972); *U.S. v. Syler*, 430 F.2d 68, 70 (7th Cir. 1970); entry through door opened by occupant may be proper, *Reyes v. U.S.*, 417 F.2d 916, 919 (9th Cir. 1969); *U.S. v. Marson*, 408 F.2d 644, 646-47 (4th Cir. 1968), *cert. denied*, 393 U.S. 1056 (1969). An officer who walked in past unaware defendant who unlocked door for another purpose did not "break" in, *U.S. v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966), *vacated per curiam on other grounds*, 390 U.S. 204 (1968).

In *U.S. v. Hutchinson*, 488 F.2d 484 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974), the court approved entry without announcement of authority or purpose where an undercover agent was first invited into a house to complete a narcotics transaction, subsequently left and returned with a search warrant and other agents. *See also U.S. v. Bradley*, 455 F.2d 1181 (1st Cir. 1972); *Lewis v. U.S.*, 385 U.S. 206 (1966).

In *Jones v. U.S.*, 304 F.2d 381 (D.C. Cir.), *cert. denied*, 371 U.S. 852 (1962), the court held that a search warrant was properly executed by narcotics agents and police officers, although the agents tricked the defendant by having the janitor announce himself at the door of the apartment. Upon the defendant opening the door three or four inches, one of the officers thrust his badge and search warrant through the opening and informed the defendant of the warrant. When the defendant ran, the officer pulled the door open, the night chain slipped off, and the officers entered and placed the defendant under arrest. *But see Wong Sun v. U.S.*, 371 U.S. 471, 482-84 (1963), in which the arrest was held improper since probable cause was partially based on the flight of defendant which occurred after officer first misrepresented his purpose and authority. Although eventually the officer did disclose his identity, it was said he "never adequately dispelled the misimpression engendered by his own use."

4. TELEPHONE SEARCH WARRANTS

Rule 41(c)(2) of the Federal Rules of Criminal Procedure provides for the issuance of a search warrant only by a federal magistrate based upon sworn oral testimony received from the government affiant, either by telephone or other appropriate means, when it is not reasonably practicable for the person to present a written affidavit. The Advisory Committee's Note suggests such circumstances would include delay that might result in the destruction or disappearance of property, the time of day when a warrant is sought, or the distance from the magistrate of the person seeking the warrant.

This provision contains a number of special, technical requirements. Although, it was held that the failure of the government agent to fill out the "duplicate original warrant" prior to his call to the magistrate was harmless procedural error, failure to administer the required oath "immediately" or in advance of the testimony given (even though the oath was given later in the telephone proceeding), rendered the search invalid because the Congressional purpose was to impress on the caller the "solemnity of the proceeding in spite of the lack of formal appearance before a court." *U.S. v. Shorter,* 600 F.2d 585, 588 (6th Cir. 1979).

B. WARRANTLESS SEARCHES

Searches that are not conducted pursuant to a valid warrant "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Katz v. U.S.,* 389 U.S. 347 (1967)...." *Mincey v. Arizona,* 437 U.S. 385, 390 (1978). Although the burden is on the defendant to go forward and prove that the search was warrantless, the burden is then on the government to prove by a preponderance of the evidence that the search comes within an exeption to the warrant requirement. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Lego v. Twomey,* 404 U.S. 477 (1972).

1. SEARCH INCIDENT TO VALID ARREST

A person validly arrested may be searched without a warrant. There does not need to be any indication that the person arrested possessed weapons or evidence. Although there must be probable cause for the arrest, probable cause for the search is not required. The lawful arrest, standing alone, authorizes a search. *Michigan v. De Fillippo,* 443 U.S. 31 (1979); *U.S. v. Robinson,* 414 U.S. 218 (1973); *Chimel v. California,* 395 U.S. 752 (1969); *U.S. v. Matthews,* 603 F.2d 48 (8th Cir. 1979).

a. VALIDITY OF THE ARREST

When a search is made incident to an arrest, the validity of the search depends upon the lawfulness of the arrest. If the arrest is illegal, the search pursuant to it will also be illegal, and any items seized will be inadmissible. *Henry v. U.S.,* 361 U.S. 98 (1959); *U.S. v. Bonds,* 422 F.2d 660 (8th Cir. 1970); *Riccardi v. Perini,* 417 F.2d 645 (6th Cir. 1969); *Jones v. Peyton,* 411 F.2d 857 (4th Cir.), *cert. denied,* 396 U.S. 942 (1969).

If an arrest is lawful under a presumptively valid ordinance, the search which follows is valid even though the ordinance is later declared unconstitutional. *Michigan v. DeFillippo,* 443 U.S. 31 (1979). If, however, the statute itself authorizes searches under circumstances which do not satisfy traditional warrant and probable cause requirements of the fourth amendment, evidence obtained pursuant to such searches will be suppressed. Thus, warrantless entry of a home to effect an arrest under authority of a statute authorizing officers to enter a private residence without a warrant to make a routine felony arrest is unconstitutional. *Payton v. New York,* 48 U.S.L.W. 4375 (1980). *See also Torres v. Puerto Rico,* 442 U.S. 465 (1979) (Puerto Rico statute authorizing baggage search of anyone arriving from the U.S.); *Almeida-Sanchez v. U.S.,* 413 U.S. 266 (1973) (statute authorized border patrol to search any vehicle within a "reasonable distance" of the border plus a regulation fixing 100 miles as "reasonable distance").

For a search incident to arrest to come within the exception to the warrant requirement, two factors must be present. First, the arresting officer must have the authority to make a valid arrest. Second, the arrest must be based on probable cause. *Sibron v. New York,* 392 U.S. 40, 62-63 (1968); *Aguilar v. Texas,* 378 U.S. 108 (1964); *Henry v. U.S.,* 361 U.S. 98, 100 (1959); *Brinegar v. U.S.,* 338 U.S. 160 (1949); *U.S. v. Fernandez-Guzman,* 577 F.2d 1093 (7th Cir.), *cert. denied,* 439 U.S. 954 (1978).

Federal statutes that authorize federal officers to make arrests generally, or under limitations, include the following: FBI agents, 18 U.S.C. §3052; United States Marshals, 18 U.S.C. §3053; Bureau of Prisons employees, 18 U.S.C. §3050 and 21 U.S.C. §878(2) and (3); Secret Service, 18 U.S.C. §3056; probation officers, 18 U.S.C. §3653; immigration officers and employees, 8 U.S.C. §1357; Postal Inspectors, 18 U.S.C. §3061; Treasury Department officers, 19 U.S.C. §1581(b); and State Department security officers, 22 U.S.C. §2667; Customs officers, 19 U.S.C. §1581 and 26 U.S.C. §7607; Internal Revenue enforcement officers, 26 U.S.C. §7608; Forest Service Employees, 16 U.S.C. §559; and Drug Enforcement Administration agents, 21 U.S.C. §878(2)-(3). Procedural requirements that govern arrests for federal offenses are found in Rule 5(a) of the Federal Rules of Criminal Procedure and 18 U.S.C. §3109.

In the absence of an applicable federal statute, the validity of an arrest for a federal offense without a warrant depends on the law of the state where the arrest takes place. *Ker v. California,* 374 U.S. 23, 34-37 (1963); *U.S. v. Di Re,* 332 U.S. 581, 589-590 (1948); *Montgomery v. U.S.,* 403 F.2d 605, 608 (8th Cir. 1968), *cert. denied,* 396 U.S. 859 (1969). State law determines the validity of an arrest without a warrant for violation of state law, subject to minimum standards required by the Constituion. *U.S. ex rel. LaBelle v. LaVallee,* 517 F.2d 750 (2d Cir. 1975), *cert denied,* 423 U.S. 1062 (1976); *Burks v. U.S.,* 287 F.2d 117 (9th Cir. 1961), *cert. denied,* 369 U.S. 841 (1962). *See Sibron v. New York,* 392 U.S. 40 (1968); *Terry v. Ohio,* 392 U.S. 1 (1968); *U.S. v. Lewis,* 362 F.2d 759, 761 (2d Cir. 1966). A search conducted incident to the valid arrest of a citizen comes within this exception to the warrant requirement. *U.S. v. Rosse,* 418 F.2d 38 (2d Cir. 1969), *cert. denied,* 397 U.S. 998 (1970); *U.S. v. Viale,* 312 F.2d 595, 599-601 (2d Cir.), *cert. denied,* 373 U.S. 903 (1963).

The arrest may not be justified by what is disclosed upon a subsequent search. If the arrest is unlawful at its inception, it remains so. If there is no probable cause for the arrest, the search is invalid. *Dunaway v. New York,* 442 U.S. 200 (1979); *Beck v. Ohio,* 379 U.S. 89 (1964); *Wong Sun v. U.S.,* 371 U.S. 471, 484 (1963); *U.S. v. Coker,* 599 F.2d 950 (10th Cir. 1979). Even if the arrest is lawful, there is authority for the proposition that the government cannot rely upon the arrest to seize evidence without a warrant if it long had probable cause to know that the evidence would be there and could easily have obtained a search warrant. *Niro v. U.S.,* 388 F.2d 535 (1st Cir. 1968).

When a search is made incident to an arrest, and the arrest is made inside the defendant's dwelling, the standards of 18 U.S.C. §3109 apply so as to require an announcement of authority and purpose prior to breaking and entering. *Sabbath v. U.S.,* 391 U.S. 585 (1968); *Miller v. U.S.,* 357 U.S. 301 (1958). These cases, however, are now limited to situations where exigent circumstances exist, as generally a warrant is required to forcibly enter a person's home to make an arrest. *Payton v. New York,* 48 U.S.L.W. 4375 (1980). But announcement of

purpose is not specifically required if certain exigent circumstances exist. *U.S. v. Artieri,* 491 F.2d 440 (2d Cir.), *cert. denied,* 417 U.S. 949 (1974); *U.S. v. Manning,* 448 F.2d 992, 1000-1002 (2d Cir.), *cert. denied,* 404 U.S. 995 (1971).

b. WHEN A PERSON IS UNDER ARREST

Once a suspect is taken into custody or otherwise deprived of his freedom of action in any significant way, he is "under arrest." *Henry v. U.S.,* 361 U.S. 98, 103 (1959). In *Henry,* after twice observing cartons being loaded into a car, FBI agents who were investigating theft of an interstate whiskey shipment stopped the car in which two persons were riding. A subsequent search of the car uncovered cartons of stolen radios, and defendants were then formally placed under arrest. The Court held that the arrest occurred when the agents stopped the car, stating that, when "the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete" and, finding that the officers did not have probable cause at that point, held the search illegal. *See also Dunaway v. New York,* 442 U.S. 200 (1979). An " 'arrest unsupported by probable cause [cannot] be saved by redesignating it an investigative stop.' " *U.S. v. Beck,* 598 F.2d 497, 501 n.3 (9th Cir. 1979).

An arrest is not determined by the subjective intent of the officers. *Taylor v. Arizona,* 471 F.2d 848 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973). More than a restriction of liberty is required, and courts will also consider the degree of force used in the stay and detention. *U.S. v. Beck,* 598 F.2d at 500-502. Whether there is an arrest depends upon an evaluation of all the circumstances. *U.S. v. Richards,* 500 F.2d 1025 (9th Cir. 1974), *cert. denied,* 420 U.S. 924 (1975). Cooperation with agents to allay suspicions does not constitute an arrest. *Oregon v. Mathiason,* 429 U.S. 492 (1977); *U.S. v. Chaffen,* 587 F.2d 920 (8th Cir. 1978); *U.S. v. Canales,* 572 F.2d 1182 (6th Cir. 1978). Where the defendant, "incapacitated by alcohol," was placed under temporary detention which was not an "arrest" under state law, there could be no search incident to an arrest; but police could make a routine inventory of defendant's belongings. *U.S. v. Gallop,* 606 F.2d 836 (9th Cir. 1979).

c. ARREST MUST BE MADE IN GOOD FAITH AND NOT AS A PRETEXT TO JUSTIFY SEARCH

Evidence seized in a search incident to an arrest without a warrant was suppressed because the court found that the officers' primary reason for going to the defendant's apartment was to make a search, noting that the manner in which officers were posted at the defendant's apartment was "inconsistent with a primary purpose of arrest." *U.S. v. Harris,* 321 F.2d 739, 742 (6th Cir. 1963). In addition, the court noted that one month earlier officers had made a similar search of the defendant's apartment, but released the defendant when no evidence of narcotics was found. *Id. See also U.S. v. Carriger,* 541 F.2d 545 (6th Cir. 1976). Where the arrest of a defendant on a traffic charge by narcotics officers was a pretext to search his automobile, the heroin seized was inadmissible. *Amador-Gonzalez v. U.S.,* 391 F.2d 308 (5th Cir. 1968). However, arrests which were delayed until defendants were inside a house were not a pretext for making a warrantless search of the premises under the circumstances of the case. *U.S. v. Woods,* 544 F.2d 242 (6th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977).

d. SEARCH MUST BE CONTEMPORANEOUS WITH ARREST

A search is incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Shipley v. California,* 395 U.S. 818, 819 (1969); *Von Cleef v. New Jersey,* 395 U.S. 814 (1969). The permitted purposes of the search are (1) to seize weapons to protect the arresting agents, (2) to prevent destruction of evidence, and (3) to prevent escape. *Chimel v. California,* 395 U.S. 752 (1969); *U.S. v. Chadwick,* 433 U.S. 1 (1977).

A search contemporaneous with an arrest is legal where there is probable cause for the arrest. *U.S. v. Costello,* 604 F.2d 589 (8th Cir. 1979). The warrantless search may be prior to the actual arrest, so long as there was probable cause for the arrest. *U.S. v. Chatman,* 573 F.2d 565 (9th Cir. 1977); *U.S. v. Jenkins,* 496 F.2d 57, 73 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1975); *Busby v. U.S.,* 296 F.2d 328 (9th Cir. 1961), *cert. denied,* 369 U.S. 876 (1962). However, the search may not be remote in time from the arrest. *U.S. v. Wyatt,* 561 F.2d 1388 (4th Cir. 1977).

A search "contemporaneous" with an arrest does not necessarily mean "simultaneous." It has been held that a search of a defendant's person and the property in his immediate possession, which could be made on the spot at the time of arrest, may be conducted legally later as a normal incident of incarceration when the accused arrived at the place of detention. *U.S. v. Castro,* 596 F.2d 674 (5th Cir.), *cert. denied,* 100 S. Ct. 448 (1979). A warrantless seizure of the jailed arrestee's clothing when substitute clothing first became available on the morning after an 11 p.m. arrest was held part of normal administrative process incident to an arrest. *U.S. v. Edwards,* 415 U.S. 800 (1974). Seizure of a jailed defendant's shoes six weeks after arrest was held proper as the defendant and his shoes were in custody from arrest until the shoes were taken for use as evidence. To require a warrant, it was said, "would be to require a useless and meaningless formality." *U.S. v. Oaxaca,* 569 F.2d 518, 524 (9th Cir.), *cert. denied,* 439 U.S. 926 (1978).

Instances where courts have held that a search was not contemporaneous with an arrest include: a search of defendant's apartment four days after he was arrested, *Mincey v. Arizona,* 437 U.S. 385 (1978); the search of a hotel room in California two days before an arrest in Nevada, *Stoner v. California,* 376 U.S. 483 (1964); the search of an office one hour after an arrest in a nearby elevator, *U.S. ex rel. Nickens v. LaVallee,* 391 F.2d 123 (2d Cir. 1968); a search of living quarters three hours after the related arrest, *U.S. ex rel. Clark v. Maroney,* 339 F.2d 710, 713-14 (3d Cir. 1965); a search of a car made several days after arrest, *Williams v. U.S.,* 323 F.2d 90, 94 (10th Cir. 1963), *cert. denied,* 376 U.S. 906 (1964).

e. SCOPE OF WARRANTLESS SEARCHES INCIDENT TO ARREST

Searches incident to arrest are for the purpose of protecting the arresting officers and preventing the destruction of evidence. As such, the scope of such a search is limited to the arrestee's person and the area within his immediate control, meaning "the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California,* 395 U.S. 752, 763 (1969); *U.S. v. Chadwick,* 433 U.S. 1 (1977).

(1) SEARCH OF THE PERSON

When there is a lawful arrest, the arrestee and everything worn by him may be searched. *U.S. v. Robinson,* 414 U.S. 218 (1973). This includes clothing, removal of which may be required for the search, *U.S. v. Edwards,* 415 U.S. 800 (1974), items in coat pockets, *U.S. v. Campbell,* 575 F.2d 505 (5th Cir. 1978); *U.S. v. Smith,* 565 F.2d 292 (4th Cir. 1977), and in pockets of pants after they have been removed, *U.S. v. Chatman,* 573 F.2d 565 (9th Cir. 1977).

A brief strip search, conducted without abuse and in a professional manner for a visual inspection of body surfaces to detect hidden evidence or objects which could be used to harm, is not unlawful. *U.S. v. Klein,* 522 F.2d 296 (1st Cir. 1975).

Body cavity searches have been found to be lawful, but there must be a "clear indication" that contraband is present in the cavity, *U.S. v. Rodriguez,* 592 F.2d 553 (9th Cir. 1979); *U.S. v. Mastberg,* 503 F.2d 465 (9th Cir. 1974); but a body cavity search, which was performed twice by two policewomen rather than skilled medical technicians on a defendant seven months pregnant, was held to violate due process, *U.S. ex rel. Guy v. McCauley,* 385 F. Supp. 193 (E.D. Wis. 1974). X-Ray examination and the use of force to prevent defendant from swallowing evidence have been held lawful. *U.S. v. Caldera,* 421 F.2d 152 (9th Cir. 1970).

(2) ARTICLES CARRIED BY ARRESTEE

Articles carried by an arrestee may be searched incident to a lawful arrest. These have included a purse, *U.S. v. Moreno,* 569 F.2d 1049 (9th Cir.), *cert. denied,* 435 U.S. 972 (1978), a wallet, *U.S. v. Castro,* 596 F.2d 674 (5th Cir. 1979), a camera and money, *U.S. v. Matthews,* 603 F.2d 48 (8th Cir. 1979), a briefcase, *U.S. v. Hayes,* 553 F.2d 824 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977), and hand-carried luggage, *U.S. v. Garcia,* 605 F.2d 349 (7th Cir. 1979).

However, if the control of an article such as a briefcase or luggage, has passed from the defendant to an arresting officer, a warrant will be required as there is no longer any danger that the arrestee will seize a weapon or destroy evidence therein. *U.S. v. Chadwick,* 433 U.S. 1, 15 (1977); *U.S. v. Schleis,* 582 F.2d 1166 (8th Cir. 1978); *U.S. v. Stevie,* 582 F.2d 1175 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 3102 (1979).

(3) AREAS WITHIN ARRESTEE'S IMMEDIATE CONTROL

A search incident to a lawful arrest may be made of areas within the arrestee's immediate control. These include the area under a mattress in a room where defendant was taken to get a shirt, *Watkins v. U.S.,* 564 F.2d 201 (6th Cir. 1977), *cert. denied,* 435 U.S. 976 (1978), the front seat of car occupied by defendant when arrested, *U.S. v. Regan,* 525 F.2d 1151 (8th Cir. 1975), a cabinet two to four feet from where a codefendant was lying on the floor, *U.S. v. Weaklem,* 517 F.2d 70 (9th Cir. 1975), a table in front of the defendants at the time they were arrested, *U.S. v. Artieri,* 491 F.2d 440 (2d Cir.), *cert. denied,* 419 U.S. 878 (1974), a bed and purse within reach of a companion of defendant who was arrested in a hotel room doorway, *U.S. v. Simmons,* 567 F.2d 314 (7th Cir. 1977), and a motel room, *U.S. v. Savage,* 564 F.2d 728 (5th Cir. 1977).

If an area is not within an arrestee's control or reach, or if he is handicapped or otherwise unable to retrieve weapons or evidence therein, the area may not be searched incident to the arrest without a warrant. *U.S. v. Neumann,* 585 F.2d 355

(8th Cir. 1978). Thus, the fruits of the search of a billfold in defendant's bedroom were suppressed where the defendant was shackled to a bed and the billfold was out of his reach. *U.S. v. Berenguer,* 562 F.2d 206 (2d Cir. 1977). *See also U.S. v. Jackson,* 576 F.2d 749 (8th Cir.), *cert. denied,* 439 U.S. 858 (1978).

Officers cannot allow a defendant to wander about an apartment and then search every room that he enters as a seach incident to an arrest. *U.S. v. Erwin,* 507 F.2d 937 (5th Cir. 1975). Arresting officers may not order the accused to dress and then not bring him his clothes, requiring him to move about the room as a pretext for searching beyond the area of defendant's immediate control. *U.S. v. Griffith,* 537 F.2d 900 (7th Cir. 1976). There is no justification for searching any room "other than that in which an arrest occurs," or searching "all the desk drawers" in that room. *Chimel v. California,* 395 U.S. 752, 763 (1969). Nor may a search of luggage be justified where the agent places it within the arrestee's reach at arrest. *U.S. v. Wright,* 577 F.2d 378 (6th Cir. 1978).

The testimony of a witness whose existence was discovered as a result of search of a file folder which was not in plain view and was beyond the area of defendant's immediate control was suppressed. *U.S. v. Scios,* 590 F.2d 956 (D.C. Cir. 1978).

2. "STOP AND FRISK"

A person who is stopped by a police officer is not necessarily under arrest even though his right to move at will is restricted for some period. The stop itself may violate constitutional protections, as do certain forcible seizures of possessions from a person so stopped.

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Supreme Court held that the police term "stop and frisk" is within the purview of the fourth amendment. The person, who is accosted by a police officer and who is denied the right to walk away, is a seized person. Such governmental intrusion into an individual's life passes constitutional muster only when the police officer's stop is based on specific, articulable facts, and the reasonable and logical inferences which flow from all that is known to the police officer before the stop occurs. *U.S. v. Roundtree,* 596 F.2d 672 (5th Cir.), *cert. denied,* 100 S. Ct. 149 (1979); *U.S. v. Smith,* 574 F.2d 882 (6th Cir. 1978) (drug courier profile characteristics, standing alone, held not enough to create reasonable suspicion to stop); *U.S. v. Cortez,* 595 F.2d 505 (9th Cir. 1979) (nothing occurring after the stop can be used to justify the stop); *U.S. v. Wylie,* 569 F.2d 62 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 944 (1978) (distinguishing between "contact" and a "stop"). A police officer's hunch does not justify even a minimal intrusion on freedom or a brief detention. The propriety of a stop is to be resolved by objective rather than subjective standards. *U.S. v. Constantine,* 567 F.2d 266 (4th Cir. 1977), *cert. denied,* 435 U.S. 926 (1978); *U.S. v. Oates,* 560 F.2d 45 (2d Cir. 1977).

The frisk, or partial search, consisting of a police officer's pat down of a person's outer garments, does not automatically follow a stop. A lawful stop and a frisk are not permissible simply because the right to stop existed. It must appear from the facts known to the officer before he conducts a pat down that there is a reasonable likelihood the restrained individual is armed and the officer's safety, therefore, is in jeopardy. *Terry v. Ohio,* 392 U.S. at 27; *Sibron v. New York,* 392 U.S. 40 (1968).

Stop and frisk principles apply with equal force to motorists and pedestrians. A tip to a police officer from a reliable informant that a parked motorist was

armed was held to justify the officer's seizure of the weapon after the motorist rolled down the vehicle window in response to the officer's request to open the car door. *Adams v. Williams*, 407 U.S. 143 (1972). Vehicle stops and the questioning of occupants at permanent border checkpoints are lawful without any individualized or articulable suspicion, *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); *U.S. v. Carroll*, 591 F.2d 1132 (5th Cir. 1979); and roadblock-type stops for all traffic are lawful, *Delaware v. Prouse*, 440 U.S. 648 (1979). A driver who is stopped for a traffic violation and ordered from his car is not a seized person, and observation of a bulge under the driver's jacket may justify a frisk. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). But random stops of vehicles, without reasonable suspicion, for the purpose of checking licenses are prohibited. Even authorized roving border patrols have no right to stop and question auto occupants without facts warranting reasonable suspicion that the vehicle passengers are aliens and then only relevant questions may be asked and, absent consent, no vehicle or occupant search may be conducted. *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

Because of the intrusive nature of the seizure and the severity of its consequences, the Supreme Court has refused to extend the reasonable suspicion standard for a stop and frisk to seizures of suspects for the purpose of subsequent station house interrogation. *Dunaway v. New York*, 442 U.S. 200 (1979). Even an individual in a high drug trafficking area who looked suspicious and who refused to produce identification could not lawfully be stopped and questioned. *Brown v. Texas*, 443 U.S. 47 (1979). If the stop is unlawful, no right to interrogate exists.

Examples of approved and rejected "stop and frisk" type encounters include: a justified stop where defendant volunteered a false statement, his companion constantly looked behind him, and a female companion tugged uncomfortably at her slacks, *U.S. v. Rico*, 594 F.2d 320 (2d Cir. 1979); a justified stop and frisk where defendants attempted to avoid observation of their faces, one had panty hose protruding from his hat, and the other was wearing a jacket on a warm night, *U.S. v. Bull*, 565 F.2d 869 (4th Cir. 1977), *cert. denied*, 435 U.S. 946 (1978); an unjustified frisk based on a police officer's observation of two men in an argument, *U.S. v. Hammack*, 604 F.2d 437 (5th Cir. 1979); a justified stop and questioning based on a DEA agent's personal knowledge of the person to whom drugs were supposed to be delivered, combined with defendant's arrival at the airport in conformity with an anonymous tipster's detailed statement, that defendant was carrying drugs, *U.S. v. Andrews*, 600. F.2d 563 (6th Cir.), *cert. denied*, 100 S. Ct. 166 (1979). A police officer was held to have acted illegally in stopping persons at random for the purpose of filling out a "field information report" and soliciting information about neighborhood gang fights. *U.S. v. Palmer*, 603 F.2d 1286 (8th Cir. 1979). Customs patrol officers who stopped a taxi containing three men, who four days earlier were cooperative and consented to an unproductive search, were held to have made an arrest and not a limited investigatory stop. *U.S. v. Beck*, 598 F.2d 497 (9th Cir. 1979). But police officers, who are told by a reliable informant that an escapee was attempting to purchase drugs and was driving an automobile parked nearby, were held to have acted reasonably in stopping the vehicle and making a routine check of the vehicle and the driver. *U.S. v. Pelley*, 572 F.2d 264 (10th Cir. 1978).

3. EXIGENT CIRCUMSTANCES THAT JUSTIFY A WARRANTLESS SEARCH

A warrantless search based upon probable cause, is permitted when there is some exigency or a compelling urgency for the protection of the police or the public, or to prevent the destruction of contraband or evidence.

a. OFFICERS RESPONDING TO EMERGENCY

The Supreme Court has said that warrantless entries and searches are permitted (1) when officers reasonably believe that someone is in immediate need of assistance, (2) to protect or to preserve life, or (3) to avoid serious injury. At such times the police may seize any evidence that is in plain view. *Mincey v. Arizona*, 437 U.S. 385, 392-393 (1978). Thus, in *Mincey*, the police could make a prompt, warrantless search to see if there were other victims or if a killer was on the premises, but were not permitted to make a warrantless, exhaustive four-day search of the premises. In *Michigan v. Tyler*, 436 U.S. 499 (1978), the Court said that an entry to fight a fire required no warrant and once in the building officials could remain for a reasonable time to seize evidence of arson that was in plain view and to investigate the causes of the fire. It was also permissible for the investigation which had been hindered at 4 a.m. by darkness, steam, and smoke, to resume without a warrant at 8 a.m. as a continuation of the original entry. Any additional entries, however, were deemed detached from the initial exigency, and a warrant was required.

Entry into a vessel to seek an explanation for, and possible victims of, an apparent nautical mishap, where a chart that led to marijuana cache was in plain view, was permissible under exigent circumstances. *U.S. v. Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). Entry into a mobile home by an officer, investigating the death of a minor child, who entered to see if any other children were present was also held proper for the same reason. *Sallie v. North Carolina*, 587 F.2d 636 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979).

Police may enter where they actually observe a crime in progress, and waiting 30 to 40 minutes does not dissipate this right when it would have taken about two hours to obtain search warrant. *U.S. v. Johnson*, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977). Also, officers may enter where it was necessary to secure a shotgun that had been used to threaten defendant's wife. *U.S. v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979).

However, exigent circumstances must be proved to justify a warrantless search, and they do not exist where officers have time to secure a warrant. *U.S. v. Houle*, 603 F.2d 1297 (8th Cir. 1979); *U.S. v. Martin*, 562 F.2d 673 (D.C. Cir. 1977); *U.S. v. Pacheco-Ruiz*, 549 F.2d 1204 (9th Cir. 1976). Forcibly seizing a sample of pubic hair from an inmate's person is not justified by exigent circumstances. *Bouse v. Bussey*, 573 F.2d 548 (9th Cir. 1977).

b. THREATENED DESTRUCTION OR REMOVAL OF CONTRABAND OR LIKELY ESCAPE OF SUSPECT

"The conclusion that evidence was probably being destroyed in the apartment not only contributes to the finding of probable cause to believe that evidence existed in the apartment, but also supplies the exigent circumstances necessary to justify a warrantless entry..." to preserve evidence. *U.S. v. Delguyd*, 542 F.2d 346, 351 (6th Cir. 1976). For example, warrantless entry and seizure of narcotics were permitted where after knocking, agents heard the sound of a toilet flushing, *U.S. v. Montiell*, 526 F.2d 1008 (2d Cir. 1975), where there was danger that cocaine would be flushed down a toilet, *U.S. v. Gardner*, 553 F.2d 946 (5th Cir. 1977),

cert. denied, 434 U.S. 1011 (1978), and where someone in a drug suspect's trailor yelled, "It's the cops," upon officer's approach, and running inside the trailor was heard, *U.S. v. Carter,* 566 F.2d 1265 (5th Cir.), *cert. denied,* 436 U.S. 956 (1978). Where agents located the house from which there was a strong odor of ether used to manufacture methamphetamine, the suspected manufacturer had arrived earlier than agents anticipated, and the agents concluded that delay in obtaining warrant would result in possible removal of contraband and explosion from chemicals, an immediate entry and search were justified. *U.S. v. Erb,* 596 F.2d 412 (10th Cir.), *cert. denied,* 100 S. Ct. 97 (1979). *See also U.S. v. Edwards,* 602 F.2d 458 (1st Cir. 1979); *U.S. v. Botero,* 589 F.2d 430 (9th Cir.), *cert. denied,* 441 U.S. 944 (1979); *U.S. v. Glasby,* 576 F.2d 734 (7th Cir. 1978); *U.S. v. James,* 555 F.2d 992 (D.C. Cir. 1977); *U.S. v. Shima,* 545 F.2d 1026 (5th Cir.), *aff'd per curiam en banc,* 560 F.2d 1287 (1977).

Probable cause to believe that contraband is in a hotel room is not sufficient for a warrantless entry where the agents had "little reason to suspect" that any evidence would be destroyed. *U.S. v. Allard,* 600 F.2d 1301 (9th Cir. 1979). A court has also found no exigent circumstances justifying a warrantless opening of a suitcase where four agents had three suspects at bay in a well lighted motel room. *U.S. v. Montano,* 613 F.2d 147 (6th Cir. 1980).

Where there is a risk that occupants of a house may escape absent immediate action, police may enter without a warrant to make an arrest. *U.S. v. Campbell,* 581 F.2d 22 (2d Cir. 1978); *U.S. v. Flickinger,* 573 F.2d 1349 (9th Cir.), *cert. denied,* 439 U.S. 836 (1978). And police may make a "protective sweep" search of a house in front of which defendant was arrested where police had reason to fear that there might be an armed accomplice in the house observing defendant's arrest. *U.S. v. Baker,* 577 F.2d 1147 (4th Cir.), *cert. denied,* 439 U.S. 850 (1978). Likewise, where an accomplice cooperating with the government delivered to the defendant a suitcase containing drugs and a beeper, the defendant was observed leaving his house driving at a high rate of speed, he was stopped, and it was discovered the suitcase was not present and the beeper was not working, it was held proper for the agents to make a "protective sweep" of the house to look for accomplices officers thought might be in the house and who might destroy the evidence. It was also held lawful to secure the premises while a search warrant was obtained, which was based in part on items seen in plain view during the protective sweep. Even though there were no accomplices and no immediate danger of destruction of evidence, securing the premises while obtaining a warrant is a matter of reasonableness to be judged at the time of making the decision to search, not in hindsight. *U.S. v. Korman,* 614 F.2d 541 (6th Cir. 1980). *See also U.S. v. Young,* 553 F.2d 1132 (8th Cir.), *cert. denied,* 431 U.S. 959 (1977).

c. "HOT PURSUIT"

A warrantless search, where (1) there is probable cause to arrest, (2) there is probable cause to believe the suspect is in particular premises, and (3) there is an urgent need for immediate police action because delay would increase the risk of harm or escape, has been approved under the "hot pursuit" exception to the fourth amendment warrant requirement. *U.S. v. Brightwell,* 563 F.2d 569, 574 (3d Cir. 1977), *cert. denied,* 439 U.S. 849 (1978); *U.S. v. Gaultney,* 581 F.2d 1137 (5th Cir. 1978); *U.S. v. Oaxaca,* 569 F.2d 518 (9th Cir.), *cert. denied,* 439 U.S. 926 (1978). In *Brightwell, supra,* however, the court held that the hot pursuit exception

did not apply because there was not probable cause to arrest Brightwell before the search or an urgent need when the house was surrounded.

In *Warden v. Hayden,* 387 U.S. 294 (1967), the Court held where officers were in pursuit of an armed suspect whom two cab drivers had seen enter a house only minutes before, warrantless entry and search were permitted by the exigencies of the situation. Where a suspect retreated into her house from the doorway where an arrest was initiated, it was held she could not avoid arrest by moving to a private place. That the pursuit ended almost as soon as it began did not make it less a "hot pursuit" sufficient to justify warrantless entry into her house. *U.S. v. Santana,* 427 U.S. 38 (1976). Where a car connected with a robbery occurring 40 minutes earlier was found in an apartment house parking lot, although there was not probable cause to search each apartment, when six of the seven apartments were searched without result, it was held that the officers then had probable cause to believe the fugitives were in the seventh apartment and the exigencies of hot pursuit existed so that a warrantless search was proper. *U.S. v. Scott,* 520 F.2d 697 (9th Cir. 1975), *cert. denied,* 423 U.S. 1056 (1976).

4. VEHICLE SEARCHES

Where there is (1) probable cause to believe that a vehicle on the highway contains contraband, and (2) when there are exigent circumstances, such as where the car can be moved, a warrantless search of the vehicle is permitted under circumstances that would not be considered reasonable in other contexts. *U.S. v. Chadwick,* 433 U.S. 1 (1977); *Carroll v. U.S.,* 267 U.S. 132 (1925); *U.S. v. Smith,* 595 F.2d 1176 (9th Cir. 1979); *U.S. v. Alden,* 576 F.2d 772 (8th Cir.), *cert. denied,* 439 U.S. 855 (1978); *U.S. v. Moreno,* 569 F.2d 1049 (9th Cir.), *cert. denied,* 435 U.S. 972 (1978). This "moving vehicle" exception includes aircraft, *U.S. v. Flickinger,* 573 F.2d 1349 (9th Cir.), *cert. denied,* 439 U.S. 836 (1978), and vessels, *U.S. v. Miller,* 589 F.2d 1117 (1st Cir. 1978), *cert. denied,* 440 U.S. 958 (1979); *U.S. v. Weinrich,* 586 F.2d 481 (5th Cir. 1978), *cert. denied,* 441 U.S. 927 (1979).

The Supreme Court has stated that there are two reasons for this exception: (1) the "inherent mobility of automobiles creates such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible"; and (2) the "expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office" in that automobiles travel public thoroughfares with their occupants in plain view and in the interest of public safety there are extensive regulations and inspections of automobiles, and they are frequently taken into custody. *Arkansas v. Sanders,* 442 U.S. 753 (1979); *South Dakota v. Opperman,* 428 U.S. 364, 367-372 (1976); *Cady v. Dombrowski,* 413 U.S. 433 (1973).

Because there is significantly less expectation of privacy in an automobile than one's home or office, "the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction." *South Dakota v. Opperman,* 428 U.S. at 367, citing *Chambers v. Maroney,* 399 U.S. 42 (1970), and *Cooper v. California,* 386 U.S. 58 (1967), both cases in which the car was moved to a police station where the warrantless search took place (in the *Cooper* case a week after the car was impounded). *See also Texas v. White,* 423 U.S. 67 (1975).

However, noting that the "word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappers," the Supreme Court held in *Coolidge v. New Hampshire,* 403 U.S. 443, 461-462 (1971), that where the

defendant had known for some time he was a suspect and had time to destroy any evidence and where his car was guarded at the time of arrest and then impounded, there was no right to search his car as incident to an arrest. The Court said that the holdings in *Carroll v. U.S.* and *Chambers v. Maroney* were not applicable.

a. INVENTORY SEARCHES OF VEHICLES

The courts have held "inventory" searches of impounded automobiles without probable cause are reasonable where the purpose is not investigative but (1) to protect the police or the public from potential danger, (2) for protection of the police against claims of lost property, or (3) for protection of the owner's property while it is in police custody. A search following standard inventory procedures where marijuana was discovered in a closed glove compartment of a locked car that had been impounded for parking violations has been held proper. *South Dakota v. Opperman,* 428 U.S. 364 (1976). Likewise, searches of cars held for forfeiture have been approved. *Cooper v. California,* 386 U.S. 58 (1967); *U.S. v. One 1972 Chevrolet Nova,* 560 F.2d 464 (1st Cir. 1977). *See also U.S. v. Cromer,* 598 F.2d 738 (2d Cir. 1979); *U.S. v. Fossler,* 597 F.2d 478 (5th Cir. 1979); *U.S. v. Stocks,* 594 F.2d 113 (5th Cir. 1979); *U.S. v. Piatt,* 576 F.2d 659 (5th Cir. 1978).

An on-the-scene inventory of the interior and trunk of an automobile has been approved after the occupants were out of the car and arrested, *U.S. v. Prescott,* 599 F.2d 103 (5th Cir. 1979); *U.S. v. Finnegan,* 568 F.2d 637 (9th Cir. 1977), *U.S. v. Martin,* 566 F.2d 1143 (10th Cir. 1977); *U.S. v. Wade,* 564 F.2d 676 (5th Cir. 1977); and, under the circumstances of one case, lifting a loose flap of carpet, under which there were stolen checks, was held proper as part of an inventory search, *U.S. v. Edwards,* 577 F.2d 883 (5th Cir. 1978) *(en banc), cert. denied,* 439 U.S. 968 (1978).

Search of an automobile trunk at the scene has also been approved, not as an inventory search, but because there is a question whether an immediate warrantless search is a "greater" or "lesser" intrusion than holding the car until a magistrate authorizes a search warrant. "Given probable cause to search, either course is reasonable under the Fourth Amendment." *U.S. v. Hawkins,* 595 F.2d 751, 753 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 910 (1979), quoting *Chambers v. Maroney,* 399 U.S. 42 (1970), which upheld a warrantless search even though the automobile had been removed to the police station. *See also U.S. v. Newbourn,* 600 F.2d 452 (4th Cir. 1979).

b. SEARCHES OF CONTAINERS FOUND IN VEHICLE

Warrantless searches of containers found in vehicles are considerably more restricted than those of the vehicle itself. "Unlike an automobile whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *U.S. v. Chadwick,* 433 U.S. 1, 13 (1977). A search warrant was required for a search of a double-locked footlocker seized from the trunk of an automobile where there were no exigent circumstances and it was in the control of federal agents in the federal building. Likewise, a warrant was required to open and search suitcases seized from the rear of an arrestee's station wagon, *U.S. v. Stevie,* 582 F.2d 1175 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 3102 (1979); search of an unlocked suitcase lawfully taken from an automobile required a warrant absent exigent circumstances even though there was probable cause to

believe it contained contraband, *Arkansas v. Sanders,* 442 U.S. 753 (1979); and it was held that a knapsack discovered during an inventory search of a defendant's automobile should have been inventoried as a unit rather than opening and itemizing the contents where the knapsack was tightly sealed and there was no danger of anything slipping out, *U.S. v. Bloomfield,* 594 F.2d 1200 (8th Cir. 1979).

However, merely lifting a lid off an unsecured cardboard box in plain view on the automobile floor was approved as an inventory search in *U.S. v. Neumann,* 585 F.2d 355 (8th Cir. 1978). And, where the police had a warrant to search a car for a sawed-off shotgun, an additional warrant was not needed to search personal luggage in the car. Such a requirement would have been "inconsistent with practicality." *U.S. v. Kralik,* 611 F.2d 343 (10th Cir. 1979).

5. EVIDENCE IN PLAIN VIEW

Seizable items, including contraband, evidence of a crime, dangerous properties, and stolen objects that inadvertently come into the view of a lawfully searching police officer may be retained and used as evidence of the criminal conduct to which they relate. If a law officer (1) has a right to be where he is, prying into hidden places likely to contain the property he seeks, and (2) inadvertently comes upon (3) immediately recognized (4) incriminating evidence, he may seize it even though the evidence is wholly unrelated to the offense which justified the search. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

In the view of the Sixth Circuit, this plain view doctrine is the "wasted motion" exception to the warrant requirement. *U.S. v. Rodriguez,* 596 F.2d 169 (6th Cir. 1979). In principle, the circuits agree that the reasons for, and the tests required by, the plain view exception to warrant requirements are constitutionally proper. *U.S. v. Ochs,* 595 F.2d 1247 (2d Cir.), *cert. denied,* 100 S. Ct. 435 (1979); *U.S. v. Roach,* 590 F.2d 181 (5th Cir. 1979); *U.S. v. Rizzo,* 583 F.2d 907 (7th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979); *U.S. v. Blalock,* 578 F.2d 245 (9th Cir. 1978); *U.S. v. Jackson,* 576 F.2d 749 (8th Cir.), *cert. denied,* 439 U.S. 558 (1978).

Inadvertent, however, does not mean unexpected. An "inadvertent" discovery occurs when an officer does not have probable cause to believe that he will find a specific item at a particular place until he actually sees it. *U.S. v. Liberti,* ____ F.2d ____, 48 U.S.L.W. 2555 (2d Cir. 1980); *U.S. v. Hare,* 589 F.2d 1291 (6th Cir. 1979). *But see U.S. v. Rizzo,* 583 F.2d at 910, in which police officers' seeing of a cassette was referred to as "unanticipated," and it was held seizable under the plain view rule. *Compare U.S. v. Bolts,* 558 F.2d 316 (5th Cir.), *cert. denied,* 439 U.S. 898 (1978), in which the court held the inadvertent condition was nonetheless satisfied even though officers expected to find certain evidence when they entered the defendant's residence to execute an arrest warrant. *See also U.S. v. Diaz,* 577 F.2d 821 (2d Cir. 1978), in which a DEA agent looked into the tank of a continuously-running toilet to remedy the problem and inadvertently discovered $14,000 in currency in a large paper bag.

The changing of darkness into light by an officer's use of a flashlight, match, or any other means of illumination, does not violate the "inadvertent" requirement of the plain view doctrine. *U.S. v. Lee,* 274 U.S. 559 (1927); *U.S. v. Pugh,* 566 F.2d 626 (8th Cir. 1977), *cert. denied,* 435 U.S. 1010 (1978). Similarly, the use of sensing aids, as a magnifying glass, binoculars, or infra-red lamps, does not taint plain view observation. *U.S. v. Thomas,* 551 F.2d 347 (D.C. Cir. 1976); *U.S. v. Coplen,* 541 F.2d 211 (9th Cir. 1976), *cert. denied,* 429 U.S. 1073 (1977); *U.S. v. Johnson,* 506 F.2d 674 (8th Cir. 1974), *cert. denied,* 421 U.S. 917 (1975). However,

attempts to create a plain view or open view exception to the warrant requirement for initial entry have been rejected. For example, officers, recognizing a strong odor of burning opium, who entered a residence when a door was opened after their knock and then placed the occupant under arrest, were held to have acted unlawfully, *Johnson v. U.S.*, 333 U.S. 10 (1948); recognition of a strong odor of mash did not justify warrantless entry into a residence; but when police officers are rightfully in or on a premises, then all that is perceived by the five senses is at once known by an officer to be contraband is in his plain view and is seizable as evidence of a crime, whether related to the purpose for the original entry, *Chapman v. U.S.*, 365 U.S. 610 (1961); plain hearing, *U.S. v. Lopez*, 475 F.2d 537 (7th Cir.), *cert. denied*, 414 U.S. 839 (1973); plain smell, *U.S. v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); plain touch, *U.S. v. Mulligan*, 488 F.2d 732 (9th Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).

Vehicles are also covered by the plain view exception. A traffic violation stop that permitted the police officer to see a weapon and ammunition of a different caliber allowed seizure of both items and a search of the vehicle for another weapon, *U.S. v. Prescott*, 599 F.2d 103 (5th Cir. 1979); a police officer who had stopped a motorist for speeding saw him attempting to stuff cash into the glove compartment and who also noticed a gun case on the vehicle floor, was held justified in seizing the property and thoroughly searching the car, *U.S. v. Finnegan*, 568 F.2d 637 (9th Cir. 1977); warrantless, emergency entry into a mobile home was held to allow seizure of evidence of a crime that was in plain view, *Sallie v. North Carolina*, 587 F.2d 636 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979).

a. ABANDONED PROPERTY

One cannot successfully challenge the search of a premises and seizure of objects he has voluntarily abandoned. *Abel v. U.S.*, 362 U.S. 217 (1960) (a guest who surrendered a hotel room would not be heard to complain when it was entered with management permission by officers who seized property left behind). *See also U.S. v. Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *U.S. v. Savage*, 564 F.2d 728 (5th Cir. 1977), holding that there was nothing unlawful in entering a yacht of unknown origin, abandoned at another's mooring, and seizing a chart in plain view on the floor. However, the abandonment cannot be precipitated by unlawful police action. *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968) (jewelry that was thrown out of a window as a direct result of a police officer, who without either a warrant or probable cause, kicking in a hotel room door was held not to have been abandoned); *U.S. v. Garcia*, 605 F.2d 349 (7th Cir. 1979).

Garbage or trash is generally considered abandoned property when it is set out for collection, *U.S. v. Mustone*, 469 F.2d 970 (1st Cir. 1972); but an apartment dweller who mingles his trash with others in the building abandons it before the collection process commences, *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976). A partially burned pile of trash a short distance from a residence is also abandoned property, and a piece of cardboard removed therefrom which listed radio scanning channels was held not suppressible. *U.S. v. Alden*, 576 F.2d 772 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978).

b. THE OPEN FIELDS DOCTRINE

It had long been held that the curtilage of a residence was an area protected by the fourth amendment. Curtilage was defined as the enclosed space of grounds

and buildings immediately surrounding a dwelling house. *Hesler v. U.S.*, 265 U.S. 57 (1924); *Care v. U.S.*, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956) (search of a plum thicket, one-half mile from the residence and of a cave in a plowed field across the road, more than a city block from the residence, was held not a trespass upon the curtilage); *U.S. v. Hassell*, 336 F.2d 684 (6th Cir. 1964), *cert. denied*, 380 U.S. 965 (1965) (search in an area 250 yards from defendant's residence and in a barn area was held an open fields search, and seized materials were admissible in evidence).

The older cases centered upon particular locations and specific places that were protected by the fourth amendment. Since *Katz v. U.S.*, 389 U.S. 347 (1967), shifted the focus of the fourth amendment application from protected areas to an individual's expectation of privacy, however, the test now is whether the resident seeks to preserve as private an area about, adjacent to, or remote from his residence. *Wattenbrug v. U.S.*, 388 F.2d 853 (9th Cir. 1968) (a Christmas tree stockpile 20 to 35 feet from a lodge and five feet from a parking lot used by lodge members and patrons, was held a private area in which defendant had a reasonable expectation of privacy).

6. ANTI-SKYJACKING SEARCHES

Courts have almost universally permitted warrantless searches without probable cause of air passengers and baggage to discover weapons and prevent air piracy. The theories for such holdings have differed widely.

Implied consent has been used by a number of circuits. Generally, there is a sign advising that all passengers and baggage are subject to search. A baggage search and a pat-down search have been approved where the passenger could elect not to be searched by deciding not to board the aircraft. *Singleton v. Commissioner*, 606 F.2d 50 (3d Cir. 1979); *U.S. v. Freeland*, 562 F.2d 383 (6th Cir.), *cert. denied*, 434 U.S. 957 (1977). And, where the defendant had stated he would not take the flight rather than permit physical insepction of his briefcase that could not adequately be inspected by X-ray, and the briefcase was opened, nevertheless, revealing marijuana and hashish, one court has held that, after having consented to the search, the defendant could not then withhold permission, once the first step in the process disclosed he was carrying articles concealed from the X-ray. *U.S. v. DeAngelo*, 584 F.2d 46 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

Some cases have held that searches of baggage by airline personnel, even when viewed by an officer, are private searches and therefore not within the scope of the fourth amendment. A factor in these cases is that the search or the particular type of search conducted was not specifically required by federal regulations. *U.S. v. Keuylian*, 602 F.2d 1033 (2d Cir. 1979); *U.S. v. Gumerlock*, 590 F.2d 794 (9th Cir.) *(en banc), cert. denied*, 441 U.S. 948 (1979).

Other cases have held that, when a passenger fits the FAA anti-skyjacking profile, usually followed by an activation of the magnetometer which detects the presence of metal objects, there is a "reasonable belief" that he may have a weapon and therefore a "frisk" within the *Terry v. Ohio* test is permitted. *U.S. v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). In *U.S. v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973), however, the same circuit held, based on the facts of that case, there was not "reasonable suspicion," and the search was illegal. Another circuit has used the *Terry* rationale, even where the magnetometer was not activated but there was other suspicious activity, because the situation

"involved a necessarily swift action predicated upon on-the-spot observations of a law enforcement officer which could not be 'subjected to the warrant procedure.' " *U.S. v. Homburg*, 546 F.2d 1350, 1352 (9th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977). *See also U.S. v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

One circuit has applied the "plain view" test to approve a search which was initially a private search by an airfreight employee who then called the police. The officer looked into the opened box and saw what looked like narcotics. *U.S. v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979).

7. BORDER AND CUSTOMS SEARCHES

Border searches and customs searches are "a long-standing, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained," and such searches without a warrant and without probable cause are reasonable within the meaning of the fourth amendment. *U.S. v. Ramsey*, 431 U.S. 606, 621 (1977); *U.S. v. Grayson*, 597 F.2d 1225 (9th Cir.), *cert. denied*, 100 S. Ct. 157 (1979). Border searches are distinct from searches of those lawfully within the country. At the border one can reasonably be searched so as to exclude illegal aliens and contraband from the county. *U.S. v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Carroll v. U.S.*, 267 U.S. 132 (1925). The border-search exception applies to incoming international mail. *U.S. v. Ramsey*, 431 U.S. at 623-625. The exception may also be applied to the functional equivalent of the border, such as a permanent checkpoint some distance from the actual border, *U.S. v. Warren*, 594 F.2d 1046 (5th Cir. 1979), to baggage arriving from outside the country in an airport customs area, *U.S. v. Scheer*, 600 F.2d 5 (3d Cir. 1979), to a nonstop flight from a foreign country to an inland city, *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 273 (1973), and to a foreign package or camper inspected at inland city where addressed rather than original port of entry, *U.S. v. Lowe*, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978); *U.S. v. Gallagher*, 557 F.2d 1041 (4th Cir.), *cert. denied*, 434 U.S. 870 (1977). These principles apply also to vessels entering coastal waterways. *U.S. v. Kleinschmidt*, 596 F.2d 133 (5th Cir.), *cert. denied*, 100 S. Ct. 267 (1979); *U.S. v. Whitmire*, 595 F.2d 1303 (5th Cir. 1979). But sighting a vessel headed toward the Bahamas three days before it docked in the United States was held to be too remote to establish "articulable facts" to believe reasonably that the vessel came from international waters. *U.S. v. Acosta*, ——— F. Supp. ———, 27 Cr. L. 2100 (S.D. Fla. 1980).

Under the authority of a section of the Immigration and Nationality Act, 8 U.S.C. §1357(a)(3), which provides for such searches a "reasonable distance" from a border, roving border patrols are permitted to stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, even without probable cause to believe that the cars have crossed the border. The Supreme Court has held, however, that such searches are constitutionally prohibited when the distance is 20 to 25 miles from the border, as that is neither the border nor its functional equivalent. *Almeida-Sanchez v. U.S.*, 413 U.S. at 273. But, one circuit has held *Almeida-Sanchez* does not apply to an "extended border search" that took place four miles from the border and seven hours after the observed border crossing where the delay was to "confirm developing suspicion" and the customs officers had reasonable suspicion that they would find illegally imported materials. *U.S. v. Bilir*, 592 F.2d 735 (4th Cir. 1979). Except at the border, or its functional equivalent, a roving border patrol may stop a vehicle

and question its occupants concerning citizenship and immigration status only if the officer has a "reasonable suspicion" that they may be aliens, and any further detention or a search must be based on consent or probable cause. *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975). Reasonable suspicion to stop a vehicle means that it is based on objective or articulable facts. *U.S. v. Kenney*, 601 F.2d 211 (5th Cir. 1979); *U.S. v. Ballard*, 600 F.2d 1115 (5th Cir. 1979).

Unlike a stop by a roving patrol, a stop at a permanent checkpoint away from the border for brief questioning upon reasonable suspicion has been upheld as less arbitrary and intrusive. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976). However, either probable cause or consent is needed to search at such a checkpoint. *U.S. v. Ortiz*, 422 U.S. 891 (1975).

8. PRISON SEARCHES

The need to maintain prison security and discipline provides the basis for dispensing with the warrant and probable cause requirements when searching a prisoner's cell, *U.S. v. Palmateer*, 469 F.2d 273 (9th Cir. 1972); *U.S. v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); or when electronically monitoring his conversation with a visitor, *Lanza v. New York*, 370 U.S. 139 (1962), or his telephone conversation, *U.S. v. Paul*, 614 F.2d 115 (6th Cir. 1980). "[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. New York*, 370 U.S. at 143. The warrantless monitoring of a conversation is not permitted, however, if it involves a "special relationship" which the law has traditionally endowed with confidentiality, such as the attorney-client relationship. *Id.* at 144.

A body cavity search of a prisoner who left the prison daily for a school program was prohibited where the "highly intrusive and humiliating" search was found to be unreasonable under the circumstances because she had no notice that her voluntary absences would subject her to such a search. The court said, however, it was not holding that notice was required in every fact situation. *U.S. v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978).

9. CONSENT SEARCHES

Another exception to the fourth amendment warrant requirement is the consent search. A valid search of premises may be made without a warrant and without probable cause if the person in control thereof has given his voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *U.S. v. Petty*, 601 F.2d 883 (5th Cir. 1979); *U.S. v. Price*, 599 F.2d 494 (2d Cir. 1979); *U.S. v. Stanley*, 597 F.2d 866 (4th Cir. 1979); *U.S. v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979); *U.S. v. Scott*, 590 F.2d 531 (3d Cir. 1979); *U.S. v. Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *U.S. v. DiGiacomo*, 579 F.2d 1211 (10th Cir. 1978); *U.S. v. Glasby*, 576 F.2d 734 (7th Cir.), *cert. denied*, 439 U.S. 854 (1978); *U.S. v. Sumlin*, 567 F.2d 684 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *U.S. v. Frazier*, 560 F.2d 884 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *U.S. v. Tolias*, 548 F.2d 277 (9th Cir. 1977). Consent, however, is not lightly inferred. *U.S. v. Patacchia*, 602 F.2d 218 (9th Cir. 1979). Whether voluntary consent to search has been given is a fact question for the court, *U.S. v. Scott*, 578 F.2d 1186 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); and in making that decision the court must examine the totality of the circumstances, *Schneckloth v. Bustamonte*, 412 U.S. at 238; *U.S. v. Lopez*, 581 F.2d 1338 (9th Cir. 1978); *U.S. v. Shields*, 573 F.2d 18 (10th Cir. 1978); *U.S. v. McCaleb*, 552 F.2d 717 (6th Cir.

1977); *U.S. v. Ellis,* 547 F.2d 863 (5th Cir. 1977). The burden is on the government to prove that consent was voluntary. *U.S. v. Price, supra; U.S. v. Scott,* 578 F.2d 1186 (6th Cir.), *cert. denied,* 439 U.S. 870 (1978); *U.S. v. Glasby, supra; U.S. v. Juarez,* 573 F.2d 267 (5th Cir.), *cert. denied,* 439 U.S. 915 (1978). It has been held that the government's proof of consent must be " 'clear and positive.' " *U.S. v. McCaleb,* 552 F.2d at 721.

The Supreme Court has identified factors relevant in assessing the voluntariness of consent: the age of the person, his education and intelligence, his mental and physical condition at the time, whether he is under arrest, the length and nature of other interrogation, and whether he has been advised of his right to refuse to consent. *Schneckloth v. Bustamonte,* 412 U.S. at 226. However, no single factor will determine the voluntariness of consent. The Supreme Court has held that failure to inform the person of his right to refuse consent does not necessarily make consent involuntary. *Schneckloth v. Bustamonte, supra. See also U.S. v. Matthews,* 603 F.2d 48 (8th Cir. 1979); *U.S. v. Scott,* 590 F.2d 531 (3d Cir. 1979); *U.S. v. Juarez,* 573 F.2d at 274. Nor is consent obtained after a person has been arrested and placed in custody necessarily involuntary. *U.S. v. Watson,* 423 U.S. 411 (1976); *U.S. v. Vasquez-Santiago,* 602 F.2d 1069 (2d Cir. 1979); *U.S. v. Frazier, supra; U.S. v. Tolias, supra.* It has been held, however, when trying to establish that there was voluntary consent after an illegal stop, the test is stricter than when consent is given after a permissible stop. *U.S. v. Ballard,* 573 F.2d 913, 916 (5th Cir. 1978).

Consent can be given voluntarily even though *Miranda* warnings have not been given. *U.S. v. Tobin,* 576 F.2d 687 (5th Cir.), *cert. denied,* 439 U.S. 1051 (1978); *U.S. v. Hall,* 565 F.2d 917 (5th Cir. 1978); *U.S. v. Lemon,* 550 F.2d 467 (9th Cir. 1977). Consent also can be voluntary after a person has exercised his *Miranda* right to remain silent. *U.S. v. Busic,* 592 F.2d 13 (2d Cir. 1978). And, consent can be voluntary even though the government agent fails to identify himself as such. *U.S. v. Bullock,* 590 F.2d 117 (5th Cir. 1979). Where an FBI agent served a union official with a subpoena for union records and the official mistakenly believed that it gave the agent authority to search the premises, the search was held valid as a consent search under the totality of the circumstances test. *U.S. v. Allison,* _____ F.2d _____, 48 U.S.L.W. 2668 (8th Cir. 1980).

Where, however, a government agent uses deceit, trickery, or misrepresentation to secure consent to search, the consent has been held to be involuntary. *U.S. v. Tweel,* 550 F.2d 297 (5th Cir. 1977); *U.S. v. Robson,* 477 F.2d 13 (9th Cir. 1973), *cert. denied,* 420 U.S. 927 (1975). Consent is also involuntary where it is the product of coersion or threat, express or implied. *Schneckloth v. Bustamonte,* 412 U.S. at 228. For example, a threat to ransack the house unless consent was given invalidated the consent. *U.S. v. Kampbell,* 574 F.2d 962 (8th Cir. 1978). Consent following the warrantless entry of eight officers with guns drawn was invalidated. *U.S. v. Calhoun,* 542 F.2d 1094 (9th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977). Consent obtained from a girl after repeated requests, assistance from the girl's mother, and notice that the girl might be a suspect was held involuntary. *U.S. v. Mayes,* 552 F.2d 729 (6th Cir. 1977). However, the statement that a search warrant will be obtained if consent to search is not given does not, in and of itself, render the consent involuntary. *U.S. v. Miller,* 589 F.2d 1117 (1st Cir. 1978), *cert. denied,* 440 U.S. 958 (1979); *U.S. v. Miley,* 513 F.2d 1191 (2d Cir.), *cert. denied,* 423 U.S. 842 (1975).

Consent to search can be express or implied from all the circumstances. Examples of implied consent follow: consent to search airline baggage, *U.S. v. Freeland,* 562 F.2d 383 (6th Cir.), *cert. denied,* 434 U.S. 957 (1977), consent to search of fourth class mail by postal officials, *U.S. v. Riley,* 554 F.2d 1282 (4th Cir. 1977), consent to search person upon entry into a prison facility, *U.S. v. Sihler,* 562 F.2d 349 (5th Cir. 1977), and upon entry into a secured courtroom, *McMorris v. Alioto,* 567 F.2d 897 (9th Cir. 1978). However, the Supreme Court has held that a retail store does not consent to a wholesale search just because it has invited the public to enter. *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979).

A person giving consent to search may limit the area to be searched. *U.S. v. Griffin,* 530 F.2d 739 (7th Cir. 1976).

A third party may consent to a search, but only to the extent that he or she exercises authority or control over the area or items to be searched. For example, authority of a third party to consent to a search of a commonly used room does not necessarily extend to a search of a locked box or bag found therein. *U.S. v. Diggs,* 569 F.2d 1264 (3d Cir. 1977). *See also U.S. v. Block,* 590 F.2d 535 (4th Cir. 1978); *U.S. v. Isom,* 588 F.2d 858 (2d Cir. 1978); *U.S. v. Wilson,* 536 F.2d 883 (9th Cir.), *cert. denied,* 429 U.S. 982 (1976).

The Supreme Court has stated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *U.S. v. Matlock,* 415 U.S. 164, 170 (1974). Common authority, it was said, 415 U.S. at 171 n.7, is

> not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

In determining whether there was common authority or mutual use, the court should examine the totality of the circumstances. *U.S. v. Patterson,* 554 F.2d 852 (8th Cir. 1977). If there is reasonable belief that the third person had "the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others," there is authority to give consent. *U.S. v. Block,* 590 F.2d 535, 540 (4th Cir. 1978).

Cases, involving third-party consent tend to turn on their separate facts. Courts have examined consent by co-tenants or mutual users of premises. *U.S. v. Bethea,* 598 F.2d 331 (4th Cir.), *cert. denied,* 100 S. Ct. 124 (1979); *U.S. v. Reeves,* 594 F.2d 536 (6th Cir. 1979); *U.S. v. Dubrofsky,* 581 F.2d 208 (9th Cir. 1978); *U.S. v. Jones,* 580 F.2d 785 (5th Cir. 1978); *U.S. v. Sumlin,* 567 F.2d 684 (6th Cir. 1977), *cert. denied,* 425 U.S. 932 (1978); *U.S. v. Green,* 523 F.2d 968 (9th Cir. 1975). Courts have also considered consent given by lessors to search leased premises and consent given by building managers. *U.S. v. Cornejo,* 598 F.2d 554 (9th Cir. 1979); *U.S. v. Main,* 598 F.2d 1086 (7th Cir.), *cert. denied,* 100 S. Ct. 301 (1979); *Marshall v. Western Waterproofing Co., Inc.,* 560 F.2d 947, 950-951 (8th Cir. 1977) (apartment manager); *U.S. v. Kelly,* 551 F.2d 760 (8th Cir.), *cert. denied,* 433 U.S. 912 (1977). Other situations include consent by relatives such as spouses, parents, or children. *U.S. v. Hendrix,* 595 F.2d 883 (D.C. Cir. 1979); *U.S. v. Wright,* 564 F.2d 785 (8th Cir. 1977); *Wolfel v. Sanborn,* 555 F.2d 583 (6th Cir. 1977); *U.S. v. Long,* 524 F.2d 660 (9th Cir. 1975). The government must also show that consent by a third party was given voluntarily. *U.S. v. Block,* 590 F.2d at 539; *U.S. v. Patterson,* 554 F.2d 852 (8th Cir. 1977).

C. EVIDENCE AFFECTED BY A SEARCH AND SEIZURE

1. PROPERTY THAT MAY BE SEIZED

Rule 41(b) of the Federal Rules of Criminal Procedure provides for issuance of a warrant "to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense, (2) contraband, the fruits of crime, or things otherwise criminally possessed, (3) property designed or intended for use or which is or has been used as a means of committing a criminal offense, or (4) person for whose arrest there is probable cause, or who is unlawfully restrained."

The first of these—property constituting evidence of a criminal offense—was added by Congress to take account of the Supreme Court's holding in *Warden v. Hayden,* 387 U.S. 294 (1967), that "mere evidence" could be seized in an lawful search, thus broadening the prior rule. However, there must still be probable cause and a nexus between the "mere evidence" seized and the crime under investigation. *Warden v. Hayden, supra.*

A sufficient nexus has been found with clothes seized for examination of paint chips possibly matching paint chips found at the scene of the crime, *U.S. v. Edwards,* 415 U.S. 800 (1974), a phone number card seized from the defendant's wallet at the time of arrest to help establish a conspiracy, *U.S. v. Gimelstop,* 475 F.2d 157, 161 (3d Cir.), *cert. denied,* 414 U.S. 828 (1973), a seized scrap of newspaper that matched newspaper found at a bomb site, *U.S. v. Davis,* 589 F.2d 904 (5th Cir.), *cert. denied,* 441 U.S. 950 (1979), seized documents relating to an adjoining lot of land as evidence of intent to defraud with regard to the lot under investigation, *Andresen v. Maryland,* 427 U.S. 463 (1976).

Seized evidence that has been held inadmissible for lack of a sufficient nexus includes a tape cassette seized from the defendant's person where the search warrant authorized only a search of defendant's car, *U.S. v. Rizzo,* 583 F.2d 907 (7th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), and evidence seized upon a search of an automobile where the warrant authorized a search of a house trailer, *U.S. v. Stanley,* 597 F.2d 866 (4th Cir. 1979).

Although a search warrant must describe with particularity the property to be seized, other evidence not particularly described may sometimes be seized. *U.S. v. Clark,* 531 F.2d 928 (8th Cir. 1976). Where a search is made pursuant to a valid warrant, evidence uncovered which is not specifically the subject of the search may be seized. *U.S. v. Rettig,* 589 F.2d 418 (9th Cir. 1978); *U.S. v. Lee,* 581 F.2d 1173 (6th Cir.), *cert. denied,* 439 U.S. 1048 (1978); *U.S. v. Forsythe,* 560 F.2d 1127 (3d Cir. 1977); *U.S. v. Bills,* 555 F.2d 1250 (5th Cir. 1977). Evidence of other crimes or offenses may also be seized where government agents conducting a search are lawfully searching for property listed in the warrant or for which they had probable cause to search. *Able v. U.S.,* 362 U.S. 217 (1960); *U.S. v. Cortellesso,* 601 F.2d 28 (1st Cir. 1979) (warrant subsequently obtained for the evidence of other crimes uncovered); *U.S. v. Nedd,* 582 F.2d 965 (5th Cir. 1978); *U.S. v. Lee, supra.*

Rule 41(b)(4), added in 1979, provides for a warrant to search for persons for whose arrest there is probable cause and for persons who are unlawfully restrained, *i.e.,* kidnap victims. Of course, when exigent circumstances exist, a warrantless search for such persons may be made. *U.S. v. Watson,* 423 U.S. 411 (1976). But absent exigent circumstances, the better practice is to secure a search warrant from a magistrate, especially when there is a need to enter the premises of third parties. *Virgin Islands v. Gereau,* 502 F.2d 914 (3d Cir. 1974), *cert. denied,* 420 U.S. 909 (1975).

2. THE EXCLUSIONARY RULE

As a general rule, illegally obtained evidence, to which there is timely objection, will not be admitted into evidence. This exclusionary rule is designed primarily to deter improper conduct by law enforcement. *Michigan v. DeFillippo,* 443 U.S. 31 (1979); *Lego v. Twomey,* 404 U.S. 477 (1972); *Elkins v. U.S.,* 364 U.S. 206 (1960). This rule applies not only to illegally obtained physical evidence, but also to oral testimony about what was seen or found, *Wong Sun v. U.S.,* 371 U.S. 471 (1963); *Gissendanner v. Wainwright,* 482 F.2d 1293 (5th Cir. 1973), and to the fruits of what was illegally obtained, *Alderman v. U.S.,* 394 U.S. 165 (1969); *Wong Sun v. U.S.,* 371 U.S. at 484.

The exclusionary rule extends to all evidence that is the fruit of an illegal search or arrest. *Wong Sun v. U.S.,* 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385 (1920). For example, in *Wong Sun,* the court excluded a statement given by the defendant after his illegal arrest, and narcotics recovered from a third person who had been identified by the defendant in his post arrest statements. Counterfeit currency seized from a defendant during an inventory search after an illegal arrest was suppressed in *U.S. v. Wynn,* 544 F.2d 786 (5th Cir. 1977).

Not all evidence resulting from an unlawful search or arrest is considered fruit of the unlawful search or arrest. The test is not "but for the illegal actions of the police"; it is whether the evidence has been obtained by "exploitation" of the unlawful conduct or has been obtained by other means " 'sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun v. U.S.,* 371 U.S. at 488; *Brown v. Illinois,* 422 U.S. 590 (1975). Where the link between the illegal conduct and the evidence is found to have become sufficiently attenuated to dissipate the taint of the illegal conduct, the evidence will not be excluded. *Nardone v. U.S.,* 308 U.S. 338 (1939); *U.S. v. Scios,* 590 F.2d 956 (D.C. Cir. 1978); *U.S. v. Carsello,* 578 F.2d 199 (7th Cir.), *cert. denied,* 439 U.S. 979 (1978); *U.S. v. Duncan,* 570 F.2d 292 (9th Cir. 1978); *U.S. v. Wilson,* 569 F.2d 392 (5th Cir. 1978); *U.S. v. Moore,* 562 F.2d 106 (1st Cir. 1977), *cert. denied,* 435 U.S. 926 (1978); *U.S. v. Villano,* 529 F.2d 1046 (10th Cir.), *cert. denied,* 426 U.S. 953 (1976). Further, if the evidence is shown to have been obtained from sources independent of the illegal conduct, it will not be excluded. *U.S. v. Crews,* 100 S. Ct. 1244 (1980); *Silverthorne Lumber Co. v. U.S.,* 251 U.S. at 392; *Grimaldi v. U.S.,* 606 F.2d 332 (1st Cir.), *cert. denied,* 100 S. Ct. 465 (1979); *U.S. v. Allard,* 600 F.2d 1301 (9th Cir. 1979); *U.S. v. Fredericks,* 586 F.2d 470 (5th Cir. 1978), *cert. denied,* 440 U.S. 962 (1979); *U.S. v. Sor-Lokken,* 557 F.2d 755 (10th Cir.), *cert. denied,* 434 U.S. 894 (1977).

The fruit of the poisonous tree doctrine distinguishes between tangible or documentary evidence and witness testimony. *U.S. v. Ceccolini,* 435 U.S. 268 (1978). Live-witness testimony will not necessarily be excluded even when it was secured through a chain of discovery following illegal conduct. Instead, the court will look at the degree of free will exercised by the witness, the time lapse between the illegal conduct and the live-witness testimony, the status of the witness as

either a putative defendant or a third party, and then will balance the benefit of exclusion as a deterrent against the societal cost of permanently disabling a witness from testifying. *U.S. v. Ceccolini,* 435 U.S. at 276-277; *U.S. v. Rubalcava-Montoya,* 597 F.2d 140 (9th Cir. 1978); *U.S. v. Scios,* 590 F.2d at 962-963; *U.S. v. Carsello,* 578 F.2d at 204; *U.S. v. Houltin,* 566 F.2d 1027 (5th Cir.), *cert. denied,* 439 U.S. 826 (1978).

Where a defendant has made statements following an illegal search or arrest, the Supreme Court has held that fourth and fifth amendment considerations are applicable. Thus, a statement of an accused following illegal police conduct may be excluded as fruit of the illegal conduct, even though the statement was given voluntarily after *Miranda* warnings had been given. *Brown v. Illinois,* 422 U.S. at 602. *Miranda* is only one factor. Others to be considered in determining whether to exclude such statements are the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois,* 422 U.S. at 603-604.

When a defendant establishes that evidence was obtained as a result of unlawful government conduct, the burden is on the government to establish an independent basis for the evidence by a preponderance or to show that the evidence has been purged of its original taint. *U.S. v. Matlock,* 415 U.S. 164 (1974); *Wong Sun v. U.S.,* 371 U.S. at 488.

D. MOTIONS TO SUPPRESS

1. TIMING OF MOTIONS TO SUPPRESS

Motions to suppress evidence must be filed by the date before trial set by the court. Rule 12(b) and (c), Fed. R. Crim. P. Failure to timely file a motion to suppress constitutes a waiver, "but the court for cause shown may grant relief from the waiver." Rule 12(f), Fed. R. Crim. P. "Cause" has not been found readily by the courts, and appellate courts have regularly upheld trial court decisions denying untimely motions to suppress. *U.S. v. Scavo,* 593 F.2d 837 (8th Cir. 1979); *U.S. v. Hare,* 589 F.2d 242 (5th Cir. 1979); *U.S. v. Bridwell,* 583 F.2d 1135 (10th Cir. 1978); *U.S. v. Echols,* 577 F.2d 308 (5th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979); *U.S. v. Wood,* 550 F.2d 435 (9th Cir. 1976); *U.S. v. Farnkoff,* 535 F.2d 661 (1st Cir. 1976); *U.S. v. Rollins,* 522 F.2d 160 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976). *But see U.S. v. Hall,* 565 F.2d 917 (5th Cir. 1978) (attorney's inadvertence and court's desire to avoid penalizing the defendant constituted "cause").

However, a court may find "cause" where a defendant is not aware of the facts giving rise to the motion to suppress until after the time for the filing of the motion has passed. Thus, it is prudent for the government to notify a defendant as soon as is practicable of the government's intention to use specific evidence that may be subject to a motion to suppress. Rule 12(d)(1), Fed. R. Crim. P.

If a motion to suppress is filed, it must be heard and ruled on by the court before trial, unless "for good cause," the court orders that its ruling on the motion be deferred. However, the court should not defer its ruling where appeal rights of either the defendant or the government would be adversely affected. Rule 12(e), Fed. R. Crim. P.; *U.S. v. Thompson,* 558 F.2d 522 (9th Cir. 1977), *cert. denied,* 435 U.S. 914 (1978). Since the government can appeal an adverse decision by a

court on a motion to suppress heard prior to trial (18 U.S.C. §3731), but cannot appeal once jeopardy has attached during trial, every effort should be made by the government to obtain rulings on motions to suppress before trial. *See U.S. v. Payner,* 572 F.2d 144 (6th Cir. 1978), *cert. granted,* 100 S. Ct. 42 (1979) (argued 2/20/80).

2. HEARING

a. BURDEN OF PROOF

As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. *U.S. v. Feldman,* 606 F.2d 673 (6th Cir. 1979); *U.S. v. Evans,* 572 F.2d 455 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978); *U.S. v. Galente,* 547 F.2d 733 (2d Cir. 1976), *cert. denied,* 431 U.S. 969 (1977); *U.S. v. Phillips,* 540 F.2d 319 (8th Cir.) *cert. denied,* 429 U.S. 1000 (1976). Once the defendant has established a basis for his motion, such as an initial showing that the search was conducted without a warrant, or that a statement may not have been voluntary, or that an out-of-court identification may have been improperly suggested, the burden of proof shifts to the government to show that the warrantless search was reasonable, that the statement was voluntary, or that the identification was not suggestive. *U.S. v. Williams,* 604 F.2d 1102 (8th Cir. 1979); *U.S. v. Sacco,* 563 F.2d 552 (2d Cir. 1977); *U.S. v. De LaFuente,* 548 F.2d 528 (5th Cir. 1977); *U.S. v. Ochs,* 461 F. Supp. 1 (S.D.N.Y. 1978). This burden is proof by a preponderance of the evidence. *U.S. v. Matlock,* 415 U.S. 164, 177 (1974).

b. EVIDENTIARY RULES

The trial court is not bound by the Federal Rules of Evidence in hearing motions to suppress. Rule 104 and Rule 1101(d)(1), Fed. R. Evid.; *U.S. v. Killebrew,* 594 F.2d 1103 (6th Cir. 1979); *U.S. v. De LaFuente,* 548 F.2d 528 (5th Cir.), *cert. denied,* 431 U.S. 932 (1977); *U.S. v. Ochs,* 461 F. Supp. 1 (S.D.N.Y. 1978), *aff'd,* 595 F.2d 1247 (2d Cir. 1979). Hearsay evidence is admissible on a motion to suppress. *U.S. v. Matlock,* 415 U.S. 164, 172 (1974); *U.S. v. Killebrew,* 594 F.2d at 1105; *U.S. v. Tussell,* 441 F. Supp. 1092 (M.D. Pa. 1977), *aff'd,* 593 F.2d 543 (3d Cir. 1979). Jencks Act material, sought under 18 U.S.C. §3500, need not be disclosed at a pretrial hearing on a motion to suppress evidence. *U.S. v. Sebastian,* 497 F.2d 1267 (2d Cir. 1974).

c. RIGHT TO A HEARING

The defendant is entitled to a hearing on his motion to suppress when issues of fact, as opposed to law, are contested and the credibility of witnesses is important. *U.S. v. Raddatz,* 592 F.2d 976 (7th Cir.), *cert. granted,* 100 S. Ct. 44 (1979) (argued 2/25/80). Where factual issues are involved, the trial court must state its essential findings on the record. Rule 12(e), Fed. R. Crim. P. However, a condition precedent to a hearing is the recitation of a claim which is definite, specific, detailed, and non-conjectural. *U.S. v. Salsedo,* 477 F. Supp. 1235 (E.D. Cal. 1979).

3. STANDING

A defendant's right to challenge a search no longer depends upon traditional concepts of standing, but on whether the defendant had a legitimate expectation

of privacy in the area searched, *i.e.*, whether the search and seizure violated the defendant's personal fourth amendment rights. *Rakas v. Illinois,* 439 U.S. 128 (1978); *U.S. v. Agapito,* ——— F.2d ———, 27 Cr. L. 2059 (2d Cir. 1980). Also, a defendant can no longer challenge a search merely because it was "directed" at him, or because he was "legitimately on the premises." *See Rakas v. Illinois, supra; Jones v. U.S.,* 362 U.S. 257 (1960).

Prior to *Rakas,* a defendant had to establish standing to challenge evidence obtained in an alleged illegal search and seizure. In determining whether standing existed, the courts examined the level and kind of interest the defendant had in the premises searched and the property seized. *Alderman v. U.S.,* 394 U.S. 165 (1969); *Mancusi v. DeForte,* 392 U.S. 364 (1968); *Simmons v. U.S.,* 390 U.S. 377 (1968); *Jones v. U.S.,* 362 U.S. at 261. It had been held that a defendant did not have standing to challenge the admission of items seized from third persons. *Alderman v. U.S.,* 394 U.S. at 174. However, the Supreme Court fashioned two "automatic" exceptions to this rule: (1) where the possession of the seized item was an element of the offense charged, and (2) where the defendant was said to be "legitimately on the premises." *Jones v. U.S.,* 362 U.S. at 263. The "legitimately on the premises" exception was rejected in *Rakas v. Illinois,* 439 U.S. at 143, in favor of a fourth amendment analysis of whether the defendant had a reasonable expectation of privacy in the premises searched. As this chapter went to press, the "possession as an element" exception was before the Supreme Court from a First Circuit case, *U.S. v. Salvucci,* 599 F.2d 1094 (1st Cir.), *cert. granted,* 100 S. Ct. 519 (1979), and a Kentucky case, *Rawlings v. Commonwealth,* 581 S.W.2d 401 (Ky.), *cert. granted,* 100 S. Ct. 519 (1979) (argued in tandem, 3/26/80).

Thus, unless a defendant can show that the search and seizure violated his personal fourth amendment rights to a legitimate expectation of privacy or that the possession of the item seized is an element of the offense charged, he may not challenge the reasonableness of that search and seizure. *Rakas v. Illinois,* 439 U.S. at 143; *Alderman v. U.S.,* 394 U.S. at 173; *Simmons v. U.S.,* 390 U.S. at 389; *Katz v. U.S.,* 389 U.S. 347 (1967); *U.S. v. Calandrella,* 605 F.2d 236 (6th Cir.), *cert. denied,* 100 S. Ct. 522 (1979); *Word v. U.S.,* 604 F.2d 1127 (8th Cir. 1979); *U.S. v. Salvucci,* 599 F.2d at 1097; *U.S. v. Reyes,* 595 F.2d 275 (5th Cir. 1979); *U.S. v. Baltazar,* 477 F. Supp. 236 (E.D.N.Y. 1979).

4. APPEAL FROM SUPPRESSION HEARING

A defendant may not appeal directly from denial of a motion to suppress. He may appeal only on conviction. *DiBella v. U.S.,* 369 U.S. 121 (1962). However, the government has a right to appeal trial court decisions suppressing evidence where the defendant has not yet been placed in jeopardy. The only additional requirements are that the U.S. Attorney certify to the district court that the appeal is not taken for purposes of delay and that the suppressed evidence is substantial proof of a material fact. 18 U.S.C. §3731. Such appeals must be made within 30 days after the decision suppressing evidence has been rendered.

A subsequent plea of guilty or nolo contendere waives the defendant's right to challenge on appeal a denial of his motion to suppress. *Tollett v. Henderson,* 411 U.S. 258 (1973); *DiBella v. U.S.,* 369 U.S. 121 (1962); *Lott v. U.S.,* 367 U.S. 421 (1961). However, the November 1979 preliminary draft of the proposed addition of subdivision (2) to Rule 11(a) of the Federal Rules of Criminal Procedure provides that a defendant may preserve for appeal the issues raised in a motion to

suppress if a "conditional plea" is entered. Two circuits currently approve the entry of such "conditional pleas." *U.S. v. Moskow,* 588 F.2d 882 (3d Cir. 1978); *U.S. v. Burke,* 517 F.2d 377 (2d Cir. 1975).

E. WIRETAPPING AND OTHER ELECTRONIC SURVEILLANCE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, contains a comprehensive scheme regulating wiretapping and other forms of electronic surveillance. The principle embodied in this legislation is the one enunciated in *Katz v. U.S.,* 389 U.S. 347 (1967): whether an electronic interception of a conversation is offensive to the fourth amendment depends not on whether the interception resulted from a physical trespass but rather on whether the person whose conversation was intercepted had reasonable expectations of privacy. Because the statutory scheme adheres closely to the fourth amendment constitutional limitations as set forth by the Supreme Court, *Katz,* 389 U.S. at 348-353; *U.S. v. U.S. District Court,* 407 U.S. 297 (1972), Title III's constitutionality has been upheld by numerous courts. *U.S. v. Frederickson,* 581 F.2d 711 (8th Cir. 1978); *U.S. v. Feldman,* 535 F.2d 1175 (9th Cir. 1976), *cert. denied,* 429 U.S. 940 (1976); *U.S. v. Cafero,* 473 F.2d 489 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974).

Evidence obtained in violation of Title III is inadmissible in any state or federal prosecution. Section 2515 of Title 18 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding, in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof if the disclosure of that information would be in violation of this chapter.

There are two broad statutory exceptions to the prohibition of Section 2515: (1) interceptions conducted pursuant to court order as authorized by the statute; and (2) interceptions obtained with the consent of one party.

1. INTERCEPTION PURSUANT TO COURT ORDER

A two-step procedure must be followed to lawfully intercept an oral or wire communication without consent of one of the parties. First, authorization must be obtained to apply for a court order approving an interception. Second, application must be made to a federal judge and an order obtained.

a. AUTHORIZATION

Authorization for a wiretap may be given only to obtain evidence of crimes specified in 18 U.S.C. §2516(1)(a) through (g). Authorization to investigate one crime, however, does not preclude ancillary use of the information obtained to prove a different crime if the new offense was discovered through the surveillance. *U.S. v. Cox,* 567 F.2d 930, 933 (10th Cir. 1977), *cert. denied,* 435 U.S. 927 (1978). Authorization must be granted by the "Attorney General, or any Assistant Attorney General specifically designated by the Attorney General." 18 U.S.C.

§2516(1); *U.S. v. Giordano,* 416 U.S. 505, 507-508 (1974); *U.S. v. Diadone,* 558 F.2d 775, 778-779 (5th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978). There is, however, no need to authenticate the signature of the Attorney General at trial or hearing where the authorization appears regular on its face. *U.S. v. De La Fuente,* 548 F.2d 528, 531-532 (5th Cir.), *cert. denied,* 434 U.S. 954 (1977); *U.S. v. McCoy,* 539 F.2d 1050, 1055 (5th Cir. 1976), *cert. denied,* 431 U.S. 919 (1977). Further, authorization in writing is not needed where there is other proof that authorization was obtained. *U.S. v. Scully,* 546 F.2d 255, 260-261 (9th Cir. 1976), *vacated,* 430 U.S. 902, *aff'd,* 554 F.2d 363, *cert. denied,* 430 U.S. 970 (1977) (affidavit that proper authorization was given over the telephone).

b. APPLICATION AND ORDER

Section 2518(1) requires that application be made to a judge of competent jurisdiction for prior approval of the interception. This includes a federal district judge, court of appeals judge, or a state judge authorized by state statutes. 18 U.S.C. §2510(9). The application must set forth a full and complete statement of the facts "as to the particular offense that has been, is being, or is about to be committed" and "a particular description of the type of communication sought to be intercepted." A specific crime or series of related crimes must be identified. The nature and type of anticipated conversations must be described. *U.S. v. Tortorello,* 480 F.2d 764, 778-81 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973). *See also U.S. v. Steinberg,* 525 F.2d 1126 (2d Cir. 1975), *cert. denied,* 425 U.S. 971 (1976). Judicial approval for continuation of the surveillance to obtain evidence of a crime not specified in the original application is required. *U.S. v. Masciarelli,* 558 F.2d 1064, 1068 (2d Cir. 1977) (such approval can be implied and a specific order not needed), and *U.S. v. Cox,* 567 F.2d 931-932. The fruits of one wiretap may be used to set forth the specificity needed in a subsequent application. *U.S. v. Johnson,* 539 F.2d 181, 186-188 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977). Information from a wiretap in one district may be used in another. *U.S. v. Cox,* 567 F.2d 932-933.

The application, as well as the court order, must name those persons law enforcement authorities have probable cause to believe are committing the offense and whose communications are to be intercepted. *U.S. v. Lee,* 542 F.2d 353 (6th Cir. 1976), *vacated,* 430 U.S. 902, *aff'd,* 557 F.2d 540 (1977). An application need not name persons who are unknown at the time of the application. *U.S. v. Baker,* 589 F.2d 1008 (9th Cir. 1979); *U.S. v. Chiarizio,* 525 F.2d 289 (2d Cir. 1975). *See also U.S. v. Kahn,* 415 U.S. 143, 155 (1974) (application not required to name non-target spouse who was likely to be intercepted and who was only later discovered to be part of gambling conspiracy).

The application must set forth an investigative need, that is, why other techniques have failed or would fail, to justify electronic surveillance. Wiretaps are not to be used routinely as the first step in a criminal investigation. *U.S. v. Martinez,* 588 F.2d 1227, 1231-1233 (9th Cir. 1978). However, the government is not required to exhaust all possible investigatory techniques before resorting to a wiretap. *U.S. v. Martin,* 599 F.2d 880, 886-887 (9th Cir. 1979); *U.S. v. McCoy,* 539 F.2d 1050, 1055-1056 (5th Cir. 1976), *cert. denied,* 431 U.S. 919 (1977); *U.S. v. Matya,* 541 F.2d 741, 745-746 (8th Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977). More than mere conclusory language is needed to fulfill the investigatory need requirement. *U.S. v. Martinez,* 588 F.2d at 1231; *U.S. v. Gerardi,* 586 F.2d 896, 898 (1st Cir. 1978). For example, unwillingness of informants to testify has been held to be a valid reason to use the electronic surveillance technique. *Id.* at 898; *U.S. v. Feldman,* 535 F.2d 1175 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976); *U.S. v. Vento,* 533 F.2d 838, 850 (3d Cir. 1976). *See also U.S. v. Giordano,* 416 U.S. 505, 515 (1974); *U.S. v. Rotchford,* 575 F.2d 166, 173 (8th Cir. 1978); *U.S. v. Steinberg,* 525 F.2d at 1130; *U.S. v. Kerrigan,* 514 F.2d 35 (9th Cir.), *cert. denied,* 423 U.S. 924 (1975).

As with any other search and seizure, it must be shown there is probable cause to believe that a specific crime has been or is about to be committed before the government may be permitted to invade a constitutionally protected area. 18 U.S.C. §2518(3)(a). Subparagraph (3) of §2518 prescribes the necessary elements of probable cause needed for authorization. As to the quantum of probable cause required, *see generally U.S. v. Tortorello,* 480 F.2d at 775-776; *U.S. v. Poeta,* 455 F.2d 117, 121-122 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972). Hearsay may be sufficient if there is a substantial basis for its belief. *U.S. v. Agrusa,* 541 F.2d 690, 694 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977).

Subparagraph (4) of §2518 sets forth the required contents of the order. Each order must specify "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." The order must include a statement as to how long the interception will last and whether the interception will automatically terminate when the communication sought to be intercepted has been obtained. The order must terminate when the communication sought is first obtained unless the court finds probable cause to intercept additional communications. *See U.S. v. Cafero,* 473 F.2d 489 (3d Cir.), *cert. denied,* 417 U.S. 918 (1974); *U.S. v. Poeta,* 455 F.2d at 120-121. Provisions for minimization should be spelled out in the court order. *See generally U.S. v. Cirillo,* 499 F.2d 872, 879-880 (2d Cir.), *cert. denied,* 419 U.S. 1056 (1974); *U.S. v. Rizzo,* 492 F.2d 443, 446 (2d Cir.), *cert. denied,* 417 U.S. 944 (1974); *U.S. v. Manfredi,* 488 F.2d 588, 598 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974); all holding that, where affidavit and order are read together and construed in a common sense manner, there was sufficient language to satisfy the statutory requirement that the order contain a minimization provision.

Whether the court order specifically authorizes a surreptitious entry to effect the interception, such authority is implicit in the order to intercept. *Dalia v. U.S.,* 441 U.S. 238 (1979) (order itself acted as a warrant to enter the premises). *See also U.S. v. Licavoli,* 604 F.2d 613, 618-619 (9th Cir. 1979); *U.S. v. Scafidi,* 564 F.2d 633, 638-640 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978).

Subparagraph (5) of §2518 provides that no interception shall be approved for longer than 30 days and provides a procedure for obtaining an extension for a maximum of 30 days. This subparagraph also provides that all orders must contain a statement that the interception "shall be conducted in such a way as to minimize the interception of communication not otherwise subject to interception." The court will objectively assess the interceptor's actions in light of the circumstances surrounding him at the time. Good faith is not necessarily enough. *Scott v. U.S.,* 436 U.S. 128 (1978). Specialized jargon or code making criminal conversations harder to decipher will affect attempts at minimization. *U.S. v. Daly,* 535 F.2d 434, 441 (8th Cir. 1976).

Minimization must be judged on a case by case basis; and while interception of a substantial portion of irrelevant calls is suspect, it does not automatically warrant an inference of failure to minimize. For cases upholding the minimization procedures followed, *see U.S. v. Manfredi,* 488 F.2d at 599 (upholding minimization procedures that monitored and recorded all calls in the context of a

complex, far-flung narcotics conspiracy); *U.S. v. Capra,* 501 F.2d 267, 275-276 (2d Cir. 1974), *cert. denied,* 420 U.S. 990 (1975) (interception of some personal calls, including those with family and with an attorney, did not automatically vitiate properly conducted minimization); *U.S. v. Rizzo,* 492 F.2d 443, 446 (2d Cir.), *cert. denied,* 417 U.S. 944 (1974); and *U.S. v. Rizzo,* 491 F.2d 215 (2d Cir.), *cert. denied,* 416 U.S. 990 (1974) (minimization held proper where monitoring ceased as soon as a determination could be made that a conversation was not pertinent).

In sustaining surveillance in the face of claims of failure to minimize the overhearing of irrelevant conversations, reviewing courts have emphasized the degree of judicial supervision of the surveillance. *U.S. v. Bynum,* 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974) (logs submitted to the court every four to six days). *See U.S. v. Sklaroff,* 323 F. Supp. 296, 316-317 (S.D. Fla. 1971), *aff'd,* 506 F.2d 837 (5th Cir. 1975).

The government has a statutory duty to inform the issuing judge of the identities of all parties known whose communications have been intercepted. 18 U.S.C. §2518(8)(d); *U.S. v. Donovan,* 429 U.S. 413 (1977). Unintentional omission does not necessarily require suppression, but naming only the principal targets of the investigation is not enough. *Donovan, supra.* To object to the seizure, one must be an aggrieved party whose primary rights have been violated. *U.S. v. Cruz,* 594 F.2d 268, 273-274 (1st Cir.), *cert. denied,* 100 S. Ct. 205 (1979) (drug dealer who was caught through surveillance of monitored party held not aggrieved where his name and address not mentioned in intercepted conversation). Standing to complain about illegal entry to implant the surveillance differs from standing to complain as an aggrieved party. *U.S. v. Scafidi,* 564 F.2d at 638.

Whether the fruits of an electronic surveillance will be suppressed may depend on whether the defendant has standing to object to the electronic seizure. Defendants with standing may move under 18 U.S.C. §2518(10)(a) to suppress the contents and fruits of electronic surveillance on the grounds that (1) the interception was unlawful; (2) the court order is insufficient on its face; or (3) the interception was not made in conformance with the court order. *See U.S. v. Chavez,* 416 U.S. 562 (1974). Such a motion must be made before trial or it is waived. 18 U.S.C. §2518(10)(a); *U.S. v. Wright,* 524 F.2d 1100 (2d Cir. 1975). The government has the right to appeal from a pretrial suppression order. 18 U.S.C. §2518(10)(b). Suppression hearings are not necessarily required. *U.S. v. Losing,* 539 F.2d 1174 (8th Cir. 1976), *cert. denied,* 434 U.S. 969 (1977); *U.S. v. Steinberg,* 525 F.2d 1126 (2d Cir. 1975), *cert. denied,* 425 U.S. 971 (1976). Likewise, a defendant is not necessarily entitled to an evidentiary hearing on the reasonableness of the surreptitious entry. *U.S. v. Licavoli,* 604 F.2d 613 (9th Cir. 1979).

c. SCOPE OF TITLE III

It is clear that only acquisition of aural communications is covered by the statute. Thus, electronic devices such as pen registers, which do not intercept the contents of conversations, are not wiretaps within the meaning of the statute. *Smith v. Maryland,* 442 U.S. 735 (1979). A pen register is a device which, by monitoring the electronic impulses caused by dialing a telephone, can record the number dialed. The Supreme Court in *Smith, supra,* found no expectation of privacy in which numbers were dialed.

Since federal statutes apply only within the territorial jurisdiction of the United States, evidence from wiretaps conducted by foreign governments outside the United States without judicial authorization may still be used in U.S. courts. *U.S. v. Cotroni,* 527 F.2d 708 (2d Cir. 1975), *cert. denied,* 426 U.S. 906 (1976); *U.S. v. Toscanino,* 500 F.2d 267 (2d Cir. 1974).

Evidence legally seized by a wiretap in a criminal case can be used in a subsequent civil proceeding. *Fleming v. U.S.,* 547 F.2d 872 (5th Cir.), *cert. denied,* 434 U.S. 831 (1977).

2. INTERCEPTION WITH CONSENT OF ONE PARTY

Subdivisions (c) and (d) of §2511(2) provide exceptions to the prohibition against wiretapping or other electronic surveillance if consent is given by one of the parties to a conversation. The consenting party may himself intercept and record the conversation, or may consent to having law enforcement personnel effect the interception. There is no expectation within the meaning of *Katz v. U.S.,* 389 U.S. 347 (1967), that one party to a conversation will not repeat what has been said by the other party, *Hoffa v. U.S.,* 385 U.S. 293, 302 (1966); *U.S. v. Horton,* 601 F.2d 319 (7th Cir.), *cert. denied,* 100 S. Ct. 287 (1979), or that such party may not himself be a government agent or informant, *Hoffa v. U.S.,* 385 U.S. at 300-304. Nor is the fourth amendment violated because an undisclosed agent simultaneously records a conversation with an electronic device on his person, *Lopez v. U.S.,* 373 U.S. 427 (1963), or because the conversation is electronically transmitted by the undisclosed agent to a remote place where it is overheard by other agents and recorded, *U.S. v. White,* 401 U.S. 745 (1971); *U.S. v. Horton,* 601 F.2d at 320-324. Warrantless recordings with the consent of only one party to a conversation have been consistently admitted into evidence over fourth amendment objections. *U.S. v. Wright,* 573 F.2d 681, 684 (1st Cir.), *cert. denied,* 436 U.S. 949 (1978); *U.S. v. Craig,* 573 F.2d 455, 474 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978); *U.S. v. Bastone,* 526 F.2d 971 (7th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976); *U.S. v. McMillan,* 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975); *U.S. v. Santillo,* 507 F.2d 629 (3d Cir. 1975), *cert. denied,* 421 U.S. 968 (1975); *U.S. v. Lippman,* 492 F.2d 314, 318 (6th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975); *U.S. v. Bonanno,* 487 F.2d 654, 658-659 (2d Cir. 1973); *U.S. v. Dowdy,* 479 F.2d 213, 229 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973).

The motives of the consenting party in giving his consent are irrelevant unless there is an illegal purpose in making the interception. Thus, the benefit of a plea bargain does not vitiate an otherwise voluntary consent, *U.S. v. Craig,* 573 F.2d at 475-477, nor does a hope for leniency, *U.S. v. Hodge,* 539 F.2d 898, 904-905 (6th Cir.), *cert. denied,* 429 U.S. 1091 (1976); *U.S. v. Franks,* 511 F.2d 25, 30-31 (6th Cir.), *cert. denied,* 422 U.S. 1042 (1975). Likewise, a promise of relocation expenses to be paid by the government did not negate a finding that the informant had voluntarily consented to record the conversation. *U.S. v. Juarez,* 573 F.2d 267, 278 (5th Cir.), *cert. denied,* 439 U.S. 915 (1978). The pressure of potential indictment or promise of future immunity will not render such consent involuntary. *U.S. v. Dowdy,* 479 F.2d at 229. *See also Cooper v. U.S.,* 594 F.2d 12, 14 (4th Cir. 1979). Actual threats of a physical nature, however, or of unfounded prosecution may negate consent. *U.S. v. Horton,* 601 F.2d at 322-323. *Cf., U.S. v. Ryan,* 548 F.2d 782 (9th Cir.), *cert. denied,* 429 U.S. 939 (1976).

Where the purpose of making the recording or interception is criminal or tortious, permission is specifically withheld. 18 U.S.C. §2511(2)(d). *See U.S. v. Turk,* 526 F.2d 654 (5th Cir.), *cert. denied,* 429 U.S. 823 (1976); *U.S. v. Jones,* 542

F.2d 661 (6th Cir. 1976) (recording for purposes of extortion).

The consenting party's later unavailability does not prevent proof of consent being shown by other evidence. *U.S. v. White,* 401 U.S. at 746-754; *U.S. v. Gladney,* 563 F.2d 491 (1st Cir. 1977).

CHAPTER II

FIFTH AND SIXTH AMENDMENT CONFRONTATIONS

The fifth amendment protects an individual's right to be free from compelled self-incrimination. Thus, the government may use at trial only those confessions that are voluntarily made. *Malloy v. Hogan,* 378 U.S. 1 (1964). The introduction into evidence of an involuntary confession requires reversal of a subsequent conviction. *Mincey v. Arizona,* 437 U.S. 389, 398 (1978); *Jackson v. Denno,* 378 U.S. 368, 376-377 (1964). Since coerced confessions are not only inherently unreliable but also obtained through unlawful methods, courts are concerned with more than just the truth or falsity of a confession. Because of this, whether a confession is the truth is irrelevant to the issue of voluntariness. *U.S. v. Shoemaker,* 542 F.2d 561 (10th Cir.), *cert. denied,* 429 U.S. 1004 (1976).

While the ultimate test of admissibility of a confession is its voluntariness, there are many factors and circumstances that interact in enabling a court to reach that determination. *U.S. v. Brown,* 557 F.2d 541 (6th Cir. 1977).

It is the government's burden to prove the voluntariness of a confession, but only by a preponderance of the evidence. *Lego v. Twomey,* 404 U.S. 477, 482-484 (1972).

A. CONFESSIONS

1. FORM

If it is properly identified as coming from the defendant, the form in which an admissible confession is received has long been held to be immaterial. *Thomas v. U.S.,* 15 F.2d 958 (8th Cir. 1926).

A statement reduced to writing by one other than the accused is admissible where the accused reads it and signs it or orally adopts it. *U.S. v. Johnson,* 529 F.2d 581 (8th Cir.), *cert. denied,* 426 U.S. 909 (1976). *See U.S. v. Evans,* 320 F.2d 482 (6th Cir. 1963). Rule 801(d)(2) of the Federal Rules of Evidence precludes a hearsay objection to a confession in this form.

An oral confession is not subject to suppression on grounds that it has not been recorded, either electronically or stenographically. *U.S. v. Coades,* 549 F.2d 1303 (9th Cir. 1977).

2. NEED FOR CORROBORATION

A confession must be corroborated in order to sustain a conviction. A defendant may not be convicted solely on the basis of his own admission. *Smith v. U.S.,* 348 U.S. 147 (1954); *U.S. v. Micieli,* 594 F.2d 102 (5th Cir. 1979).

The requirement for corroboration does not affect the admissibility of a confession. It affects the sufficiency of evidence required to sustain a conviction.

U.S. v. Fearn, 589 F.2d 1316 (7th Cir. 1978). A degree of corroboration may be found in the detailed nature of the confession itself, or in the recital of facts that would be unknown to anyone other than the criminal. *U.S. v. Gresham,* 585 F.2d 103 (5th Cir. 1978). Hearsay may be relevant and admissible for purposes of corroborating confessions. *U.S. v. Trotter,* 538 F.2d 217 (8th Cir.), *cert. denied,* 429 U.S. 943 (1976) (registration documents admissible for purposes of corroboration); *U.S. v. Jacobson,* 536 F.2d 793 (8th Cir.), *cert. denied,* 429 U.S. 864 (1976) (introduction of theft report upheld).

The corroboration required is of the truth or trustworthiness of the confession, not of the fact that the confession was made. *Cash v. U.S.,* 265 F.2d 346, 347 (D.C. Cir.), *cert. denied,* 359 U.S. 973 (1959). The corroborating evidence standing alone need not be sufficient to sustain the conviction, only sufficient to establish the reliability of the confession beyond a reasonable doubt. *U.S. v. Evans,* 572 F.2d 455 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978). In *Opper v. U.S.,* 348 U.S. 84, 93 (1954), the Supreme Court stated:

> [T]he corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delecti.* It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement .... It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

"All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." *Smith v. U.S.,* 348 U.S. 147, 156 (1954).

The degree of corroboration required depends on the nature of the case. Tangible crimes involving injury to person or property, may be corroborated solely by proof that the act was committed; no independent link between the injury and the accused is needed. *U.S. v. Daniels,* 528 F.2d 705, 707-708 (6th Cir. 1976); *U.S. v. Fleming,* 504 F.2d 1045 (7th Cir. 1974). Where the crime involves no tangible *corpus delecti, e.g.,* tax evasion, the corroborative evidence must implicate the one making the confession. *Smith v. U.S.,* 348 U.S. at 153-154. Such corroboration may consist of proof of a negative. *U.S. v. Fearn,* 589 F.2d at 1323-1326.

Corroboration may not come from statements by the defendant's partners in crime unless such statements would be admissible as direct evidence of the defendant's guilt. *Wong Sun v. U.S.,* 371 U.S. 471, 488-491 (1963). Thus, in a conspiracy case, corroboration may be found in the form of admissions of codefendants. *U.S. v. Harbin,* 601 F.2d 773 (5th Cir.), *cert. denied,* 100 S. Ct. 433 (1979). *See also Parker v. Randolph,* 442 U.S. 62 (1979).

Judicial confessions made in earlier proceedings require corroboration. *U.S. v. Wilson,* 529 F.2d 913 (10th Cir. 1976). Admissibility is not contingent upon order of proof. Proof of *corpus delecti* may be offered before or after the confession. *U.S. v. Harbin,* 601 F.2d at 780.

Venue need not be corroborated. If otherwise sufficient corroboration is present, venue may be established solely by the confession. *U.S. v. Wolf,* 535 F.2d 476 (8th Cir.), *cert. denied,* 429 U.S. 920 (1976).

3. CONFESSION AFTER ARREST BUT BEFORE INITIAL APPEARANCE—"UNNECESSARY DELAY"

Arrested individuals must be brought before a federal magistrate without "unnecessary delay." Rule 5(a), Fed. R. Crim. P. A confession obtained during a period of unreasonable delay is not admissible over defendant's objection. *Mallory v. U.S.,* 354 U.S. 449 (1957). This is an evidentiary rather than a constitutional rule. *McNabb v. U.S.,* 318 U.S. 332, 341-342 (1943). This exclusionary rule also prevents the use of other evidence obtained during detentions that violate Rule 5(a). *E.g., Adams v. U.S.,* 399 F.2d 574 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1067 (1969) (testimony on lineup identification excluded).

Delay solely for the purpose of repeated interrogation is unnecessary. *Mallory v. U.S.,* 354 U.S. at 454-456. A confession taken during an unexplained five-hour delay while defendant sat in a police wagon was excluded from evidence in *U.S. v. Hernandez,* 574 F.2d 1362 (5th Cir. 1978).

Delay for ordinary administrative steps is not unnecessary. This includes "booking," or completing a confession begun before arrest. *Mallory v. U.S.,* 354 U.S. at 453-454; *Walton v. U.S.,* 334 F.2d 343 (10th Cir. 1964), *cert. denied,* 379 U.S. 991 (1965). Delay while having an oral confession transcribed is not unnecessary. *U.S. v. Curry,* 358 F.2d 904 (2d Cir. 1965), *cert. denied,* 385 U.S. 873 (1966).

Delays for unusual circumstances have also been allowed. *E.g., U.S. v. Vasquez,* 534 F.2d 1142 (5th Cir.), *cert. denied,* 429 U.S. 979 (1976) (delay caused by defendant's request to speak with a particular detective). Bad weather can excuse delay. *U.S. v. Standing Soldier,* 538 F.2d 196 (8th Cir.), *cert. denied,* 429 U.S. 1025 (1976) (confession taken during one-week delay due to blizzard and remoteness from site of magistrate). Remoteness itself may excuse delay. *U.S. v. Odom,* 526 F.2d 339 (5th Cir. 1976) (confession during five-day delay while on Coast Guard cutter after arrest on high seas 200 miles from shore).

Defendant's own behavior or condition may justify delay. *U.S. v. Isom,* 588 F.2d 858 (2d Cir. 1978) (delay for medical treatment of defendant); *U.S. v. Shoemaker,* 542 F.2d 561 (10th Cir.), *cert. denied,* 429 U.S. 1004 (1976) (defendant's refusal to appear before magistrate until he spoke with his family); *U.S. v. Bear Killer,* 534 F.2d 1253 (8th Cir.), *cert. denied,* 429 U.S. 846 (1976) (12-hour delay including time for defendant to become sober before appearing). Delays for investigatory reasons have been upheld. *U.S. v. O'Looney,* 544 F.2d 385 (9th Cir.), *cert. denied,* 429 U.S. 1023 (1976); *U.S. v. Hall,* 348 F.2d 837 (2d Cir.), *cert. denied,* 382 U.S. 947 (1965) (recovery of stolen goods); *Amsler v. U.S.,* 381 F.2d 37 (9th Cir. 1967) (delay to verify confession); *U.S. v. Price,* 345 F.2d 256 (2d Cir. 1964), *cert. denied,* 382 U.S. 949 (1965) (destruction of contraband); *Evans v. U.S.,* 325 F.2d 596 (8th Cir. 1963) (search of premises).

There must be an arrest made to trigger the rule. *U.S. v. Vita,* 294 F.2d 524 (2d Cir. 1961), *cert. denied,* 369 U.S. 823 (1962). See *Fuller v. U.S.,* 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied,* 393 U.S. 1120 (1969). Arrest for this purpose is dependent upon the impression conveyed to defendant, not on formal authorization by an Assistant U.S. Attorney. *U.S. v. Middleton,* 344 F.2d 78, 81 (2d Cir. 1965). Arrest without a warrant does not obviate the need for a prompt initial appearance. *U.S. v. Duvall,* 537 F.2d 15 (2d Cir.), *cert. denied,* 426 U.S. 950 (1976). Detention short of arrest does not trigger the rule. *U.S. v. Vita,* 294 F.2d at 533.

Where the arrest occurs at a late hour or after the beginning of a weekend or holiday, overnight detention occasioned by the unavailability of a committing magistrate is reasonable. *U.S. v. Ortega,* 471 F.2d 1350 (2d Cir. 1972), *cert. denied,* 411 U.S. 948 (1973). However, if a federal magistrate is not "reasonably available," the initial appearance should take place before a state or local judicial officer. *U.S. v. Burgard,* 551 F.2d 190 (8th Cir. 1977) (magistrate out of town for 24 hours). Where arrest occurs before a period of unavailability and reasonable delay extends into weekend or evening hours, overnight detention may be allowed. The government should be prepared to explain the delay by accounting for time periods involved and the reasons therefor. *U.S. v. Boyer,* 574 F.2d 951 (8th Cir.), *cert. denied,* 439 U.S. 967 (1978). *See also U.S. v. Ortega,* 471 F.2d at 1362.

The Juvenile Delinquency Act, 18 U.S.C. §5033, imposes a heavier burden on the government to explain any delay since the act requires that a juvenile defendant be taken before a magistrate "forthwith." *See U.S. v. Indian Boy X,* 565 F.2d 585 (9th Cir. 1977), *cert. denied,* 439 U.S. 841 (1978).

The rule suppressing statements made during unnecessary delay in the initial appearance has also been applied to aliens being held for deportation proceedings. *U.S. v. Sorof-Lopez,* 603 F.2d 789 (9th Cir. 1979).

The critical period in applying the *Mallory* rule is the time between the arrest and the statement. *U.S. v. Davis,* 532 F.2d 22 (7th Cir. 1976). Illegal detention after a statement has been made will not affect its admissibility. *U.S. v. Watson,* 591 F.2d 1058 (5th Cir.), *cert. denied,* 441 U.S. 965 (1979) (four-and-one-half-day delay in bringing defendant before magistrate did not render confession inadmissible where it was made within six hours of arrest); *U.S. v. Burgos,* 579 F.2d 749 (2d Cir. 1978) (15-hour delay); *U.S. v. Cepeda Penes,* 577 F.2d 754 (1st Cir. 1978) (seven-hour delay where no showing that delay was for purpose of obtaining confession). *See also U.S. v. Mitchell,* 322 U.S. 65, 69-71 (1944); *U.S. v. Montes-Zarate,* 552 F.2d 1330 (9th Cir. 1977), *cert. denied,* 435 U.S. 947 (1978); *U.S. v. Seohnlein,* 423 F.2d 1051 (4th Cir.), *cert. denied,* 399 U.S. 913 (1970).

Title 18 U.S.C. §3501(c) provides that a confession obtained while a person is under arrest or detention shall not be rendered inadmissible solely because of a delay in bringing the prisoner before a magistrate so long as the confession was given within six hours of the arrest or detention. A voluntary confession made within six hours of arrest or detention is admissible without reference to delay. *U.S. v. Halbert,* 436 F.2d 1226 (9th Cir. 1970). *See U.S. v. Cluchette,* 465 F.2d 749, 754 (9th Cir. 1972). Section 3501(c) also provides that statements made in any period beyond six hours may be admissible if the delay is found to be reasonable after giving consideration to the distance and means of transportation. Courts have recognized certain situations where confessions made subsequent to six hours after arrest are admissible. *U.S. v. Edwards,* 539 F.2d 689 (9th Cir.), *cert. denied,* 429 U.S. 984 (1976); *U.S. v. Ortega,* 471 F.2d at 1362; *U.S. v. Marrero,* 450 F.2d 373 (2d Cir. 1971), *cert. denied,* 405 U.S. 933 (1972). Any delay between arrest and confession, like the delay between arrest and arraignment, is but an additional factor to be used by the trial judge in determining voluntariness and is not determinative by itself. *U.S. v. Gaines,* 555 F.2d 618 (7th Cir. 1977); *U.S. v. Keeble,* 459 F.2d 757 (8th Cir. 1972), *rev'd on other grounds,* 412 U.S. 205 (1973); *U.S. v. Hathorn,* 451 F.2d 1337 (5th Cir. 1971); *U.S. v. Marrero,* 450 F.2d at 378; *U.S. v. Corral-Martinez,* 592 F.2d 263 (5th Cir. 1979). The trial court has a duty to hear evidence concerning cause of initial appearance delay where the delay is lengthy. *U.S. v. Mayes,* 552 F.2d 729 (6th Cir. 1977).

The time parameters are determined by federal detention, not by previous state incarceration, so long as there has been no collusion between state and federal officials. *U.S. v. Jensen,* 561 F.2d 1297 (8th Cir. 1977); *U.S. v. Gaines,* 555 F.2d at 625. Thus if pre-appearance detention is nonfederal, the government is relieved of its obligation to explain or justify the delay. *U.S. v. Mayes,* 552 F.2d at 734; *U.S. v. Young,* 527 F.2d 1334 (5th Cir. 1976); *U.S. v. Davis,* 459 F.2d 167 (6th Cir. 1972).

Likewise, since the *Mallory* rule is not based on constitutional grounds, it does not apply to the states. *McNabb v. U.S.,* 318 U.S. 332 (1943); *Van Ermen v. Burke,* 398 F.2d 329 (7th Cir.), *cert. denied,* 393 U.S. 1004 (1968); *U.S. ex rel. Glinton v. Denno,* 309 F.2d 543 (2d Cir. 1962), *cert. denied,* 372 U.S. 938 (1963). Therefore, confessions to federal crimes made during a period of illegal detention by state authorities, even if made to federal officers, are admissible unless the state detention is pursuant to a "working agreement" between state and federal officials. *U.S. v. Coppola,* 281 F.2d 340 (2d Cir. 1960), *aff'd per curiam,* 365 U.S. 762 (1961). *See also U.S. v. Ireland,* 456 F.2d 74, 77 (10th Cir. 1972); *Jarrett v. U.S.,* 423 F.2d 966 (8th Cir. 1970); *U.S. v. Hindmarsh,* 389 F.2d 137 (6th Cir.), *cert. denied,* 393 U.S. 866 (1968); *U.S. v. Frazier,* 385 F.2d 901 (6th Cir. 1967); *U.S. v. Gorman,* 355 F.2d 151 (2d Cir. 1965), *cert. denied,* 384 U.S. 1024 (1966).

The Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), was a direct attack on the problems which are the basis of the *Mallory* rule; consequently, it has been held that where the defendant has waived his *Miranda* rights he also waived his *Mallory* right to be brought before a magistrate as quickly as possible. *U.S. v. Indian Boy X,* 565 F.2d 585 (9th Cir. 1977), *cert. denied,* 439 U.S. 841 (1978); *U.S. v. Cluchette,* 465 F.2d 749 (9th Cir. 1972); *Frazier v. U.S.,* 419 F.2d 1161 (D.C. Cir. 1969); *Pettyjohn v. U.S.,* 419 F.2d 651, 656 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1058 (1970).

4. CONFESSIONS AND THE RIGHTS TO SILENCE AND COUNSEL

A suspect's fifth amendment privilege against self-incrimination comes into play as soon as law enforcement officers take him into custody or otherwise restrict his freedom of action in any significant way. His sixth amendment right to the assistance of counsel attaches upon the initiation of formal adversary proceedings. A formal adversary proceeding can consist of a formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois,* 406 U.S. 682, 689 (1972). An initial appearance before a magistrate is not an adversary proceeding, and thus no right to counsel attaches. *U.S. v. Dohm,* 597 F.2d 535 (5th Cir. 1979). Any statement or admission, formal or informal, obtained in violation of those rights is inadmissible as substantive evidence against the suspect at trial. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Escobedo v. Illinois,* 378 U.S. 478 (1964). However, "[a]ny statement given freely and voluntarily without any compelling influences" is admissible. *Miranda v. Arizona,* 384 U.S. at 478.

The *Miranda* procedure requires an interrogating officer to give a suspect the following warnings: (1) that the suspect has a constitutional right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has the right to confer with counsel prior to answering any questions and to have counsel present during the questioning itself; (4) that if he is indigent he has a right to have appointed counsel present, 384 U.S. at 467-473; and (5) that if he chooses to answer questions or make a statement and thus waive his rights, he

may rescind that waiver at any time and terminate the interview by stating that he wishes to remain silent or that he wishes to do so until an attorney is present, 384 U.S. 473-474. *U.S. v. James,* 493 F.2d 323 (2d Cir.), *cert. denied,* 419 U.S. 849 (1974).

A suspect's right to terminate questioning must be scrupulously honored. *Michigan v. Mosley,* 423 U.S. 96 (1975); *U.S. v. Hernandez,* 574 F.2d 1362 (5th Cir. 1978). There appear to be differing standards applied to resumption of questioning after either a request for termination or a request for an attorney. If an attorney is requested there is a per se rule against later waiver until the attorney is present. *Miranda v. Arizona,* 384 U.S. at 474-475; *U.S. v. Hernandez,* 574 F.2d at 1370; *White v. Finkbeiner,* 570 F.2d 194, 200 n.3 (7th Cir. 1978); *Michigan v. Mosley, supra* (White, J., concurring). Volunteering to resume discussions after asking to terminate the interview, however, can operate as an independent waiver of the earlier request. *U.S. v. Boyce,* 594 F.2d 1246 (9th Cir.), *cert. denied,* 100 S. Ct. 112 (1979) ("Let's talk"); *U.S. v. Messina,* 507 F.2d 73 (2d Cir. 1974) *cert. denied.* 420 U.S. 993 (1975). *See Rhode Island v. Innis,* 48 U.S.L.W. 4506 (1980). Mere demonstration that a confession came without objection after resumption of questioning is inadequate evidence of waiver. *U.S. v. Charlton,* 565 F.2d 86 (6th Cir. 1977), *cert. denied,* 434 U.S. 1070 (1978). *See also U.S. v. Ford,* 563 F.2d 1366 (9th Cir. 1977), *cert. denied,* 434 U.S. 1021 (1978); *U.S. v. Finch,* 557 F.2d 1234 (8th Cir.), *cert. denied,* 434 U.S. 927 (1977). Under these circumstances the government must show an intentional relinquishment or abandonment of a known right or privilege. *Maglio v. Jago,* 580 F.2d 202 (6th Cir. 1978). *See also Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

Respecting the higher standard for resumption of questioning after an attorney is requested, the Fifth Circuit considers the issue unsettled. "Although authorities at some point can resume questioning after a defendant has asked that questioning cease, so long as his or her 'right to cut off questioning is scrupulously honored,' whether authorities can resume questioning after a defendant has asked for an attorney is unsettled." *U.S. v. Herman,* 544 F.2d 791, 796 n.8 (5th Cir. 1977). *See also Canal Zone v. Gomez,* 566 F.2d 1289 (5th Cir. 1978). The Fifth Circuit has refused to permit inquiry into the existence of a waiver in these circumstances unless there is a temporal break in custody. *Nash v. Estelle,* 597 F.2d 513 (5th Cir. 1979). The Second Circuit permits inquiry into the existence of a valid waiver in either circumstance. *Wilson v. Henderson,* 584 F.2d 1185 (2d Cir. 1978), *cert. denied,* 99 S. Ct. 2892 (1979). The possibility of waiver of right to counsel after the suspect initially requests counsel has been recognized by the Ninth Circuit. *U.S. v. Rodriquez-Gastelum,* 569 F.2d 482 (9th Cir.) *(en banc), cert. denied,* 436 U.S. 919 (1978).

A "suspect has an absolute right to delay interrogation by requesting counsel. If such a request is disregarded and the questioning proceeds, any statements taken thereafter cannot be a result of waiver but must be presumed a product of compulsion." *U.S. v. Massey,* 550 F.2d 300, 307 (5th Cir. 1977); *U.S. v. Priest,* 409 F.2d 491 (5th Cir. 1969). Not every interrogation in violation of this rule mandates reversal, however. *U.S. v. Kilrain,* 566 F.2d 979 (5th Cir.), *cert. denied,* 439 U.S. 819 (1978). An equivocal remark, for example, may allow further inquiry. *U.S. V. Klein,* 592 F.2d 909 (5th Cir. 1979); but such further inquiry may not be an attempt to dissuade the suspect from exercising his right to counsel. *Thompson v. Wainwright,* 601 F.2d 768 (5th Cir. 1979). A request for the suspect's probation officer is not a request for an attorney operating to terminate questioning. *Fare v. Michael C.,* 442 U.S. 707 (1979).

The precise wording of the warnings set forth in *Miranda* does not constitute a ritualistic formula which must be repeated without variation. *U.S. v. Floyd,* 496 F.2d 982 (2d Cir.), *cert. denied,* 419 U.S. 1069 (1974). Words that convey the substance of the warnings along with the required information are sufficient. *U.S. v. Olivares-Vega,* 495 F.2d 827 (2d Cir.), *cert. denied,* 419 U.S. 1020 (1974). The right to appointed counsel, however, has been held to be a significant right which may not be excluded. *U.S. v. DiGiacomo,* 579 F.2d 1211 (10th Cir. 1978). *See Sanchez v. Beto,* 467 F.2d 513 (5th Cir. 1972), *cert. denied,* 411 U.S. 921 (1973).

Failure to read the required rights orally is not fatal to a confession. *U.S. v. Sledge,* 546 F.2d 1120 (4th Cir.), *cert. denied,* 430 U.S. 910 (1977) (defendant read form to himself, then signed waiver). Failure of the suspect to sign the form does not by itself preclude waiver, *U.S. v. DiGiacomo,* 579 F.2d at 1215 (government failed to sustain "heavy burden" of waiver after defendant refused to sign waiver form); *U.S. v. Stewart,* 585 F.2d 799 (5th Cir. 1979), nor does it make further inquiry illegal, *U.S. v. Klein,* 592 F.2d 909 (5th Cir. 1979). An explicit statement of waiver is not invariably necessary to support a finding that waiver occurred. *North Carolina v. Butler,* 441 U.S. 369 (1979). But signature on the standard FBI form above the space where the waiver appeared, accompanied by a refusal to sign below, amounted to a clear signal to the court that the defendant did not wish to waive his rights, and questioning should have ceased at that time. *U.S. v. Christian,* 571 F.2d 64 (1st Cir. 1978).

There is no burden on police beyond the administration of the warnings. No requirement exists that the police explain the rules of evidence or criminal laws or procedures to a suspect. The duty is discharged when the warnings required by *Miranda* are fully and fairly given. *Harris v. Riddle,* 551 F.2d 936 (4th Cir.), *cert. denied,* 343 U.S. 849 (1977).

The *Miranda* warnings impliedly assume that silence will carry no penalty. Thus, cross-examination of a suspect on his post-arrest silence is violative of the fifth amendment. *Doyle v. Ohio,* 426 U.S. 610 (1976). Asking a witness whether statements were made by the defendant at the time the warnings were given may also violate this rule if the answer is "no." *U.S. v. Martinez,* 577 F.2d 960 (5th Cir.), *cert. denied,* 439 U.S. 914 (1978) (where witness answered that defendant said, "no, not at this time," error held to be harmless). A witness' comment that the defendant was silent because, at the time the warnings were being given, a codefendant instructed the defendant to "say nothing" was allowed by the Fifth Circuit in a conspiracy case. *U.S. v. Warren,* 578 F.2d 1058, 1072-1074 (5th Cir. 1978). *See also U.S. v. Bridwell,* 583 F.2d 1135 (10th Cir. 1978) (comment that defendant refused to sign form).

Statements which are inadmissible in the prosecution's case-in-chief because they were obtained in violation of *Miranda* may, if trustworthy, be used to attack the credibility of the defendant who takes the stand and testifies contrary to such statements. *Oregon v. Hass,* 420 U.S. 714 (1975); *U.S. v. Rooks,* 577 F.2d 33 (8th Cir.), *cert denied,* 439 U.S. 862 (1978), or on cross-examination of defendant, *U.S. v. Scott,* 592 F.2d 1139 (10th Cir. 1979). In *Harris v. New York,* 401 U.S. 222, 226 (1971), the Court held, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent statements." Irrespective of *Miranda* violations, if the statement is found to have been made involuntarily, it cannot be used for any purpose. *Mincey v. Arizona,* 437 U.S. 385 (1978).

There is still some question whether statements taken in violation of *Miranda* may be used to establish probable cause for issuance of a search warrant.

Massachusetts v. White, 439 U.S. 280 (1978) *(per curiam)* (equally divided court upheld state decision that such statements may not be so used).

a. WHEN MIRANDA RIGHTS ATTACH

The premise of *Miranda* is that custodial interrogation is inherently coercive. 384 U.S. at 467. *See U.S. v. Bottone*, 365 F.2d 389, 395 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966). Whether the rights thereunder attach depends upon whether a suspect is in custody, but formal arrest is not determinative. *Dunaway v. New York*, 442 U.S. 200 (1979). The inquiry focuses upon whether there has been a significant deprivation of the suspect's freedom. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *U.S. v. Blum*, 614 F.2d 537 (6th Cir. 1980). More than just a coercive setting is required; some significant restraint on freedom of movement is necessary. *U.S. v. Jimenez*, 602 F.2d 139 (7th Cir. 1979) (statement made after auto stopped by police but prior to custody); *Borodine v. Douzanis*, 592 F.2d 1202, 1206 (1st Cir. 1979).

In *Rhode Island v. Innis*, 48 U.S.L.W. 4506, 4508 (1980), the Supreme Court held, "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." The Court, 48 U.S.L.W. at 4509, concluded

> that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Police are not required to administer the *Miranda* warnings to everyone whom they question, 384 U.S. at 477-478. *U.S. v. Clark*, 525 F.2d 314 (2d Cir. 1975). Nor is there a requirement that the warnings be given merely because the interview takes place at a station house. *Oregon v. Mathiason*, 429 U.S. at 495. Asking defendant to come to the station house for statement or photographs does not necessarily lead to a custodial situation. *Starkey v. Wyrick*, 555 F.2d 1352 (8th Cir.), *cert. denied*, 434 U.S. 848 (1977). But if one is unlawfully detained or confined, incriminating or inculpatory statements are not admissible, even where he has been properly informed of his *Miranda* rights. *Brown v. Illinois*, 422 U.S. 590 (1975). *Miranda* warnings are not required before routine questioning even after arrest if such questioning is limited to asking for information needed for processing. *U.S. v. Prewitt*, 553 F.2d 1082 (7th Cir.), *cert. denied*, 434 U.S. 840 (1977) (asking for aliases).

The grand jury room has been held to be non-custodial for purposes of *Miranda*. *U.S. v. Mandujano*, 425 U.S. 564 (1976) (no constitutional right to warnings prior to suspect's testimony before grand jury).

Routine border stops and customs inspections do not amount to custodial interrogations, *U.S. v. Martinez*, 588 F.2d 495 (5th Cir. 1979); *U.S. v. Smith*, 557 F.2d 1206 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073 (1978); but when a suspect is taken out of the mainstream of activity and either questioned singly or searched, custody may be found to exist and *Miranda* applied. *U.S. v. Del Soccorro Castro*, 573 F.2d 213 (5th Cir. 1978); *U.S. v. McCain*, 556 F.2d 253 (5th Cir. 1979) (strip search case in which defendant confessed after being told that narcotics in body cavity would be fatal if container ruptured). *U.S. v. Gomez-Londono*, 553 F.2d 805 (2d Cir. 1977) (asking at airport whether defendant was taking more than $5,000 out of the country was non-custodial questioning).

It is clear that *Miranda* rights attach to aliens at our border or in our country, providing the circumstances trigger the requirements of warnings. *See U.S. v. Henry*, 604 F.2d 908 (5th Cir. 1979). Whether or not a significant deprivation of a suspect's freedom has occurred may depend upon four factors: (1) the probable cause existing to arrest; (2) the subjective intent of the interrogators; (3) the subjective impression of the defendant; and (4) whether the investigation has focused on the suspect. *U.S. v. Micieli*, 594 F.2d 102 (5th Cir. 1979); *Hancock v. Estelle*, 558 F.2d 786 (5th Cir. 1977). No one factor is dispositive. *See U.S. v. Stanley*, 597 F.2d 866 (4th Cir. 1979). The totality of circumstances must be considered. *U.S. v. Kennedy*, 573 F.2d 657 (9th Cir. 1978).

A non-custodial interview may change character when, based upon answers received, the interrogator realizes that he is no longer willing to let the suspect go. When this perception changes, the interrogator has a duty to warn. *U.S. v. Curtis*, 568 F.2d 643 (9th Cir. 1978). Other circuits apply an objective test. *See U.S. ex rel. Sanney v. Montanye*, 500 F.2d 411 (2d Cir.), *cert. denied*, 419 U.S. 1027 (1974). All interrogations of suspects already in prison are not necessarily "custodial" for purposes of *Miranda*. In these situations the court must look to whether there were added restraints on the prisoner's freedom or other changes in the prisoner's normal surroundings. *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978).

The mere fact that more than one crime may be the subject of the interrogation does not require rewarning each time the interrogation focuses on a new crime. *U.S. ex rel. Henne v. Fike*, 563 F.2d 809 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

The sole fact that a criminal investigation has been commenced does not require *Miranda* warnings in an otherwise non-custodial setting. *Beckwith v. U.S.*, 425 U.S. 341 (1976) (taxpayer's home). *But see Orozco v. Texas*, 394 U.S. 324 (1969). Thus, mere focus of an investigation on an individual, without more, is insufficient to trigger a need for the warnings. *U.S. v. Jackson*, 578 F.2d 1162 (5th Cir. (1978); *U.S. v. Schmoker*, 564 F.2d 289 (9th Cir. 1977); *U.S. v. Mapp*, 561 F.2d 685 (7th Cir. 1977). A postal inspector's office has been held to be a non-custodial setting for a postal employee called in and questioned about a missing check. *U.S. v. Lewis*, 556 F.2d 446 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977). The boarding of a ship by the Coast Guard under an established "right of approach" doctrine on the high seas did not in itself create a custodial situation. *U.S. v. Postal*, 589 F.2d 862, 887 (5th Cir.), *cert. denied*, 100 S. Ct. 61 (1979).

Miranda was designed to curb unfair methods of custodial interrogation. Thus *Miranda* rights do not attach to volunteered statements. They attach only to those

which are the product of interrogation. *U.S. v. Cornejo,* 598 F.2d 554 (9th Cir. 1979); *U.S. v. Vigo,* 487 F.2d 295 (2d Cir. 1973); *U.S. v. Purin,* 486 F.2d 1363, 1367-1368 (2d Cir. 1973), *cert. denied,* 417 U.S. 930 (1974). They do not attach to excited or spontaneous utterances. *Stanley v. Wainwright,* 604 F.2d 379 (5th Cir. 1979). *See also U.S. v. Roach,* 590 F.2d 181 (5th Cir. 1979) (codefendant asked authorities why he was being arrested, defendant responded "shut up—you know why"). Even under the most coercive of settings a statement made without questioning can be said to be volunteered. *Pavao v. Cardwell,* 583 F.2d 1075 (9th Cir. 1978) (defendant face down on pavement at gunpoint). In *Stanley v. Wainwright,* 604 F.2d at 380-381, the defendants were placed in the back of a police car. There were no police present so no questioning could have taken place. However, a concealed tape recorder in the car was recording statements made by defendants to each other. The Fifth Circuit found no need for warnings under these circumstances. Likewise taping of undercover conversations in a non-custodial situation does not trigger *Miranda* rights. *U.S. v. Craig,* 573 F.2d 455 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978); *U.S. v. Gray,* 565 F.2d 881 (5th Cir.), *cert. denied,* 435 U.S. 955 (1978).

Statements by a defendant to undercover agents do not require prior warning for admissibility. *U.S. v. Marks,* 603 F.2d 582 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 673 (1980). *Cf. U.S. v. Barnes,* 431 F.2d 878 (9th Cir. 1970), *cert. denied,* 400 U.S. 1024 (1971) (person not entitled to *Miranda* warning during commission of a crime); *U.S. v. Gentile,* 525 F.2d 252, 259 (2d Cir. 1975), *cert. denied,* 425 U.S. 903 (1976) (IRS agent not required to give *Miranda* warnings in criminal tax investigation). A defendant need not be advised of his right to silence or counsel while engaging in crime. *U.S. v. Haynes,* 398 F.2d 980, 987-988 (2d Cir. 1068), *cert. denied,* 393 U.S. 1120 (1969).

Private security guards are not law enforcement officers and need not give *Miranda* warnings before interrogating a suspect. *U.S. v. Bolden,* 461 F.2d 998 (8th Cir. 1972); *U.S. v. Antonelli,* 434 F.2d 335 (2d Cir. 1970).

b. SCOPE OF MIRANDA

The rights to silence and counsel do not attach to non-testimonial types of evidence. *Schmerber v. California,* 384 U.S. 757 (1966). Thus, the fifth amendment privilege is limited to testimonial compulsion. *Schmerber* involved the non-consensual taking of blood samples from a motorist after he had been arrested for driving while intoxicated.

Likewise, the fifth amendment privilege does not protect identifying characteristics. *See, e.g., U.S. v. Dionisio,* 410 U.S. 1 (1973) (permitting voice exemplars); *Gilbert v. California,* 388 U.S. 263 (1967) (handwriting exemplars), *U.S. v. Wade,* 388 U.S. 218 (1967) (voice and display of person); *In re Grand Jury Proceedings,* 558 F.2d 1177 (5th Cir. 1977) (subpoena directing photographs, fingerprints, and handwriting upheld in face of claim of privilege); *U.S. v. Shaw,* 555 F.2d 1295 (5th Cir. 1977) (voice exemplars).

The sixth amendment right to counsel however, may attach to non-testimonial evidentiary procedures held at a critical stage in the criminal proceedings. *See U.S. v. Ash,* 413 U.S. 300 (1973) (dealing with right to counsel at a post-indictment photographic display).

c. CONFESSIONS OBTAINED AFTER INDICTMENT

A defendant's sixth amendment right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal

charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois,* 406 U.S. 682, 688-689 (1972). A "heavy burden" is placed on the government to show a knowing and intelligent waiver of sixth amendment rights under these circumstances. *Brewer v. Williams,* 430 U.S. 387, 403 (1977); *Faretta v. California,* 422 U.S. 806 (1975).

A post-indictment or arraignment confession made in the absence of counsel may be considered inadmissible wholly apart from considerations of voluntariness. *Massiah v. U.S.,* 377 U.S. 201 (1964). This may be limited, however, to deliberately induced statements as in *Massiah* where the confession was induced by a codefendant at the urging of, and in cooperation with, the prosecutor. *See also Beatty v. U.S.,* 389 U.S. 45, *rev'g per curiam,* 377 F.2d 181 (5th Cir. 1967) (unsolicited post-indictment confession to an informer which was overheard by a hidden agent held inadmissible). Post-indictment statements outside presence of counsel may be allowed if it is clear that the confrontation and discussion were voluntary. *U.S. v. Monti,* 557 F.2d 899 (1st Cir. 1977). It has been held not to be violative of the sixth amendment for the FBI to elicit a confession from the defendant after indictment but before retention of counsel. *U.S. v. Patman,* 557 F.2d 1181 (5th Cir. 1977), *cert. denied,* 441 U.S. 933 (1979). The right to counsel can be waived at any stage of the criminal proceedings. *U.S. v. Springer,* 460 F.2d 1344 (7th Cir. 1972), *cert. denied,* 409 U.S. 873 (1972).

It is clear that the right to counsel attaches upon indictment and before arrest or interrogation. *U.S. v. Satterfield,* 558 F.2d 655 (2d Cir. 1976). But statements made to an undercover officer after complaint and arrest warrant were filed but before an indictment was returned were admitted over objection in *U.S. v. Archbold-Newball,* 554 F.2d 665, 672-675 (5th Cir.), *cert. denied,* 434 U.S. 1000 (1977). A request for an attorney at arraignment may not preclude subsequent station house interrogation where the request is not made in such a way as to preclude subsequent interrogation. *See Blasingame v. Estelle,* 604 F.2d 893, 896 (5th Cir. 1979).

Use of a post-indictment statement has been permitted where it was made voluntarily and unexpectedly to a representative of the government. *U.S. v. Gaynor,* 472 F.2d 899 (2d Cir. 1973); *U.S. v. Garcia,* 377 F.2d 321 (2d Cir.), *cert. denied,* 389 U.S. 991 (1967). The circuit courts have also permitted the use of post-indictment confessions when made to codefendants and prison mates who were not acting on behalf of the prosecutor at the time. *U.S. ex rel. Baldwin v. Yeager,* 428 F.2d 182 (3d Cir. 1970), *cert. denied,* 401 U.S. 919 (1971); *U.S. ex rel. Milani v. Pate,* 425 F.2d 6 (7th Cir.), *cert. denied,* 400 U.S. 867 (1970) (fellow inmate was in contact with police, but was not acting under police instructions); *Paroutian v. U.S.,* 370 F.2d 631 (2d Cir.), *cert. denied,* 387 U.S. 943 (1967); *Stowers v. U.S.,* 351 F.2d 301 (9th Cir. 1965). *But see Milton v. Wainwright,* 407 U.S. 371 (1972) (use of testimony elicited by officer posing as cell mate was harmless error in light of overwhelming evidence of guilt).

Statements taken in violation of the sixth amendment under these circumstances are inadmissible and cannot be used to prove the charges in the indictment. *U.S. v. Missler,* 414 F.2d 1293 (4th Cir. 1969), *cert. denied,* 397 U.S. 913 (1970). Such statements may still be used by the government in the investigation of other subjects. *U.S. v. Satterfield,* 558 F.2d 655, 657 (2d Cir. 1976).

5. "FRUIT OF THE POISONOUS TREE"

If there has been an illegal search and seizure, or an invalid arrest, any

statements derived immediately therefrom are the "fruit" of the illegality and are thus inadmissible, even if they were exculpatory when made. *Wong Sun v. U.S.*, 371 U.S. 471, 485-487 (1963). More than a mere casual relationship between illegal police activity and a subsequent confession is required, however, in order to warrant exclusion of the confession from evidence. In *Wong Sun, id.* at 487-488, the Court said:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

The government's burden with respect to the admissibility of a statement derived from illegal activity is to show that the statement was not only given voluntarily, but that it was "sufficiently an act of free will to purge the primary taint." *Id.* at 486. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court held that the giving of *Miranda* warnings after an illegal arrest does not alone purge the taint of an illegal arrest. The Court said, at 603-604:

> The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances ... and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

See also U.S. v. Wilson, 569 F.2d 393 (5th Cir. 1978). Thus, taking a person into custody and to the police station for questioning on less than probable cause to arrest violates the fourth amendment. Confessions obtained during such detention are therefore inadmissible, even if the fifth amendment has been complied with, unless there has been a sufficient break in the causal connection between the illegality and the confession. *Dunaway v. New York*, 442 U.S. 200 (1979).

An improper search can operate to taint an otherwise valid confession. *U.S. v. Cruz*, 581 F.2d 535 (5th Cir. 1978); *U.S. v. Lilly*, 576 F.2d 1240, 1247 (5th Cir. 1978) (statement found to be fruit of illegal body cavity search). *See U.S. v. Scios*, 590 F.2d 956 (D.C. Cir. 1978). Unproductive illegal searches, however, do not taint a later legal search. *U.S. v. Haddad*, 558 F.2d 968 (9th Cir. 1977). Indirect use of tainted evidence is illegal, but illegally seized information that merely causes the government to intensify its investigation may not be enough to taint subsequently discovered evidence. *U.S. v. Cella*, 568 F.2d 1266 (9th Cir. 1977).

Likewise, an improperly taken confession may lead to suppression of the product of an otherwise valid search. *U.S. v. Melvin*, 596 F.2d 492 (1st Cir.), *cert. denied*, 100 S. Ct. 73 (1979) (discovery of firearms was not the result of defendant's statement). But, if the evidence is obtained by means sufficiently distinguishable as to be purged of the primary taint, it will not be suppressed. *Id.* at 500. The use of a statement taken in violation of *Miranda* to establish probable cause for issuance of a search warrant equally divided the Supreme Court in 1978, *Massachusetts v. White*, 439 U.S. 280 (1978), thereby allowing a state supreme court's decision not to allow use of the statement to stand. A tainted confession has also been held to invalidate an indictment if considered and relied upon by the grand jury. *U.S. v. James*, 493 F.2d 323 (2d Cir. 1974).

6. COERCED CONFESSIONS

Coercion, as a method of obtaining a confession, is prohibited. Physical force is but one form of coercion. Physical force includes actual torture. *Brown v. Mississippi*, 297 U.S. 278 (1936). Physical force used to subdue a violent suspect can also render statements inadmissible. *U.S. v. Brown*, 557 F.2d 541 (6th Cir. 1977) (physical force used during arrest, and defendant was struck by arresting officer while in patrol car at time incriminating statement was made). Keeping the suspect in handcuffs while he confessed, however, is not coercive per se. *U.S. v. Ogden*, 572 F.2d 501 (5th Cir.), *cert. denied*, 439 U.S. 979 (1978).

Coerced statements are inherently suspect, and the means of coercion are not limited to acts of physical brutality. *U.S. v. Powe*, 591 F.2d 833, 839-840 (D.C. Cir. 1978); *U.S. v. Fritz*, 580 F.2d 370 (10th Cir.) *(en banc), cert. denied*, 439 U.S. 947 (1978). Coercive pressures can exist independently from threats of use of force. *U.S. v. Hernandez*, 574 F.2d 1362 (5th Cir. 1978) (five hours in police wagon said to be a coercive pressure); *Brooks v. Florida*, 389 U.S. 413 (1967) (defendant held in cage for two weeks with little food or drink).

In examining whether the defendant's will has been overborne by coercive pressure, courts examine personal characteristics of the accused as well as details of the interrogation. *Gallegos v. Colorado*, 370 U.S. 49 (1962); *U.S. v. Smith*, 574 F.2d 707 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978) (streetwise 17-year-old); *U.S. v. Schmidt*, 573 F.2d 1057, 1064 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) (defendant with two years of law school). *See also Hall v. Wolff*, 539 F.2d 1146, 1150 (8th Cir. 1976). Special consideration and caution are taken when the confession is one made by a juvenile. *U.S. v. Spruille*, 544 F.2d 303, 306 (7th Cir. 1976).

Special medical problems may affect the existence of coercion. *Elliott v. Morford*, 557 F.2d 1228 (6th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (allegation of denial of insulin to diabetic defendant for four days before confession required voluntariness hearing). A defendant who is high on drugs or alcohol may still give a voluntary confession. *U.S. v. Dorsett*, 544 F.2d 687, 689 (4th Cir. 1976); *U.S. v. Brown*, 535 F.2d 424, 427 (8th Cir. 1976). A hospitalized defendant may be able to give a voluntary statement. *Johnson v. Havener*, 534 F.2d 1232, 1233 (6th Cir.), *cert. denied*, 429 U.S. 889 (1976) (no coercion where interrogation was conducted with doctor's permission although suspect was hospitalized and was being treated with drugs). But the confession of a critically wounded defendant who was in an intensive care unit was held to be inadmissible. *Mincey v. Arizona*, 437 U.S. 385 (1978) (requests to stop interview because of unbearable pain ignored).

Some psychological pressure may be allowed and confessions based on such pressures are not necessarily involuntary, *e.g., U.S. v. Jordan*, 570 F.2d 635, 643 (6th Cir. 1978) (threat of arrest of pregnant wife); *U.S. v. Charlton*, 565 F.2d 86, 89 (6th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978) (suspect told confession was only way to exculpate son). But psychological coercion can easily exceed permissible limits. In *Brewer v. Williams*, 430 U.S. 387 (1977), a defendant who was known to have deep religious convictions was persuaded by statements of a police detective to lead officers to the location of his victim's body by what has become famous as the "Christian burial speech." *But see Rhode Island v. Innis*, 48 U.S.L.W. 4506 (1980), where a suspect arrested for armed robbery told officers he would show them where his gun was located, after interrupting the officers' conversation concerning the missing shotgun in which one officer expressed

concern that handicapped children might hurt themselves if they found the weapon. The Court held that the defendant was not "interrogated" in violation of his *Miranda* right to remain silent until he had consulted with a lawyer after he had requested one.

While psychological pressure may be allowed in some instances, the use of deception has been viewed more narrowly. Telling a suspect that his accomplices had confessed when they had not was not allowed in *Schmidt v. Hewitt,* 573 F.2d 794, 801 (3d Cir. 1978). *See also Ferguson v. Boyd,* 566 F.2d 873, 878-879 (4th Cir. 1977) (confession exacted by fostering defendant's erroneous belief that his acknowledgement of guilt was necessary to exonerate his girlfriend was held to be involuntary).

7. USE OF CONFESSIONS AT JOINT TRIALS

Bruton v. U.S., 391 U.S. 123 (1968), held that the admission of a codefendant's post-conspiracy confession implicating the defendant constituted reversible error if the codefendant does not testify. The basis for this rule is the sixth amendment right to confrontation and cross-examination. *See also Nelson v. O'Neil,* 402 U.S. 622 (1971). This rule does not apply to statements made during the course of a conspiracy, *U.S. v. Mitchell,* 556 F.2d 371 (6th Cir.), *cert. denied,* 434 U.S. 925 (1977), or to a confession at joint trial of a codefendant which does not inculpate the accused, *U.S. v. Louderman,* 576 F.2d 1383 (9th Cir. 1978) (statement only about intent of one defendant); *U.S. v. Bailleul,* 553 F.2d 731 (1st Cir. 1977); *U.S. v. Gerry,* 515 F.2d 130 (2d Cir. 1975), *cert. denied,* 423 U.S. 832 (1975). But, if the extrajudicial confession clearly implicates another defendant and is vitally important to the government's case, cautionary instructions will not suffice to remove the taint caused by lack of opportunity to confront the witness, *U.S. v. Knuckles,* 581 F.2d 305 (2d Cir.), *cert. denied,* 439 U.S. 986 (1978) (admission did not clearly inculpate complaining defendant); *Smith v. Estelle,* 569 F.2d 944, 950 (5th Cir. 1978) (introduction of principal offender's unredacted confession under confusing jury instructions not harmless error). *See U.S. v. Wingate,* 520 F.2d 309 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976). However, the admission into evidence of one defendant's written statement which made it clear that he was assisted by two others though his accomplices remained unnamed and were not identified by race, age, size, or any other means except by sex did not violate the codefendant's sixth amendment rights. *U.S. v. Holleman,* 575 F.2d 139 (7th Cir. 1978).

"Redaction" or "sanitization" is the process of deleting reference to the non-confessing defendant. Redaction may obviate the need for separate trials if it does not clearly implicate the defendant when revised. *Hodges v. Rose,* 570 F.2d 643 (6th Cir.), *cert. denied,* 436 U.S. 909 (1978). Methods of redaction have included substituting the letter "A" for the name of the defendant, *Burkhart v. Lane,* 574 F.2d 346 (6th Cir. 1978) (summary dismissal of habeas corpus petition held to be inappropriate; case remanded to determine whether confession sufficiently redacted); use of the words "someone else," *U.S. v. Weinrich,* 586 F.2d 481 (5th Cir. 1978), *cert. denied,* 441 U.S. 927 (1979) (immediate cautionary instruction also given and speaker later testified); and use of "him and some of his buddies," *U.S. v. Stewart,* 579 F.2d 356 (5th Cir.), *cert. denied,* 439 U.S. 936 (1978) (held not to be sufficiently identifiable to defendant and not error in view of instruction by court not to consider the confession as proof of the other defendant's guilt). Simple deletion of names, however, may not be sufficient to avoid a *Bruton*

problem. *U.S. v. Cleveland,* 590 F.2d 24 (1st Cir. 1978). The possibility of spill-over must be considered in considering the choice between sanitization and severance, but mere risk of spill-over is not sufficient to require granting of separate trials. The defendant must make a strong showing of prejudice. *U.S. v. Cleveland,* 590 F.2d at 29.

Bruton cannot be circumvented by taking codefendants' statements in the presence of each other. It is the opportunity for confrontation at trial that is important. *Hall v. Wainwright,* 559 F.2d 964 (5th Cir. 1977), *cert. denied,* 434 U.S. 1076 (1978). But, *Bruton* does not apply to interlocking confessions since risk that a properly instructed jury will be unable to disregard the codefendant's confession is not present when a defendant's own confession is in evidence. *Parker v. Randolph,* 422 U.S. 62 (1979) (confessions were redacted by the use of blanks or "another person"). The interlocking confessions need not be identical to come within this exception; it is sufficient if the confessions are substantially the same and consistent on the major elements of the crime. *U.S. v. Dizdar,* 581 F.2d 1031 (2d Cir. 1978); *U.S. ex. rel. Stainbridge v. Zelker,* 514 F.2d 45 (2d Cir. 1975), *cert. denied,* 423 U.S. 872 (1975).

Bruton does not apply when the trial is before a judge. *Cockrell v. Oberhauser,* 413 F.2d 256 (9th Cir. 1969), *cert. denied,* 397 U.S. 994 (1970).

8. INADMISSIBILITY OF STATEMENTS RELATED TO PLEAS AND OFFERS OF PLEAS

Under Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, evidence of a plea of guilty later withdrawn or a plea of nolo contendere to the crime charged or any other crime, and evidence of offers to so plead, as well as statements made in connection with such pleas or offers, are not admissible in any criminal proceeding.

The purpose of this rule is to encourage plea bargaining. The importance of plea negotiations to the criminal justice system was emphsized by the Supreme Court in *Blackledge v. Allison,* 431 U.S. 63 (1977). *See also Santobello v. New York,* 404 U.S. 257 (1971). Not every discussion between an accused and a government agent is a plea negotiation that is inadmissible, however. *U.S. v. Robertson,* 582 F.2d 1356 (5th Cir. 1978) *(en banc).* "Statements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea." *U.S. v. Herman,* 544 F.2d 791, 797 (5th Cir. 1977).

Lack of a causal connection between the bargain and the confession precludes exclusion of the confession. *Hutto v. Ross,* 429 U.S. 28, 30 (1976). The defendant must "make manifest" his intent to seek a plea bargain before he seeks the route of self-incrimination in order for the exclusion to apply. *U.S. v. Levy,* 578 F.2d 896 (2d Cir. 1978). But evidence of a phone call by defendant to a postal inspector stating that the defendant would plead guilty in return for a two-year maximum sentence was held to be inadmissible in *U.S. v. Brooks,* 536 F.2d 1137 (6th Cir. 1976). *See also U.S. v. Verdoorn,* 528 F.2d 103 (8th Cir. 1976); *U.S. v. Smith,* 525 F.2d 1017, 1021 (10th Cir. 1975); *U.S. v. Ross,* 493 F.2d 771 (5th Cir. 1974).

Admissions not made in the course of formal bargaining, however, may still be adduced at trial. *U.S. v. Levy,* 578 F.2d at 901-902; *U.S. v. Stirling,* 571 F.2d 708, 730-732 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978). An after-the-fact assertion by the accused that he was attempting to negotiate a plea will be viewed on the objective record. *See U.S. v. Robertson,* 582 F.2d at 1366-1371. The court

will look to whether there was an actual subjective expectation to negotiate a plea and whether the accused's expectation was reasonable at the time. *Cf. U.S. v. Calimano,* 576 F.2d 637 (5th Cir. 1978); *Toler v. Wyrick,* 563 F.2d 372 (8th Cir. 1977), *cert. denied,* 435 U.S. 907 (1978); *Calabrese v. U.S.,* 507 F.2d 259 (1st Cir. 1974); *Ford v. U.S.,* 418 F.2d 855 (8th Cir. 1969).

B. IDENTIFICATIONS BEFORE TRIAL

1. SIXTH AMENDMENT RIGHTS

A federal defendant's right to counsel at all critical stages of the criminal process is guaranteed by the sixth amendment ("... and to have the Assistance of Counsel for his defence"). Failure to provide counsel to the accused at these critical stages, without a knowing waiver, renders evidence of a lineup or showup inadmissible per se. Under these circumstancs, subsequent in-court identifications of the accused may be admitted only if the government demonstrates the witness' in-court identification was independent of the tainted pretrial identification.

The right to counsel does not extend to on-the-scene identifications, photographic displays, voice identifications, or unplanned confrontations, either before or after the initiation of judicial criminal proceedings.

Due process under the fifth amendment requires the exclusion of testimony identifying an accused where impermissibly suggestive pretrial identification proceedings give rise to a very substantial likelihood of irreparable misidentification. The dominant consideration is the "reliability" of the identification as determined by the "totality of the circumstances" in each case.

This section addresses the admissibility of pretrial identification evidence within the purview of the fifth and sixth amendments and considers other peripheral questions, including the application of Rule 801(d)(1)(C) of the Federal Rules of Evidence which permits a witness to testify concerning a previous extrajudicial identification of the accused so long as the witness is available for cross-examination.

The "lineup" or the "showup" at which pretrial identification evidence is obtained is deemed a "critical stage" of the prosecution which, under the sixth amendment, entitles the accused to the presence of counsel. *Stovall v. Denno,* 388 U.S. 293 (1967) (suspect in one-on-one confrontation in victim's hospital room); *Gilbert v. California,* 388 U.S. 263 (1967) (post-indictment lineup); *U.S. v. Wade,* 388 U.S. 218, 237 (1967) (post-indictment lineup). Although the accused may not refuse on fifth amendment grounds to participate in a lineup, *id.* at 221, he must, under ordinary circumstances, be offered the opportunity to have counsel present. Substitute counsel may satisfy this requirement. *U.S. v. Smallwood,* 473 F.2d 98 (D.C. Cir. 1972). In the absence of a knowing waiver by the accused of the right to have counsel present, evidence of the lineup or showup identification is inadmissible per se, *U.S. v. Wade,* 388 U.S. at 237, and no subsequent identification, including an in-court identification, is admissible unless the government can demonstrate that it had a source independent of the tainted pretrial identification. *Gilbert v. California,* 388 U.S. at 272. The Second Circuit, noting that precise compliance with the *Wade-Gilbert* rule may be difficult at the pre-arraignment or pre-indictment stage, has said that an in-court identification after a violation of the rule may be permitted if the trial judge is properly satisfied that the in-court identification was affected only "insignificantly or not at all and that no injustice could have occurred ...." *U.S. v. Edmons,* 432 F.2d 577, 585 (2d Cir. 1970).

In *Kirby v. Illinois,* 406 U.S. 682 (1972), the Court, in a plurality opinion, held that the *Wade-Gilbert* sixth amendment rule is not applicable to confrontations before the commencement of formal criminal proceedings. Citing *Kirby,* the Second Circuit has held that issuance of a warrant of arrest under New York law sufficiently marks the initiation of judicial criminal proceedings to require that counsel be present at a subsequent showup. *U.S. ex rel. Robinson v. Zelker,* 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied,* 411 U.S. 939 (1973).

A defendant without counsel who was confronted on numerous occasions by potential witnesses in the two days following arrest was not deprived of the sixth amendment right to counsel at the time since adversary judicial proceedings had not been initiated. *McGuff v. Alabama,* 566 F.2d 939, 941 (5th Cir.), *cert. denied,* 436 U.S. 949 (1978). *Accord, U.S. v. Taylor,* 530 F.2d 639, 641 (5th Cir.), *cert. denied,* 429 U.S. 845 (1976).

The Supreme Court in *Moore v. Illinois,* 434 U.S. 220, 226 (1977), citing *Kirby,* did not limit the right to counsel to only post-indictment identifications, but to any corporeal identification "conducted 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" In *Boyd v. Henderson,* 555 F.2d 56 (2d Cir.), *cert. denied,* 434 U.S. 927 (1977), a case of first impression in the Second Circuit, the court, relying on *Kirby,* 406 U.S. at 682, held that there was no sixth amendment right to counsel before formal charges were filed where identification was made at defendant's arraignment, with counsel, on another charge.

Since adversary proceedings had not been instituted at the time defendant appeared in a police lineup the evening of the robbery, there was no constitutional right to appointment of counsel at the lineup. *Lacoste v. Blackburn,* 592 F.2d 1321 (5th Cir.), *cert. denied,* 100 S. Ct. 458 (1979). Nor does an arrest on probable cause without a warrant, even though the arrest is for the crime with which defendant is eventually charged, initiate judicial criminal proceedings, and consequently, there is no constitutional right to counsel at the lineup conducted subsequent to arrest but before the formal charge is made. *Caver v. Alabama,* 577 F.2d 1188, 1195 (5th Cir. 1978).

In *U.S. v. Tyler,* 592 F.2d 261 (5th Cir. 1979), a defendant in custody for an unrelated offense at the time of a lineup was not deprived of his right to counsel since the government had not "committed itself to prosecute" on the subject offense. Use of testimony of a witness, who was unable to identify the defendant in a photographic display two weeks after the crime but nearly nine months later made an identification at a staged confrontation during a trial recess, violated the defendant's sixth amendment right to counsel. *Cannon v. Alabama,* 558 F.2d 1211, 1217 (5th Cir. 1977).

A courtroom "showup" when defendant was being arraigned on another charge did not constitute a sixth amendment violation where prosecution had not been instituted on the subject charge; and since a critical stage of the prosecution had not been reached, it was not necessary to have counsel present. *Jackson v. Jago,* 556 F.2d 807 (6th Cir. 1977). *Accord, Sanchell v. Parratt,* 530 F.2d 286, 290 n.2 (8th Cir. 1976).

The defendant's right to counsel was not abridged by a series of informal "aural showups" consisting of brief, matter of fact conversations concerning routine matters when no effort at interrogation was made. *U.S. v. Woods,* 544 F.2d 242, 263 (6th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977).

The defendant's sixth amendment right to counsel had not attached at the time of confrontation with a potential witness in the absence of the initiation of "adversary judicial proceedings." *U.S. v. Derring,* 592 F.2d 1003, 1006 n.4 (8th Cir. 1979).

The Ninth Circuit, citing *U.S. v. Ash,* 413 U.S. 300, 321 (1973) (no right to have counsel present during witness view of post-indictment photographic array), has held that pretrial identifications by government witnesses of voices obtained through lawful electronic surveillance are not, for sixth amendment purposes, critical stages of the criminal proceedings in which the witnesses are to eventually testify. *U.S. v. Kim,* 577 F.2d 473, 480-481 (9th Cir. 1978); *U.S. v. Thomas,* 586 F.2d 123 (9th Cir. 1978). *Accord, U.S. v. Dupree,* 553 F.2d 1189, 1192 (8th Cir.), *cert. denied,* 434 U.S. 986 (1977).

It is well settled that on-the-scene identifications which occur within minutes of the witnessed crime in the absence of counsel are not prohibited by *Wade. U.S. v. Abshire,* 471 F.2d 116 (5th Cir. 1972); *U.S. v. Savage,* 470 F.2d 948 (3d Cir. 1972), *cert. denied,* 412 U.S. 930 (1973); *Spencer v. Turner,* 468 F.2d 599 (10th Cir. 1972), *cert. denied,* 410 U.S. 988 (1973); *U.S. ex rel. Cummings v. Zelker,* 455 F.2d 714 (2d Cir.), *cert. denied,* 406 U.S. 927 (1972); *U.S. v. Sanchez,* 422 F.2d 1198, 1200 (2d Cir. 1970) ("consistent with good police work").

The Second Circuit has held that *Wade* requires notice to defense counsel before a witness walks into a courtroom during a trial in a prearranged effort to identify the defendant. *U.S. v. Roth,* 430 F.2d 1137 (2d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971). But it is clear that the sixth amendment is not violated if the confrontation between witness and defendant is inadvertent and not deliberately arranged by the government. *See, e.g., U.S. v. Gentile,* 530 F.2d 461, 468 (2d Cir. 1976), *cert. denied,* 426 U.S. 936 (1976); *U.S. v. Kaylor,* 491 F.2d 1127 (2d Cir. 1973), *vacated on other grounds,* 418 U.S. 909 (1974).

The Supreme Court has differentiated between pretrial lineups and pretrial photographic identifications. Unlike post-indictment pretrial lineups, pretrial photographic identifications, whether before or after indictment, have not been held to be a "critical stage" in the criminal proceedings requiring right to counsel. *U.S. v. Ash,* 413 U.S. 300, 321 (1972). *See also Hill v. Wyrick,* 570 F.2d 748 (8th Cir.), *cert. denied,* 436 U.S. 921 (1978); *Anderson v. Maggio,* 555 F.2d 447, 450 n.5 (5th Cir. 1977).

2. FIFTH AMENDMENT DUE PROCESS RIGHTS

> No person shall be held to answer for a capital or otherwise infamous crime . . . , without due process of law . . . .

The "totality of the circumstances" must be examined in determing whether police identification procedures in a lineup or showup are "unnecessarily suggestive and conducive to irreparable mistaken identification" and thus violative of due process under the fifth and fourteenth amendments. *Stovall v. Denno,* 388 U.S. 293, 302 (1967). *See Coleman v. Alabama,* 399 U.S. 1 (1970); *Foster v. California,* 394 U.S. 440 (1969). Similarly, photographic identifications must not be "so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.,* 390 U.S. 377, 384 (1968). Whether an identification procedure is improper under the fifth amendment depends upon the totality of the circumstances in each case. *Id.* at 383; *Stovall v. Denno,* 388 U.S. at 302.

In *Neil v. Biggers,* 409 U.S. 188 (1972), involving a rape victim's showup identification seven months after the crime (and before the *Stovall* decision), the Court refused to apply a per se rule and concluded that the identification, although suggestive, was reliable under the totality of the circumstances test. The factors to be weighed in assessing reliability against the corrupting effect of the suggestive procedure include (1) the witness' opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Id.* at 199-200. *See Allen v. Estelle,* 568 F.2d 1108 (5th Cir. 1978).

Manson v. Brathwaite, 432 U.S. 98, 114 (1977), held that "reliability" is the linchpin in determining the admissibility of identification testimony for confrontations occurring both before and after *Stovall v. Denno,* and adopted the factors to be considered as those set out in *Neil v. Biggers. See Hudson v. Blackburn,* 601 F.2d 785 (5th Cir. 1979) (in-court identification not fatally tainted by suggestive procedure whereby single photographs of defendant and codefendant were shown to witness the day before trial, six months after robbery); *Jackson v. Fogg,* 589 F.2d 108 (2d Cir. 1978) (pre-lineup confrontation at stationhouse arranged by police was suggestive and trial identifications denied due process); *U.S. v. Bierey,* 588 F.2d 620 (8th Cir.), *cert. denied,* 440 U.S. 927 (1979) (difference in height, weight, and facial hair of those in lineup, not necessarily suggestive); *Cronnon v. Alabama,* 587 F.2d 246 (5th Cir.), *cert. denied,* 440 U.S. 974 (1979) (in-court identification sufficiently reliable even though photographic spread suggestive); *U.S. v. Baykowski,* 583 F.2d 1046 (8th Cir. 1978) (defendant in photo spread was only one wearing stolen sweater and the photo identification was excluded as unreliable); *U.S. v. Herring,* 582 F.2d 535 (10th Cir. 1978) (in-court identification not invalid where witness was with defendants for two or three hours, was aware he would be called to identify them, and photos displayed were not suggestive).

In *U.S. v. Sheehan,* 583 F.2d 30 (1st Cir. 1978), two later photo displays, six and one-half months apart, which then included defendant, where witness' selections were not suggested and cross-examination was vigorous and extensive, did not give rise to substantial likelihood of irreparable misidentification.

The Supreme Court in *Simmons v. U.S.,* 390 U.S. at 384, established the standard for judging photographic identification procedures and said that such identification would be set aside only if the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Fifth Circuit in *U.S. v. Henderson,* 489 F.2d 802, 805 (5th Cir. 1973), *cert. denied,* 417 U.S. 913 (1974), applied a two-step test: "(1) whether the procedures followed were 'impermissibly suggestive,' and then (2) whether, being so, they created 'a substantial risk of misidentification.'" To make these determinations the district courts conduct *in camera* hearings to inquire into the circumstances of the challenged identification procesures. *See, e.g., U.S. v. Baykowski,* 583 F.2d 1046, 1047 (8th Cir. 1978); *U.S. v. Bubar,* 576 F.2d 192, 197 (2d Cir. 1977); *Williams v. McKenzie,* 576 F.2d 566, 571 (4th Cir. 1978); *U.S. v. Flickinger,* 573 F.2d 1349, 1358 (9th Cir.), *cert. denied,* 439 U.S. 836 (1978).

In *U.S. ex rel Moore v. Illinois,* 577 F.2d 411 (7th Cir. 1978), *cert. denied,* 440 U.S. 919 (1979), the court weighed the possibly corrupting effect of a suggestive confrontation as bearing on the reliability of the victim's in-court identification and found that the victim's identification was based upon her observation of defendant other than at the suggestive pretrial confrontation. *See also U.S. v. Alden,* 576 F.2d 772 (8th Cir.), *cert. denied,* 439 U.S. 855 (1978); *U.S. v.*

Flickinger, 573 F.2d at 1358 (voice identification).

In *U.S. v. Bubar,* 567 F.2d at 198, since the government witness, a participant in the alleged crime, had an independent basis in memory sufficient to support his in-court identification without reliance on an intervening single photograph, his in-court identification was deemed reliable.

Applying the "totality of the circumstances" test, the court, in *Boyd v. Henderson,* 555 F.2d 56 (2d Cir.), *cert. denied,* 434 U.S. 927 (1977), found a courtroom showup not suggestive where the defendant was one of six black defendants who appeared for arraignment on other charges and the witness had no idea when or where he would appear. *See also U.S. v. Smith,* 602 F.2d 834 (8th Cir.), *cert. denied,* 100 S. Ct. 215 (1979) (procedure not so impermissibly suggestive where defendant was only person wearing bib overalls in photospread in light of fact all but two of the eyewitnesses failed to identify him); *U.S. v. Coades,* 549 F.2d 1303 (9th Cir. 1977) (suspect returned to the scene of the crime for a showup shortly after the occurrence); *Sanchell v. Parratt,* 530 F.2d 286 (8th Cir. 1976) (substantial likelihood of irreparable misidentification as defendant repeatedly was presented as a single suspect to victims who initially failed to identify him). *Cf. Williams v. McKenzie,* 576 F.2d 566 (4th Cir. 1978) (photographic identification from only four photos was not unduly suggestive; no per se rule requiring six photos in spread).

In *Dupuie v. Egeler,* 552 F.2d 704 (6th Cir. 1977), the court declined to apply a per se rule that federal due process requires rejection of otherwise admissible identification testimony simply because the witness to a crime might have seen a newspaper photograph of the accused before the lineup or in-court identification.

Because the possibility of irreparable misidentification is as great when the out-of-court identification is from a tape recording as when it is from a photograph or a lineup, the same due process protection applies to either method. *U.S. v. Pheaster,* 544 F.2d 353 (9th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977).

In *U.S. v. Milhollan,* 599 F.2d 519, 522 (3d Cir. 1979), the court held that in-court identifications of defendant were admissible even in face of earlier tainted identification procedures if the prosecution established by "clear and convincing" evidence that the later identifications were based on independent observations at the scene of the crime and not on the tainted procedure. It was held in *U.S. v. Crews,* 100 S. Ct. 1244 (1980), that an in-court identification of defendant was admissible since it was based upon the victim's untainted independent recollection which had no causal relationship with the intervening inadmissible photographic and lineup identifications of defendant following his illegal arrest.

Identifications resulting from unexpected and unplanned encounters with defendants usually do not violate due process. *U.S. v. Massaro,* 544 F.2d 547 (1st Cir. 1976), *cert. denied,* 429 U.S. 1052 (1977) (witness outside courtroom waiting for trial to begin saw defendant walk down the hall with two other men and immediately recognized him); *U.S. v. Colclough,* 549 F.2d 937 (4th Cir. 1977) (robbery victim's unexpected encounter with defendant who was standing in hallway outside courtroom). Although most accidental encounters do not involve any significant degree of suggestiveness requiring a review on constitutional grounds, the Ninth Circuit concluded in *Green v. Loggins,* 614 F.2d 219, 223 (9th Cir. 1980), that a chance holding cell encounter between the state's star witness (who previously identified another as the assailant) and the murder suspect defendant, was unnecessarily and impermissibly suggestive under the totality of the circumstances, where (1) the setting of the encounter made it clear the defendant had been accused of some crime; (2) the defendant was identified as the state's suspect by the booking officer mentioning his name; and (3) the encounter resulted from the state's negligent exercise of its control over the witness and the accused.

When defendant fails to allege the existence of any lineup conditions that would justify finding the in-court identification tainted in any way, the pre-indictment lineup does not violate defendant's due process rights. *U.S. v. Taylor,* 530 F.2d 639 (5th Cir.), *cert. denied,* 429 U.S. 845 (1976). *See also Hill v. Wyrick,* 570 F.2d 748 (8th Cir.), *cert. denied,* 436 U.S. 921 (1978) (no factual allegations that pretrial photographic display was in any way impermissibly suggestive); *Johnson v. Riddle,* 562 F.2d 312 (4th Cir. 1977) (general unsupported allegation of due process violation in a showup).

In *U.S. v. Hines,* 455 F.2d 1317 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 975 (1972), the court held that once an eyewitness has made a positive identification at a valid showup or lineup, government counsel's review of that identification with the witness through the use of photographs in preparation for trial does not taint an in-court identification.

Rights of defendants are not prejudiced by the use of photographs rather than a lineup to obtain eyewitness identifications. *U.S. v. Boston,* 508 F.2d 1171 (2d Cir. 1974), *cert. denied,* 421 U.S. 1001 (1975). Even though a defendant has no constitutional right to a lineup, a court ordered lineup may be granted by the trial judge, in the exercise of his discretion; and if the request is made promptly after the crime or arrest, it may be of value to both sides. *U.S. v. Estremera,* 531 F.2d 1103, 1111 (2d Cir.), *cert. denied,* 425 U.S. 979 (1976).

In a bench trial, it should be noted, the court may exercise more lenient standards with respect to identification evidence. *See Smith v. Paderick,* 519 F.2d 70 (4th Cir.), *cert. denied,* 423 U.S. 935 (1975).

It is important that photographic spreads used by the government be retained for possible use at trial, or at least be subject to reconstruction. Otherwise the court, being unable to make an independent judicial review of their contents, may assume the pretrial identification procedures were impermissibly suggestive. *See, e.g., U.S. v. Sanchez,* 603 F.2d 381 (2d Cir. 1979).

3. EVIDENCE OF EXTRAJUDICIAL IDENTIFICATIONS

Rule 801(d)(1)(C) of Federal Rules of Evidence provides, "A statement is not hearsay if ... the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... one of identification of a person made after perceiving him ...." The purpose of the rule is to permit the introduction of identifications made by a witness when his memory was fresher and there was less opportunity for influence to be exerted upon the witness' recollection. Protection against misidentifications is afforded by the requirement that the declarant be available for cross-examination. Questions about the probative value of the testimony are for the jury. Consequently, Rule 801(d)(1)(C) governs admissibility, not sufficiency. *See, e.g., U.S. v. Hudson,* 564 F.2d 1377 (9th Cir. 1977). In *U.S. v. Marchand,* 564 F.2d 983, 996 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978), the court held that " 'Rule 801(d)(1)(C) should ... be interpreted as allowing evidence of prior identification by the witness of a photograph of the person whom he had initially perceived,' 4 Weinstein & Berger, Commentary on Rules of Evidence for the United States Courts and Magistrates 801-107 to 108 (1976), and also to descriptions and sketches [photographic identification and sketch made by a witness rather than a police artist]."

The sketch itself need not satisfy the requirements of Rule 801(d)(1)(C), but only the authentication requirements of Rule 901. Statements of witnesses that the

sketch looked like the robber met the requirements of Rule 801 in *U.S. v. Moskowitz,* 581 F.2d 14, 21 (2d Cir.), *cert. denied,* 439 U.S. 871 (1978). The testimony of the artist was no more necessary as a condition of admissibility than a photographer's testimony would have been had the witnesses identified a photograph. *Id.* In *U.S. v. Watson,* 587 F.2d 365 (7th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979), the court permitted out-of-court identification testimony of witness who was positive and unequivocal about his identification of the defendants at a showup, yet some six months later at trial he was somewhat less certain. The court noted that the application of the criteria set forth in *Neil v. Biggers,* 409 U.S. 188 (1972), established the reliability of the identification and that there were other circumstances (incriminating physical evidence) which showed the reliability of the identification. *U.S. v. Watson,* 587 F.2d at 368 n.3. *See also U.S. v. Lewis,* 565 F.2d 1248 (2d Cir. 1977), *cert. denied,* 435 U.S. 973 (1978) (failure of witness who made pretrial photographic identification of defendant to make corporeal identifications at trial did not render testimony of FBI agent, that witness had previously identified defendant, inadmissible where witness recalled prior identifications and so testified); *Anderson v. Maggio,* 555 F.2d 447 (5th Cir. 1977) (witness at trial could properly testify that he identified a particular photograph, seen by him at an unsuggestive pretrial proceeding, of the defendant as the robber).

The absence of counsel in violation of *U.S. v. Wade,* 388 U.S. 218 (1967), would render the out-of-court identification inadmissible per se. Where counsel was not required, such out-of-court identification is subject to the due process standards of *Stovall v. Denno,* 388 U.S. 293 (1967). If, under *Stovall,* the out-of-court identification is found to have been unnecessarily obtained by impermissibly suggestive means, evidence of it must be excluded from trial. *Manson v. Brathwaite,* 432 U.S. 98 (1977); *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972).

It should be noted that one circuit, citing *Mallory v. U.S.,* 354 U.S. 449 (1957), has held that evidence of lineups, conducted during an investigatory delay in violation of Rule 5(a), should be excluded. *Adams v. U.S.,* 399 F.2d 574 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1067 (1969). *See U.S. v. Broadhead,* 413 F.2d 1351 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970) (Rule 5 applies to lineups as well as confessions).

Although mug shots are generally indicative of past criminal conduct and likely to raise inferences of past criminal behavior in the minds of the jury, they may be admitted under certain circumstances, particularly where their probative value outweighs the prejudicial effect. The First and Second Circuits have adopted principles governing the introduction into evidence of "mug shot" photographs which have been used in making out-of-court identifications: (1) the government must have demonstrable need to introduce the photographs; (2) the photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and (3) the manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. *U.S. v. Fosher,* 568 F.2d 207, 214 (1st Cir. 1978). In *Fosher,* even though a "demonstrable need" was present for introduction of mug shots, their admission was an abuse of discretion where defendant's guilt was less than overwhelming, when the photographs were clearly mug shots showing inartistic masking of prejudicial features, and colloquy concerning admissibility had taken place in presence of the jury. *U.S. v. Harrington,* 490 F.2d 487, 494 (2d Cir. 1973) (in spite of "demonstrable need," the introduction of "mug shots" constituted reversible error where the method of masking defendant's criminality and the police source of the photograph had been awkwardly handled before the jury).

CHAPTER III
THE GRAND JURY AND IMMUNITY

The Constitution requires that federal felonies be charged by grand jury indictment. U.S. Const. Amend. V. The grand jury may use its subpoena powers to determine whether there is probable cause to believe a crime has been committed and that a particular individual or corporation committed it. Information gathered during the course of a grand jury's investigation is also a primary source of evidence which may be offered by the prosecution at trial.

The powers of the grand jury are not defined in federal statutory law. The statutes authorize district courts to call grand juries, provide for the manner of such calling, define a quorum, and give the court the right to excuse or discharge grand jurors; but, the powers of the grand jury, a common-law institution, have been defined by the courts on a case-by-case basis.

A. PROCEDURES

Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. §§3331-3334 vest in the district courts the power to summon regular and special grand juries. Special grand juries serve for a term of 18 months, and a district court may extend that term for another 18 months. 18 U.S.C. §3331(a). The term of a regular grand jury is limited to 18 months and cannot be extended by judicial action. *See U.S. v. Fein,* 504 F.2d 1170 (2d Cir. 1974). Extension of a special grand jury's term is not reviewable on appeal, absent a showing of flagrant abuse. *In re Korman,* 486 F.2d 926 (7th Cir. 1973).

Federal grand juries must consist of at least 16 and not more than 23 persons. An indictment may be found upon the concurrence of 12 or more jurors. Rule 6(f), Fed. R. Crim. P. While the Second Circuit has taken the position that the absence of some grand jurors during the presentation of some of the evidence does not affect the validity of an indictment, *U.S. v. Colasurdo,* 453 F.2d 585 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972), at least one district court has taken the view that at least 12 jurors must be present at all sessions of the grand jury where evidence is heard. *U.S. v. Leverage Funding Systems, Inc.,* 478 F. Supp. 799 (C.D. Cal. 1979). *But see U.S. v. Olin Corp.,* 465 F. Supp. 1120 (W.D.N.Y. 1979).

All grand jury proceedings, except deliberations or voting, must be recorded electronically or by a stenographer. Rule 6(e)(1), Fed. R. Crim. P. The attorney for the government is responsible for maintaining the recordings or the reporter's notes.

No federal grand jury can indict without the concurrence of the attorney for the government. He must sign the indictment. Rule 7(c), Fed. R. Crim. P. A court cannot compel an attorney for the government to sign an indictment because in

signing the indictment the attorney for the government is exercising a power belonging to the executive branch of the government. *See Smith v. U.S.*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *U.S. v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970).

In *U.S. v. Mandujano*, 425 U.S. 564 (1976), the Supreme Court ruled that the sixth amendment right to counsel does not apply to grand jury appearances because criminal proceedings have not yet been instigated. However, a witness may leave the grand jury room to consult with counsel. *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *U.S. v. George*, 444 F.2d 310 (6th Cir. 1971). Such departures from the grand jury room to consult with counsel may be subject to reasonable limitations. *See In re Tierney*, 465 F.2d 806, 810 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973).

A witness has the right to object to the presence of unauthorized persons during his testimony. *In re Grand Jury Investigation*, 424 F. Supp. 802 (E.D. Pa.), *appeal dismissed*, 576 F.2d 1071 (1976), *cert. denied*, 439 U.S. 953 (1978); *U.S. v. DiGirlomo*, 393 F. Supp. 997 (W.D. Mo. 1975), *aff'd*, 520 F.2d 372, *cert. denied*, 423 U.S. 1033 (1975). The presence of unauthorized persons may also serve to void the grand jury's indictment. *Latham v. U.S.*, 226 F. 420, 424 (5th Cir. 1915); *U.S. v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977). *But see U.S. v. Glassman*, 562 F.2d 954 (5th Cir. 1977), where the presence of an agent operating a movie projector did not vitiate an indictment.

Defendants have frequently challenged the validity of letters of appointment of Justice Department attorneys appearing before grand juries. These challenges have been uniformly rejected. *U.S. v. Sklaroff*, 552 F.2d 1156, 1160-1161 (5th Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978); *U.S. v. Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *Schebergen v. U.S.*, 536 F.2d 674 (6th Cir. 1976); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975). However, courts are increasingly sensitive about potential conflicts created by attorneys from other federal agencies appearing before grand juries by special appointment. Following are cases which should be reviewed before a decision to make a special appointment of an agency attorney is reached: *U.S. v. Birdman*, 602 F.2d 547 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 703 (1980); *In re April 1977 Grand Jury Subpoenas: General Motors Corp. v. U.S.*, 573 F.2d 936 (6th Cir.), *appeal dismissed en banc*, 584 F.2d 1366 (1978), *cert. denied*, 440 U.S. 934 (1979); *U.S. v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979).

B. SUPERVISORY POWERS OF DISTRICT COURT

Although the grand jury must turn to the court for enforcement of its orders, it has an independent constitutional identity and is not subject to the courts' directions and orders with respect to the exercise of its essential functions. *U.S. v. U.S. District Court, 238 F.2d 713, 719 (4th Cir. 1956), cert. denied*, 352 U.S. 981 (1957). The courts of appeals do have authority to issue mandamus to district courts under the All Writs Act, 28 U.S.C. §1651(a), when the district court exceeds its authority by interfering with the work of a grand jury. *Id.* at 718. A court may not order a grand jury to come to a decision concerning an indictment, *id.* at 722; nor, may a court stay a grand jury's investigation pending the outcome of state litigation. *In re Grand Jury Proceedings*, 525 F.2d 151 (3d Cir. 1975). A court may not interfere with the prosecutor's decision of what evidence to present

to the grand jury and how to present it. *U.S. v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1972).

C. EVIDENCE BEFORE GRAND JURY

If an indictment is valid on its face, it is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even evidence obtained in violation of the defendant's fifth amendment privilege against self-incrimination. *U.S. v. Calandra*, 414 U.S. 338, 345 (1974); *U.S. v. Blue*, 384 U.S. 251 (1966); *Lawn v. U.S.*, 355 U.S. 339 (1958); *Costello v. U.S.*, 350 U.S. 359 (1956). A grand jury may return an indictment based partly or solely on hearsay evidence. *U.S. v. Brown*, 573 F.2d 1274 (5th Cir. 1978); *U.S. v. Newcomb*, 488 F.2d 190 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974); *U.S. v. Hickok*, 481 F.2d 377 (9th Cir. 1973); *Doss v. U.S.*, 431 F.2d 601 (9th Cir. 1970).

Courts have rejected defense arguments that the government's failure to produce key witnesses before the grand jury and its reliance upon hearsay before the grand jury substantially undermined the policy underlying the Jencks Act, 18 U.S.C. §3500. *U.S. v. Head*, 586 F.2d 508 (5th Cir. 1978); *U.S. v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974). However, the grand jury should not be misled into believing that a witness is basing his testimony on firsthand knowledge when he is not. *U.S. v. Harrington*, 490 F.2d 487 (2d Cir. 1973); *U.S. v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). Use of hearsay testimony when non-hearsay testimony is readily available could invalidate an indictment if the court finds that there is a high probability that had the grand jury heard the eyewitnesses it would not have indicted. *U.S. v. Curz*, 478 F.2d 408, 410 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973). An indictment may not be based solely on the informal unsworn hearsay testimony of the prosecutor. *U.S. v. Hodge*, 496 F.2d 87 (5th Cir. 1974).

Because the grand jury determines only probable cause, the prosecutor may be selective in deciding what evidence to present to the grand jury. There is no obligation to present all evidence that might be exculpatory or undermine the credibility of the government's witnesses. *U.S. v. Smith*, 595 F.2d 1176 (9th Cir. 1979); *U.S. v. Smith*, 552 F.2d 257 (8th Cir. 1977); *U.S. v. Y. Hata & Co. Ltd.*, 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976); *U.S. v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 422 U.S. 861 (1976); *Jack v. U.S.*, 409 F.2d 522 (9th Cir. 1969); *Loraine v. U.S.*, 396 F.2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968); *U.S. v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978). Some courts have made exceptions to the general rule that a prosecutor need not present exculpatory evidence to the grand jury in factual situations where fairness would dictate such a result. In *U.S. v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977), the court held that a prosecutor's failure to present exculpatory testimony after advising the witness that his statements would be considered part of the grand jury records was an abuse that rendered the proceedings defective. In *U.S. v. Provensano*, 440 F. Supp. 561 (S.D.N.Y. 1977), the prosecutor knew that the identifying witness in a one-witness identification case had expressed doubts about the identification and this fact was not presented to the grand jury; the court found this procedure improper. *See also U.S. v. Carcaise*, 442 F. Supp. 1209 (M.D. Fla. 1978).

Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires that arguments regarding the propriety of matters occurring before the grand jury must be raised before trial or they will deemed to be waived. *U.S. v. Daley,* 564 F.2d 645 (2d Cir. 1977), *cert. denied,* 435 U.S. 933 (1978); *U.S. v. Kaplan,* 554 F.2d 958 (9th Cir.), *cert. denied,* 434 U.S. 956 (1977).

1. CALLING AND QUESTIONING OF WITNESSES AND WARNINGS

The grand jury's broad authority to subpoena witnesses is considered essential to its task and the Supreme Court has declined to make exceptions to the longstanding principle that "the public has a right to every man's evidence." *Branzburg v. Hayes,* 408 U.S. 665, 668 (1972); *U.S. v. Mandujano,* 425 U.S. 564 (1976). A witness may not refuse to answer questions before a grand jury unless he can assert his fifth amendment privilege or establish that some other common-law privilege applies. *U.S. v. Mandujano,* 425 U.S. at 571. (*See* chapter on Privileges, *infra.*) Even when a grand jury witness asserts his fifth amendment right, a prosecutor may continue the examination by pursuing other lines of inquiry. *U.S. v. Cohen,* 444 F. Supp. 1314 (E.D. Pa. 1978).

The grand jury's right to inquire into possible offenses is generally "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *U.S. v. Calandra,* 414 U.S. 338, 343 (1974). The only rule in the Federal Rules of Evidence that applies to grand jury proceedings is Rule 501 (privileges). *See* Rules 101 and 1101(c) and (d), Fed. R. Evid.

A witness may not refuse to respond to a subpoena or refuse to answer questions on the grounds of relevance, *Blair v. U.S.,* 250 U.S. 273 (1919); *U.S. v. Doe,* 457 F.2d 895 (2d Cir. 1972), *cert. denied,* 410 U.S. 941 (1973); *U.S. v. Weinberg,* 439 F.2d 743 (9th Cir. 1971), or because he feels that testifying may result in physical harm, *U.S. v. Gomez,* 553 F.2d 958 (5th Cir. 1977); *Dupuy v. U.S.,* 518 F.2d 1295 (9th Cir. 1975); *U.S. v. Doe,* 478 F.2d 194 (1st Cir. 1973); *In re Kilgo,* 484 F.2d 1215 (4th Cir. 1973); *Latona v. U.S.,* 449 F.2d 121 (9th Cir. 1971). A witness must respond to a grand jury subpoena even if his compliance results in hardship or inconvenience. *U.S. v. Calandra,* 414 U.S. at 345.

The first amendment does not protect a newsman from being called by a grand jury to testify concerning his news sources. *Branzburg v. Hayes, supra.* However, post-*Branzburg* departmental policy requires approval of the Attorney General before a newsman is subpoenaed. The first amendment also does not preclude questioning a grand jury witness concerning his past political associations. *U.S. v. Weinberg, supra.*

A potential defendant may properly be subpoenaed to appear before a grand jury that is investigating his activities. "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete." *U.S. v. Mandujano,* 425 U.S. 564, 573 (1976). However, a potential defendant does not have the right to appear before the grand jury. *U.S. v. Smith,* 552 F.2d 257 (8th Cir. 1977); *U.S. v. Gardner,* 516 F.2d 334 (7th Cir.), *cert. denied,* 423 U.S. 861 (1975); *U.S. v. Neidelman,* 356 F. Supp. 979 (S.D.N.Y. 1973). There is no duty of the prosecution to tell a grand jury witness what evidence it may have against him. *U.S. v. Del Toro,* 513 F.2d 656, 664 (2d Cir.), *cert. denied,* 423 U.S. 826 (1975). A defendant who falsely testified and is later charged with perjury cannot claim entrapment because the government used taped conversations between the

defendant and an informant to frame its questions and did not advise the defendant that such tapes existed. *U.S. v. Edelson,* 581 F.2d 1290 (7th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979).

Once an indictment has been returned, it is an abuse of process to call a defendant to testify concerning pending charges or to use the grand jury's subpoena power to gather other evidence for trial. *U.S. v. Doss,* 563 F.2d 265 (6th Cir. 1977); *U.S. v. Fahey,* 510 F.2d 302 (2d Cir. 1974) (held to be harmless error and usable for impeachment); *U.S. v. Fisher,* 455 F.2d 1101 (2d Cir. 1972). However, despite the fact that a prosecution is pending, the government may call witnesses before the grand jury if the primary purpose of calling them is to investigate the possible commission of other offenses, even if the evidence received may also relate to the pending indictment. *U.S. v. Gibbons,* 607 F.2d 1320 (10th Cir. 1979); *In re Grand Jury Proceedings (Pressman),* 586 F.2d 724 (9th Cir. 1978); *U.S. v. Zarattini,* 552 F.2d 753 (7th Cir.), *cert. denied,* 431 U.S. 942 (1977); *U.S. v. Beasley,* 550 F.2d 261 (5th Cir.), *cert. denied,* 434 U.S. 863 (1977); *U.S. v. Woods,* 544 F.2d 242 (6th Cir.), *cert. denied,* 429 U.S. 1062 (1976); *U.S. v. Braasch,* 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). While ordinarily the party alleging abuse must bear the burden of proving that grand jury process is being used to gather evidence for trial, *Woods, supra,* where the underlying facts sought to be established are the same for both investigations, the burden may shift to the government to demonstrate good faith. *U.S. v. Kovaleski,* 406 F. Supp. 267 (E.D. Mich. 1976). A grand jury should never be used to gather evidence for a civil case, *In re Grand Jury Subpoenas April 1978, Etc.,* 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 440 U.S. 971 (1979); *FTC v. Atlantic Richfield Co.,* 567 F.2d 96, 104 n.19 (D.C. Cir. 1977); *In re Special March 1974 Grand Jury, Etc.,* 541 F.2d 166 (7th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977); but a witness' fear that evidence may improperly find its way into the hands of governmental agencies for use in future civil litigation is no basis for failure to comply with a subpoena, *Coson v. U.S.,* 533 F.2d 1119 (9th Cir. 1976).

A grand jury witness should be given fair opportunity to respond fully to questions and, whenever possible, should not be limited to the "yes" or "no" answers that typify responses to leading questions. *U.S. v. Boberg,* 565 F.2d 1059 (8th Cir. 1977). A perjury conviction that rests on a witness' response to leading questions will be strictly scrutinized for fairness. *Id.* at 1063. Unnecessary, repetitious questioning designed to coax a witness into the commission of perjury or contempt of court is an abuse of the grand jury process. *Bursey v. U.S.,* 466 F.2d 1059 (9th Cir. 1972). In *U.S. v. Bruzgo,* the Third Circuit criticized a prosecutor for threatening a reluctant witness with loss of citizenship and calling her a "thief" and a "racketeer." 373 F.2d 383, 384 (3d Cir. 1967). Gratuitous comments by the prosecutor that the defendants were connected with organized crime have also been condemned. *U.S. v. Serubo,* 604 F.2d 807 (3d Cir. 1979); *U.S. v. Riccobene,* 451 F.2d 586 (3d Cir. 1971). And an indictment has been dismissed where a district court found that the prosecutor misled the potential defendant-witness into believing he could be compelled to answer without explaining his fifth amendment rights and the immunity procedure. *U.S. v. Pepe,* 367 F. Supp. 1365 (D. Conn. 1973).

The Supreme Court has declined to extend the fourth amendment's exclusionary rule to grand jury proceedings. Questions based on evidence obtained from an illegal search and seizure do not constitute independent violations of a grand jury witness' fourth amendment rights. *U.S. v. Calandra, supra. Costello v. U.S.,* 350 U.S. 359 (1956), prevents the same sort of issues being raised to

invalidate the indictment. In a case involving a confession obtained by torture, the Ninth Circuit has extended the *Calandra* analysis to statements given in violation of the fifth amendment. *In re Weir,* 495 F.2d 879 (9th Cir.), *cert. denied,* 419 U.S. 1038 (1974).

Questions derived from illegal electronic surveillance, however, are not permissible because of the specific statutory prohibition in the Omnibus Crime Control and Safe Streets Act of 1968 against the use of such evidence, 18 U.S.C. §§2510-2520. *Gelbard v. U.S.,* 408 U.S. 41 (1972). *Gelbard* left open the issue of whether a witness who refuses to answer a question because he believes that it was derived from illegal electronic surveillance is entitled to a plenary hearing on the issue. In cases where the legality of court-ordered surveillance is challenged the Second, Fifth, Seventh, and Ninth Circuits have held that a judge's findings of facial validity after an *in camera* review of electronic surveillance documents is sufficient, and no discovery or further hearing is required. *Matter of Special February 1977 Grand Jury,* 570 F.2d 674 (7th Cir. 1978); *In re Grand Jury Proceedings (Worobyst),* 522 F.2d 196 (5th Cir. 1975); *Droback v. U.S.,* 509 F.2d 625 (9th Cir. 1974), *cert. denied,* 421 U.S. 964 (1975); *In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974). In contrast, the First, Eighth, and District of Columbia Circuits have held that the witness is entitled to inspect the application for the wiretap, the supporting affidavits, the court order, and the affidavit stating the length of the surveillance. If the government interposes a secrecy objection, the court should excise the secret information and then release the documents. *In re Grand Jury Proceedings (Katsouros),* ——— F.2d ——— (D.C. Cir. 1979); *Melickian v. U.S.,* 547 F.2d 416 (8th Cir.), *cert. denied,* 430 U.S. 986 (1977); *In re Lochiatto,* 497 F.2d 803 (1st Cir. 1974).

In cases where a witness alleges that illegal electronic surveillance occurs and there is no court order, the necessity for and the specificity of the denial that the government must make depend upon the specificity of the witness' claim. *Matter of Archeluta,* 561 F.2d 1059 (2d Cir. 1977); *In re Millow,* 529 F.2d 770 (2d Cir. 1976); *In re Grand Jury Impaneled January 21, 1975 (Freedman),* 529 F.2d 543 (3d Cir.), *cert. denied,* 425 U.S. 992 (1976); *U.S. v. Tucker,* 526 F.2d 279 (5th Cir.), *cert. denied,* 425 U.S. 958 (1976); *In re Quinn,* 525 F.2d 222 (1st Cir. 1975); *Matter of Grand Jury (Vigil),* 524 F.2d 209 (10th Cir. 1975), *cert. denied,* 425 U.S. 927 (1976) (this opinion has an appendix that discusses all earlier cases by circuit). A general denial by affidavit of the government attorney is sufficient in response to a general unsubstantiated allegation, *U.S. v. Stevens,* 510 F.2d 1101 (5th Cir. 1975), whereas a hearing might be appropriate where there are particularized allegations. *See Vigil, supra.* A person who is not a witness or a defendant has no standing to allege improper use before a grand jury of evidence derived from illegal electronic surveillance. *In re Vigorito,* 499 F.2d 1351 (2d Cir. 1974).

The Supreme Court has not decided whether fifth amendment warnings are constitutionally required for grand jury witnesses. *See U.S. v. Washington,* 431 U.S. 181, 186 (1977). The Court has decided that a grand jury witness' incriminating testimony, if not compelled, is admissible against him in a subsequent prosecution even if he was not told that he was a potential defendant, *Washington, supra;* and, the failure of the prosecution to give full *Miranda* warnings or of the witness to understand them does not require suppression of perjured testimony in a subsequent perjury trial, *U.S. v. Mandujano, supra; U.S. v. Wong,* 431 U.S. 174 (1977). Nonetheless, the Justice Department has established an internal policy of advising grand jury witnesses of their fifth amendment rights and of their status as "targets," if that is the case. The Second Circuit has affirmed

the suppression of perjured grand jury testimony because a Strike Force attorney failed to warn a witness that he was a putative defendant. That court based its ruling on its supervisory powers rather than on constitutional grounds, observing that it was the uniform practice among federal prosecutors in the Second Circuit to give such warnings. *U.S. v. Jacobs,* 547 F.2d 772 (2d Cir. 1976), *cert. dismissed,* 436 U.S. 931 (1978). While other circuits have not followed the Second, such rulings are possible in view of the Justice Department's announced practice of giving warnings. *See U.S. v. Crocker,* 568 F.2d 1049, 1055 (3d Cir. 1977).

2. SUBPOENAS DUCES TECUM

The grand jury has the power to subpoena physical evidence in addition to testimony. It can subpoena voice exemplars, *U.S. v. Dionisio,* 410 U.S. 1 (1973), and handwriting samples, *U.S. v. Mara,* 410 U.S. 19 (1973). It can summon a witness to appear in a lineup, *In re Melvin,* 550 F.2d 674, 677 (1st Cir. 1977); and a district court may order reasonable physical force to compel a defiant grand jury witness to appear in a lineup, *Appeal of Maguire,* 571 F.2d 675 (1st Cir.), *cert. denied,* 436 U.S. 911 (1978). However, the majority of cases concerning subpoenas duces tecum involve requests by grand juries for documents.

Grand jury subpoenas are governed by Rule 17(c) of the Federal Rules of Criminal Procedure which provides that a court may quash or modify any subpoena duces tecum if compliance therewith would be unreasonable or oppressive. The party opposing enforcement of the subpoena bears the burden of showing that it is unreasonable or oppressive. *In re Lopreato,* 511 F.2d 1150 (1st Cir. 1975); *In re Grand Jury Proceedings (Schofield I),* 507 F.2d 963 (3d Cir. 1975). The issue can be raised by the witness filing a motion to quash pursuant to Rule 17(c) or by the witness' refusal to comply, thereby forcing the government to move for enforcement. (*See* Procedures for Enforcement of Subpoenas and Compulsion Orders, this chapter, *infra.*) An order denying a motion to quash is not appealable. *U.S. v. Ryan,* 402 U.S. 530 (1971); *In re Grand Jury Subpoenas, April 1978, At Baltimore,* 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 1533 (1979). However, any court order suppressing evidence during a grand jury investigation is appealable by the government pursuant to 18 U.S.C. §3731. *In re February 1978 Grand Jury,* ——— F.2d ——— (3d Cir. 1979). A contempt order is appealable. *In re Grand Jury Subpoena, May 1978, At Baltimore,* 596 F.2d 630 (4th Cir. 1979); *In re Grand Jury Investigation, Etc.,* 566 F.2d 1293 (5th Cir.), *cert. denied,* 437 U.S. 905 (1978). Where the district court has permitted a non-witness intervenor to be heard, courts will permit appeal by an intervenor without the necessity of a contempt sentence. *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3d Cir. 1977).

The Tenth Circuit has adopted a three-pronged test that has been widely used by district courts for evaluating grand jury subpoenas duces tecum for documents: (1) the material sought must be relevant to the investigation being pursued; (2) the documents sought must be described with reasonable particularity; and (3) the subpoena must be limited to a reasonable period of time. *U.S. v. Gurule,* 437 F.2d 239 (10th Cir.), *cert. denied,* 403 U.S. 904 (1970). The requirement of relevance is not the same test of probative value used at trial; rather, the court should determine whether the records sought have some conceivable relation to a legitimate object of grand jury inquiry. *In re Rabbinical Seminary, Etc.,* 450 F. Supp. 1078 (E.D.N.Y. 1978); *In re Special November 1975 Grand Jury, Etc.,* 433 F. Supp. 1094 (N.D. Ill. 1977); *In re Grand Jury Subpoenas Duces Tecum, Etc.,*

391 F. Supp. 991 (D.R.I. 1975). In deciding what constitutes "reasonable particularity," courts are cognizant of the limitations on a grand jury's ability to know precisely how a witness' books and records are kept; thus, a subpoena calling for the entire contents of three file cabinets could meet the requirement of reasonable particularity because the witness knew what was wanted. *In re Horowitz,* 482 F.2d 72 (2d Cir. 1973). Designation of records by general terms used in the accounting and finance fields is sufficiently definite and reasonable. *Matter of Witness Before the Grand Jury,* 546 F.2d 825 (9th Cir. 1976). The statute of limitations may be used as a guide to determine what constitutes a reasonable time period; however, the statute of limitations is not necessarily determinative because time-barred facts might be relevant to issues such as intent. *Coson v. U.S.,* 533 F.2d 1119 (9th Cir. 1976).

Since the cost of compliance normally falls on the party being subpoenaed, it is one of the factors that a court may consider in determining whether a subpoena is unreasonable or oppressive under Rule 17(c). Cost should be measured by what it costs to provide original documents since copying is generally undertaken by the witness for his own convenience. *In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum,* 555 F.2d 1306 (5th Cir. 1977). *See also In re Grand Jury Subpoena Duces Tecum, Etc.,* 436 F. Supp. 46 (D. Md. 1977). Financial institutions may be entitled to reimbursement for the costs associated with subpoena compliance under the Right to Financial Privacy Act, 12 U.S.C. §3415, depending upon the kinds of documents subpoenaed.

The fact that successive grand juries subpoena the same documents does not demonstrate an abuse of process. *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. 1098 (E.D. Pa. 1976); *U.S. v. Culver,* 224 F. Supp. 419 (D. Md. 1963). *See U.S. v. Thompson,* 251 U.S. 407 (1920).

Motions to quash grand jury subpoenas frequently rely on the case of *Hale v. Henkel,* 201 U.S. 43 (1906), to support the proposition that an overly broad grand jury subpoena constitutes a forbidden search in violation of the fourth amendment. Although not explicitly overruled, that decision has been substantially undermined by a subsequent Supreme Court decision. *In Re Horowitz,* 482 F.2d (2d Cir. 1973). In *U.S. v. Dionisio,* 410 U.S. at 9, the Supreme Court held that"... a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome."

The records of a state are not immune from grand jury process because of any constitutional considerations of state sovereignty. *In re Special April 1977 Grand Jury (Scott),* 581 F.2d 589 (7th Cir. 1978), *cert. denied,* 439 U.S. 1046 (1978). If subpoenaed records do not bear on protected legislative acts, the federal common-law legislative privilege or state constitutional speech and debate clauses do not protect state senators and other legislative officials from subpoenas for their records. *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3d Cir. 1977).

Recognizing that direct delivery of a mass of documents to 23 laymen would be "unproductive if not chaotic," courts have upheld the use of subpoenas which provided that they could be satisfied by delivery of the described documents to agents of the IRS or FBI. *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. at 1118. Court orders providing that records may be delivered to investigative agents are proper. *U.S. v. Universal Manufacturing Co.,* 525 F.2d 808 (8th Cir. 1975). Such arrangements are not the same as the "forthwith subpoenas" that were severely criticized by the Sixth Circuit in *Consumer Credit Insurance Agency, Inc. v. U.S.,* 599 F.2d 770 (6th Cir. 1979),

cert. denied, 100 S. Ct. 1078 (1980), and the Third Circuit in *U.S. v. Hilton,* 534 F.2d 556 (3d Cir. 1976), *cert. denied,* 429 U.S. 828 (1976), as improper attempts to circumvent the requirements of the fourth amendment for obtaining search warrants. Subpoenas duces tecum should only direct compliance on dates when the grand jury is sitting. *See U.S. v. Hilton, supra.* It should be noted that, in deciding to allow production of documents without a witness appearing to testify that compliance is complete, a prosecutor may give up testimony that could have impeachment value in later contempt proceedings or at trial, if documents covered by the subpoena should later be discovered.

D. SECRECY OF PROCEEDINGS AND DISCLOSURE

The Supreme Court has consistently held that the proper functioning of the grand jury system depends upon maintaining the secrecy of grand jury proceedings. In *Douglas Oil Company of California v. Petrol Stops, Etc.,* 411 U.S. 211, 219 (1979), the Court reiterated the four distinct interests that are served by this policy.

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Rule 6(e)(2) of the Federal Rules of Criminal Procedure imposes an obligation to maintain the secrecy of matters occuring before the grand jury upon grand jurors, interpreters, stenographers, operators of recording devices, typists who transcribe testimony, attorneys for the government and government personnel authorized to assist attorneys for the government. Rule 6(e) further defines four limited exceptions to the secrecy requirement: (1) disclosure to an attorney for the government in the performance of such attorney's duty; (2) disclosure to such government personnel as an attorney for the government deems necessary to assist such attorney in the enforcement of federal criminal law; (3) disclosure by a court preliminary to or in connection with a judicial proceeding; and (4) disclosure to a defendant who can demonstrate that matters occurring before the grand jury may be grounds for dismissing the indictment.

Rule 6(e) does not impose a secrecy obligation on witnesses, *In re Investigation Before April 1975 Grand Jury,* 531 F.2d 600 (D.C. Cir. 1976); and it is improper for a prosecutor to instruct a witness that he must keep his knowledge of the proceedings confidential, *U.S. v. Radetsky,* 535 F.2d 556, 569 nn.15-16 (10th Cir.), *cert. denied,* 429 U.S. 820 (1976). However, a witness has no general right to a transcript of his testimony. *In re Bianchi,* 542 F.2d 98 (1st Cir. 1976); *Bast v. U.S.,* 542 F.2d 893 (4th Cir. 1976). This rule has been applied even where a witness asserts a need for a transcript in order to decide whether to recant his testimony to avoid perjury charges, but refuses to verify his petition at the request of the court. *U.S. v. Clavey,* 565 F.2d 111 (7th Cir.), *cert. denied,* 439 U.S. 954 (1978).

The phrase "matters occurring before the grand jury" is not limited to the testimony of witnesses, but also extends to internal memoranda that would reflect what transpired before the grand jury. *U.S. Industries, Inc. v. U.S. District Court,* 345 F.2d 18 (9th Cir. 1965). As a general rule, however, physical evidence, such as a document, does not become secret merely because it has been presented to a grand jury if it was created for purposes other than the grand jury investigation, and its disclosure "does not constitute disclosure of matters occurring before the grand jury." *U.S. v. Stanford,* 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied,* 99 S. Ct. 1794 (1979). *Stanford* involved the use of subpoenaed documents by FBI agents during interviews of defendants, but courts have similarly interpreted the phrase where private parties sought documents, subpoenaed by a grand jury, for use in civil litigation. *See also U.S. v. Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960); *U.S. v. Saks & Co.,* 426 F. Supp. 812 (S.D.N.Y. 1976); *Capital Indemnity Corp. v. First Minnesota Construction Co.,* 405 F. Supp. 929 (D. Mass. 1975); *Davis v. Romney,* 55 F.R.D. 337 (E.D. Pa. 1972); *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.,* 211 F. Supp. 729 (N.D. Ill. 1962). A court order must be obtained to disclose documents or physical evidence subpoenaed by a grand jury if some form of privilege, such as the right of the owner to maintain the confidentiality of his records, would otherwise shield them from inspection. *See U.S. v. RMI Co.,* 599 F.2d 1183 (3d Cir. 1979), which held that third parties from whom documents were subpoenaed have a right to intervene at the stage of a Rule 16 discovery motion. *See also In Re Grand Jury Investigation (General Motors Corporation),* 210 F. Supp. 904 (S.D.N.Y. 1962). Situations may also arise where disclosing documents may in fact reveal what transpired before the grand jury. An example would be a general request for "all documents collected or received in connection with the investigation of antitrust violations ...." *In re Grand Jury Investigation of Ven-Fuel,* 441 F. Supp. 1299, 1303 (M.D. Fla. 1977). *See also Corona Construction Co. v. Ampress Brick Co.,* 376 F. Supp. 598 (ND. Ill. 1974).

The phrase "attorney for the government" is limited by Rule 54(c) to "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of the United States Attorney ...." It does not include attorneys for state and county government. *In re Holovachka,* 317 F.2d 834 (7th Cir. 1963). The phrase "for use in such attorney's duty" has been construed by the Second Circuit to mean that a court order need not be sought where the purpose of presenting grand jury minutes to a second grand jury is enforcement of perjury and false statement statutes. *U.S. v. Garcia,* 420 F.2d 309 (2d Cir. 1970). The Fifth Circuit, however, has held that a court order should be sought before a prosecutor presents a grand jury with a transcript of testimony before another grand jury. *U.S. v. Malatesta,* 583 F.2d 748, 752-754 (5th Cir. 1978).

Attorneys for the government may in turn disclose grand jury material to other government personnel whom they deem necessary to assist them, but the attorney must disclose to the court a list of the persons to whom such disclosure has been made. Rule 6(e)(2)(A)(ii) and (B), Fed. R. Crim. P. But, there is no requirement that the assistance offered by other government personnel be technical in nature. *In re Perlin,* 589 F.2d 260 (7th Cir. 1978). And, the disclosure notice need not be filed prior to disclosure, though the legislative history recommends doing so. *In re Grand Jury Proceedings (Larry Smith),* 579 F.2d 836 (3d Cir. 1978). There is no requirement that a witness be given a copy of the government's disclosure notice before he can be required to comply with a subpoena. *Id.* at 840.

The phrase "other government personnel" has been interpreted by one district court as limiting disclosure to federal government personnel. *In re Grand Jury Proceedings,* 445 F. Supp. 349 (D.R.I.), *appeal dismissed,* 580 F.2d 13 (1st Cir. 1978). The First Circuit declined to review that decision because the order of the district court denying disclosure was not a final order pursuant to 28 U.S.C. §1291, and the government did not seek an extraordinary writ under 28 U.S.C. §1651, or certification of the issue under 28 U.S.C. §1292(b). In *U.S. v. Stanford,* 589 F.2d 285 (7th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979), the Seventh Circuit upheld a court order permitting disclosure to employees of the Illinois Department of Public Aid and Illinois Department of Law Enforcement. The *Stanford* court approved such disclosure orders where the grand jury took the precautions of swearing in the state government personnel as agents of the grand jury, instructed them as to their duties, and cautioned them as to their secrecy obligations.

Reasoning that a witness is aware of his own testimony, courts have held that permitting a witness to review a transcript of his own testimony prior to trial is not a prohibited disclosure. *U.S. v. Heinze,* 361 F. Supp. 46, 57 (D. Del. 1973); *King v. Jones,* 319 F. Supp. 653, 657 (N.D. Ohio 1970). It is improper, however, to disclose the grand jury testimony of one witness to another witness. *U.S. v. Bazzano,* 570 F.2d 1120, 1124-1126 (3d Cir. 1977), *cert. denied,* 436 U.S. 917 (1978). *Bazzano* distinguishes prohibited verbatim disclosure from the acceptable practice in which a prosecutor states in general terms the evidence which other witnesses may give. 570 F.2d at 1125.

Courts may order disclosure preliminary to or in connection with judicial proceedings. Rule 6(e)(3)(C)(i), Fed. R. Crim. P. In *Douglas Oil Co. of California v. Petrol Stops, Inc.,* 441 U.S. 211, 221 (1979), the Supreme Court restated its earlier opinion in *U.S. v. Proctor and Gamble Co.,* 356 U.S. 677 (1958), and held that

> a private party seeking to obtain grand jury transcripts must demonstrate that "without the transcript a defense would be greatly prejudiced 'or that without reference to it an injustice would be done." 356 U.S., at 682. Moreover, the Court required that the showing of need for the transcripts be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly." *Id.,* at 683.

The Supreme Court, in denying disclosure in *Douglas Oil, supra,* held that the party seeking disclosure bears the burden of demonstrating that the public interest in disclosure outweighs the interest in secrecy, and describes the procedure to be followed when private plaintiffs who sue in one district seek to discover transcripts of grand jury proceedings that occurred in another district. More than a general need for discovery must be shown in order to tip the balance in favor of lifting the veil of secrecy, and courts also consider such factors as whether the grand jury investigation is on-going and whether there is a possibility that disclosure might deter future witnesses from freely coming forward to testify. *Douglas Oil, supra; U.S. v. Proctor & Gamble Co.,* 356 U.S. 677 (1958); *Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied,* 424 U.S. 889 (1977); *Texas v. U.S. Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977); *U.S. Industries, Inc. v. U.S. District Court,* 345 F.2d 18 (9th Cir.), *cert. denied,* 382 U.S. 814 (1965); *SEC v. National Student Marketing Corporation,* 430 F. Supp. 639 (D.D.C. 1977). The standard for reviewing orders granting or denying disclosure is abuse of discretion. *Douglas Oil, supra.*

The phrase "preliminary to judicial proceedings" has been held to include

impeachment hearings, *Haldeman v. Sirica,* 501 F.2d 714 (D.C. Cir. 1974), bar association grievance committee hearings, *U.S. v. Salanitro,* 437 F. Supp. 240 (D. Neb. 1977); *Doe v. Rosenberry,* 255 F.2d 118 (2d Cir. 1958), and police disciplinary hearings, *Special February Grand Jury v. Conlisk,* 490 F.2d 894 (7th Cir. 1973); *In re Grand Jury Transcripts,* 309 F. Supp. 1030 (S.D. Ohio 1970). One court has released transcripts to the public when it deemed that the public interest required disclosure, even though no judicial proceeding was involved or even contemplated. *In re Biaggi,* 478 F.2d 489 (2d Cir. 1973). There is no first amendment right of the press to grand jury testimony not made public at trial. *U.S. v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978).

A defendant seeking pretrial disclosure of grand jury transcripts other than those he can obtain under the Jencks Act, 18 U.S.C. §3500, must demonstrate a particularized need. *Dennis v. U.S.,* 384 U.S. 855, 870 (1966). Unsubstantiated assertions of impropriety occurring before the grand jury do not establish particularized need. *U.S. v. Migely,* 596 F.2d 511 (1st Cir. 1979); *U.S. v. Edelson,* 581 F.2d 1290 (7th Cir. 1978); *U.S. v. Kim,* 577 F.2d 473 (9th Cir. 1978); *U.S. v. Wallace,* 528 F.2d 863 (4th Cir. 1976); *U.S. v. Tucker,* 526 F.2d 279 (5th Cir.), *cert. denied,* 425 U.S. 958 (1976). The Freedom of Information Act, 5 U.S.C. §552, does not create a right to obtain grand jury transcripts. *Thomas v. U.S.,* 597 F.2d 656 (8th Cir. 1979). The need to ascertain the existence of a double jeopardy claim or the need to challenge the validity of search warrants may constitute particularized need for disclosure. *U.S. v. Hughes,* 413 F.2d 1244 (5th Cir. 1969). However, *in camera* inspection may also be appropriate. *See Star of Wisconsin v. Schaffer,* 565 F.2d 961 (7th Cir. 1977), which held that a grand jury transcript could be released to a state court judge with suitable instructions to release it to counsel for a state defendant if it developed that grand jury minutes might be exculpatory. Disclosure in habeas corpus actions is also governed by the particularized need test. *DeVincent v. U.S.,* 602 F.2d 1006 (1st Cir. 1979).

Disclosure of grand jury material to agency attorneys or other government personnel for use in civil enforcement actions requires a court order based upon a showing of good faith that the grand jury process has not been abused. *In re Grand Jury,* 583 F.2d 128 (5th Cir. 1978). The courts may exercise closer scrutiny where the grand jury fails to return an indictment because, in such a case, there is a greater likelihood of improper use of grand jury process. *In re Grand Jury Subpoenas, April 1978, Etc.,* 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 1533 (1979).

E. MOTIONS CHALLENGING MULTIPLE REPRESENTATION OF WITNESSES

A district court has jurisdiction to discipline an attorney whose unethical conduct relates to a grand jury proceeding within that court's control. *U.S. v. Gopman,* 531 F.2d 262, 266 (5th Cir. 1976). When it appears that a conflict of interest exists on the part of an attorney representing multiple grand jury witnesses, the prosecutor may ask the court to disqualify the attorney from representing more than one witness or category of witnesses. Before making such a motion, the prosecutor should be prepared to demonstrate that an actual conflict (as opposed to a potential conflict) exists and that the actions of witnesses would have been different, but for the conflict. *Matter of Investigative Grand Jury Proceedings,* 480 F. Supp. 162 (N.D. Ohio 1979); *In re Special Grand Jury,* 480 F. Supp. 174 (E.D. Wis. 1979).

An actual conflict exists when an attorney represents an organizational client, such as a labor union, that would have an interest in making full disclosure, and individual witnesses who have an interest in resisting disclosure. *Gopman, supra.* An actual conflict also exists where one attorney represents an immunized witness and a target witness, because it would be in the immunized witness' interest to make full disclosure, *Matter of Grand Jury Proceedings,* 428 F. Supp. 273 (E.D. Mich. 1976), or where the attorney himself is a target of the investigation or a defendant in a related case, *U.S. v. Clarkson* 567 F.2d 270 (4th Cir. 1977) (contempt proceeding against an attorney who continued representation); *In re Investigation Before February 1979, Lynchburg Grand Jury,* 563 F.2d 652 (4th Cir. 1977). In such situations, a witness cannot waive the right to conflict-free representation because of the competing public interest in the effective functioning of the grand jury. *In re Grand Jury Investigation,* 436 F. Supp. 818 (W.D. Pa. 1977).

Because of the importance attached to the right to counsel of one's choosing, courts are reluctant to disqualify counsel where only a potential for conflict can be shown. Such a situation exists where several witnesses who are jointly represented all claim their fifth amendment privilege or experience a failure of recollection, but where none has been immunized. *In re Taylor,* 567 F.2d 1183 (2d Cir. 1977); *Matter of Grand Jury Empaneled January 21, 1975,* 536 F.2d 1009 (3d Cir. 1976); *In Re Investigation Before April 1, 1975 Grand Jury,* 531 F.2d 600 (D.C. Cir. 1976); *In re Grand Jury,* 446 F. Supp. 1132 (N.D. Tex. 1978).

The Seventh Circuit has held that the government need not show an actual conflict but only a grave danger of conflict. However, in the same case, the court ruled that the government must do more than show that some jointly represented witnesses have been immunized while others have not, it must further demonstrate that the immunized witnesses could in fact provide information incriminating to the attorney's other clients. *Matter of Special February 1977 Grand Jury,* 581 F.2d 1262 (7th Cir. 1978).

F. IMMUNITY

The Organized Crime Control Act of 1970 added sections 6001-6005 to Title 18 of the United States Code, creating a single comprehensive provision to govern immunity grants in judicial, administrative, and congressional proceedings, and amending or repealing all prior immunity provisions. The immunity granted under this provision is that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 18 U.S.C. §6002.

The act was designed to reflect the "use" and "derivative use" immunity concept of *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964), rather than the "transactional" immunity concept of *Counselman v. Hitchock,* 142 U.S. 547 (1892). This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. In *Kastigar v. U.S.,* 406 U.S. 441, 462 (1972), the Supreme Court held that this limited grant of immunity by which testimony is compelled under threat of imprisonment is constitutional:

> We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

In addition to granting only use and derivative use immunity, these provisions differ from prior immunity statutes in three ways: (1) the immunity may be granted without regard to the particular federal violation at issue; (2) the witness must claim his privilege; and (3) use of the immunity provisions must be approved in advance by the Attorney General or certain other designated persons.

Before application to the court, the United States Attorney must make a judgment that the testimony or information sought may be necessary and in the public interest and that the witness has refused or is likely to refuse to testify. 18 U.S.C. §6003(b). Within these parameters, the choice of who should receive immunity is extremely broad. Under the act, even the target of an investigation who has been arrested and charged with a crime the grand jury is investigating may be compelled to respond to questions concerning that very crime. *Goldberg v. U.S.*, 472 F.2d 513 (2d Cir. 1973). And, the court may not withhold the order granting immunity if the factual prerequisites are met. *Ryan v. Commissioner,* 568 F.2d 531 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978); *U.S. v. Vancier,* 515 F.2d 1378 (2d Cir. 1975), *cert. denied,* 423 U.S. 857 (1975); *U.S. v. Henderson,* 406 F. Supp. 417 (D. Del. 1975); (1970) U.S. Code Cong. & Ad. News 4018.

Witnesses who are granted immunity are not entitled, under the due process clause, to notice and hearing on an immunity request. *Ryan v. Commissioner, supra.* The immunity authorized by the statute is not self-executing; the witness must physically appear and claim the privilege before he can be held in contempt for refusing to testify. *U.S. v. DiMauro,* 441 F.2d 428 (8th Cir. 1971). A second immunity order is not required when a witness who was called to testify and held in contempt for his refusal to testify before one grand jury is recalled before a second grand jury. *In re Weir,* 520 F.2d 662 (9th Cir. 1975).

Once the witness has been granted immunity, he may not refuse to testify on the ground of the privilege against self-incrimination. Such refusal may be followed by contempt and a sentence. (*See* section on Enforcement of Subpoenas and Compulsion Orders, *infra.*) However, a witness may not be held in contempt if the body or court before which he testified clearly led him to believe he might still claim the privilege. *Raley v. Ohio,* 360 U.S. 423 (1959).

Neither the courts nor defense counsel have a legal or constitutional right to use the immunity statute to compel the testimony of defense witnesses. *U.S. v. Lenz,* _____ F.2d _____, 48 U.S.L.W. 2683 (6th Cir. 1980); *U.S. v. Herman,* 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *U.S. v. Morrison,* 535 F.2d 223 (3d Cir. 1976); *U.S. v. Alessio,* 528 F.2d 1079 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976); *U.S. v. Bautista,* 509 F.2d 675 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975); *U.S. v. Allstate Mortgage Corporation,* 507 F.2d 492 (7th Cir. 1974); *U.S. v. Ramsey,* 503 F.2d 524 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975); *Cerda v. U.S.,* 488 F.2d 720 (9th Cir. 1973); *In re Kilgo,* 484 F.2d 1215 (4th Cir. 1973); *U.S. v. Berrigan,* 482 F.2d 171 (3d Cir. 1974); *U.S. v. Jenkins,* 470 F.2d 1061 (9th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973); *Morrison v. U.S.,* 365 F.2d 521 (D.C. Cir. 1966); *Earl v. U.S.,* 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

Even after a witness has been granted "derivative use" immunity, he may still be prosecuted for crimes about which he has testified. Such prosecutions, however, face two hurdles. First, because it is the policy of the Department of Justice to avoid future prosecutions of witnesses for offenses disclosed under a grant of immunity, any such prosecution must be authorized in writing and personally signed by the Attorney General. Second, the immunity prohibits the prosecution from using the compelled testimony in any respect. The testimony therefore may

not be used either for investigative leads or to focus investigation on the witness. Once the defendant establishes that he has testified under a grant of immunity to matters related to the federal prosecution, the government has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar v. U.S.,* 406 U.S. 441, 453, 460 (1972). That is, the government cannot satisfy its burden merely by denying that immunized testimony was used; it must affirmatively prove an independent source of evidence. *U.S. v. Nemes,* 555 F.2d 51 (2d Cir. 1977).

Where immunity is conferred on a potential defendant, the government has been strongly advised to make a written certification, prior to the testimony, stating what evidence it already has. *Goldberg v. U.S.,* 472 F.2d 513, 516 n.5 (2d Cir. 1973). If testimony relevant to the charges is compelled from a witness before a grand jury, and the government then seeks his indictment, it may be appropriate to present the case to a different grand jury. *Id.* at 516 n.4. *But see U.S. v. Calandra,* 414 U.S. 338 (1974). In the view of some courts that have adopted a highly attenuated notion of "taint" in connection with use immunity statutes even these procedures may be insufficient. *U.S. v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973); *U.S. v. Dornau,* 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds,* 491 F.2d 473 (2d Cir.), *cert. denied,* 419 U.S. 872 (1974). *But see U.S. v. Bianco,* 534 F.2d 501, 511 n.14 (2d Cir.), *cert. denied,* 429 U.S. 822 (1976).

The use immunity statute applies only to past offenses. Specifically excepted by the statute are "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. §6002. These exceptions were considered unnecessary by the drafters, *see Glickstein v. U.S.,* 222 U.S. 139 (1911), but were included out of caution, (1970) U.S. Code Cong. & Ad. News 4018. The grant of immunity covers only truthful testimony. It does not protect the witness against the subsequent use by the government of falsehoods or willful evasion in his immunized testimony. *U.S. v. Tramunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974). The fifth amendment clause itself would not protect a witness' refusal to answer questions which would incriminate him in the future as to crimes about to be committed. *See U.S. v. Freed,* 401 U.S. 601, 606-607 (1971).

In *New Jersey v. Portash,* 440 U.S. 450 (1979), the Supreme Court ruled that testimony compelled pursuant to a grant of use immunity could not be used to impeach a defendant in a later trial. In *U.S. v. Apfelbaum,* 100 S. Ct. 948 (1980), the Supreme Court held that the prosecution may use all relevant portions of an immunized witness' testimony in a subsequent perjury prosecution, and that the evidence should not be limited to those portions of the witness' testimony that constitute the *corpus delicti* or core of the false statement offense. *See also U.S. v. Frumento,* 552 F.2d 534 (3d Cir. 1977) (*en banc*); *U.S. v. Hockenberry,* 474 F.2d 247 (3d Cir. 1973). Truthful immunized testimony cannot be used to prove earlier or later perjury. *U.S. v. Berardelli,* 565 F.2d 24 (2d Cir. 1977); *U.S. v. Housand,* 550 F.2d 818 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977).

The requirement that every sovereign, state or federal, recognize immunity granted by another sovereign protects a witness from use of immunized testimony in a subsequent state prosecution. *In re Bianchi,* 542 F.2d 98 (1st Cir. 1976); *U.S. v. Watkins,* 505 F.2d 545 (7th Cir. 1974). Because Rule 6(e) strictly limits disclosure of grand jury proceedings, a witness cannot refuse to testify because he fears prosecution by the authorities of foreign countries. *In re Grand Jury Proceedings (Postal),* 559 F.2d 234 (5th Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); *In re Parker,* 411 F.2d 1067 (10th Cir. 1969), *vacated as moot,* 397 U.S. 96 (1970).

Because the fifth amendment privilege extends only to use in criminal proceedings, compelled testimony can be used in subsequent civil proceedings. *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *In re Grand Jury Proceedings*, 443 F. Supp. 1273 (D.S.D. 1978). Immunized testimony may be used in subsequent state bar disciplinary proceedings. *In re Daley*, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977). It may also be used in license revocation hearings. *Childs v. Schlitz*, 556 F.2d 1178 (4th Cir. 1977).

G. PROCEDURES FOR ENFORCEMENT OF SUBPOENAS AND ORDERS COMPELLING TESTIMONY

When a witness refuses to testify or to provide other information to a grand jury, the attorney for the government can ask the court for an order to show cause why the witness should not be held in contempt. Rule 17(g), Fed. R. Crim. P. The Supreme Court has decided that the district court should first consider the feasibility of effecting compliance through the imposition of civil contempt pursuant to the Recalcitrant Witness Statute, 28 U.S.C. §1826, before resorting to more drastic criminal contempt powers under 18 U.S.C. §401 as applied by Rule 42 of the Federal Rules of Criminal Procedure. *U.S. v. Wilson*, 421 U.S. 309 (1975); *Shillitani v. U.S.*, 384 U.S. 364 (1966). Successive contempts are punishable as separate offenses. *U.S. v. Hawkins*, 501 F.2d 1029 (9th Cir.), *cert. denied*, 419 U.S. 1079 (1974); *U.S. v. Gebhard*, 426 F.2d 965 (9th Cir. 1970). The court may use a combination of civil and criminal contempt to vindicate its authority. *U.S. v. Morales*, 566 F.2d 402 (2d Cir. 1977); *U.S. v. Marra*, 482 F.2d 1196, 1202 (2d Cir. 1973).

Civil contempt proceedings brought under 28 U.S.C. §1826 do not give rise to a constitutional right to trial by jury because any fines or incarceration resulting is coercive and not punitive. *Shillitani v. U.S., supra; U.S. v. Boe*, 491 F.2d 970 (8th Cir. 1974); *U.S. v. Handler*, 476 F.2d 709 (2d Cir. 1973). However, courts have held that Rule 42(b) does apply to such proceedings, and a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense. *In re Grand Jury Investigation*, 545 F.2d 385 (3d Cir. 1976); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975); *In re Sadin*, 509 F.2d 1252 (2d Cir. 1975); *U.S. v. Alter*, 482 F.2d 1016 (9th Cir. 1973). While five days is generally deemed to be adequate, what constitutes a reasonable time to prepare a defense is committed to the discretion of the district judge. *In re Grand Jury Proceedings*, 550 F.2d 1240 (3d Cir. 1977); *Matter of Grand Jury*, 524 F.2d 209 (10th Cir.), *cert. dismissed*, 425 U.S. 927 (1975); *In re Sadin, supra; U.S. v. Alter, supra*. As little as one day has been held to be sufficient. *U.S. v. Hawkins, supra*. A witness who may be held in contempt is entitled to representation and an indigent is entitled to court-appointed counsel. *U.S. v. Anderson*, 553 F.2d 1154 (8th Cir. 1977); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973).

The party seeking to demonstrate that a subpoena is improper bears the burden of proof in a proceeding brought under 28 U.S.C. §1826. *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978); *In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). While accepting that the witness has the burden of showing cause for noncompliance, the Third Circuit requires that the United States make a

minimum showing by affidavit that the information sought is relevant to an investigation properly within the grand jury's jurisdiction and is not sought primarily for another purpose. *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973). Other circuits have declined to require such affidavits. *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978); *In re Grand Jury Investigation (McLean)*, 565 F.2d 318 (5th Cir. 1977); *In re Hergenroeder*, 555 F.2d 686 (9th Cir. 1977). The First Circuit has held that the right is waived unless the witness requests such an affidavit. *In re Lopreato*, 511 F.2d 1150 (1st Cir. 1975). *See also Universal Manufacturing Co. v. U.S.*, 508 F.2d 684 (8th Cir. 1975). An affidavit may be presented *in camera* if disclosure of its contents might result in the destruction of evidence or otherwise disrupt the grand jury proceedings. *Schofield I*, 486 F.2d at 93. Exclusion of the public from civil contempt proceedings does not violate a defendant's sixth amendment right to public trial. *In re DiBella, supra*.

When a witness is found in civil contempt, he may be incarcerated for the term of the grand jury, including extensions, but his confinement cannot exceed 18 months. 28 U.S.C. §1826(a)(2). Although not explicitly stated in 28 U.S.C. §1826, a court may impose a fine; however, a fine and incarceration should not be imposed simultaneously absent a finding that such severe action is necessary. *Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976). A district court may increase or decrease a penalty once imposed. *Id.; In re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978). A witness already incarcerated is not entitled to credit against his sentence for time spent in civil contempt confinement. *In re Grand Jury Proceedings*, 534 F.2d 41 (5th Cir. 1976); *In re Grand Jury Proceedings*, 532 F.2d 410 (5th Cir.), *cert. denied*, 429 U.S. 924 (1976); *Martin v. U.S.*, 517 F.2d 906 (8th Cir.), *cert. denied*, 423 U.S. 856 (1975).

Appeals taken from civil contempt judgments must be disposed of within 30 days of the filing of the appeal. 28 U.S.C. §1826; *In re Berry*, 521 F.2d 179 (10th Cir. 1975), *cert. denied*, 423 U.S. 928 (1975). New reasons for the witness' failure to comply with the court's order cannot be raised on appeal, even if they would have constituted justification for the witness's silence. *In re Bianchi*, 542 F.2d 98 (1st Cir. 1976); In re Grand Jury Investigation, 542 F.2d 166 (3d Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977). Bail pending appeal is not available if it appears that the appeal is frivolous or taken for delay. 28 U.S.C. §1826(b). The provisions of 18 U.S.C. §3148 do not apply to determinations by the district court to grant bail. *In re Visitor*, 400 F. Supp. 446 (D.S.D. 1975). Instead, the considerations governing stays pending appeal in civil proceedings are applicable. Rule 62, Fed. R. Civ. P.; Rule 8, Fed. R. App. P.; *Beverly v. U.S.*, 468 F.2d 732 (5th Cir. 1972).

Criminal contempt may be more appropriate if a contempt occurs near the end of a grand jury's term. If it is appropriate to impose punishment upon a recalcitrant witness, a court may invoke the provisions of 18 U.S.C. §401 by giving oral notice on the record or by directing the United States Attorney to file appropriate criminal charges. Rule 42(b), Fed. R. Crim. P.; *U.S. v. DiMauro*, 441 F.2d 428 (8th Cir. 1971). A grand jury may also charge a violation of 18 U.S.C. §401. *See U.S. v. Sternman*, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

The Supreme Court held in *Harris v. U.S.*, 382 U.S. 162 (1965), that where the contempt consists of a refusal to testify before a grand jury, the court must proceed under Rule 42(b) with its requirements of notice and hearing; the

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summary contempt provisions of Rule 42(a) may not be brought into play merely by having the witness repeat his refusal in the court's presence. Refusals to testify during a trial by a witness who has been granted immunity, however, may be punished summarily under Rule 42(a). *U.S. v. Wilson, supra.* While case law limits summary punishment under Rule 42(a) to imprisonment for six months, there is no maximum set for punishing criminal contempt after notice and hearing under Rule 42(b). A court may not impose a sentence of more than six months unless a defendant in a criminal contempt action is afforded a right to jury trial. *Frank v. U.S.*, 395 U.S. 147 (1969); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). Bail for a defendant in a criminal contempt action is controlled by the provisions of Rule 46 of the Federal Rules of Criminal Procedure.

H. GRAND JURY REPORTS

In addition to its authority to indict or return a no true bill, a federal grand jury possesses common law authority to issue a report that does not indict for a crime. *In re Johnson*, 484 F.2d 791 (7th Cir. 1973) (and cases cited therein). *See also U.S. v. Cox*, 342 F.2d 167, 185-190 (5th Cir. 1965) (Wisdom, J., concurring), *cert. denied*, 381 U.S. 935. Congress has specifically authorized special grand juries to issue reports and has spelled out the procedures to be followed. 18 U.S.C. §3333. The subject matter of such reports is limited by that section to matters relating to organized crime conditions in the district or the noncriminal misconduct in office of appointed public officers or employees. The district judge who receives the grand jury's report may expunge portions of such a report and order that it be disseminated. *In re Report of Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973). Decisions to disseminate such reports are appealable by interested parties under the All Writs Act, 28 U.S.C. §1651; the standard of review is abuse of discretion, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974).

CHAPTER IV
PRETRIAL DISCOVERY AND DISCLOSURE

Pretrial discovery and disclosure of evidence by either the government or the defense in a criminal case are primarily controlled by certain of the Federal Rules of Criminal Procedure and a body of case law dealing with the disclosure by the government of the identity of an informant and evidence potentially favorable to a defendant. This chapter outlines the various rights of both the government and the defendant to compel discovery or disclosure of evidence, the obligations imposed upon both parties before discovery or disclosure is required, and the limitations on the discovery process.

The basic purposes of the Federal Rules of Criminal Procedure concerning discovery are to simplify the discovery procedure by clearly outlining the steps involved, and to avoid surprise and eliminate unfair advantage to either the government or the defendant, by requiring the disclosure of certain evidence in advance of trial. Disclosure was designed to enable both parties to be better informed before trial, thereby resulting in (1) the elimination of numerous pretrial motions based on speculation and misinformation, (2) reducing and narrowing the legal and factual issues on the remaining pretrial motions, (3) more meaningful plea bargain negotiations, (4) the orderly presentation of the evidence at the trial itself, and (5) the elimination of motions for "last minute" trial continuances or mid-trial recesses based upon a claim of surprise to the introduction of certain evidence.

Consequently, Rule 7(f) of the Federal Rules of Criminal Procedure provides that a defendant may obtain a bill of particulars where the charge is not framed with sufficient detail to enable him to prepare his defense, or to enter a plea of former jeopardy. Rule 12.1 mandates that, upon written demand of the government, a defendant must serve written notice of his intention to offer an alibi defense and state the place the defendant claims to have been and the names and address of witnesses upon whom he intends to rely to establish the defense. Rule 12.2 requires that a defendant notify the government of his intention to base his defense upon insanity or mental disease or defect or of his intention to introduce expert testimony to establish the inconsistency of the mental condition with the mental state required for the offense charged.

Rule 16 of the Federal Rules of Criminal Procedure defines or describes the evidence which a defendant may discover from the government. Generally, a defendant may discover any statement he has made, whether written or oral, his criminal record, documents and tangible objects taken from him or to be used in the government's case-in-chief, and the results of any tests or examinations conducted by the government in relation to the case. Under the rule, the government has a reciprocal but limited right of discovery to certain evidence of the defendant. The rule also balances the rights of the parties to discovery against

the potential abuse caused by such disclosure and, in appropriate circumstances, provides for protective orders to deny or restrict discovery. In addition, the rule provides for sanctions against a party for negligent or willful noncompliance with the discovery process.

A. BILL OF PARTICULARS

Rule 7(f) of the Federal Rules of Criminal Procedure provides that the court "may direct the filing of a bill of particulars." The rule further provides that a motion for a bill of particulars may be made before arraignment, within 10 days after arraignment, or at such later time as the court may permit.

A bill of particulars is granted only where necessary to inform the accused of the charge against him with sufficient precision to enable him to prepare his defense, to avoid or minimize the danger of surprise at trial, or to enable him to plead his acquittal or conviction in bar of further prosecution for the same offense. *Wong Tai v. U.S.*, 273 U.S. 77 (1927); *U.S. v. Giese,* 597 F.2d 1170 (9th Cir.), *cert. denied,* 100 S. Ct. 480 (1979); *U.S. v. Hill,* 589 F.2d 1344 (8th Cir.), *cert. denied,* 99 S. Ct. 2843 (1979); *U.S. v. Haas,* 583 F.2d 216 (5th Cir. 1978), *cert denied,* 440 U.S. 981 (1979); *U.S. v. Davis,* 582 F.2d 947 (5th Cir. 1978), *cert. denied,* 441 U.S. 962 (1979); *U.S. v. Birmley,* 529 F.2d 103 (6th Cir. 1976). In a conspiracy case, a bill of paritculars may be granted to compel the government to disclose the names of unindicted coconspirators if the government plans to use them as witnesses. *U.S. v. Barrentine,* 591 F.2d 1069 (5th Cir.), *cert. denied,* 100 S. Ct. 521 (1979).

A bill of particulars is not an investigative vehicle for the defense and is not available as a tool "to obtain detailed disclosure of the government's evidence prior to trial." *U.S. v. Kilrain,* 566 F.2d 979, 985 (5th Cir.), *cert. denied,* 439 U.S. 819 (1978); *U.S. v. Long,* 449 F.2d 288 (8th Cir. 1971), *cert. denied,* 405 U.S. 974 (1972). Thus, a defendant may not use a motion for a bill of particulars to compel the disclosure of a government witness list. *U.S. v. Largent,* 545 F.2d 1039 (6th Cir. 1976). As a general rule, an inquiry into the government's legal or evidentiary theory as to the means by which a defendant committed a specific criminal act is not a proper purpose for a bill of particulars. *See, e.g., U.S. v. Leonelli,* 428 F. Supp. 880 (S.D.N.Y. 1977); *U.S. v. Bozza,* 234 F. Supp. 15 (E.D.N.Y. 1964); *U.S. v. Kahaner,* 203 F. Supp. 78 (S.D.N.Y.), *aff'd,* 317 F.2d 459 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963).

The particulars furnished by the government may confine the government's theory of proof, as a defendant is entitled to rely upon the statements contained in the response. As a result, it is reversible error for the government then to introduce other unambiguous statements in the bill of particulars even though it may have been "voluntarily" filed by the government. *U.S. v. Flom,* 558 F.2d 1179 (5th Cir. 1977).

A denial of a bill of particulars is within the discretion of the court and is reviewable only for an abuse of discretion. *Wong Tai v. U.S., supra; U.S. v. Diecidue,* 603 F.2d 535 (5th Cir. 1979); *U.S. v. Giese, supra; U.S. v. Cooper,* 577 F.2d 1079 (6th Cir.), *cert. denied,* 439 U.S. 868 (1978); *U.S. v. Cohen,* 518 F.2d 727 (2d Cir.), *cert. denied,* 423 U.S. 926 (1975). A delay in furnishing particulars until a few days before trial does not require reversal, absent a showing the defendant was so burdened by the response that he could not properly assimilate the information before trial. The court may grant a continuance until the material is properly digested. *U.S. v. Salazar,* 485 F.2d 1272 (2d Cir. 1973), *cert. denied,* 415 U.S. 985 (1974).

B. NOTICE OF ALIBI

Rule 12.1 of the Federal Rules of Criminal Procedure enables the government to discover whether a defendant intends to offer an alibi defense. Under the rule, however, the attorney for the government must demand in writing that the defendant declare his intention to use an alibi defense at trial, and the demand by the government must include the time, date, and place of the alleged offense. Within 10 days, unless the court extends or contracts the time, the defendant must then serve upon the government written notice of his intention to rely upon an alibi defense and must state in the notice the specific time and place or places he claims to have been at the time of the alleged offense and the names and addresses of the witnesses relied upon to establish his alibi. In response, the government must provide the defense with the names and addresses of any witnesses it intends to use to place defendant at the scene of the offense or to rebut defendant's alibi witnesses.

Failure of either party to comply with the requirements of Rule 12.1 may result in exclusion at trial of the undisclosed alibi or rebuttal witnesses. The rule empowers the court to grant exceptions to the requirements of Rule 12.1(a) through (d) upon a showing of "good cause." Factors to be considered include "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." *U.S. v. Myers,* 550 F.2d 1036, 1043 (5th Cir.), *cert. denied,* 439 U.S. 847 (1977). The sanction of exclusion of a defendant's alibi witnesses at trial has been imposed when the defendant either failed to provide a response to the government's demand within the time set by the rule or by the court, or made absolutely no response until the time of trial depriving the government of an opportunity to investigate and adequately prepare a rebuttal. *U.S. v. White,* 583 F.2d 899 (6th Cir. 1978); *U.S. v. Fitts,* 576 F.2d 837 (10th Cir. 1978); *U.S. v. Barron,* 575 F.2d 752 (9th Cir. 1978). Similarly, failure of the government to respond with its list of alibi rebuttal witnesses until trial has also triggered the sanction of exclusion where the defendant was deprived of the opportunity to interview those witnesses, and the other evidence of guilt against the defendant was less than overwhelming. *U.S. v. Myers, supra.* However, nondisclosure by the government under the rule has been held not to be reversible error where overwhelming evidence of the defendant's guilt was introduced at trial and the defendant know the identities of the rebuttal witnesses long before trial. *McClendon v. U.S.,* 587 F.2d 384 (8th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979).

There is no obligation upon the defendant to provide notice of alibi if he is the only witness who will attempt to establish his alibi defense. Rule 12.1(d), Fed. R. Crim. P. Therefore, it would seem "good cause" should exist to allow the government to call undisclosed witnesses on rebuttal to refute the "solo" alibi defense. The rule also provides that no evidence of an intention to rely on an alibi defense that is later withdrawn is admissible in the defendant's criminal trial. Rule 12.1(f), Fed. R. Crim. P.

C. NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

Rule 12.2 of the Federal Rules of Criminal Procedure provides that, within the time set by the court for the filing of pretrial motions or within any additional time granted by the court, a defendant must notify the government in writing of his intention to rely upon the defense of insanity or to introduce expert testimony of mental disease on the theory such mental condition is inconsistent with the mental state required for the crime charged. The rule further requires that defendant file a copy of such notice with the clerk. Also, the rule vests the court with power to allow late filing, "for cause shown," or to grant additional time to prepare for trial.

The basic purpose for requiring the defendant to give notice of his intention to rely upon an insanity defense is to give the government time to prepare to rebut such a defense. *U.S. v. Winn,* 577 F.2d 86 (9th Cir. 1978); *U.S. v. Hudson,* 566 F.2d 889 (4th Cir. 1977), *cert. denied,* 435 U.S. 946 (1978). Once a defendant has presented "some evidence" raising a doubt as to his sanity, the government has the burden of proving the defendant's sanity beyond a reasonable doubt. *Davis v. U.S.,* 160 U.S. 469 (1895); *U.S. v. Sennett,* 505 F.2d 774 (7th Cir. 1974); *U.S. v. Cooper,* 465 F.2d 451 (9th Cir. 1972); *Bradley v. U.S.,* 447 F.2d 264 (8th Cir. 1971); *U.S. v. Currier,* 405 F.2d 1039 (2d Cir.), *cert. denied,* 395 U.S. 914 (1969).

The rule, therefore, provides that failure by the defendant to give proper notice of an insanity defense, may result in the court excluding any evidence on the insanity issue. If a defendant does not file a timely notice under the rule, and does not offer a reasonable explanation for such failure, or does not request a continuance and permission to file a late notice, the trial court may properly refuse to instruct the jury on the issue of insanity. *U.S. v. Winn, supra.*

Likewise, Rule 12.2(b) requires a defendant to give timely notice of his intention to use expert testimony to show he suffered from a mental disease or defect sufficient to affect his mental capacity to form specific intent where such intent is an element of the crime charged. *U.S. v. Olson,* 576 F.2d 1267 (8th Cir.), *cert. denied,* 439 U.S. 896 (1978). However, the notice requirement of Rule 12.2(b) applies only to expert testimony; consequently, no notice is necessary where lay testimony is introduced about a defendant's mental state in an attempt to show his lack of specific intent by reason of mental defect or disease. *U.S. v. Winn, supra.*

Rule 12.2(c) gives the court authority, upon motion by the government, to order the defendant to submit to a psychiatric examination. However, the rule expressly provides that any statements made by the defendant during the course of such examination shall not be admitted into evidence at any subsequent trial on the issue of the defendant's guilt. If a defendant ultimately decides to forego his insanity defense before trial, no such statements made by him during the examination can be used by the government, even for the limited purpose of impeachment. *U.S. v. Leonard,* 609 F.2d 1163 (5th Cir. 1980).

D. DISCOVERY AND INSPECTION

Rule 16 of the Federal Rules of Criminal Procedure is the basic and, in most cases, the exclusive discovery tool that can be utilized by a defendant. Generally, recorded and written statements made by the defendant before or after arrest, the substance of any oral statements made by the defendant to any person known to be a government agent, the defendant's prior arrest record, documents and tangible objects to be introduced by the government during its case-in-chief or taken from the possession of the defendant, and reports of scientific tests and medical examinations are all subject to discovery upon request under Rule 16.

In addition, the rule provides that documents and tangible objects that are material to the preparation of the defense, although not intended to be introduced by the government during its case-in-chief, are discoverable under the rule. There is also a continuing duty upon the attorney for the government to exercise due diligence in disclosing additional material which may become known to him before trial. If disclosure is requested by the defense and the government complies, the prosecution has a reciprocal but limited right to discovery under the rule. Request for discovery must be made within the time provided by the trial court for pretrial motions. *See* Rule 12(b) and (c), Fed. R. Crim. P.

1. STATEMENTS OF DEFENDANT

Rule 16(a)(1)(A) provides that a defendant, upon request, "shall be permitted to inspect and copy or photograph" any of three types of statements he has made which the government possesses: (1) any written or recorded statements; (2) any oral statements made by the defendant, either during a pre-arrest or post-arrest interview to a person then known to the defendant to be a government agent; and (3) any testimony of the defendant before a grand jury which relates to the offense charged. Even if the attorney for the government does not know of the existence of any written or recorded statement by the defendant at the time of such request, the rule imposes an affirmative duty on the prosecutor to exercise due diligence in determining whether any such statements exist. This duty requires that the attorney for the government make a demand on the agency responsible for the investigation to search its files to determine if any such statements exist. *U.S. v. Jensen,* 608 F.2d 1349 (10th Cir. 1979); *U.S. v. James,* 495 F.2d 434 (5th Cir.), *cert. denied,* 419 U.S. 899 (1974). And, as with all of the sections of Rule 16 providing for discovery, Rule 16(c) imposes upon both the government and the defense a continuing duty to disclose promptly upon discovery additional evidence previously requested by either side, or ordered by the court to be provided.

"Written and recorded statements" by the defendant include those made in either a pre-arrest or post-arrest setting. Any written statement, either inculpatory or exculpatory, made by the defendant is obviously included under this rule and should be provided whether given by the defendant in response to pre-arrest investigation questioning or the more usual post-arrest setting.

Written or recorded statements of the defendant are not limited to recitals of past occurrences. Recorded statements made of telephone conversations or face-to-face meetings between a defendant and a government agent (and the transcripts subsequently produced by the government of those statements) made during the course of a commission of a crime are also discoverable. *U.S. v. Walker,* 538 F.2d 266 (9th Cir. 1976); *U.S. v. Crisona,* 416 F.2d 107 (2d Cir. 1969), *cert. denied,* 397 U.S. 961 (1970). For example, a tape recording made of a conversation in which the defendant allegedly offered a government agent a bribe is a "statement" under Rule 16(a)(1)(A) and is discoverable by the defendant. Letters written by a defendant in the possession of the government and tape recordings of conversations between a defendant and a third person not associated with the government are also discoverable. *U.S. v. Pascual,* 606 F.2d 561 (5th Cir. 1979); *U.S. v. Caldwell,* 543 F.2d 1333 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 1087

(1976); *U.S. v. Crisona, supra.* However, under Rule 16(d)(1), a protective order denying defendant's request for tape recordings of her statements was proper where there was concern for the safety of persons cooperating on the case whose identity would be revealed to the defendant if she heard the tape. *U.S. v. Pelton,* 578 F.2d 701 (8th Cir.), *cert. denied,* 439 U.S. 964 (1978). If the government's recorded statement of a defendant was the fruit of electronic surveillance under Title III, disclosure of the defendant's statement is mandatory under 18 U.S.C. §2518(9).

A defendant's oral statement made to a person then known to the defendant to be a government agent, even though neither recorded nor reduced to writing, is nonetheless required to be produced pursuant to the rule. *U.S. v. Manetta,* 551 F.2d 1352 (5th Cir. 1977); *U.S. v. Lewis,* 511 F.2d 798 (D.C. Cir. 1975). Even summary reports and interview memoranda made by government agents, merely setting forth the substance of the defendant's remarks, are within the scope of the rule. *U.S. v. Johnson,* 525 F.2d 999 (2d Cir. 1975), *cert. denied,* 424 U.S. 920 (1976).

However, production of pre-arrest oral statements made by the defendant to an undercover agent, not then known as such to the defendant, is not required. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides that only oral statements made by a defendant "in response to interrogation by any person then known to the defendant to be a government agent" are discoverable by the defense. *U.S. v. Johnson,* 562 F.2d 515 (8th Cir. 1977); *U.S. v. Green,* 548 F.2d 1261 (6th Cir. 1977). Likewise, oral statements of the defendant made to a third party, incorporating admissions or acknowledgements of guilt, are not discoverable under the rule. *U.S. v. Zarattini,* 552 F.2d 753 (7th Cir.), *cert. denied,* 431 U.S. 942 (1977). One court has applied the rule when a third party conversation was overheard by a government agent whose presence was not known to the defendant. *U.S. v. Viserto,* 596 F.2d 531 (2d Cir.), *cert. denied,* 100 S. Ct. 80 (1979).

The recorded testimony of the defendant before a grand jury must be made available to the defendant. In addition, under Rule 16(a)(1)(A), where the defendant is a corporation, partnership, association, or labor union, it is entitled to discover the grand jury testimony of a witness who was an officer or employee at the time of his testimony and able to legally bind the defendant to acts constituting the offense in question.

2. DEFENDANT'S PRIOR RECORD

Rule 16(a)(1)(B) of the Federal Rules of Criminal Procedure provides that, upon request, the government shall furnish the defendant with a copy of his prior criminal record, if any, which is in the possession of the government, known by the government to exist, or becomes known to the government after the exercise of due diligence, *i.e.*, an inquiry made to the agency responsible for the investigation of the case.

3. DOCUMENTS AND TANGIBLE OBJECTS

Rule 16(a)(1)(C) provides that, upon request, the government shall permit the defendant to inspect and copy "books, papers, documents, photographs, tangible objects, buildings or places . . . " if any one of the following conditions is met: (1) the defendant shows that disclosure of the document or tangible object is material to the defense; (2) the government intends to introduce the document or tangible

object as evidence in its case-in-chief; or (3) the document or tangible object was obtained from or belonged to the defendant. In the latter two instances, the defendant need not specifically designate the items sought, and if a decision is later made to use other evidence in the government's case-in-chief, the defense must be notified immediately or the government faces the risk of having the evidence excluded under Rule 16(c). *U.S. v. Bowers,* 593 F.2d 376 (10th Cir.), *cert. denied,* 100 S. Ct. 106 (1979).

If the evidence sought by the defendant does not fall into either of the above categories, the government has no obligation to turn over other documents or tangible objects, absent a showing of materiality by the defense. *U.S. v. Jordan,* 399 F.2d 610 (2d Cir.), *cert. denied,* 393 U.S. 1005 (1968). Materiality means more than that the evidence in question bears some abstract or logical relationship to the issues in the case. To obtain documents and tangible objects not originally the property of the accused or evidence to be used in the government's case-in-chief, the defendant must show that the pretrial disclosure of the material would "enable the accused to substantially alter the quantum of proof in his favor." *U.S. v. Marshall,* 532 F.2d 1279, 1285 (9th Cir. 1976); *U.S. v. Buckley,* 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979); *U.S. v. Ross,* 511 F.2d 757 (5th Cir. 1975). In addition, the defendant's request must also be reasonable. Therefore, a request for documents by a defendant must not be unduly burdensome to the government and must be framed in specific terms to show the government what it must produce. Factors to be considered by the court in determining whether the government must produce such material include the extensiveness of the material and its availability from other sources, including the defendant's own knowledge. *U.S. v. Marshall, supra; U.S. v. Ross, supra.*

Rule 16(a)(1)(C) applies only to items "within possession, custody or control of the government." Accordingly, disclosure is not required, for example, where the evidence is in the custody of foreign police authorities or other persons not subject to the control of the government attorney. *U.S. v. Flores,* 540 F.2d 432 (9th Cir. 1976); *U.S. v. Cotroni,* 527 F.2d 708 (2d Cir. 1975), *cert. denied,* 426 U.S. 906 (1976). However, the language of the rule is sufficiently broad to require disclosure by the United States Attorney of evidence in the custody of another federal agency. *U.S. v. Scruggs,* 583 F.2d 238 (5th Cir. 1978); *U.S. v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971). However, even if there is a violation of the rule, "sufficient prejudice" to the defendant must be shown for reversal. *U.S. v. Scruggs,* 583 F.2d at 242.

4. REPORTS OF EXAMINATIONS AND TESTS

Upon request, the government must permit the defendant to inspect and copy results or reports of physical or mental examinations, as well as results or reports of any scientific tests or experiments, which are within the possession, custody, or control of the government and which are (1) material to the preparation of the defense, or (2) to be used by the government during its case-in-chief. Therefore, the government is compelled to produce copies of the reports of fingerprint and handwriting experts who have examined known fingerprint or handwriting exemplars of the defendant and have compared them to questioned specimens. *U.S. v. Buchanan,* 585 F.2d 100 (5th Cir. 1978). Similarly, a defendant has the right to inspect and copy results or reports of examinations made by the government of controlled substances. *U.S. v. Gordon,* 580 F.2d 827 (5th Cir.), *cert. denied,* 439 U.S. 1051 (1978).

Rule 16(a)(1)(D), like Rule 16(a)(1)(C) relating to the production of documents and tangible objects, contains a threshold requirement of materiality. A defendant must meet this burden where the government does not intend to use such tests and examinations as evidence at trial. *U.S. v. Thompson,* 493 F.2d 305 (9th Cir.), *cert. denied,* 419 U.S. 834 (1974). Therefore, the government is not required to provide memoranda related to the tests necessary for determining whether a substance represented is an unlawful isomer of a particular substance if such memoranda were not made in connection with any particular prosecution. *U.S. v. Orzechowski,* 547 F.2d 978 (7th Cir.), *cert. denied,* 431 U.S. 906 (1977).

5. DISCLOSURE OF EVIDENCE BY THE DEFENDANT

Rule 16(b)(1) is one of the few provisions allowing discovery of a defendant's evidence by the government. The materials potentially discoverable by the government parallel the materials obtainable by the defendant under Rule 16(a)(1)(C) and (D). They are books, papers, documents, photographs, or tangible objects in the possession of the defendant, and results of scientific tests and experiments conducted on the behalf of the defendant. Before any evidence may be discovered by the government under the rule, however, there must be a discovery request by the defendant, and the government must comply with the request. *U.S. v. Opager,* 589 F.2d 799 (5th Cir. 1979). Additionally, the court must find that the government's request is material and reasonable and not designed to harass the defendant or probe into defense strategy. *U.S. v. Estremera,* 531 F.2d 1103 (2d Cir.), *cert. denied,* 425 U.S. 979 (1976).

This material is subject to a government discovery request only if the defense intends to introduce the material as evidence in chief, or in the case of the results of a test or examination, the defense intends to call the preparer of such report at trial and the results of such test or examination relate to his testimony. Rule 16(b)(1)(B), Fed. R. Crim. P. Thus, the disclosure obligation of the defense is more limited under the rule than is that of the government under Rule 16(a)(1)(D), since the government must disclose any reports "material to the defense." For example, government psychiatric reports concerning the defendant, including any supporting the contentions of the defense, must be disclosed; but the defendant need not disclose any psychiatric report supporting the government position if the defendant decides not to call the examining psychiatrist who wrote the report. *U.S. v. Alvarez,* 519 F.2d 1036, 1046 (3d Cir. 1975).

6. LIMITATIONS UPON DISCOVERY

a. DISCOVERY OF WITNESS STATEMENTS AND THE IDENTITIES OF WITNESSES

Rule 16(a)(2) of the Federal Rules of Criminal Procedure specifically excludes from pretrial discovery (1) "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case," and (2) statements made by government witnesses or potential government witnesses except as provided under the Jencks Act (18 U.S.C. §3500). Thus, written or oral statements of witnesses, including coconspirators and codefendants, are not discoverable under Rule 16. *U.S. v. Fearn,* 589 F.2d 1316 (7th Cir. 1978); *U.S. v. Cook,* 530 F.2d 145 (7th Cir. 1976), *cert. denied,* 426 U.S. 909 (1977); *U.S. v. Percevault,* 490 F.2d 126 (2d Cir. 1974).

Likewise, Rule 16(b)(2) precludes the discovery of (1) "reports, memoranda or other internal defense documents" made in connection with the case, and (2) statements made by the defendant or by witnesses or prospective witnesses to the defense.

Rule 16(a)(3) states that, "except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of the recorded proceedings of a grand jury." Thus, recorded statements of a witness made before a grand jury are not subject to pretrial discovery by a defendant.

Likewise, Rule 16 does not mandate disclosure of the names of witnesses. *U.S. v. Dark,* 597 F.2d 1097 (6th Cir.), *cert. denied,* 100 S. Ct. 267 (1979); *U.S. v. Dreitzler,* 577 F.2d 539, 553 (9th Cir. 1978), *cert. denied,* 440 U.S. 921 (1979); *U.S. v. Little,* 562 F.2d 578 (8th Cir. 1978); *U.S. v. Mitchell,* 540 F.2d 1163, 1166 (3d Cir. 1976); *U.S. v. Cook, supra; U.S. v. Cannone,* 528 F.2d 296, 302 (2d Cir. 1975).

Attempts to amend Rule 16 to compel the disclosure of the names of prospective witnesses by either side have been rejected by Congress. H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 12 (1975). The conference report accompanying the 1975 amendments to the Rules of Criminal Procedure notes:

> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formation of this policy.

However, the fact that Rule 16 does not compel disclosure of the names and addresses of government witnesses does not mean that a defendant is necessarily precluded outright from obtaining this information. Generally, the granting of a defendant's request for pretrial disclosure of the identities of the government's witnesses is within the discretion of the trial court. *U.S. v. John Bernard Industries, Inc.,* 589 F.2d 1353 (8th Cir. 1979); *U.S. v. Chaplinski,* 579 F.2d 373 (5th Cir.), *cert. denied,* 439 U.S. 1050 (1978); *U.S. v. Sclamo,* 578 F.2d 888 (1st Cir. 1978); *U.S. v. Dreitzler,* 577 F.2d 539 (9th Cir. 1978); *U.S. v. Harris,* 542 F.2d 1283 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977); *U.S. v. Cannone,* 528 F.2d 296 (2d Cir. 1975). Also, in a capital case under any federal criminal statute, 18 U.S.C. §3432 requires the government to provide the defense with a list of witnesses at least three days before trial.

Generally, to obtain a government witness list a defendant must make a specific showing that such disclosure is both material to the preparation of his defense and reasonable in light of the circumstances. A defense request for disclosure of a government witness list for the general need to prepare for cross-examination does not constitute a showing of necessity. *U.S. v. Sclamo,* 578 F.2d 888 (1st Cir. 1978). Where the government has made a motion for a protective order under Rule 16(d)(1), representing that disclosure of the names of the witnesses would involve potential physical danger to the witness and supporting its position by materials submitted *in camera,* a trial court does not abuse its discretion by refusing to order the government to provide a defendant with a witness list. *U.S. v. Harris, supra.*

A refusal by the government to obey a court order requiring it to exchange witness lists, witness testimony, and copies of exhibits, not sanctioned by Rule 16, will not necessarily result in reversal upon appeal. Such factors as the defendant's minimal compliance with a reciprocal discovery order, the defendant's failure to

call to the court's attention at trial the government's refusal to comply with a previous discovery order, or overwhelming evidence of the defendant's guilt mitigate any such failure of disclosure by the government. *See, e.g., U.S. v. Seymour,* 576 F.2d 1345 (9th Cir. 1978); *U.S. v. Larson,* 555 F.2d 673 (8th Cir. 1977). In addition, interlocutory appeal of a trial court's order requiring pretrial disclosure of the identities of government witnesses, where the government has presented some evidence of potential danger to the witnesses and the defense has presented no specific reason of its need for disclosure, may be proper. It has been held an abuse of discretion for the trial court to allow a defendant to obtain the names and addresses of witnesses under such circumstances. *U.S. v. Cannone, supra.*

Another provision used by defendants attempting to go beyond Rule 16 for discovery of the government's case is the Freedom of Information Act, 5 U.S.C. §552. However, it has been held that this act does not enlarge the scope of criminal discovery under Rule 16. *U.S. v. Buckley,* 586 F.2d 498 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979); *U.S. v. Murdock,* 548 F.2d 599 (5th Cir. 1977); *Fruehauf Corp. v. Thornton,* 507 F.2d 1253 (6th Cir. 1974).

b. DISCLOSURE OF IDENTITIES OF INFORMANTS

Disclosure of the identity of a government informant is required only where it would be helpful to the defense or essential to a fair determination of the cause. *Roviaro v. U.S.,* 353 U.S. 53 (1957); *U.S. v. Hernandez-Berceda,* 572 F.2d 680 (9th Cir. 1978). There must be more than a mere request and more than mere speculation that disclosure will be helpful. *U.S. v. Trejo-Zambrano,* 582 F.2d 460 (9th Cir. 1978), *cert. denied,* 439 U.S. 1005 (1978); *In re U.S.,* 565 F.2d 19 (2d Cir. 1977).

Basically, disclosure is required if the court finds "it is reasonably probable that the informer can give relevant testimony" material to the defense. *U.S. v. McManus,* 560 F.2d 747, 751 (6th Cir. 1977), *cert. denied,* 434 U.S. 1047 (1978). *See also U.S. v. Opager,* 589 F.2d 799 (5th Cir. 1979); *U.S. v. Silva,* 580 F.2d 144 (5th Cir. 1978). Where a defendant cannot show with "reasonable probability" that the informant was an active participant in the criminal matter under review, but only a "mere tipster," the government is not required to disclose the identity of the informant. *U.S. v. Suarez,* 582 F.2d 1007, 1011 (5th Cir. 1978); *U.S. v. Sherman,* 576 F.2d 292 (10th Cir.), *cert. denied,* 439 U.S. 913 (1978); *U.S. v. Alonzo,* 571 F.2d 1384 (5th Cir.), *cert. denied,* 439 U.S. 847 (1978). Similarly, disclosure is not required where the informant played only a small or passive role in the offense charged, had no firsthand information, or where his potential disclosures are already known to the defendant. *U.S. v. Moreno,* 588 F.2d 490 (5th Cir. 1978), *cert. denied,* 441 U.S. 936 (1979); *U.S. v. Suarez, supra; U.S. v. Weir,* 575 F.2d 668 (8th Cir. 1978); *U.S. v. Robinson,* 530 F.2d 1076 (D.C. Cir. 1976). Likewise, disclosure will not be ordered where the witness would be in personal danger and the potential testimony of the witness was not of an exculpatory nature. *U.S. v. Pelton,* 578 F.2d 701 (8th Cir. 1978), *cert. denied,* 439 U.S. 964 (1979); *U.S. v. Cannone,* 528 F.2d 296 (2d Cir. 1975). When, before trial, the defendant knows the informant's identity, he may not later claim that the government's refusal to confirm the identity denied him a fair trial. *U.S. v. Brown,* 562 F.2d 1144 (9th Cir. 1977); *U.S. v. Gonzalez,* 555 F.2d 308 (2d Cir. 1977).

Even when the informant is substantially involved in the alleged criminal transaction and disclosure of his identity is required, the government has no duty

to physically produce the informant at trial. *U.S. v. Fuentes,* 563 F.2d 527 (2d Cir. 1977), *cert. denied,* 434 U.S. 959 (1977); *U.S. v. Turbide,* 558 F.2d 1053 (2d Cir.), *cert. denied,* 434 U.S. 934 (1977). When disclosure is mandated by the court, however, the government must exercise due diligence in supplying the informant's name and available information about his whereabouts, and reasonably cooperate in securing the informant's appearance at trial. *U.S. v. Turbide, supra.* The government may not take affirmative steps to secrete the informant after such disclosure is made. *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir.), *cert. denied,* 439 U.S. 873 (1978).

c. DUTY TO DISCLOSE "EXCULPATORY" EVIDENCE

Apart from its duty to disclose evidence under Rule 16 or as ordered by the court in its discretion, the government may have a duty to disclose when a defendant specifically requests exculpatory evidence material to (1) guilt or innocence, or (2) punishment. *Brady v. Maryland,* 373 U.S. 83 (1963).

7. PROTECTIVE ORDERS

Rule 16(d)(1) of the Federal Rules of Criminal Procedure vests the court with discretion, upon a sufficient showing of necessity by either party, to deny, restrict, or defer discovery or inspection. The rule further allows the party seeking a protective order to submit a written statement for an *in camera* inspection and decision. An FBI file relating to the activities of the defendant as a prior informant is not discoverable when the file contains nothing exculpatory, material, or relevant to the indictment in the case. *Xydas v. U.S.,* 445 F.2d 660 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 826 (1972).

8. SANCTIONS FOR FAILURE TO PROVIDE DISCOVERY

Rule 16(d)(2) gives the court wide discretion in dealing with the failure of either party to comply with the discovery procedures of Rule 16; the court "may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." *See, e.g., U.S. v. Weatherspoon,* 581 F.2d 595 (7th Cir. 1978); *U.S. v. Jackson,* 508 F.2d 1001 (7th Cir. 1975).

If a party fails to provide evidence required to be produced under Rule 16 until immediately before or during the trial, the opposing party has a duty to move for a continuance or a recess if trial has commenced and to show that additional time is needed to properly consider, investigate, or utilize the new evidence. *U.S. v. Krohn,* 558 F.2d 390 (8th Cir.), *cert. denied,* 434 U.S. 868 (1977); *U.S. v. Bailey,* 550 F.2d 1099 (8th Cir. 1977).

A recess during a trial has been held sufficient to cure any prejudice to a defendant where previous failure to disclose by the government was inadvertent and the recess gave the defense time to investigate the ramifications of the new material or to prepare for cross-examination. *U.S. v. Lambert,* 580 F.2d 740 (5th Cir. 1978); *U.S. v. Fulton,* 549 F.2d 1325 (9th Cir. 1977). Where the defense until trial concealed its intention to assert that a substance seized from the defendant was not a controlled substance and, in response, the government tested the material but failed to inform the defendant of the results, it was held that the granting of a recess to give the defense time to conduct its own test cured any

prejudice resulting from the mid-trial disclosure. *U.S. v. Bockius,* 564 F.2d 1193 (5th Cir. 1977). Even withholding evidence until trial will not result in reversal if a recess will enable the defense sufficient time to the review and use the material supplied. *U.S. v. Kaplan,* 554 F.2d 577 (3d Cir. 1977). The admission of previously undisclosed evidence that can be classified as merely supplementary to other evidence already made available to the defense is within the discretion of the trial judge and will not be reversed unless there is prejudice to the defendant's substantial rights. *Hansen v. U.S.,* 393 F.2d 763 (5th Cir. 1968).

Even the failure of the government to respond until trial to a request of a defendant for his statements under Rule 16(a)(1)(A) generally does not require reversal where the failure to provide pretrial discovery was inadvertent, the statement contains nothing of a significant exculpatory nature, or the impact of the failure to produce the statement could not have reasonably deprived the defendant of a meritorious defense. Thus, the government's inadvertant failure to produce a defendant's statement containing no exculpatory statements was excused as being non-prejudicial to any reasonable interest of the defendant. *U.S. v. Gladney,* 563 F.2d 491 (1st Cir. 1977); *U.S. v. Smith,* 557 F.2d 1206 (5th Cir.), *cert. denied,* 434 U.S. 1073 (1977); *U.S. v. Eddy,* 549 F.2d 108 (9th Cir. 1976). Likewise, the government's failure to produce one of four of defendant's statements in timely fashion did not require reversal where such failure had no impact on the defense strategy. *U.S. v. Johnson,* 525 F.2d 999 (2d Cir.), *cert. denied,* 424 U.S. 920 (1975). Prejudice does not exist when the contents of the withheld statement are known to the defendant in advance of trial. *U.S. v. Arquelles,* 594 F.2d 109 (5th Cir.), *cert. denied,* 100 S. Ct. 124 (1979).

Failure to produce a defendant's statement may result in more severe sanctions where more than inadvertence or mere negligence on the part of the government is present. The government's failure to provide a tape recording of a conversation between a government agent and the defendant before trial resulted in the court forbidding the use of the tape and instructions to the jury to ignore previous mention of it by the government. *U.S. v. Gillings,* 568 F.2d 1307, 1310 (9th Cir.), *cert. denied,* 436 U.S. 919 (1978). Reversal has been held required where the government withheld a defendant's post-arrest statement that had substantial bearing on the contested issue of the defendant's mental capacity. *U.S. v. Manetta,* 551 F.2d 1352 (5th Cir. 1977). And, the prosecutor's use on cross-examination of the defendant's statement, a copy of which the court has ordered furnished to the defense but which was withheld by the prosecution, was highly prejudicial and reversal was required in *U.S. v. Pardone,* 406 F.2d 560 (2d Cir. 1969). Even an inadvertent failure by the government to supply a defendant with a document, even though a codefendant had received a copy, resulted in the government being barred from placing the document into evidence. *U.S. v. Kelly,* 569 F.2d 928 (5th Cir.), *cert. denied,* 439 U.S. 829 (1978).

E. SUBPOENA FOR THE PRODUCTION OF DOCUMENTARY EVIDENCE AND OBJECTS

Rule 17(c) of the Federal Rules of Criminal Procedure governs the issuance of trial subpoenas duces tecum of documents or objects in criminal cases. *See* Chapter III, *infra,* for the rule as applied to the issuance of grand jury subpoenas.

Subpoenas duces tecum can be issued for returns before trial by the prosecution or the defense. One of the purposes of Rule 17(c) is to expedite the

trial by providing a means for pretrial inspection of subpoenaed materials. *U.S. v. Nixon,* 418 U.S. 683, 698 (1974). Decisions to enforce subpoenas and order pretrial production are discretionary with the trial court "since the necessity for the subpoena most often turns upon a determination of factual issues." *Id.* at 702.

Defendants will sometimes direct pretrial subpoenas to the government requesting production of items that are not discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure. In *Bowman Dairy Co. v. U.S.,* 341 U.S. 214, 221 (1951), the Supreme Court stated that "any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." However, the Court went on to say that pretrial subpoenas are not intended to provide an alternate means of pretrial discovery in criminal cases. *See U.S. v. Nixon,* 418 U.S. at 698; *U.S. v. Zirpolo,* 288 F. Supp. 993 (D.N.J. 1968), *rev'd on other grounds,* 450 F.2d 424 (3d Cir. 1971).

In *U.S. v. Nixon,* 418 U.S. at 699, the Supreme Court approved the criteria outlined in *U.S. v. Iozia,* 13 F.R.D. 335, 338 (S.D.N.Y. 1952), for considering Rule 17(c) subpoenas. They are (1) that the material sought is evidentiary and relevant; (2) that it is not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; (3) that the defendant cannot properly prepare for trial without such production and inspection in advance and the failure to produce may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition. The Court in *Nixon* further refined the criteria by requiring a minimal showing of (1) relevancy, (2) admissibility, and (3) specificity. *Nixon,* 418 U.S. at 700. Examples of applications of the criteria are found in *U.S. v. Campagnuolo,* 592 F.2d 852 (5th Cir. 1979); *U.S. v. Hill,* 589 F.2d 1344, 1352 (8th Cir.), *cert. denied,* 99 S. Ct. 2843 (1979); *U.S. v. Bailey,* 550 F.2d 1099, 1100 (8th Cir. 1977); *U.S. v. Anderson,* 481 F.2d 685 (4th Cir. 1973), *aff'd,* 417 U.S. 211 (1974); *U.S. v. Purin,* 486 F.2d 1363 (2d Cir. 1973), *cert. denied,* 416 U.S. 987 (1974); *U.S. v. Marchisio,* 344 F.2d 653, 669 (2d Cir. 1965).

Where a defendant's discovery motion is sweeping and broadly phrased in an endeavor to secure a whole array of materials without designating with reasonable particularity the documents sought, the motion fails to comply with the rule. *U.S. v. Haldemann,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977). In *U.S. v. Murray,* 297 F.2d 812, 821 (2d Cir.), *cert. denied,* 369 U.S. 828 (1962), the court stated that the moving party should intend that the material he seeks be used as evidence.

As under Rule 16, the government has a "continuing duty" under Rule 17(c) for the production of documents subpoenaed before trial. A new trial may be ordered where documents are negligently suppressed. *U.S. v. Consolidated Laundries Corp.,* 291 F.2d 563 (2d Cir. 1961). *See Kyle v. U.S.,* 297 F.2d 507 (2d Cir. 1961).

Subject to applicable privileges, the government may also use Rule 17(c) to subpoena evidence before trial. Like the defendant, however, the government may not utilize the rule as an additional means of discovery inasmuch as the purpose is simply to allow inspection of subpoenaed material by all parties before trial. *U.S. v. Nixon,* 418 U.S. at 698.

F. RULE OF BRADY v. MARYLAND

In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court held that, irrespective of good or bad faith, suppression by the prosecution of evidence

favorable to a defendant who has requested it violates due process where such evidence is material to either guilt or punishment. The *Brady* holding imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence that is materially favorable to the accused, either as direct or impeaching evidence. *Brady* is not a rule of discovery; it is a rule of fairness and minimum prosecutorial obligation. *U.S. v. Beasley,* 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979), citing *U.S. v. Agurs,* 427 U.S. 97, 107 (1976). *See also U.S. v. Campagnuolo,* 592 F.2d 852, 859 (5th Cir. 1979). The obligation to disclose is measured by the "character of the evidence, not the character of the prosecutor." *U.S. v. Agurs,* 427 U.S. at 110.

Grand jury testimony of a witness may be required to be disclosed under the *Brady* rule. *U.S. v. Campagnuolo,* 592 F.2d 852, 859 (5th Cir. 1979); *U.S. v. Azzarelli Const. Co.,* 459 F. Supp. 146 (E.D. Ill. 1978); *U.S. v. Brighton Building & Maintenance Co.,* 435 F. Supp. 222 (N.D. Ill. 1977), *aff'd,* 598 F.2d 1101 (1979).

The Third and Ninth Circuits have held that agents' rough notes must be preserved so that the trial court can determine whether they should be made available under *Brady. U.S. v. Shields,* 571 F.2d 1115, 1119 (9th Cir. 1978); *U.S. v. Vella,* 562 F.2d 275, 276 (3d Cir. 1977), *cert. denied,* 434 U.S. 1074 (1978). On the other hand, the Fifth Circuit has held an agent's rough notes are not *Brady* material, in the absence of a showing that they contain evidence material to guilt or punishment. *U.S. v. Martin,* 565 F.2d 362 (5th Cir. 1978). In any event, it has been said that the government's failure to take appropriate steps to preserve evidence may, in some circumstances, constitute grounds for reversal. *See Virgin Islands v. Testamark,* 570 F.2d 1162, 1165 (3d Cir. 1978).

1. SITUATIONS REQUIRING DISCLOSURE

The *Agurs* decision, following *Brady,* articulated three distinct types of situations in which the *Brady* doctrine applies. 427 U.S. at 103-106. The defense need only demonstrate that the prosecutor suppressed material evidence favorable to the defendant in order to establish a violation of one of the three categories of nondisclosure cases set forth in *Agurs.* Each category requires a separate analysis, however, and has a distinct test for materiality to determine whether the alleged suppression was so fundamentally unfair as to deny the due process right of a fair trial. If the suppressed evidence is then found to be material, the conviction cannot stand.

Under the first category of nondisclosure discussed in *Agurs,* where the prosecution knew or should have known that its case contained perjured testimony (as in *Mooney v. Holohan,* 294 U.S. 103 (1935)), the test of materiality is so applied that the conviction will be set aside if there is "any reasonable likelihood" that the false testimony "could have affected" the jury's judgment. *U.S. v. Agurs,* 427 U.S. at 103; *U.S. v. Anderson,* 574 F.2d 1347, 1352-1353, (5th Cir. 1978); *U.S. v. Hedgeman,* 564 F.2d 763, 766 (7th Cir. 1977), *cert. denied,* 434 U.S. 1070 (1978); *U.S. v. Brown,* 562 F.2d 1144, 1150 (9th Cir. 1977).

Under the second category of nondisclosure set forth in *Agurs,* where the prosecution fails to respond to a defendant's specific request for information (as in *Brady v. Maryland,* 373 U.S. 83 (1963)), a new trial must be granted if the suppressed evidence "might have affected the outcome." 427 U.S. at 104; *Monroe v. Blackburn,* 607 F.2d 148, 151-152 (5th Cir. 1979); *U.S. v. Goldberg,* 582 F.2d 483, 489-490 (9th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979); *U.S. v. Sutton,* 542

F.2d 1239, 1242-1243 (4th Cir. 1976). The mere possibility that undisclosed information might have helped the defendant is, however, insufficient to establish "materiality." *U.S. v. Jackson,* 579 F.2d 553 (10th Cir.), *cert. denied,* 439 U.S. 981 (1978). Further, for the defense request under this category to be considered sufficiently specific, it must provide the prosecutor with notice of exactly what the defense desires. *U.S. v. Agurs,* 427 U.S. at 106; *U.S. v. Di Carlo,* 575 F.2d 952, 959-960 (1st Cir.), *cert. denied,* 439 U.S. 834 (1978); *Marzeno v. Gengler,* 574 F.2d 730, 736 (3d Cir. 1978); *U.S. v. Mackey,* 571 F.2d 376, 389 (7th Cir. 1978); *U.S. v. McCrane,* 547 F.2d 204, 207-208 (3d Cir. 1976).

In the third category of nondisclosure set out in *Agurs,* where the defendant fails to request, or only generally requests, exculpatory evidence (as in *Agurs* itself), reversal is necessary only if the undisclosed evidence "creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112; *U.S. v. Alberico,* 604 F.2d 1315 (10th Cir.), *cert. denied,* 100 S. Ct. 524 (1979); *Galtieri v. Wainwright,* 582 F.2d 348 (5th Cir. 1978); *Ostrer v. U.S.,* 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); *U.S. v. Di Carlo,* 575 F.2d 952, 960 (1st Cir.), *cert. denied,* 439 U.S. 834 (1978); *U.S. v. Mackey,* 571 F.2d 376, 389 (7th Cir. 1977). Thus, a greater showing of materiality is required when the defense request is absent or is general than when the request is specific.

Circuits vary on what constitutes a general request. A request for any material bearing adversely on the character and reputation of named witness has been deemed a general request. *Ostrer v. U.S.,* 577 F.2d at 786. Also, a request for information relating to material inconsistencies between statements given by any person has been deemed a general request. *U.S. v. Mackey,* 571 F.2d 376, 389 (7th Cir. 1977). In order to be deemed specific, the request must, minimally, focus on a particular witness. *Id.* Furthermore, it has been held that a defense request for "all *Brady* material or for anything exculpatory is equivalent to no request at all." *U.S. v. Weiner,* 578 F.2d 757, 767 (9th Cir.), *cert. denied,* 439 U.S. 981 (1978). In such a case, reversal is required only if undisclosed evidence creates a reasonable doubt as to defendant's guilt.

In all three *Agurs* categories materiality is determined by evaluating all the evidence introduced at trial. 427 U.S. at 112. Reversal is not required where the defendant fails to establish materiality of suppressed evidence. *U.S. v. Parker,* 586 F.2d 422 (5th Cir. 1978), *cert. denied,* 441 U.S. 962 (1979). *See also U.S. v. Friedman,* 593 F.2d 109 (9th Cir. 1979). The duty of disclosure under *Brady* obviously extends to the individual prosecutor and his office. *See U.S. v. Morell,* 524 F.2d 550 (2d Cir. 1975). In general, that duty also extends to persons working as part of the prosecution team or intimately connected with the government's case, even if not employed in the prosecutor's office. *See U.S. v. Morell,* 524 F.2d at 555 (BNDD agent with knowledge of confidential file concerning key government witness). Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, are guilty of nondisclosure. *U.S. v. Butler,* 567 F.2d 885 (9th Cir. 1978). *See also U.S. v. Deutsch,* 475 F.2d 55 (5th Cir. 1973) (Post Office Department in possession of key personnel folder).

However, the prosecutor is not deemed to have constructive knowledge of material of which he would logically be unaware. *U.S. v. Quinn,* 445 F.2d 940, 944 (2d Cir.), *cert. denied,* 404 U.S. 850 (1971) (sealed indictment against government witness in another district). Nor is the prosecutor required to furnish information available only from public records or from outside the United States and not within the government's control. *U.S. v. Flores,* 540 F.2d 432, 438 (9th

Cir. 1976); *U.S. v. Reyes-Padron,* 538 F.2d 33 (2d Cir. 1976), *cert. denied,* 429 U.S. 1046 (1977). Moreover, the prosecutor is generally not held to a duty of disclosure of evidence or witnesses who are already known or are accessible to the defendant. *U.S. v. Shelton,* 588 F.2d 1242 (9th Cir. 1978), *cert. denied,* U.S. 99 S. Ct. 2822 (1979); *U.S. v. Craig,* 573 F.2d 455, 492 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978); *U.S. v. Prior,* 546 F.2d 1254, 1259 (5th Cir. 1977); *U.S. v. Di Giovanni,* 544 F.2d 642, 645 (2d Cir. 1976); *U.S. v. Stewart,* 513 F.2d 957 (2d Cir. 1975); *U.S. v. Brawer,* 496 F.2d 703 (2d Cir.), *cert. denied,* 419 U.S. 1051 (1974).

Further, the government cannot be held to have suppressed *Brady* material where material sought is unavailable to either the government or the defendant because of its loss by state officials. *U.S. v. Johnston,* 543 F.2d 55 (8th Cir. 1976) (breath test results; government apprised defense of name of administering officer placing defendant in position of parity with the government); *U.S. v. McDaniel,* 428 F. Supp. 1226 (W.D. Okla. 1977).

Finally, the defense is not entitled under *Brady* to know everything the government investigation has unearthed. *U.S. v. Arroyo-Angulo,* 580 F.2d 1137 (2d Cir.), *cert. denied,* 439 U.S. 913 (1978). Where the government stated that it complied with requirements of *Brady,* the court is not required to order that all evidence in the government's possession be given to defendants. *U.S. v. Azzarelli Const. Co.,* 459 F. Supp. 146 (E.D. Ill. 1978).

2. MATERIAL THAT MUST BE DISCLOSED

There are two general categories of material required to be disclosed under the *Brady* rule: (1) material which tends to be exculpatory, and (2) material which may be used to impeach or discredit government witnesses.

a. EXCULPATORY MATERIAL

As in the case of *Brady v. Maryland,* 373 U.S. at 86-87, failure to reveal the existence of another person's confession would merit reversal because such evidence obviously tends to exculpate the defendant. Likewise, failure by the prosecution to disclose the existence of an eyewitness whose testimony, developed by skilled counsel, could have induced reasonable doubt was reversible error. *Grant v. Alldredge,* 498 F.2d 376 (2d Cir. 1974) (goverment's duty was not met by statement merely that eyewitness had failed to select defendant's photograph from spread when actually witness had identified someone else). *But see U.S. v. Stone,* 471 F.2d 170 (7th Cir.), *cert. denied,* 411 U.S. 931 (1973) (no error in failing to give notice that witnesses failed to identify defendant before trial, where witnesses were produced at trial). *See also Jackson v. Wainwright,* 390 F.2d 288 (5th Cir. 1968); *U.S. v. ex rel. Meers v. Wilkins,* 326 F.2d 135 (2d Cir. 1964).

The prosecution has no duty to disclose the inability of certain eyewitnesses to positively identify a defendant. *U.S. v. Rhodes,* 569 F.2d 384 (5th Cir.), *cert. denied,* 439 U.S. 844 (1978) (where eyewitnesses did not state that defendant was not involved in the crime, but, rather, testified that they could not state whether he was or was not one of the perpetrators). In *Moore v. Illinois,* 408 U.S. 786, 794 (1972), the Supreme Court restricted the government's obligation so as to require only revelation of exculpatory material that is "material either to guilt or to punishment." The Court there rejected a defense *Brady* claim where the state had not revealed the existence of a witness' prior misidentification of the defendant as one "Slick," when others testified that Moore was not "Slick" but had committed the murder.

Physical evidence or information from police reports favorable to the defense should be disclosed. *Barbee v. Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964), and, the prosecutor has the duty to disclose to the defense favorable results of a physical or mental examination. *Orr v. U.S.,* 386 F.2d 988 (D.C. Cir. 1967) (a finding that the defendant was mentally incompetent when an insanity defense was raised).

b. IMPEACHMENT MATERIAL

Evidence that may be used to substantially impeach the credibility of a key government witness must also be disclosed to the defense. *Giles v. Maryland,* 386 U.S. 66 (1967); *U.S. v. Crowell,* 586 F.2d 1020 (4th Cir. 1978), *cert. denied,* 440 U.S. 959 (1979); *U.S. v. Butler,* 567 F.2d 885 (9th Cir. 1978); *U.S. v. Sweet,* 548 F.2d 198 (7th Cir.), *cert. denied,* 430 U.S. 969 (1977); *U.S. v. Miller,* 411 F.2d 825 (2d Cir. 1969). Thus, the government must reveal promises of leniency or immunity for its witnesses. *Giglio v. U.S.,* 405 U.S. 150 (1972); *U.S. v. Joseph,* 533 F.2d 282, 286-287 (5th Cir. 1976), *cert. denied,* 431 U.S. 905 (1977); *U.S. v. Pfingst,* 490 F.2d 262 (2d Cir. 1973), *cert. denied,* 417 U.S. 919 (1974); *U.S. v. Harris,* 462 F.2d 1033 (10th Cir. 1972). In *Weatherford v. Bursey,* 429 U.S. 545 (1977), however, the Supreme Court held that the government is not required under *Brady* to reveal its arrangements with undercover agents or other witnesses who will testify, when the informant in question has concealed his identity from the defendant.

The government must disclose the prior criminal record or other prior material acts of misconduct of its witnesses. *U.S. v. Rosner,* 516 F.2d 269 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); *U.S. v. Seijo,* 514 F.2d 1357 (2d Cir. 1975), *cert. denied,* 429 U.S. 1043 (1977); *U.S. v. Fried,* 486 F.2d 201 (2d Cir. 1973), *cert. denied,* 416 U.S. 983 (1974) (indictment pending against witness in neighboring district). Disclosure of a presentence report on a government witness, however, was not required under the *Brady* rule since the reports were unavailable to the prosecutors. *U.S. v. Dingle,* 546 F.2d 1378 (10th Cir. 1976). Letters or information sent to the prosecutor by the witness, showing his understanding of promises or revealing pressure on him to testify, must also be disclosed. *U.S. v. Badalamente,* 507 F.2d 12 (2d Cir. 1974), *cert. denied,* 421 U.S. 911 (1975). In *Moore v. Illinois,* 408 U.S. 786, 797 (1972), however, the Court refused to find that production of a diagram reflecting one prosecution witness' story was inconsistent with that of another was required under *Brady.*

3. TIME FOR DISCLOSURE

The appropriate time for disclosure of requested evidence that is materially favorable to the accused is unsettled. Some courts have held that the appropriate time to turn over *Brady* material is before trial. *U.S. v. Pollack,* 534 F.2d 964, 973-974 (D.C. Cir.), *cert. denied,* 429 U.S. 924 (1976); *Grant v. Alldredge,* 498 F.2d 376, 382 (2d Cir. 1974); *U.S. v. Deutsch,* 373 F. Supp. 289, 290-291 (S.D.N.Y. 1974). There is other authority, however, that the prosecutor is not required to turn over *Brady* material until trial. *U.S. v. Campagnuolo,* 592 F.2d 852, 859 (5th Cir. 1979); *U.S. ex rel. Lucas v. Regan,* 503 F.2d 1, 3 n.1 (2d Cir. 1974), *cert. denied,* 420 U.S. 939 (1975).

CHAPTER V

TRIAL DISCOVERY OF PRIOR STATEMENTS

A. JENCKS ACT: 18 U.S.C. §3500

The 1957 legislation, commonly referred to as the "Jencks Act," was designed to clarify and limit the Supreme Court's holding in *Jencks v. U.S.*, 353 U.S. 657 (1957). This legislation, 18 U.S.C. §3500, permits the government to refuse to disclose pretrial statements of any of its witnesses in federal criminal cases until each such witness has concluded his direct examination at trial. At that time, upon a defendant's motion, the court is required to order the government to produce the witness' prior statements that are in its possession and which relate to his testimony.

The purpose of the Jencks Act is to provide appropriate material to enable the defense to cross-examine thoroughly, while protecting the government's files from unwarranted disclosure. *U.S. v. Robinson,* 585 F.2d 274, 280-281 (7th Cir.), *cert. denied,* 99 S. Ct. 2171 (1979); *U.S. v. Nickell,* 552 F.2d 684, 688 (6th Cir. 1977), *cert. denied,* 436 U.S. 904 (1978); *U.S. v. Smaldone,* 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied,* 430 U.S. 967 (1977); *U.S. v. Percevault,* 490 F.2d 126, 129-130 (2d Cir. 1974). The Supreme Court has held that 18 U.S.C. §3500 is the exclusive means for obtaining statements of government witnesses made before trial. *Palermo v. U.S.,* 360 U.S. 343, 351 (1959); *U.S. v. Covello,* 410 F.2d 536 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969). Neither the requirements nor the limitations of the Jencks Act either derive from, or violate, the U.S. Constitution. *Weatherford v. Bursey,* 429 U.S. 545, 559 (1977); *U.S. v. Beasley,* 576 F.2d 626, 629 (5th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979); *U.S. v. Washabaugh,* 442 F.2d 1127, 1129 (9th Cir. 1971).

If Jencks Act statements of a potential government witness also contain exculpatory information, the government is further obligated under the *Brady* doctrine not to suppress that information, just as it is with any other exculpatory information in its hands. *See U.S. v. Agurs,* 427 U.S. 97 (1976); *Brady v. Maryland,* 373 U.S. 83 (1963). It has been held that the Jencks Act does not impair the government's duty to disclose exculpatory information, *U.S. v. Murphy,* 569 F.2d 771, 774 (3d Cir.), *cert. denied,* 435 U.S. 955 (1978), and that, conversely, the duty to provide exculpatory information does not abrogate the requirements of the Jencks Act, *U.S. v. Dotson,* 546 F.2d 1151, 1153 (5th Cir. 1977). *See generally U.S. v. Campagnuolo,* 592 F.2d 852, 858-861 (5th Cir. 1979).

1. PROCEDURE FOR OBTAINING DOCUMENTS

a. REQUEST BY DEFENSE COUNSEL

The requirement of a request for statements of a government witness is set forth at 18 U.S.C. §3500(b):

> After a witness called by the United States has testified on direct examination, the court shall, *on motion of the defendant,* order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject as to which the witness has testified. [Emphasis supplied].

When read in conjunction with subsection (a) of the Jencks Act, it is clear that such motion of the defendant applies only to witnesses at trial and not to those called by the government at a pretrial hearing. *U.S. v. Bernard,* 607 F.2d 1257, 1262 (9th Cir. 1979); *U.S. v. Murphy,* 569 F.2d 771 (3d Cir.), *cert. denied,* 435 U.S. 955 (1978).

Although the defendant may present a Jencks Act motion before trial, the court may not compel the government to disclose statements of a witness before the conclusion of his direct testimony. 18 U.S.C. §3500(a); *U.S. v. Campagnuolo,* 592 F.2d 852, 858 (5th Cir. 1979); *U.S. v. Murphy,* 569 F.2d 771, 774 (3d Cir.), *cert. denied,* 435 U.S. 955 (1978); *U.S. v. McMillen,* 489 F.2d 229, 230 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973). This is true even when such statements relate to conversations with the defendant, *U.S. v. Harris,* 542 F.2d 1283, 1291 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977), or contain exculpatory evidence otherwise producible under the *Brady* doctrine, *U.S. v. Anderson,* 574 F.2d 1347, 1352 (5th Cir. 1978). However, appellate courts encourage the practice of pretrial disclosure of Jencks Act materials in order to expedite discovery and trials, and to avoid potential *Brady* questions. *U.S. v. Campagnuolo,* 592 F.2d 852, 858 n.3 (5th Cir. 1979); *U.S. v. Murphy,* 569 F.2d at 774 n.10; *U.S. v. Dotson,* 546 F.2d 1151, 1153 (5th Cir. 1977).

No particular language is required for a defendant to trigger the government's responsibilities under the Jencks Act. *Lewis v. U.S.,* 340 F.2d 678, 682 (8th Cir. 1965); *U.S. v. Aviles,* 315 F.2d 186, 191 (2d Cir. 1963). But, the request must be timely. *Wilson v. U.S.,* 554 F.2d 893, 894 (8th Cir.), *cert. denied,* 434 U.S. 849 (1977). For example, although a request for Jencks Act statements made immediately after the conclusion of cross-examination may be timely, *Banks v. U.S.,* 348 F.2d 231, 234-235 (8th Cir. 1965), such a request presented after the government had rested its case the day before has been held to have been untimely, *U.S. v. Sacasas,* 381 F.2d 451, 454 (2d Cir. 1967). There is no appellate review of Jencks Act questions without a timely request. *Wilson v. U.S.,* 554 F.2d at 894.

Apparently a request for the Jencks Act statements of a particular witness who testifies in the government's case-in-chief may not automatically reapply to that same witness if he testifies in rebuttal. In *U.S. v. Goldberg,* 582 F.2d 483, 487 (9th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979), the defense failed to make a second request for Jencks Act statements after such rebuttal testimony and thereby did not obligate the government to produce statements the witness had made after his initial trial appearance.

b. THE TRIAL COURT'S OBLIGATION

A motion of the defendant generates a response from the government: production of a statement or statements, or non-production. Thereafter, the defendant must specify with reasonable particularity, typically through cross-examination of the witness at trial, that material which may be a Jencks Act statement exists which the government failed to provide in its response, to invoke the protection of the court. *U.S. v. Robinson,* 585 F.2d 274, 280-281 (7th Cir.),

cert. denied, 99 S.Ct. 2171 (1979). Further inquiry as to whether such material must be produced under the Jencks Act should then be made in a hearing out of the presence of the jury, *U.S. v. Chitwood,* 457 F.2d 676, 678 (6th Cir.), *cert. denied,* 409 U.S. 858 (1972), or by an *in camera* examination of such material, *U.S. v. Rivero,* 532 F.2d 450, 460 (5th Cir. 1976), or both. If the defendant fails to provide a foundation for the government to turn over any materials as Jencks Act statements, or for the court to screen any materials therefor, it is not an abuse of discretion for the court to refuse either to order the government to produce or to screen materials *in camera. U.S. v. Nickell,* 552 F.2d 684, 689-690 (6th Cir.), *cert. denied,* 436 U.S. 904 (1978); *U.S. v. Dingle,* 546 F.2d 1378, 1381 (10th Cir. 1976). If the defendant does provide such a foundation, the court's obligation is to determine "producibility," *i.e.,* if the material is a statement, if it is in the government's possession, and whether it relates to the witness' direct testimony. These questions, to be resolved out of the presence of the jury, must be considered by the court with the aid of the extrinsic evidence which is available and germaine. *Lewis v. U.S.,* 340 F.2d 678, 682 (8th Cir. 1965). Whether, and to what extent, the material must be produced are questions of fact committed to the discretion of the trial judge. 18 U.S.C. §3500(c); *U.S. v. Cuesta,* 597 F.2d 903, 914 (5th Cir. 1979). Such determination will not be overturned unless clearly erroneous. *U.S. v. Medel,* 592 F.2d 1305, 1316 (5th Cir. 1979); *U.S. v. Sten,* 342 F.2d 491, 494 (2d Cir. 1965).

Within the Second Circuit the motion of the defendant for Jencks Act statements should be made only after he has sought leave to so move, out of the jury's presence, whereupon a record as to the extent of the government response is to be made. *U.S. v. Gardin,* 382 F.2d 601, 605 (2d Cir. 1967). The purpose for removing the jury is to avoid the implication that any prior statements produced, but not used to impeach, reinforce a witness' testimony. *U.S. v. Frazier,* 479 F.2d 983, 986 (2d Cir. 1973).

c. POSSESSION OF THE UNITED STATES

The government is not obligated to produce a requested statement unless it is in government possession. 18 U.S.C. §3500(b). A former additional limitation that only a statement made directly "to an agent of the Government" needed to be produced, was removed by a 1970 amendment to the Jencks Act. Accordingly, almost any statement or report in the government's possession may be encompassed. Although it recently has been held that a transcript of a witness' testimony in a prior trial was not within the Jencks Act, *U.S. v. Harris,* 542 F.2d 1283, 1293 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977), because that holding was based upon a pre-1970 case wherein a court reporter was found not to be "an agent of the Government" to whom the statement was made, the above-mentioned amendment may bring such prior transcripts within the Jencks Act.

Statements in the possession of the United States may include a letter that a witness wrote to a government attorney who, both at the time he received the letter and at the time of trial, was no longer working on the case. *U.S. v. Sperling,* 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975). Grand jury testimony that has never been transcribed is still within the possession of the government and must be produced. *U.S. v. Merlino,* 595 F.2d 1016, 1019 (5th Cir. 1979). Moreover, sworn statements a witness made to state officers who investigated the case, and which were never actually requested or received by the federal attorney prosecuting the case, or by any other federal agent, have,

nonetheless, been held to be in the constructive possession of the United States. *U.S. v. Heath,* 580 F.2d 1011, 1018-1019 (10th Cir. 1978), *cert. denied,* 439 U.S. 1075 (1979). On the other hand, a witness' notes or a personal diary which were unknown to government agents and attorneys and which the witness maintained privately, are not within the government's possession. *U.S. v. Friedman,* 593 F.2d 109, 120 (9th Cir. 1979); *U.S. v. Goldberg,* 582 F.2d 483, 486 (9th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979).

It has been held that the Jencks Act includes only statements in the possession of federal prosecutorial agencies, such as the United States Attorney or the Federal Bureau of Investigation. Accordingly, presentence reports in the possession of the court's probation department which may contain statements of a previously convicted witness are not "in the possession of the United States" for Jencks Act purposes. *U.S. v. Trevino,* 556 F.2d 1265, 1271 (5th Cir. 1977); *U.S. v. Dansker,* 537 F.2d 40, 61 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). Furthermore, a statement a witness had given to an NLRB official may not have been in the government's possession, within the meaning of the Jencks Act, since the NLRB is not a prosecutorial agency. *U.S. v. Weidman,* 572 F.2d 1199, 1207 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978).

d. RELATION TO WITNESS' DIRECT TESTIMONY

The statement or report must relate to the subject matter of the witness' direct testimony, or the government is not obligated to produce it. 18 U.S.C. §3500(b) and (c); *U.S. v. Carter,* _____ F.2d _____ (6th Cir. 1980). Of course, no such materials can be considered to relate to any direct testimony if the witness is not called to testify by the government. *U.S. v. Medel,* 592 F.2d 1305, 1316 n.12 (5th Cir. 1979); *U.S. v. Warden,* 545 F.2d 32, 37 (7th Cir. 1976); *U.S. v. Snow,* 537 F.2d 1166, 1168 (4th Cir. 1976). If the government does call a witness whose prior statement is generally related to events or activities he testifies to on direct examination, the statement is a Jencks Act statement; but if it is incidental or collateral, it is not. *U.S. v. Birnbaum,* 337 F.2d 490, 497 (2d Cir. 1964). The courts appear to apply pragmatic case-by-case analyses, inquiring as to the relative importance of the witness, the relationship of the prior statement to the critical issues of the trial, and the extent to which such statement exposes the credibility of the witness. For example, letters written by witnesses to government attorneys or agents containing apologies for having been untruthful, complaints about improper government pressure, or displaying an eagerness to tailor testimony to fit the government's theory of the case have been held to be related to the witness' direct testimony when such testimony was critical to the case. *U.S. v. Badalamente,* 507 F.2d 12, 18 (2d Cir. 1974), *cert. denied,* 421 U.S. 911 (1975); *U.S. v. Sperling,* 506 F.2d 1323, 1332-1333 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *U.S. v. Pacelli,* 491 F.2d 1108, 1119 (2d Cir.), *cert. denied,* 419 U.S. 826 (1974); *U.S. v. Borelli,* 336 F.2d 376, 393 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965).

In *U.S. v. Rivero,* 532 F.2d 450 (5th Cir. 1976), the defendant was convicted of attempting to distribute 11 pounds of cocaine. A government witness testified about defendant's intent by describing a prior transaction of defendant involving two ounces of cocaine. The prior transaction had been the subject of the same witness' testimony before a federal grand jury that returned a prior indictment against the defendant, dismissed shortly thereafter. The appellate court held that the trial judge should have examined the transcript of the witness' prior grand jury

testimony and required the production of that which related to the witness' testimony at trial.

General debriefing of an informant witness about prior events and his knowledge of particular areas of illegal activity may not relate to trial testimony which is focused upon the particular facts and circumstances involving the defendant and therefore may not be within the Jencks Act. *U.S. v. Smaldone,* 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied,* 430 U.S. 967 (1977); *U.S. v. Covello,* 410 F.2d 536, 546 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969); *U.S. v. Cardillo,* 316 F.2d 606, 615-616 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963). A witness' statement concerning a prior narcotics transfer, wherein the defendant paid money, was held not to relate to the witness' direct testimony which concerned the facts of defendant's income tax evasion. *U.S. v. Mackey,* 571 F.2d 376, 389 (7th Cir. 1978).

In a Ninth Circuit extortion case and in a Second Circuit gambling case, defendants sought, but were denied, the federal income tax returns filed by critical witnesses. In each case the appellate court held that the defendant suffered no prejudice thereby, without actually deciding whether such returns constituted Jencks Act statements related to the witness' direct testimony. *U.S. v. Phillips,* 577 F.2d 495, 503 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978); *U.S. v. Covello,* 410 F.2d 536, 545, 546 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969). In another case involving defendants' attempts to procure the tax returns of important witnesses, the court held that "[u]nless the tax returns were substantial verbatim recitals they were not clearly statements within the meaning of the Jencks Act [footnote omitted]." *U.S. v. Carrillo,* 561 F.2d 1125, 1128 (5th Cir. 1977).

If the government claims that a statement the court has ordered it to produce contains material not related to the witness' direct testimony, the statement must then be submitted for *in camera* inspection, whereupon the court must excise those portions which are not so related. 18 U.S.C. §3500(c). Although the government may suggest that certain portions of a statement do not relate, the task of determining which parts are to be produced is vested in the trial court alone. *Scales v. U.S.,* 367 U.S. 203, 258 (1961); *U.S. v. Conroy,* 589 F.2d 1258, 1273 (5th Cir.), *cert. denied,* 100 S. Ct. 82 (1979); *U.S. v. Del Valle,* 587 F.2d 699, 705 (5th Cir.), *cert. denied,* 99 St. Ct. 2887 (1979).

If the case agent testifies about part of the case, typically not all of his reports about the case relate to his testimony; and, therefore, not all need be produced. *U.S. v. Nickell,* 552 F.2d 684, 688 (6th Cir. 1977), *cert. denied,* 436 U.S. 904 (1978). Standard agency forms filled out by federal agents, such as booking forms, daily attendance sheets, and expense itemizations have been held not to relate to agents' direct testimony. *U.S. v. Augello,* 451 F.2d 1167, 1170 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972); *Smith v. U.S.,* 416 F.2d 1255, 1256 (2d Cir. 1969). However, the Seventh Circuit has ruled that, in tax evasion cases using the net worth method of proof, the entire, unredacted special agent's report relates to his testimony if he is called as a witness by the government. *U.S. v. Cleveland,* 507 F.2d 731, 736, 737 (7th Cir. 1974).

Since there is no "work product" exception to the Jencks Act, an attorney's notes of an interview with a witness could be within the Jencks Act. *Goldberg v. U.S.,* 425 U.S. 94, 101-102 (1976). However, if a witness should adopt or approve an attorney's notes containing trial strategy or tactics, such notes need not be produced since they would not relate to the witness' direct testimony; "[t]hus, the primary policy underlying the work-product doctrine — *i.e.,* protection of the privacy of an attorney's mental process ... — is adequately safeguarded by the

Jencks Act itself." *Id.* at 106. Notwithstanding the absence of a "work product" exception, the Fourth Circuit has apparently recognized a "confidentiality" exception to the Jencks Act. When a defendant sought the presentence report of a previously convicted accomplice-witness, prepared pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, that court stated that the basic issue is one of "materiality," with confidentiality to be maintained unless disclosure is "required to meet the ends of justice." *U.S. v. Figurski,* 545 F.2d 389, 391, 392 (4th Cir. 1976).

2. DOCUMENTS SUBJECT TO PRODUCTION

"Statement" is defined by subsection (e) of the Act, as amended by the Organized Crime Control Act of 1970, as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

The primary purpose in limiting the government's obligation to the production of only a witness' own statements is to insure that each witness be impeached only with that which can fairly be said to be his own, and not by the selections or interpretations of another. *U.S. v. Carrasco,* 537 F.2d 372, 376 (9th Cir. 1976). Accordingly, even if a witness signs or approves a writing consisting of trial strategy or an investigator's mental impressions, personal beliefs, or legal conclusions, such a writing cannot fairly be said to be the witness' own statement producible under the Jencks Act. *Goldberg v. U.S.,* 425 U.S. 94, 106 (1976).

Relative to the recorded but untranscribed grand jury testimony of a witness, courts may require the government to transcribe the recording and produce the transcript. *U.S. v. Merlino,* 595 F.2d 1016, 1019 (5th Cir. 1979).

a. WRITTEN, SIGNED, ADOPTED, OR APPROVED BY THE WITNESS

The writing must be a statement attributable to the witness to fall within the Jencks Act. *U.S. v. Crumpler,* 536 F.2d 1063 (5th Cir. 1976). Therefore, the notes and reports written by an investigative agent may amount to Jencks Act statements of the agent. *U.S. v. Sink,* 586 F.2d 1041, 1051 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 3102, (1979). However, if the agent neither wrote the reports nor approved their substantive detail, but, rather, simply signed off on other agents' reports in his administrative or supervisory capacity, said reports are not thereby rendered to be his statements. *Virgin Islands v. Lovell,* 410 F.2d 307, 310 (3d Cir.), *cert. denied,* 396 U.S. 964 (1969).

If a witness approves the notes, taken during an interview of him, or approves a more formal interview report prepared thereafter, such approval renders the notes or report the witness' own statement under the Jencks Act, to the same extent as it would if he had written the notes, or signed them, himself. *Goldberg v. U.S.,* 425 U.S. 94 (1976); *U.S. v. Peterson,* 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 424 U.S. 925 (1976); *U.S. v. Pacheco,* 489 F.2d 554, 566 (5th Cir. 1974),

cert. denied, 421 U.S. 909 (1975); *U.S. v. Chitwood,* 457 F.2d 676, 678 (6th Cir.), *cert. denied,* 409 U.S. 858 (1972). On the other hand, interview reports not signed or otherwise adopted or approved by the witness at the conclusion of the interview, or sometime thereafter, are not his statements. *U.S. v. Shannahan,* 605 F.2d 539, 542 (10th Cir. 1979); *U.S. v. Foley,* 598 F.2d 1323 (4th Cir. 1979); *U.S. v. Gates,* 557 F.2d 1086, 1089 (5th Cir. 1977), *cert. denied,* 434 U.S. 1017 (1978); *U.S. v. Larson,* 555 F.2d 673, 677 (8th Cir. 1977). This rule may be followed even if an agent's notes are extremely accurate, containing occasional verbatim recitations of the witness. *U.S. v. Cuesta,* 597 F.2d 903, 914 (5th Cir.), *cert. denied,* 100 S. Ct. 451 (1979). *But see U.S. v. Harris,* 542 F.2d 1283, 1292 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977).

Pretrial questioning by a government attorney based upon notes or a report of a prior interview with the witness does not, in itself, result in adoption or approval of such notes or report by the witness. *U.S. v. Strahl,* 590 F.2d 10, 15 (1st Cir. 1978), *cert. denied,* 440 U.S. 918 (1979); *U.S. v. Adams,* 581 F.2d 193, 199 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978). However, if in the course of such a review the witness actually reads them, the notes or report can thereby become his own statements. *U.S. v. Harris,* 542 F.2d at 1292.

In *U.S. v. Scaglione,* 446 F.2d 182, 184 (5th Cir.), *cert. denied,* 404 U.S. 941 (1971), at a pretrial review of a witness' anticipated testimony, the government attorney showed the witness an agent's report of a previous interview whenever the witness' recollection varied from the report. Although it was held there that the witness had not adopted or approved the report, the court recognized that a witness might, in piecemeal fashion, ratify substantially all of a report and thereby make it his statement.

b. SUBSTANTIALLY VERBATIM AND CONTEMPORANEOUSLY MADE

Under subdivision (e)(2), the statement must be a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which contains a substantially verbatim account of an oral statement made by the witness, and it must have been recorded contemporaneously with the making of the statement.

The government's obligation to produce recorded statements of a witness is not fulfilled through delivery of only the best of two or more tape recordings which were made contemporaneously and simultaneously. Because separately made back-up recordings may help resolve potential questions concerning alleged gaps or inaudible passages on the primary recording, all recordings should be produced. *U.S. v. Bufalino,* 576 F.2d 446, 449 (2d Cir.), *cert. denied,* 439 U.S. 928 (1978). *See also U.S. v. Well,* 572 F.2d 1383, 1384 (9th Cir. 1978).

The government may be required to produce notes of an interview of the witness if the notes are substantially verbatim and made at the time of the interview. *U.S. v. Harris,* 542 F.2d 1283, 1292 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977). However, interview notes that tend to be summaries, even if containing occasional verbatim quotes, do not constitute Jencks Act statements. *U.S. v. Foley,* 598 F.2d 1323 (4th Cir. 1979); *U.S. v. Friedman,* 593 F.2d 109, 120 (9th Cir. 1979); *U.S. v. Medel,* 592 F.2d 1305, 1316 (5th Cir. 1979). Moreover, if the account of the witness' statement was prepared after the interview, and not contemporaneously, it does not constitute a Jencks Act statement, no matter how accurate it may be. *U.S. v. Consolidated Packaging,* 575 F.2d 117, 129 (7th Cir. 1978); *U.S. v. Hodges,* 556 F.2d 366, 368 (5th Cir. 1977), *cert. denied,* 434 U.S. 1016 (1978).

Photographs identified by a witness as part of a statement otherwise producible under the Jencks Act must also be produced. *Simmons v. U.S.*, 390 U.S. 377, 387 (1968). An artist's composite sketch of a criminal derived from the descriptions of witnesses does not, however, comprise a statement of a witness because it does not fully reveal what witnesses actually said and, therefore, is not accurate to the extent required by 18 U.S.C. §3500(e)(2). *U.S. v. Zurita*, 369 F.2d 474, 477 (7th Cir. 1966).

3. CONSEQUENCES OF REFUSAL TO PRODUCE

According to 18 U.S.C. §3500(d):

> If the United States elects not to comply with an order ... [to produce], the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

a. DESTRUCTION OF NOTES

The unequivocal obligation of the court, as set forth in subsection (d), is complicated in cases where Jencks Act statements have been previously destroyed and are, therefore, not "in possession of the United States" [subsection (b)], and in cases where the government cannot fairly be said to have elected not to comply. *See* the separate opinion of Justice Frankfurter in *Campbell v. U.S.*, 365 U.S. 85, 102 (1961), and *U.S. v. Pope*, 574 F.2d 320, 325 (6th Cir.), *cert. denied*, 436 U.S. 929 (1978). In most of the cases addressing the issue of destruction of notes, an agent had destroyed his investigative rough notes pursuant to administrative policy after they had been incorporated in a more formal report; and if the agent testified, the rough notes might have constituted his Jencks Act statements. In other cases the courts have addressed the question in circumstances where an agent's rough notes of a pretrial interview with a witness might have constituted that witness' Jencks Act statement and, therefore, should not have been destroyed.

The circuit courts are divided on the issue of generally requiring the preservation of agents' rough notes. Most of the circuits that have addressed the issue agree that the routine destruction of rough interview notes, after having been used and incorporated in a more formal report, is an acceptable practice which does not violate the Jencks Act. *U.S. v. Martin*, 565 F.2d 362 (5th Cir. 1978); *U.S. v. Mase*, 556 F.2d 671, 676 (2d Cir. 1977), *cert. denied*, 435 U.S. 916 (1978); *U.S. v. McCallie*, 554 F.2d 770, 773 (6th Cir. 1977); *U.S. v. Dupree*, 553 F.2d 1189, 1191 (8th Cir.), *cert. denied*, 434 U.S. 986 (1977); *U.S. v. Harris*, 542 F.2d 1283, 1292 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977). The Ninth Circuit and the D.C. Circuit, and perhaps the Third Circuit as well, require rough notes to be preserved. *U.S. v. Niederberger*, 580 F.2d 63, 71 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); *U.S. v. Robinson*, 546 F.2d 309, 314 n.3 (9th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977); *U.S. v. Harris*, 543 F.2d 1247, 1248 (9th Cir. 1976); *U.S. v. Harrison*, 524 F.2d 421, 433 (D.C. Cir. 1975). The reasoning employed by these three circuits is that it is the duty of the judiciary, and not the executive, to determine what is a Jencks Act statement, as well as what may qualify as exculpatory information under the *Brady* doctrine. Accordingly, the raw material necessary for a proper judicial determination must be maintained, and not routinely destroyed. In *U.S. v. Marques*, 600 F.2d 742, 748 (9th Cir.), *cert. denied*, 100 S. Ct. 119 (1979), an agent destroyed her rough notes after preparation of a typed summary, which was later produced as her Jencks Act statement. The court ruled that it was error to destroy such notes, particularly in light of her testimony on a critical point that did not appear in the summary. In *U.S. v. Walden*, 590 F.2d 85, 86 (3d Cir.), *cert. denied*, 100 S. Ct. 99 (1979), the court held that any error involved in the destruction of rough notes was cured by the production of typed copies of the same notes, with only minor spelling and grammatical changes.

In *U.S. v. Crowell*, 586 F.2d 1020, 1028 (4th Cir. 1978), the witness read the agent's rough interview notes and approved them immediately after the interview. Thereafter, the agent typed a summary of the interview and destroyed the notes. Although the typed summary was provided for cross-examination of the witness, the court held that it was error to have failed to produce the notes because they, and not the summary, constituted the Jencks Act statement. In *U.S. v. Stulga*, 584 F.2d 142, 147, 148 (6th Cir. 1978), the agent destroyed his rough notes of an interview after he had a more formal, typed report prepared. Thereafter, the witness reviewed and signed the typed report which was provided as his Jencks Act statement at trial. The court held that the government's failure to preserve and produce the agent's rough notes did not reflect bad faith and did not prejudice the defendant. Thus, an agent's rough notes of an interview do not constitute the Jencks Act statement of the witness who was interviewed unless that witness has signed or otherwise adopted or approved such notes. Therefore, it should not be a violation to destroy such unadopted notes, or otherwise refuse to provide them upon Jencks Act demand at trial. *U.S. v. Gates*, 557 F.2d 1086, 1089 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978).

A tape recorded interview of a witness is his Jencks Act statement. The erasure of such a tape, even if summarized in a written report that is produced at trial, violates the Jencks Act and may lead to suppression of the witness' testimony. *U.S. v. Well*, 572 F.2d 1383, 1384 (9th Cir. 1978). It may also be error to destroy an inferior quality back-up tape made simultaneously with a tape recording which is produced. *See U.S. v. Bufalino*, 576 F.2d 446, 449 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978).

b. HARMLESS ERROR RULE

The harmless error rule must be strictly applied in Jencks Act cases because the courts will not speculate whether materials the government failed to produce could have been used effectively in the cross-examination of its witnesses. *See Goldberg v. U.S.*, 425 U.S. 94, 111 n.21 (1976). The D.C. Circuit weighs the following factors: (1) the degree of governmental negligence or bad faith, (2) the importance of the evidence not produced, and (3) the evidence of guilt adduced at trial. *U.S. v. Rippy*, 606 F.2d 1150, 1154 (D.C. Cir. 1979); *U.S. v. Harrison*, 524 F.2d 421, 434-435 (D.C. Cir. 1975). The Second Circuit applies a test based primarily upon perceived governmental motive: (1) if the failure was deliberate, and the material is merely favorable to the defense, the error cannot be harmless; but (2) if the failure is inadvertent it may be harmless error, so long as the potential that the material could have induced reasonable doubt was relatively insignificant. *U.S. v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975), *cert. denied*, 425 U.S. 939 (1976). For the most part, courts actually appear to apply a pragmatic, case-by-case analysis similar to the test used in the Second Circuit. *See U.S. v. Heath*, 580 F.2d 1011, 1019 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); *U.S. v. Pope*, 574 F.2d 320, 325, 326 (6th Cir.), *cert. denied*, 436 U.S. 929 (1978);

U.S. v. Carrasco, 537 F.2d 372, 377, 378 (9th Cir. 1976). When the government has made no conscious choice to withhold the statement from the defendant, the principal focus is upon whether the missing statement has significantly prejudiced the defendant's position. "[V]iolation of the [Jencks] Act should be excused only where it is perfectly clear that the defense was not prejudiced thereby." *U.S. v. Snow,* 537 F.2d 1166, 1168 (4th Cir. 1976). For example, a grand jury transcript, which the government inadvertently failed to provide, reflected lies and inconsistencies in the witness' trial testimony; and, therefore, its omission was held to have been reversible error. *U.S. v. Knowles,* 594 F.2d 753, 755, 756 (9th Cir. 1979). On the other hand, where the information contained in the omitted statement was also contained in statements that had been produced, any possible prejudice was neutralized and the error has been held to have been harmless. *U.S. v. Walden,* 590 F.2d 85, 86 (3d Cir.), *cert. denied,* 100 S. Ct. 99 (1979); *U.S. v. Anthony,* 565 F.2d 533, 537 (8th Cir. 1977), *cert. denied,* 434 U.S. 1079 (1978). If the government's evidence of defendant's guilt is extremely strong, a finding of harmless error is more likely. *U.S. v. Rippy,* 606 F.2d 1150, 1154 (D.C. Cir. 1979); *U.S. v. Niederberger,* 580 F.2d 63, 71 (3d Cir.), *cert. denied,* 439 U.S. 980 (1978); *U.S. v. Kilrain,* 566 F.2d 979, 985 (5th Cir.), *cert. denied,* 439 U.S. 819 (1978). Irrespective of the evidence of guilt, where the witness' credibility has been thoroughly impeached, even without the benefit of a Jencks Act statement, the failure to have produced it has been held harmless error. *U.S. v. Marques,* 600 F.2d 742, 748 (9th Cir.), *cert. denied,* 100 S. Ct. 119 (1979); *U.S. v. Crowell,* 586 F.2d 1020, 1028 (4th Cir. 1978).

When the initial failure to provide a Jencks Act statement is cured through recall of the witness and cross-examination with the benefit of such statement, any error occasioned by the initial failure has been rendered harmless. *U.S. v. Pope,* 574 F.2d 320, 326 (6th Cir.), *cert. denied,* 436 U.S. 929 (1978); *U.S. v. Gottlieb,* 493 F.2d 987, 993, 994 (2d Cir. 1974).

B. SECTION 3500 MATERIAL OF DEFENSE WITNESSES

In *U.S. v. Nobles,* 422 U.S. 225 (1975), a defendant sought to impeach the credibility of critical government witnesses through the proffered trial testimony of a defense investigator regarding his interviews with those witnesses. The Supreme Court upheld the district court's refusal to permit the investigator to testify until the court had both inspected his report *in camera,* to delete material not related to the interviews, and turned the redacted report over to the government for use in cross-examination. Citing *Jencks v. U.S.,* 353 U.S. 657 (1957), the Supreme Court held that the judiciary's inherent power to require the government to produce prior statements of its witnesses may be employed to require the same from the defense. *U.S. v. Nobles,* 422 U.S. at 231, 232. Consistent with the reasoning in *Nobles,* the Sixth Circuit has upheld a district court order requiring the defendant to deliver to the government certain notes adopted and approved by a defense witness. *U.S. v. Tarnowski,* 583 F.2d 903, 906 (6th Cir. 1978), *cert. denied,* 440 U.S. 918 (1979).

The Supreme Court has proposed that the substance of the Jencks Act be incorporated in the Federal Rules of Criminal Procedure as new Rule 26.2. In this proposal, the Court has incorporated its holding in *U.S. v. Nobles, supra,* in that production of prior statements of defense witnesses would be required on the same

basis that statements of government witnesses are now provided to the defense. The effective date of this new provision is December 1, 1980, or until and then only to the extent approved by Act of Congress, whichever is earlier.

CHAPTER VI

[RESERVED]

CHAPTER VII

JEOPARDY AND MISTRIAL

A. JEOPARDY

The fifth amendment phrase, "nor shall any person be subject for the same offense to be twice put in jeopardy," protects against multiple convictions and multiple acquittals for the same offense. *U.S. v. Ball,* 163 U.S. 662 (1896); *Ex Parte Lange,* 85 U.S. 163 (1873). Corporations are also protected. *U.S. v. Martin Linen Supply Co.,* 430 U.S. 564 (1977). The principle applies to misdemeanor charges.

Jeopardy attaches in a jury trial when a jury is empaneled and sworn and in a non-jury trial when the judge begins to hear evidence. *Downum v. U.S.,* 372 U.S. 734 (1963).

1. SAME OFFENSE

The jeopardy clause protects against "repeated prosecutions for the same offense." *U.S. v. Dinitz,* 424 U.S. 600, 606 (1976). Therefore, the same offenses may not, generally, be charged and prosecuted in a second trial. The Supreme Court has looked beyond merely the elements of successively prosecuted offenses, however, and has adopted a "same evidence" test. *Blockburger v. U.S.,* 284 U.S. 299 (1932). The Court has said that conviction or acquittal on one indictment is not a bar to a second trial unless the government's evidence is the same for both offenses. If either indictment requires proof of an additional fact, not part of and not necessary to the other charge, the double jeopardy prohibition does not apply. *Ciucci v. Illinois,* 356 U.S. 571 (1958); *U.S. v. Frady,* 607 F.2d 383 (D.C. Cir. 1979); *U.S. v. Solano,* 605 F.2d 1141 (9th Cir. 1979); *U.S. v. Ford,* 603 F.2d 1043 (2d Cir. 1979); *U.S. v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979); *U.S. v. Barket,* 530 F.2d 181 (8th Cir. 1975), *cert. denied,* 429 U.S. 917 (1976); *U.S. v. Cioffi,* 487 F.2d 492 (2d Cir. 1973), *cert. denied,* 416 U.S. 995 (1974).

2. LESSER INCLUDED OFFENSE

Greater and lesser offenses are, for jeopardy purposes, the same offense when the greater offense does not require proof of a fact different from that required to prove the lesser offense. *Brown v. Ohio,* 432 U.S. 161 (1977); *U.S. v. Cruz,* 568 F.2d 781 (1st Cir. 1978), *cert. denied,* 100 S. Ct. 205 (1979); *Virgin Islands v. Smith,* 558 F.2d 691 (3d Cir.), *cert. denied,* 434 U.S. 957 (1977); *U.S. v. Scijo,* 537 F.2d 694 (2d Cir. 1976), *cert. denied,* 429 U.S. 1043 (1977). This rule applies only where separate trials are involved. It has no application where, in the same trial, the accused stands charged with both the greater and lesser offenses, such as felony murder arising from an armed robbery and armed robbery. *Harris v.*

Oklahoma, 433 U.S. 682 (1977). However, if the defendant moves for and receives separate trials where greater and lesser offenses are charged, or if the defendant agrees to or fails to object to consolidation for trial, without raising the issue that greater and lesser offenses are involved, he cannot successfully complain that the double jeopardy protection has been violated. *Jeffers v. U.S.,* 432 U.S. 137 (1977). Separate trials for a greater and a lesser offense are also permitted where the evidence to support the greater charge did not exist or could not reasonably be discovered when the trial on the lesser charge commenced. *Diaz v. U.S.,* 223 U.S. 442 (1912); *U.S. v. Fultz,* 602 F.2d 830 (8th Cir. 1979); *U.S. v. Stavros,* 597 F.2d 108 (7th Cir. 1979); *U.S. v. John,* 587 F.2d 683 (5th Cir.), *cert. denied,* 99 S. Ct. 2036 (1979); *U.S. v. Walking Crow,* 560 F.2d 386 (8th Cir. 1977), *cert. denied,* 435 U.S. 953 (1978); *U.S. v. Shepard,* 515 F.2d 1324 (D.C. Cir. 1975).

3. DUAL SOVEREIGNS

The federal constitution recognizes multiple sovereigns with separate and distinct rights, responsibilities, and authority. A single act often violates both state and federal laws. The double jeopardy clause does not prohibit prosecution by a state merely because the accused has been convicted or acquitted of the identical offense by a federal court or vice versa. *U.S. v. Wheeler,* 435 U.S. 313 (1978); *Abbate v. U.S.,* 359 U.S. 187 (1959); *Bartkus v. Illinois,* 359 U.S. 121 (1959); *U.S. v. Lanza,* 260 U.S. 377 (1922); *U.S. v. Solano,* 605 F.2d 1141 (9th Cir. 1979); *U.S. v. Brown,* 604 F.2d 557 (8th Cir. 1979); *Bonner v. Circuit Court of City of St. Louis, Missouri,* 526 F.2d 1331 (8th Cir. 1975), *cert. denied,* 424 U.S. 946 (1976); *U.S. v. Mejias,* 552 F.2d 435 (2d Cir.), *cert. denied,* 434 U.S. 847 (1977); *U.S. v. King,* 590 F.2d 253 (8th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979); *Turley v. Wyrick,* 554 F.2d 840 (8th Cir. 1977), *cert. denied,* 434 U.S. 1033 (1978). Double joepardy restrictions do prohibit prosecutions by different units of the same government. For example, trial by court-martial precludes trial for the same offense in a federal district court. *Grafton v. U.S.,* 206 U.S. 333 (1907); *U.S. v. Jones,* 527 F.2d 817 (D.C. Cir. 1975). (For a discussion of the same offense prosecuted by different units of the same sovereign, *see Waller v. Florida,* 397 U.S. 387 (1970), and *Douglas v. Nixon,* 459 F.2d 325 (6th Cir.), *cert. denied,* 409 U.S. 1010 (1972).)

4. THE PETITE POLICY

It is a general policy of the Department of Justice, not a prohibition of the double jeopardy clause, that several offenses arising out of a single transaction should not be the basis of successive federal prosecutions, nor should a violation already prosecuted at the state or local level be federally prosecuted without the approval of the Attorney General. *Petite v. U.S.,* 361 U.S. 529 (1960). Such approval is to be predicated only upon a clear showing of a compelling federal interest in a second prosecution, sufficient to override the policy. This is designed to protect the individual from needless, multiple prosecutions, to promote fairness, and to provide for orderly and efficient law enforcement. A trial court abuses its discretion if it denies a government motion to dismiss a charge filed in violation of this policy, even where the policy violation results from a U.S. Attorney's misrepresentation to the trial court that approval of the Attorney General had been obtained to proceed with a successive prosecution. *Rinaldi v. U.S.,* 434 U.S. 22 (1977).

This policy, however, is strictly internal. It is not constitutionally mandated, and it is not enforceable against the government. The policy does not apply and is not intended to apply where the federal charges are totally different in nature and degree from the state charges. *U.S. v. Fossler,* 597 F.2d 478 (5th Cir. 1979); *U.S. v. Snell,* 592 F.2d 1083 (9th Cir.), *cert. denied,* 99 S. Ct. 2889 (1979); *U.S. v. Howard,* 590 F.2d 564 (4th Cir.), *cert. denied,* 440 U.S. 976 (1979); *U.S. v. Michel,* 588 F.2d 986 (5th Cir.), *cert. denied,* 100 S. Ct. 47 (1979); *U.S. v. Mikka,* 586 F.2d 152 (9th Cir. 1978), *cert. denied,* 440 U.S. 921 (1979); *U.S. v. Valenzuela,* 584 F.2d 374 (10th Cir. 1978); *U.S. v. Frederick,* 583 F.2d 273 (6th Cir. 1978), *cert. denied,* 100 S. Ct. 124 (1979); *U.S. v. Fritz,* 580 F.2d 370 (10th Cir.), *cert. denied,* 439 U.S. 947 (1978); *U.S. v. Thompson,* 579 F.2d 1184 (10th Cir.), *cert. denied,* 439 U.S. 896 (1978); *U.S. v. Wallace,* 578 F.2d 735 (8th Cir.), *cert. denied,* 439 U.S. 898 (1978); *U.S. v. Nelligan,* 573 F.2d 251 (5th Cir. 1978).

5. ACQUITTALS AND DISMISSALS

While there is no doubt that the jeopardy protection prohibits a second prosecution for the same distinct offense following an acquittal, *U.S. v. Ball,* 163 U.S. 622 (1896), the question remains: What is an acquittal and how does it differ from a dismissal? If the issue of factual guilt is resolved by the trial court in defendant's favor following a hung jury, the result is an acquittal, and the government may not re-try the accused on that charge. *U.S. v. Martin Linen Supply Co.,* 430 U.S. 564 (1977). Where the charge is simply dismissed after trial because of indictment defect or other valid reason, however, jeopardy has not attached and retrial may occur. *Lee v. U.S.,* 432 U.S. 23 (1977). Jeopardy does not attach when a defense motion to dismiss is granted where the motion is not related to factual guilt or innocence. *U.S. v. Scott,* 437 U.S. 82 (1978), *overruling U.S. v. Jenkins,* 420 U.S. 358 (1975). *See also U.S. v. Alberti,* 568 F.2d 617 (2d Cir. 1977).

Even where erroneous evidentiary rulings during trial lead to an acquittal for insufficient evidence, further prosecution is prohibited. *Sanabria v. U.S.,* 437 U.S. 54 (1978). But, the label affixed to a trial court's ruling is not necessarily determinative, as it is the substance of the order that determines whether there was a factual finding for the defendant and the resulting attachment of jeopardy. *U.S. v. Bodey,* 607 F.2d 265 (9th Cir. 1979); *U.S. v. Hospital Monteflores, Inc.,* 575 F.2d 332 (1st Cir. 1978); *U.S. v. Boyd,* 566 F.2d 929 (5th Cir. 1978); *U.S. v. Appawoo,* 553 F.2d 1242 (10th Cir. 1977); *U.S. v. Lasater,* 535 F.2d 1041 (8th Cir. 1976); *U.S. v. Esposito,* 492 F.2d 6 (7th Cir. 1973), *cert. denied,* 414 U.S. 1135 (1974).

B. MISTRIAL

The double jeopardy clause of the fifth amendment does not require that every time a defendant goes on trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. *Wade v. Hunter,* 336 U.S. 684, 688 (1949). A balance has been struck between the public interest in affording the prosecution a full and fair opportunity to convict one accused of crime, *Wade v. Hunter,* 336 U.S. at 688-690; *Downum v. U.S.,* 372 U.S. 734 (1963), and the defendant's right to have his trial completed by a particular jury. *Illinois v. Somerville,* 410 U.S. 458 (1973). Any strict rule which operates only to a

defendant's advantage, however, is too high a price to pay for the added assurance of personal security and freedom from government harrassment. *U.S. v. Jorn,* 400 U.S. 470 (1971).

Since 1824, trial courts have had discretion to declare a mistrial and to discharge the jury whenever there is manifest necessity to do so or where the ends of justice would be defeated if a tainted trial were not terminated prior to verdict. *U.S. v. Perez,* 22 U.S. 579 (1824) (hung jury). Previously, reviewing courts paid little attention to a trial court's finding of manifest necessity to discharge a jury over defendant's objection. *Gori v. U.S.,* 367 U.S. 364 (1961). However, this lack of interest and lack of concern no longer exist. *Downum v. U.S.,* 372 U.S. at 736-738. Manifest necessity is the strong showing that the prosecutor must make for a mistrial to be declared over objection by the defendant. The right of a defendant to have his trial concluded by a particular jury is important, but a variety of circumstances which do not invariably create unfairness to the accused may make it necessary to discharge a jury before the trial is concluded. Where such circumstances exist, however, the prosecutor must justify the mistrial if he is to avoid the double jeopardy bar. *Arizona v. Washington,* 434 U.S. 497, 505 (1978).

The general rule now is that trial cannot be aborted over a defendant's objection without jeopardy attaching unless the court first considers all available alternatives. If choices exist, including but not limited to a continuance in progress, the choice that most effectively purifies the trial contamination must be selected and used. Manifest necessity to terminate a trial is present only when effective alternatives are absent. *U.S. v. Jorn,* 400 U.S. 470 (1971); *U.S. v. Grasso,* 606 F.2d 342 (2d Cir. 1979); *U.S. v. Nelson,* 599 F.2d 714 (5th Cir. 1979); *U.S. v. Lynch,* 598 F.2d 132 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 939 (1979); *U.S. v. Love,* 597 F.2d 81 (6th Cir. 1979); *U.S. v. Pierce,* 593 F.2d 415 (1st Cir. 1979); *U.S. v. McKoy,* 591 F.2d 218 (3d Cir. 1979); *U.S. v. Rich,* 589 F.2d 1025 (10th Cir. 1978); *Drayton v. Hayes,* 589 F.2d 117 (2d Cir. 1979); *U.S. v. Johnson,* 584 F.2d 148 (6th Cir. 1978), *cert. denied,* 440 U.S. 918 (1979); *U.S. v. Hooper,* 576 F.2d 1382 (9th Cir. 1978); *Virgin Islands v. Smith,* 558 F.2d 691 (3d Cir.), *cert denied,* 434 U.S. 957 (1977); *Wallace v. Havener,* 552 F.2d 721 (6th Cir. 1977); *U.S. v. Beran,* 546 F.2d 1316 (8th Cir. 1976), *cert. denied,* 430 U.S. 916 (1977); *U.S. v. Walden,* 448 F.2d 925 (4th Cir. 1971), *cert. denied,* 410 U.S. 969 (1973).

Prosecutorial or judicial manipulation which aborts a "trial which is going badly so as to afford a more favorable opportunity to convict" will not be permitted. *See Groi v. U.S.,* 367 U.S. 364, 369 (1961). Even failure to subpoena a witness whose absence causes a mistrial to be ordered may result in further prosecution being barred. *U.S. v. Downum,* 372 U.S. 734 (1963). When the record does not reflect bad faith, prosecutorial overreaching, or specific prejudice to the defendant, however, under certain circumstances retrial may be permitted. *Illinois v. Somerville,* 410 U.S. 458 (1973); *U.S. v. Sanders,* 592 F.2d 1293 (9th Cir. 1979); *Mizell v. Attorney General of State of New York,* 586 F.2d 942 (2d Cir. 1978), *cert. denied,* 440 U.S. 967 (1979); *U.S. v. Martin,* 561 F.2d 135 (8th Cir. 1977); *U.S. v. Cyphers,* 553 F.2d 1064 (7th Cir. 1977); *U.S. v. Sanabria,* 548 F.2d 1 (1st Cir. 1976), *rev'd on other grounds,* 437 U.S. 54 (1978); *U.S. v. Larry,* 536 F.2d 1149 (6th Cir.), *cert. denied,* 429 U.S. 984 (1976).

If a mistrial is granted with the consent or at the request of a defendant, re-prosecution ordinarily is not barred. The defendant has primary control, and it is basically his decision either to surrender his first jury right or to continue the trial tainted by judicial or prosecutorial error. *U.S. v. Dinitz,* 424 U.S. 600 (1976).

Trial conduct not tolerated of prosecutors and judges may sometimes be tolerated of the defense. Defense counsel error or defendant's bad conduct which denies a fair trial to the government, however, may permit retrial without offending the jeopardy clause. *Arizona v. Washington,* 434 U.S. 497 (1978); *U.S. v. Bobo,* 586 F.2d 355 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979). Where defense tactics make a fair trial virtually impossible, the trial judge has no obligation to consider alternatives to a mistrial order or to make a record finding of the presence of manifest necessity. *Arizona v. Washington,* 434 U.S. at 510-516.

C. APPEALS

Defendants who successfully appeal convictions because of trial errors are subject to re-prosecution. *Ball v. U.S.,* 163 U.S. 662 (1896). New evidence which supports the indictment can be used at the retrial. *U.S. v. Gallagher,* 602 F.2d 1139 (3d Cir. 1979). It is only when an appellate court reverses a conviction because of insufficient evidence that the defendant may not be retried. *U.S. v. Wilkinson,* 601 F.2d 791 (5th Cir. 1979); *Greene v. Massey,* 437 U.S. 19 (1978); *Burks v. U.S.,* 437 U.S. 1 (1978). A conviction for a lesser included offense, which is successfully appealed on grounds other than evidence insufficiency, does not reinstate the greater charge on retrial. Only the lesser charge may be the subject of a second prosecution. *Price v. Georgia,* 398 U.S. 323 (1970); *Green v. U.S.,* 355 U.S. 184 (1957); *U.S. v. Larkin,* 605 F.2d 1360 (5th Cir. 1979). The imposition of a harsher sentence following conviction on retrial does not violate the double jeopardy prohibition so long as vindictiveness is absent and the record reflects the reasons for the increased penalty. *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973); *North Carolina v. Pearce,* 395 U.S. 711 (1969); *U.S. v. Fredenburgh,* 602 F.2d 1143 (3d Cir. 1979); *U.S. v. Denson,* 588 F.2d 1112 (5th Cir. 1979).

A defendant has a right to appeal the denial of his pretrial double jeopardy motion. *Abney v. U.S.,* 431 U.S. 651 (1977). However, the filing of an appeal does not automatically strip the trial court of jurisdiction to go forward with the trial. The test is whether the double jeopardy motion is frivolous. A trial court finding of nonfrivolousness does preclude further hearing on the merits pending appeal. *U.S. v. Dunbar,* 611 F.2d 985 (5th Cir. 1980).

Government appeals are authorized and controlled by 18 U.S.C. §3731, but only where double jeopardy would not result. Once a trial court has found for a defendant on the merits of the case the result is not reviewable even when the ruling is clearly and obviously erroneous. *Fong Foo v. U.S.,* 369 U.S. 141 (1962) (directed verdict of acquittal during government's case). But, where the trial court grants judgment of acquittal after a jury verdict of guilty, the government may seek appellate review because the guilty verdict would simply be reinstated and the defendant is not tried twice if the government prevailed on appeal. *U.S. v. Wilson,* 420 U.S. 332 (1975); *U.S. v. Mandel,* 591 F.2d 1347 (4th Cir. 1979); *U.S. v. Blasco,* 581 F.2d 681 (7th Cir.), *cert. denied,* 439 U.S. 966 (1978); *U.S. v. Jones,* 580 F.2d 219 (6th Cir. 1978); *U.S. v. Schoenhut,* 576 F.2d 1010 (3d Cir.), *cert. denied,* 439 U.S. 964 (1978); *U.S. v. Donahue,* 539 F.2d 1131 (8th Cir. 1976).

D. COLLATERAL ESTOPPEL

The double jeopardy clause includes the collateral estoppel doctrine under certain limited circumstances. Where an issue of ultimate fact was once determined

by a valid final judgment, that issue cannot be relitigated against a defendant in a second trial. Where the earlier verdict is not guilty, the record of that proceeding must be reviewed, the charge and the evidence must be examined, and all other relevant matters must be considered so that the second trial court can determine whether the jury based its verdict on an issue other than that upon which the defendant was previously acquitted. *One Lot Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232 (1972) (civil forfeiture proceedings are not affected by an acquittal); *Simpson v. Florida*, 403 U.S. 384 (1971); *Ashe v. Swenson*, 397 U.S. 436 (1970).

Collateral estoppel is available only to the formerly acquitted defendant. Its benefit is denied to a defendant where it is unclear from the first trial record whether the not guilty verdict rested on an issue or issues common to the separate trials. The burden is on the defendant to establish that the issue which he seeks to foreclose from litigation in the present prosecution was necessarily decided in his favor by the prior not guilty verdict. *U.S. v. Mock*, 604 F.2d 341 (5th Cir. 1979); *U.S. v. Lasky*, 600 F.2d 765 (9th Cir. 1979); *U.S. v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *U.S. v. Huffman*, 595 F.2d 551 (10th Cir. 1979); *Oliphant v. Koehler*, 594 F.2d 547 (6th Cir.), *cert. denied*, 100 S. Ct. 162 (1979); *U.S. v. Hatrak*, 588 F.2d 414 (3d Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); *U.S. v. MacDonald*, 585 F.2d 1211 (4th Cir. 1978), *cert. denied*, 440 U.S. 961 (1979); *U.S. v. Brown*, 547 F.2d 438 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977); *U.S. v. Cala*, 521 F.2d 605 (2d Cir. 1975); *U.S. v. Haines*, 485 F.2d 564 (7th Cir. 1973), *cert. denied*, 417 U.S. 977 (1974); *Ottomano v. U.S.*, 468 F.2d 269 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). The collatoral estoppel doctrine does not bar the government from retrying defendants on substantive charges, on which the jury deadlocked, who were acquitted of a conspiracy charge. Nor does this acquittal preclude the introduction of hearsay statements of the defendant's alleged coconspirators. *U.S. v. Clark*, 613 F.2d 391 (2d Cir. 1979).

CHAPTER VIII
PROSECUTORIAL MISCONDUCT AND VINDICTIVENESS

"The function of the prosecutor under the federal constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (Douglas, J., dissenting).

A. OPENING STATEMENT ERRORS

The purpose of the prosecution's opening statement is to outline broadly the facts of the case so that the jury will understand the evidence as it unfolds. A clear, concise, prima facie case should be stated, *Chatman v. U.S.*, 557 F.2d 147 (8th Cir.), *cert. denied*, 434 U.S. 863 (1977); *U.S. v. DiGregorio*, 605 F.2d 1184 (1st Cir.), *cert. denied*, 100 S. Ct. 287 (1979), the evidence supporting each count should be outlined, *U.S. v. D' Alora*, 585 F.2d 16 (1st Cir. 1978), and nothing should be said which is designed to poison the minds of the jury against the defendant or to destroy his credibility before the evidence is offered, *Virgin Islands v. Turner*, 409 F.2d 102 (3d Cir. 1968); *U.S. v. Lynn*, 608 F.2d 132 (5th Cir. 1979).

A federal prosecutor "carries a special aura of legitimacy about him." Attempts to take advantage of his position by inferring in his opening statement that he is an impartial truth seeker who would not ask for conviction unless the evidence established guilt beyond a reasonable doubt, may raise serious questions about the fairness of the trial. *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979). Generally, anticipation of a defense to a charge in opening remarks risks a mistrial. *U.S. v. Gentile*, 525 F.2d 252 (2d Cir), *cert. denied*, 425 U.S. 903 (1976). An exception to this rule is found in cases where the defense is obvious, as absence of intent where intent is an essential element to be proved by the government, *U.S. v. Jardan*, 552 F.2d 216 (8th Cir.), *cert. denied*, 433 U.S. 912 (1977), or where there has been a previous trial resulting in a hung jury, *U.S. v. Adderly*, 529 F.2d 1178 (5th Cir. 1976).

1. REFERENCE TO INADMISSIBLE EVIDENCE

Opening statements must be limited to evidence to be offered that the prosecutor in good faith believes is both available and admissible. *U.S. v. Mahone*, 537 F.2d 922 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976). Statements containing references to irrelevant material amounting to character assassination invite reversal. *U.S. v. Dinitz*, 538 F.2d 1214 (5th Cir.), *cert. denied*, 429 U.S. 1104 (1976). Discussion of unrelated events not affecting the outcome of the trial is reversible error, even though the objectionable statements are struck. *U.S. v. Steinkoetter*, 593 F.2d 747 (6th Cir. 1979). A likening of a defendant's alleged tax violations to a fox in the hen house fable was held to be highly prejudicial. *U.S. v.*

Signer, 482 F.2d 394 (6th Cir.), *cert. denied,* 414 U.S. 1092 (1973). A verbatim reading of wiretap transcripts, while not plain error, has been said to abuse the purpose of an opening statement. *U.S. v. DeRosa,* 548 F.2d 464 (3d Cir. 1977). *See also U.S. v. Griffin,* 579 F.2d 1104 (8th Cir.), *cert. denied,* 439 U.S. 981 (1978), where the prosecutor in his opening statement read portions of unsigned statements of defendants.

The circuits agree that, where there is mention of prior offenses and coconspirator convictions in opening statements, the chances of prejudicial error are substantially increased. Prosecutors are cautioned that such action is ill-advised even when the jury is told of the purpose for which such evidence is offered. *Grimaldi v. U.S.,* 606 F.2d 332 (1st Cir. 1979); *U.S. v. Handly,* 591 F.2d 1125 (5th Cir. 1979); *U.S. v. Watkins,* 600 F.2d 201 (9th Cir.), *cert. denied,* 100 S. Ct. 148 (1979); *U.S. v. Bailey,* 505 F.2d 417 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 961 (1975).

Other examples of improper, out-of-place opening statement comments which may rise to the plain error level are statements that the government proposes to introduce a representative sample of some 150 conversations and that the balance had been made available to the defendants who could play them for the jury if they wished, *U.S. v. Chong,* 544 F.2d 58 (2d Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977); statements that, instead of calling two or three witnesses who would all testify to the same thing, only one would be called, *U.S. v. Humer,* 542 F.2d 254 (5th Cir. 1976); repeated insinuations that information outside of the record, obtained from unknown witnesses, identified defendant as the robber and by the name "Meatball," *U.S. v. Hilliard,* 569 F.2d 143 (D.C. Cir. 1977); reference to defendant's admissions made in a suppression hearing, *U.S. v. Morrow,* 541 F.2d 1229 (7th Cir. 1976), *cert. denied,* 430 U.S. 933 (1977). *See also U.S. v. Calvert,* 498 F.2d 409 (6th Cir. 1974).

Ordinarily, where evidence is misstated or discussed in the opening statement but rejected by the trial court, both the good faith of the prosecutor and the impact of the statements on the trial determine whether there was prejudicial error. *U.S. v. Akin,* 562 F.2d 459 (7th Cir. 1977), *cert. denied,* 435 U.S. 933 (1978); *U.S. v. Jones,* 592 F.2d 1038 (9th Cir.), *cert. denied,* 441 U.S. 951 (1979).

2. STATEMENTS OF PERSONAL OPINION

The prohibition against interjection of personal opinion by a federal prosecutor, at any stage of the case, is strict and is an important part of the Code of Professional Responsibility of the American Bar Association. DR 7-106(C)(4) provides that a lawyer shall not:

> Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, ... or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

And the Standards for Criminal Justice Nos. 5 and 8 of the American Bar Association further provide:

> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

Violations of these principles occur most frequently in closing arguments. Courts have often and forcefully addressed this subject at that stage of the case, but without limiting the "no personal comment" restriction to final argument. The

strong position assumed by the Eighth Circuit in *U.S. v. Splain,* 545 F.2d 1131 (8th Cir. 1976), is representative of the general attitude of the courts toward professionalism. *But see U.S. v. Tropeano,* 476 F.2d 586 (1st Cir. 1973), *cert. denied,* 414 U.S. 839 (1973), where the prosecutor stated: 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 held that this was not such a positive statement of a prosecutor's personal belief in defendant's guilt as to require reversal. *See also U.S. v. Davis,* 564 F.2d 840 (9th Cir.), *cert. denied,* 434 U.S. 1015 (1978); *U.S. v. Davis,* 548 F.2d 840 (9th Cir. 1977). *Compare U.S. v. Prince,* 515 F.2d 564 (5th Cir.), *cert. denied,* 423 U.S. 1032 (1975), where the prosecutor in his opening statement said that the government's first witness would tell the truth, and *U.S. v. Medel,* 592 F.2d 1305 (5th Cir. 1979), in which the prosecutor stated that she believed a careful appraisal of the evidence would result in a guilty verdict, neither of which is plain error.

3. ARGUMENTATIVE AND INFLAMMATORY COMMENTS

Problems involving improper comment by the prosecutor arise most frequently in closing arguments. In general, however, the same types of comment are as much improper in opening statements as they are in closings and, except that there is more time for curative instructions, such improper statements have the same potential for introducting reversible error. For example, the recognized prejudice resulting from a prosecutor's request of the jury to do him a "favor by being fair to public interest in law enforcement" was cured by admonishment that no favors are granted by the court. *U.S. v. Miller, 478 F.2d 1315 (2d Cir.), cert. denied,* 414 U.S. 851 (1973).

B. PROOF PRESENTATION PROBLEMS

1. FALSE OR MISLEADING TESTIMONY

The due process guarantee and the fair trial right of the accused are destroyed when a prosecutor obtains a conviction with the aid of evidence which he actually knows, or should know, to be false and allows it to go uncorrected. Deliberate deception of a court and jurors by the presentation of false evidence is reprehensible and incompatible with "rudimentary demands of justice." *Giglio v. U.S.,* 405 U.S. 150 (1972); *Napue v. Illinois,* 360 U.S. 264 (1959); *Mooney v. Holohan,* 294 U.S. 103 (1935). It is immaterial whether the prosecutor consciously solicited the false evidence. It is also immaterial whether the false testimony directly concerns an essential element of the crime charged or it bears only on the credibility of a witness. *U.S. v. Barham,* 595 F.2d 231 (5th Cir. 1979). If there is any reasonable likelihood that the false testimony could have affected the jury's judgment, a new trial must be ordered. *U.S. v. Runge,* 593 F.2d 66 (8th Cir.), *cert. denied,* 100 S. Ct. 63 (1979); *U.S. v. Antone,* 603 F.2d 566 (5th Cir. 1979). The prosecutor's duty to correct the false testimony arises when the false evidence appears, *U.S. v. Sanfilippo,* 565 F.2d 176 (5th Cir. 1977), or as soon as he becomes aware of inaccuracies, *U.S. v. Glover,* 588 F.2d 876 (2d Cir. 1978). Promises of leniency, plea bargains, payments to informers, and all arrangements with government witnesses must promptly be disclosed where a government witness gives either an evasive answer or denies the existence of any of the

arrangements. *U.S. v. Carter,* 566 F.2d 1265 (5th Cir.), *cert. denied,* 436 U.S. 956 (1978); *U.S. v. McClintic,* 570 F.2d 685 (8th Cir. 1978); *U.S. v. Butler,* 567 F.2d 885 (9th Cir. 1978); *U.S. v. Pope,* 529 F.2d 112 (9th Cir. 1976); *Sanders v. U.S.,* 541 F.2d 190 (8th Cir. 1976), *cert. denied,* 429 U.S. 1066 (1977).

Use of misleading evidence, unrelated to the charge, is grounds for reversal. *U.S. v. McFayden-Snider,* 552 F.2d 1178 (6th Cir. 1977), *cert. denied,* 435 U.S. 995 (1978). A federal prosecutor, who knowingly gives a false response to a court's question whether any members of an anti-war organization subpoenaed as grand jury witnesses were government informers, is entitled only to qualified rather than absolute immunity from a civil suit since his role is investigative and is not as an advocate. *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir.), *cert. denied,* 437 U.S. 904 (1978).

2. UNDISCOVERED AND UNDISCLOSED FAVORABLE DEFENSE EVIDENCE

Prosecutorial suppression of evidence favorable to an accused which is supportive of a claim of innocence denies a defendant of his right to a fair trial, is a due process violation, and vitiates a conviction. *U.S. v. Agurs,* 427 U.S. 97 (1976). This rule applies in cases where there has been only a general request for information or even no defense request for disclosure. *U.S. v. Jackson,* 579 F.2d 553 (10th Cir.), *cert. denied,* 439 U.S. 981 (1978). However, every nondisclosure to a general defense request, or where there is no request, is not constitutional error. It is where the omitted evidence creates a reasonable doubt that did not otherwise exist that prejudicial error permeates the trial record. A request seeking all evidence of any kind favorable to the defendant is considered general in nature. *U.S. v. DiCarlo,* 575 F.2d 952 (1st Cir.), *cert. denied,* 439 U.S. 834 (1978); *U.S. v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978).

A specific request points with particularity to the evidence desired and is clear and unambiguous. The prosecution must respond to a specific defense request for purely impeaching evidence which does not concern a substantive issue, provided the evidence sought is relevant. *U.S. v. Anderson,* 574 F.2d 1347 (5th Cir. 1978). Even when faced with a detailed, explicit defense demand, the prosecution has no constitutional duty to make a detailed accounting of all investigative work on the case. *Moore v. Illinois,* 408 U.S. 786 (1972).

For a defendant to force production of evidence, a strict standard of materiality of the evidence as to guilt or punishment applies. *U.S. v. Gaston,* 608 F.2d 607 (5th Cir. 1979). The defendant has the burden of establishing the materiality of any evidence allegedly suppressed by the prosecution, *U.S. v. Parker,* 586 F.2d 422 (5th Cir. 1978), *cert. denied,* 441 U.S. 962 (1979), together with the need for any withheld evidence, *Monroe v. Blackburn,* 607 F.2d 148 (5th Cir. 1979). For a discussion of timely and late disclosure of evidence which might create reasonable doubt, *see U.S. v. McPartlin,* 595 F.2d 1321 (7th Cir.), *cert. denied,* 100 S. Ct. 65 (1979). The good faith of the prosecutor ordinarily is not in issue. Even where the facts suggest bad faith, a defendant must prove prejudice if he is to overturn a conviction. *U.S. v. Goldberg,* 582 F.2d 483 (9th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979). *But see U.S. v. Disston,* 582 F.2d 1108 (7th Cir. 1978), which held that if the withheld evidence is material, the good faith of the prosecution may well bear on the materiality determination. Materiality means reasonable doubt about defendant's guilt where there has been no specific defense demand to disclose favorable evidence. *U.S. v. Ramirez,* 608 F.2d 1261 (9th Cir. 1979). The standard by which materiality of undisclosed information for which the defendant made a specific request, which assertedly could have been used for impeachment purposes, is whether the materials could have been used to impeach a government witness in a manner which might have affected the outcome of the trial. *U.S. v. DiFrancesco,* 604 F.2d 769 (2d Cir. 1979).

No due process violation or fair trial denial results if the defendant is aware of the favorable evidence, knows of its source, and has access to it. *U.S. v. Weidman,* 572 F.2d 1199 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978); *U.S. v. Haro-Espinosa,* 608 F.2d 796 (9th Cir. 1979). Lack of defense diligence to obtain evidence through an available witness known to defendant, coupled with a good-faith government effort to locate such evidence, satisfy constitutional requirements. *U.S. v. Shelton,* 588 F.2d 1242 (9th Cir. 1978), *cert. denied,* 442 U.S. 909 (1979). Information concerning "favors or deals" made with a key government witness need not be disclosed before trial. Since they reach only the issue of witness credibility, they must be disclosed only after the witness testifies. *U.S. v. Rinn,* 586 F.2d 113 (9th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979).

3. FORCING A CLAIM OF PRIVILEGE

Where the prosecution knows that a witness, if called to testify, would assert his fifth amendment privilege against self-incrimination and that such claim of privilege would be proper and lawful, prejudicial error results when the witness is compelled to appear and to invoke the privilege where the government's purpose is to bolster its case upon inferences arising from the use of the constitutional protection. *Namet v. U.S.,* 373 U.S. 179 (1963); *U.S. v. Maloney,* 262 F.2d 535 (2d Cir. 1959). Each case must be decided in light of its own facts and circumstances with consideration given to the motive of the prosecutor and the likelihood that the jury will draw unwarranted inferences against the defendant from the declination to testify. *U.S. v. Quinn,* 543 F.2d 640 (8th Cir. 1976); *U.S. v. Peterson,* 549 F.2d 654 (9th Cir. 1977); *U.S. v. Crouch,* 528 F.2d 625 (7th Cir.), *cert. denied,* 429 U.S. 900 (1976). *Compare U.S. v. Ritz,* 548 F.2d 510 (5th Cir. 1977). Where it is uncertain whether a witness will claim his self-incrimination privilege, it is not error to call him, provided there is termination of questioning after four refusals to answer. *Skinner v. Cardwell,* 564 F.2d 1381 (9th Cir. 1977), *cert. denied,* 435 U.S. 1009 (1978). The Tenth Circuit in *U.S. v. Dingle,* 546 F.2d 1378 (1976), found that it is preferable to dismiss the jury before calling a witness who is certain to claim his privilege. The court should examine the witness, rule on any privilege assertion, and consider any request for a grant of immunity outside the presence of the jury.

Defense witnesses, who are simply advised by a prosecutor of the penalties for perjury and that immunity does not extend to perjury, are not government-intimidated witnesses when they are called by the defense and invoke the fifth amendment. *U.S. v. Valdes,* 545 F.2d 957 (5th Cir. 1977).

C. CLOSING ARGUMENT ERRORS

1. REASONABLE INFERENCES AND INFLAMMATORY COMMENTS

While the singular purpose of final argument is to persuade, prosecutors should refrain from injecting issues broader than the accused's guilt or innocence,

or predicting the consequences of a particular verdict. Such tactics divert the jury from its duty to decide the case on the evidence. *U.S. v. Mikka,* 586 F.2d 152 (9th Cir. 1978), *cert. denied,* 440 U.S. 921 (1979); *U.S. v. Bess,* 593 F.2d 749 (6th Cir. 1979). The character and content of a prosecutor's argument can deny a defendant a fair trial. The test is whether the remarks, taken as a whole in the context of the entire case, prejudicially affect the rights of the accused. *U.S. v. Corona,* 551 F.2d 1386 (5th Cir. 1977).

Statements by the prosecutor, whether deliberate or otherwise, that tend to incite and inflame the jury or which are likely to cajole a guilty verdict without full consideration of all the evidence may amount to reversible error despite curative instructions. It is beyond the bounds of propriety for the prosecutor to suggest that unless a defendant is convicted it will be impossible to maintain "law and order" in the community. *Brown v. U.S.,* 370 F.2d 242, 246 (D.C. Cir. 1966). *See also U.S. v. Wiley,* 524 F.2d 659, 665 (6th Cir.), *cert. denied,* 425 U.S. 995 (1976) ("if this man goes free you have chalked up one point for the criminal"); *U.S. v. Barker,* 553 F.2d 1013 (6th Cir. 1977) (prosecutor's statement that if the defendants are acquitted, "We might as well open all the banks and say, 'Come on in and get the money, boys,'" was reversible error). *But see U.S. v. Fulton,* 549 F.2d 1325 (9th Cir. 1977) (prosecutor's reference to the Manson murders was not prejudicial error because of immediate admonishment).

The line between merely over-zealous emotional comment and impermissible inflammatory statements is a fine one. The presence or absence of repetition, apparent design, or bad faith frequently determine whether prejudicial error is found. Urging conviction to stamp out the drug problem was held harmless error, *Malley v. Manson,* 547 F.2d 25 (2d Cir. 1976), *cert. denied,* 430 U.S. 918 (1977), as was the statement that a guilty verdict would inform every "dishonest cop" that "we are sick and tired" of those who abuse their office. *Perry v. Mulligan,* 544 F.2d 674 (3d Cir.), *cert. denied,* 430 U.S. 972 (1977). *See also U.S. v. Mattucci,* 502 F.2d 883 (6th Cir. 1974). Also, reference to the jurors' tax dollars in a government overbilling scheme trial was harmless error. *U.S. v. Smyth,* 556 F.2d 1179 (5th Cir.), *cert. denied,* 434 U.S. 862 (1977). *See also U.S. v. Homer,* 545 F.2d 864 (3d Cir. 1976), *cert. denied,* 431 U.S. 954 (1977).

Counsel is not free to go outside the evidence to substitute emotion for evidence, either directly or by innuendo. *U.S. v. Hawkins,* 595 F.2d 751 (D.C. Cir.), *cert denied,* 441 U.S. 910 (1979); *U.S. v. McPartlin, 595 F.2d 1321 (7th Cir.), cert. denied,* 100 S. Ct. 65 (1979). Where there is a factual basis in the record, however, use of strong and indecorous terms, including "liar," is not prejudicial. *U.S. v. Craig,* 573 F.2d 455 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978).

Examples of remarks found to be prejudicial in the circumstance of the particular case include: analogizing the crime charged with the offenses involving Sirhan Sirhan, James Earl Ray, Richard Speck, and Jack Ruby, *U.S. v. Phillips,* 476 F.2d 538 (D.C. Cir. 1973); *U.S. v. Marques,* 600 F.2d 742 (9th Cir. 1979), *cert. denied,* 100 S. Ct. 674 (1980); telling the jury they either had to find the defendant guilty or conclude that the federal agents were liars, *U.S. v. Vargas,* 583 F.2d 380 (7th Cir. 1978); the prosecutor's suggestion that the defendant is guilty merely because he was indicted and is being prosecuted, *U.S. v. Bess,* 593 F.2d 749 (6th Cir. 1979); commenting that "not one white witness has been produced in this case that contradicts [the victim's] position in this case," *Withers v. U.S.,* 602 F.2d 124 (6th Cir. 1979); stating that "we are trying to convict him because he committed a crime, and we are convinced of that or we wouldn't be trying him,"

U.S. v. Splain, 545 F.2d 1131 (8th Cir. 1976); and telling the jury "you can believe all of it and turn him loose and we'll send him [the defendant] down in the elevator with you with his gun. He'll go out the front door with you," *U.S. v. McRae,* 593 F.2d 700 (5th Cir.), *cert. denied,* 100 S. Ct. 128 (1979). Examples of comments which did not warrant reversal in the context of the case include: characterizing defendant as "Chinatown's chief corrupter for 20 years," *U.S. v. Ong,* 541 F.2d 331 (2d Cir. 1976); referring to a record piracy defendant as a "scavenger," "parasite," "fraud," and "a professional con-man," *U.S. v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); commenting that defendant presented a "tailored defense" to fit the government's evidence, *U.S. v. Duff,* 551 F.2d 187 (7th Cir. 1977); stating that "there is no difference in these guys [false statements and wire fraud defendants] and people who go out and stick up banks," *U.S. v. Calandrella,* 605 F.2d 236 (6th Cir. 1979); remarking that the verdict would be the jury's verdict and "I wish it was mine," *U.S. v. Juarez,* 566 F.2d 511 (5th Cir. 1978); and stating that even the very best counsel money could buy couldn't disentangle the defendant, *U.S. v. Rapoport,* 545 F.2d 802 (2d Cir. 1976), *cert. denied,* 430 U.S. 931 (1977).

2. RESPONSE TO DEFENSE PROVOCATIONS

Impugning the prosecution's integrity or motivation by the defense opens the door and justifies a reply in kind. *U.S. v. Hoffa,* 349 F.2d 20 (6th Cir.), *aff'd on other grounds,* 385 U.S. 293 (1966). The fair reply doctrine in closing argument has been applied in cases where defense counsel attacked the quality of the investigation and the attitude of the investigators. *U.S. v. Hiett,* 581 F.2d 1199 (5th Cir. 1978). Other examples of defense accusation which warrant and justify a response include: claiming that "the Witness Protection Program was about to be revealed as a major government scandal," *U.S. v. Ricco,* 549 F.2d 264 (2d Cir.), *cert. denied,* 431 U.S. 905 (1977); the prosecutor's professional integrity, *U.S. v. Alpern,* 564 F.2d 755 (7th Cir. 1977); attacking the government for failure to call certain witnesses, *U.S. v. Sherrif,* 546 F.2d 604 (5th Cir. 1977); repeatedly asserting that the government was participating in or knowingly abetting a frame-up, *U.S. v. Stassi,* 544 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 907 (1977); arguing that a coconspirator was not given a polygraph test "because government counsel and agents do not believe in them," *U.S. v. Gabirel,* 597 F.2d 95 (7th Cir.), *cert. denied,* 100 S. Ct. 120 (1979); attempting to shift the blame to an alleged coconspirator thereby giving rise to the justifiable, biblical, response, "I'm not my brother's keeper," *U.S. v. Mackey,* 571 U.S. 376 (7th Cir. 1978). In each of the foregoing instances and in other cases of similar character, the prosecutor's disparaging remarks in rebuttal argument, which are not so inflammatory as to deny a fair trial, do not constitute reversible error. *U.S. v. Grabiec,* 563 F.2d 313 (7th Cir. 1977).

3. STATEMENT OF LAW—INVADING THE PROVINCE OF THE COURT

It is the duty of the court and not the privilege of the prosecutor to advise the jury as to the law which controls the case. Departure from this principle, however, is not reversible error absent some possibility of prejudice. *U.S. v. Parr-Pla,* 549 F.2d 660 (9th Cir.), *cert. denied,* 431 U.S. 972 (1977); *U.S. v. Rosenfeld,* 545 F.2d 98 (10th Cir. 1976), *cert. denied,* 430 U.S. 941 (1977); *U.S. v. Leon,* 534 F.2d 667

(6th Cir. 1976); *U.S. v. Figurski,* 545 F.2d 389 (4th Cir. 1976). But erroneous and misleading statements of the law by the prosecutor, particulary in a close case, are plain error, notwithstanding the court's instructions which correctly state the law. *U.S. v. Segna,* 555 F.2d 226 (9th Cir. 1977). *But see U.S. v. Whitson,* 587 F.2d 948 (9th Cir. 1978), and *U.S. v. Hollinger,* 553 F.2d 535 (7th Cir. 1977), where the prosecutor stated that the judge decides whether immunity shall be granted to a witness, and *U.S. v. Fullmer,* 457 F.2d 447 (7th Cir. 1972), in which the prosecutor commented on legislative intent, Congressional purpose, and the development of a statute.

4. OBJECTION AND CURATIVE INSTRUCTIONS

Generally, improper comments of a prosecutor, if followed by curative instructions upon a defense objection, are not reversible error, unless in the context of the entire record, it appears that the constitutional privileges of the accused have been affected and the tenor of the argument, as a whole, has violated defendant's fair trial rights. *U.S. v. Cook,* 592 F.2d 877 (5th Cir.), *cert. denied,* 442 U.S. 921 (1979); *U.S. v. Hollinger,* 553 F.2d 535 (7th Cir. 1977); *U.S. v. Massey,* 594 F.2d 676 (8th Cir. 1979); *U.S. v. Jones,* 592 F.2d 1038 (9th Cir.), *cert. denied,* 441 U.S. 951 (1979); *U.S. v. Brown,* 541 F.2d 858 (10th Cir.), *cert. denied,* 429 U.S. 1026 (1976). The plain error rule applies. *U.S. v. Librach,* 536 F.2d 1228 (8th Cir.), *cert. denied,* 429 U.S. 939 (1976); *U.S. v. Miranda,* 593 F.2d 590 (5th Cir. 1979); *U.S. v. Cornfeld,* 563 F.2d 967 (9th Cir. 1977), *cert. denied,* 435 U.S. 922 (1978). Where corrective instructions have been given, reversal is required only where the damage conceivably inflicted cannot be removed by the judicial order to disregard the prosecutor's remarks. *U.S. v. Harbin,* 601 F.2d 773 (5th Cir. 1979); *U.S. v. Segna,* 555 F.2d 226 (9th Cir. 1977).

5. STATEMENT OF PERSONAL OPINION

While an expression of personal opinion in final argument is not necessarily fatal to the government's case, repeated, pronounced, and persistent assertion of the prosecutor's belief in the honesty, sincerity, and good motives of his witnesses, the guilt of the accused, and the weakness of the defense case is misconduct. The "evil influence" of such misconduct on the jury cannot be removed by "stern, judicial rebuke," and instructions to ignore the comments. *Berger v. U.S.,* 295 U.S. 78, 85 (1935). Statements of personal belief permit the prosecutor to testify as an expert witness. This use of his personal status is not only improper, it is "pernicious." *U.S. v. Garza,* 608 F.2d 659 (5th Cir. 1979) (where the prosecutor said that in his opinion his witnesses simply wanted to make the community a better place and "if I thought that I had framed an innocent man and sent him to the penitentiary I would quit"). The circuits are basically in agreement on this position. *U.S. v. Vargas,* 558 F.2d 631 (1st Cir. 1977); *U.S. v. Farnkoff,* 535 F.2d 661 (1st Cir. 1976) (where the prosecutor said, "I suggest to you, I ask you to consider these things, come to the decision which I think you should come to, based upon the evidence, that the defendant is guilty as charged"); *U.S. v. Rodarte,* 596 F.2d 141 (5th Cir. 1979); *U.S. v. Handly,* 591 F.2d 1125 (5th Cir. 1979); *U.S. v. Bess,* 593 F.2d 749 (6th Cir. 1979); *U.S. v. Creamer,* 555 F.2d 612 (7th Cir.), *cert. denied,* 434 U.S. 833 (1977). The Third Circuit rule, however, as expressed in *U.S. v. Gallagher,* 576 F.2d 1028 (3d Cir. 1978), is that reversal is not warranted, even though the prosecutor makes numerous statements vouching for

the veracity of his witnesses unless the statements are based on information not before the court and, therefore, are outside the record. If the statements are based on the evidence, prejudice must be established before a conviction will be overturned. And, where prejudice is shown, it may be cured by instruction or may be disregarded if there is overwhelming evidence to support the conviction.

The proscecutor may state, "I believe that the evidence has shown defendant's guilt," but not "I believe that defendant is guilty." *U.S. v. Rodriguez,* 585 F.2d 1234 (5th Cir. 1978). Use of the phrase "I submit" is not the equivalent of expressing a personal opinon. *U.S. v. Stulga,* 584 F.2d 142 (6th Cir. 1978). "We know, if we know nothing else in this case, that Agent Lopez is a careful and completely honest, scrupulous man and would not make such an indentification if he were not absolutely sure," is not erroneous as vouching for a government witness in the absence of proof that the word "we" was used to suggest personal knowledge of the prosecutor outside the record, *U.S. v. Williams,* 583 F.2d 1194 (2d Cir. 1978), *cert. denied, 439 U.S. 1117 (1979).*

6. COMMENT ON POST-ARREST AND IN-TRIAL SILENCE

Reference in final argument to a defendant's post-arrest, pretrial, or in-trial silence, while generally condemned, is not always reversible error. The test for determining when a prosecutor's comment is a reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended, or was of such character, that the jury would naturally and necessarily accept it as a reminder that the defendant did not testify. *U.S. v. Waller,* 607 F.2d 49 (3d Cir. 1979); *U.S. v. Harbin,* 601 F.2d 773 (5th Cir. 1979); *U.S. v. Muscarella,* 585 F.2d 242 (7th Cir. 1978); *Catches v. U.S.,* 582 F.2d 453 (8th Cir. 1978); *U.S. v. Carleo,* 576 F.2d 846 (10th Cir.), *cert. denied,* 439 U.S. 850 (1978). Failure to object is not a bar to review and reversal. *O'Connor v. Ohio,* 385 U.S. 92 (1966). The error, however, may be nonprejudicial if it is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). It was prosecutor characterizations of evidence, or any parts thereof, as "unrefuted," "uncontradicted," and "unimpeached," which prompted the rule that the use of such words is plain error only where the defendant alone could have contested and contradicted the government testimony. *U.S. v. Hooker,* 541 F.2d 300 (1st Cir. 1976); *U.S. v. Rodriguez,* 556 F.2d 638 (2d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); *U.S. v. Jenkins,* 544 F.2d 180 (4th Cir. 1976), *cert. denied,* 431 U.S. 931 (1977); *U.S. v. Sorzano,* 602 F.2d 1201 (5th Cir. 1979). Where defense counsel focuses on the silence of the defendant by announcing near the end of the case that "defendant would be the next witness," then, even though defendant did not testify, the prosecution's argument that the evidence was unrefuted and uncontradicted violated no constitutional right of the accused. *Lockett v. Ohio,* 438 U.S. 586 (1978). Currently awaiting decision of the Supreme Court is *Jenkins v. Anderson,* 599 F.2d 1055 (6th Cir.) (decision without opinion), *cert. granted,* 100 S. Ct. 45 (1979), wherein the prosecution commented upon defendant's post-arrest failure to inform law enforcement officers of the defense of self-defense.

Carefully planned questions and answers by a prosecutor with a government witness may constitute comment on a defendant's failure to testify, "despite its obliguity." *U.S. v. Helina,* 549 F.2d 713, 718 (9th Cir. 1977). The test for determing whether an indirect, in-trial remark constitutes improper comment on a defendant's silence is: "Was the language used intended to be or was it of such character that the jury naturally and necessarily would take it to be a comment on

the failure of the accused to testify." *U.S. v. Anderson,* 481 F.2d 685, 701 (4th Cir.), *affd,* 417 U.S. 211 (1974). Thus, where a prosecution witness who, when asked if he testified in his tax evasion trial responded, "No, if I would have testified to the truth, it would have convicted me and if I would have lied under oath I would have been guilty of perjury—I would not lie under oath," is not a prosecutor's deliberate attempt to establish indirectly that the avoidance of perjury was the reason the defendant failed to testify. *U.S. v. Whitehead,* _____ F.2d _____ (4th Cir. 1980).

Examples of remarks which were held not to be comments on a defendant's silence follow: "that stands uncontradicted based on the cross-examination of the testimony," *U.S. v. Goldman,* 563 F.2d 501 (1st Cir. 1977), *cert. denied,* 434 U.S. 1067 (1978); "there is no conflict in the testimony of any of the witnesses in this case," *U.S. v. McDowell,* 539 F.2d 435 (5th Cir. 1976); "one who engages in criminal activity is not going to make it public knowledge," *U.S. v. Cornfeld,* 563 F.2d 967 (9th Cir. 1977), *cert. denied,* 435 U.S. 922 (1978); that there was no evidence by the defense why the defendant hastily left town, *U.S. v. Thurmond,* 541 F.2d 744 (8th Cir. 1976), *cert. denied,* 430 U.S. 933 (1977); that defendant has not told us "when the gold cap was put around one of his teeth," *U.S. v. Parker,* 549 F.2d 1217 (9th Cir.), *cert. denied,* 430 U.S. 971 (1977); that one defendant is "the man in the shadows" in this case, *U.S. v. Hansen,* 583 F.2d 325 (7th Cir.), *cert. denied,* 439 U.S. 912 (1978); where the prosecutor commented upon the body weight of the non-testifying defendant at the time of alleged offense, *U.S. v. Snow,* 552 F.2d 165 (6th Cir.), *cert. denied,* 434 U.S. 970 (1977); where the prosecutor challenged counsel for defendants charged with various narcotic violations to explain the sources of defendant's large income, *U.S. v. Barnes,* 604 F.2d 121 (2d Cir. 1979).

D. PROSECUTORIAL VINDICTIVENESS

While the decision to charge rests solely with the prosecutor, the exercise of his discretion is not without constitutional limits since it is subject to abuse. In *North Carolina v. Pearce,* 395 U.S. 711 (1969), the Supreme Court held that a due process violation of the most basic sort results when the government seeks to punish a citizen through the filing of additional, harsher charges, because he has done what the law plainly allows him to do by demanding trial by jury or by appealing a conviction. *See also Blackledge v. Perry,* 417 U.S. 21 (1974), where the Court spoke in terms of the danger of retaliating against the accused for attacking his conviction, and *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973), which noted that it is "patently unconstitutional" to pursue a course of action, the object of which is to penalize a person's reliance upon his legal rights. Of particular importance is the total absence of any element of punishment or retaliation in plea bargaining sessions, so long as the accused is free to accept or reject the prosecution's offer. *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (state prosecutor carried out his threat made during plea negotiations that he would reindict the accused as an habitual criminal if he did not plead guilty to uttering a forged instrument and agree to a 5-year committed sentence); *U.S. v. Vaughan,* 565 F.2d 283 (4th Cir. 1977); *U.S. v. Allsup,* 573 F.2d 1141 (9th Cir.), *cert. denied,* 436 U.S. 961 (1978); *Blackmon v. Wainwright,* 608 F.2d 183 (5th Cir. 1979).

Vindictiveness basically occurs in those instances where the prosecutor's motive in filing additional charges is to discourage or preclude an appeal in a

particular case or in certain future cases, regardless of any ill will toward a particular defendant. *Jackson v. Walker,* 585 F.2d 139 (5th Cir. 1978). But, when there is strong evidence that a prosecutor or a responsible member of an administrative agency has instituted or recommended prosecution out of personal ill will or on invidious grounds, a charge of discriminatory prosecution will be sustained. *U.S. v. Bourque,* 541 F.2d 290 (1st Cir. 1976). The Ninth Circuit has sanctioned pretrial appeal of a denied claim of vindictive prosecution. *U.S. v. Griffin,* _____ F.2d _____, 27 Cr. L. 2052 (9th Cir. 1980).

It currently is unsettled in the circuits whether an appearance of vindictiveness test or a reasonable likelihood of vindictiveness standard is to be applied for analyzing a prosecutor's action in adding charges. *U.S. v. Andrews* 612 F.2d 235 (6th Cir. 1979) (mere appearance is insufficient); *Jackson v. Walker,* 585 F.2d 139 (5th Cir. 1978) (whether either actual or reasonable apprehension of vindictiveness should be required, the court should nonetheless balance the prosecutor's freedom to decide what to prosecute with the defendant's freedom to decide whether he should appeal). *But see Miracle v. Estelle,* 592 F.2d 1269 (5th Cir. 1979) (holding that the accused must show actual vindictiveness to establish a due process violation).

The line between prosecutorial zeal and vindictiveness is a narrow one as shown by the following examples. A prosecutor's proposal to a defense contractor to terminate the grand jury investigation into possible fraud in exchange for the contractor's agreement to forego the Armed Services Board of Contract Appeals reconsideration of an award, which offer was rejected and a criminal fraud indictment was then returned, was not vindictive or retaliative. *U.S. v. Litton Systems, Inc.,* 573 F.2d 195 (4th Cir.), *cert. denied,* 439 U.S. 828 (1978). A new charge for relatively distinct criminal conduct following dismissal of an indictment, where the new criminal charge resulted from the "same spree of activity," gives rise to a prima facie case of vindictiveness to which the prosecutor must have an opportunity to respond. *U.S. v. Thomas,* 593 F.2d 615 (5th Cir. 1979). Prosecution of federal drug conspiracy charges following a state court conviction of the same charges is not prosecutorial vindictiveness. *U.S. v. Sellers,* 603 F.2d 53 (8th Cir. 1979). Prosecutorial vindictiveness did not appear where a second indictment is returned following dismissal of the first indictment upon which there had been a conviction upon which defendant had served a period of probation. *U.S. v. Hall,* 559 F.2d 1160 (9th Cir. 1977). Re-indictment for first-degree murder after declaration of a mistrial on second-degree murder charge, which mistrial was prevoked by the prosecution, was held vindictive, absent a government showing of justification for the increased degree of the charge. *U.S. v. Jamison,* 505 F.2d 407 (D.C. Cir. 1974). Increasing a charge from misdemeanor to felony upon a refusal to plead guilty coupled with a request for time to move to suppress evidence where all the facts were known to the prosecution before the misdemeanor was filed created the appearance of vindictiveness and required dismissal of the indictment. *U.S. v. Alvarado-Sandoval,* 557 F.2d 645 (9th Cir. 1977). Government concession that efforts by defendant to recover impounded funds were factored into the decision to indict did not describe action designed to foreclose civil remedies and was not vindictive conduct. *U.S. v. Stacey,* 571 F.2d 440 (8th Cir. 1978). Return of an indictment for a felony marijuana charge against one who prevailed on a motion to dismiss a prior cocaine possession charge because of a speedy trial denial, was held vindictive action which the prosecution did not overcome by asserting "failure to cooperate" where the government knew that cooperation would not extend beyond the name and address of the source of

supply. *U.S. v. Groves,* 571 F.2d 450 (9th Cir. 1978). Specific acts of misconduct sufficient to require dismissal of an indictment, however, do not bar the government from recharging through new prosecutors who need not avoid all contact with the dismissed attorney and the evidence he gathered. *In re November 1979 Grand Jury,* _____ F.2d _____, 27 Cr. L. 2056 (7th Cir. 1980).

CHAPTER IX
[RESERVED]

PART II

THE LAW OF EVIDENCE

CHAPTER X

JUDICIAL NOTICE

Judicial notice is that process by which a court may declare certain propositions to be proven, on the basis of general policy considerations, without requiring evidence of the same. This relieves a part of the burden of offering evidence of a particular fact since judicial notice of that fact is the same as proof of it and is of equal force. *Ricaud v. American Metal Co.,* 246 U.S. 304 (1918); *Wilson v. Shaw,* 204 U.S. 24 (1907); *Deshotels v. Liberty Mut. Ins. Co.,* 116 F. Supp. 55 (W.D. La. 1953), *aff'd,* 219 F.2d 271 (5th Cir. 1955).

It has been suggested that it is improper for the trial court to allow the introduction of evidence in support of matters of which the court is taking judicial notice. *See Public Ser. Ry. v. Wursthorn,* 278 F. 408 (3d Cir.), *cert. denied,* 259 U.S. 585 (1922). Judicial notice is to be distinguished from a judge's actual knowledge. *Williams v. U.S.,* 218 F.2d 473, 475 (5th Cir. 1955). Even if a judge has personal knowledge of facts, unless they are appropriate for judicial notice, such facts must be proved. *Brown v. Piper,* 91 U.S. 37 (1875); *Virgin Islands v. Gereau,* 523 F.2d 140, 147-148 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). Similarly, it is not essential that a judge be personally acquainted with matters proper for judicial notice, since the court may inform itself in any manner it sees fit. *Brown v. Piper, supra.*

A. ADJUDICATIVE FACTS

The Federal Rules of Evidence regarding judicial notice apply only to "adjudicative facts." Adjudicative facts are simply the facts of a particular case. Rule 201(a), Fed. R. Evid. As such, they are specifically distinguished from "legislative" facts which are not dealt with in the Federal Rules of Evidence. "Legislative facts, on the other hand, do not relate specifically to the activities or characteristics of the litigants." *U.S. v. Gould,* 536 F.2d 216, 219-220 (8th Cir. 1976). The Advisory Committee's Note clarifies further the difference between adjudicative and legislative facts:

> Adjudicative facts are simply the facts of a particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

While "[t]he precise line of demarcation between adjudicative facts and legislative facts is not always easily identified," it is to be noted that judicial access to "legislative" facts is unrestricted. *U.S. v. Gould,* 536 F.2d at 219. *See also* Advisory Committee's Note.

Rule 201(b) of the Federal Rules of Evidence provides that a judicially noticed adjudicative fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See Werk v. Parker,* 249 U.S. 130 (1919); *Brown v. Piper, supra; St. Louis Baptist Temple, Inc. v. F.D.I.C.,* 605 F.2d 1169, 1172 (10th Cir. 1979) (court's own files and records); *U.S. v. Gould,* 536 F.2d at 219; *U.S. ex rel. Fong Foo v. Shaughnessy,* 234 F.2d 715 (2d Cir. 1955); *Nice v. Chesapeake & O. Ry.,* 305 F. Supp. 1167, 1181 (W.D. Mich. 1969) (HEW mortality tables). Courts may take judicial notice of adjudicative facts which are obvious and indisputable. *U.S. v. Ricciardi,* 357 F.2d 91, 95 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966) (general knowledge of jurors). Similarly, adjudicative facts which are "capable of certain, easily accessible, and indisputably accurate verification" may be noticed. *U.S. v. Gould,* 536 F.2d at 219. Absent a showing that the facts are unreliable for some good reason, courts may take judicial notice of them. *Mitchell v. Rose,* 570 F.2d 129, 132 n.2 (6th Cir. 1978) (census figures).

B. PROCEDURE FOR TAKING NOTICE

A court may take judicial notice, whether requested or not, but shall take judicial notice if requested by a party and supplied with the necessary information. Rule 201(d), Fed. R. Evid. "For a court to notice facts judicially, if they are matters of general knowledge, the sources of those facts must be placed before the court." *Clark v. South Central Bell Telephone Co.,* 419 F. Supp. 697, 704 (W.D. La. 1976). However, in the absence of a request, failure of the court to notice such fact is not error. *U.S. v. Sorenson,* 504 F.2d 406, 410 (7th Cir. 1974); *O'Neill v. U.S.,* 411 F.2d 139, 144 (3d Cir. 1969); *Pellerin Laundry Mach. Sales Co. v. Reed,* 300 F.2d 305, 309-310 (8th Cir. 1962) (one relying on the law of a foreign state must call it to the attention of the trial court); *Prudential Ins. Co. v. Carlson,* 126 F.2d 607, 611-612 (10th Cir. 1942).

Judicial notice may be taken at any stage of proceedings whether in the trial court or on appeal. Rule 201(f), Fed. R. Evid.; *U.S. v. Salzmann,* 417 F. Supp. 1139, 1159-1160 (E.D.N.Y. 1976) (on motion to dismiss under speedy trial rules court noticed practice in the jurisdiction); *Fox v. Kane-Miller Corp.,* 398 F. Supp. 609, 651 (D. Md. 1975), *aff'd,* 542 F.2d 915 (4th Cir. 1976) (on motion for judgment n.o.v.). In keeping with the rule, it has also been held that judicial notice may be taken by the appellate court even though not taken by the trial court. *Canal Zone v. Burjan,* 596 F.2d 690, 693-694 (5th Cir. 1979); *U.S. v. Garcia,* 555 F.2d 708 (9th Cir. 1977); *U.S. v. Rivero,* 532 F.2d 450, 458 (5th Cir. 1976). *But see Garner v. Louisiana,* 368 U.S. 157, 173 (1961); *U.S. v. Jones,* 580 F.2d 219, 223-224 (6th Cir. 1978) (which limits the rule to civil cases).

A party is entitled to be heard on the propriety of taking judicial notice. Rule 201(e), Fed. R. Evid. Opposing counsel should be informed before trial of the facts of which the government will request the court to take judicial notice, thereby providing an opportunity to prepare objections. Facts judicially noticed may be subject to rebuttal. *Virgin Islands v. Gereau,* 523 F.2d 140, 147 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976).

Judicial notice of an adjudicative fact does not offend the sixth amendment's guarantee of the right to confront witnesses where the facts are indisputable.

Canal Zone v. Burjan, 596 F.2d at 690; *U.S. v. Alvarado,* 519 F.2d 1133, 1135 (5th Cir. 1975).

Once judicial notice has been taken, the jury must be properly instructed as to the evidentiary weight to be given to the fact noticed. "In a criminal case the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Rule 201(g), Fed. R. Evid. It is not reversible error, however, when an instruction varies slightly from the language set out in the rule. *U.S. v. Anderson,* 528 F.2d 590, 592 (5th Cir. 1976), *cert. denied,* 439 U.S. 898 (1977).

C. MATTERS TO BE NOTICED

All federal courts of original jurisdiction are bound to take judicial notice of the constitution and public laws of each state, whether statutory or based on judicial opinion. *Laman v. Micou,* 114 U.S. 218 (1885); *McDermott v. John Hancock Mut. Life Ins. Co.,* 255 F.2d 562 (3d Cir.1958), *cert denied,* 358 U.S. 935 (1959); *Leis v. Opportunity Consultants,* 441 F. Supp. 1314, 1315 n.1 (S.D. Ohio 1977); *McGee v. Schmidt,* 411 F. Supp. 43, 44 (W.D. Wis. 1976).

The federal courts must also take notice of the U.S. Constitution, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), treaties entered into by the United States with other nations, *U.S. v. Rauscher,* 119 U.S. 407 (1886), and public acts of Congress, *Hurley v. Crawley,* 50 F.2d 1010 (D.C. Cir. 1931). An act is public, although it may pertain solely to a particular locale, if it affects the public at large. If private laws have a clause declaring them to be public, then the courts must take cognizance of them. *Case v. Kelly,* 133 U.S. 21 (1890).

Federal courts will take notice of executive orders, proclamations which are legally effective, and administrative regulations having the force of law. *NLRB v. E.C. Atkins & Co.,* 331 U.S. 398, 406 n.2 (1947); *Colonial Airlines, Inc. v. Janas,* 202 F.2d 914, 919 n.1 (2d Cir. 1953) (action of federal agencies); *Stasiukevich v. Nicolls,* 168 F.2d 474 (1st Cir. 1948) (official reports of legislative committees); *U.S. v. Lucas,* 6 F.2d 327 (W.D. Wash. 1925) (rules and regulations of the executive department). Judicial notice has been taken of presidential proclamations, *Green v. U.S.,* 67 F.2d 846 (9th Cir. 1933), and official acts of the United States government, *Underhill v. Hernandez,* 168 U.S. 250, 253 (1897); *Jones v. U.S.,* 137 U.S. 202 (1890) (recognition of a foreign government). *See Oetjen v. Central Leather Co.,* 246 U.S. 297, 301 (1918); *U.S. v. Bank of New York & Trust Co.,* 77 F.2d 866 (2d Cir. 1935), *aff'd,* 296 U.S. 463 (1936).

The courts will also notice rules and regulations prescribed by the principal departments of the federal government under express authority of Congress. *Caha v. U.S.,* 152 U.S. 211 (1894). *See Tucker v. Texas,* 326 U.S. 517 (1946) (Federal Housing Authority regulations); *Bowles v. U.S.,* 319 U.S. 33 (1943) (regulations of Director of Selective Service); *Foster v. Biddle,* 14 F.2d 280 (8th Cir. 1926) (postal regulations); *U.S. v. Holmes,* 414 F. Supp. 831, 839 (D. Md. 1976) (lawfully issued army regulations); *U.S. v. Gibbs,* 233 F. Supp. 934 (W.D. Pa. 1964) (records of United States Weather Bureau); *U.S. ex rel. Ormento v. Warden,* 216 F. Supp. 609 (D. Kan. 1963) (regulations of Bureau of Prisons). In this connection, *see* 44 U.S.C. § 1507 (contents of Federal Register shall be judicially noticed). One court, however, has held that state regulations are beyond the scope of judicial notice provided for in the Federal Rules of Evidence. *Campbell v. Mincey,* 413 F. Supp.

16, 19 (N.D. Miss. 1975). A domestic statute or rule prescribed by an agency acting under legislative authority must be judicially noticed whether it is pleaded or proved, and failure to bring it to the trial court's attention will not prevent reliance upon it on appeal. *Lilly v. Grand Trunk W. Ry.*, 317 U.S. 481 (1943); *Schultz v. Tecumseh Prods.*, 310 F.2d 426, 432-434 (6th Cir. 1962).

The principles and traditions of "international law" will be noticed in federal courts. *Skiriotes v. Florida,* 313 U.S. 69, 72 (1941); *Brown v. Piper,* 91 U.S. 37, 42 (1875). With respect to judicial notice of foreign law, Rule 26.1 of the Federal Rules of Criminal Procedure provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

A full analysis of the purpose and operation of this rule is contained in the Advisory Committee's Note to Rule 26.1 *See also* Rule 44.1, Fed. R. Civ. P.

Courts will generally take notice of records and matters within the files of the court. *St. Louis Baptist Temple, Inc. v. F.D.I.C.,* 605 F.2d 1169, 1172 (10th Cir. 1979) (judicial notice taken of court's own records of prior litigation closely related to the case before it); *U.S. v. Doss,* 563 F.2d 265, 269 n.2 (6th Cir. 1977); *U.S. v. Haldemann,* 559 F.2d 31, 107 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977) (judicial notice of testimony presented at a hearing at which trial judge had presided on a related matter); *U.S. v. Lucchetti,* 533 F.2d 28 (2d Cir. 1976), *cert. denied,* 429 U.S. 849 (1976) (conditions of a jail based on records from a previous case); *Virgin Islands v. Testamark,* 528 F.2d 742 (3d Cir. 1976) (prior conviction for impeachment purposes); *U.S. v. Gorham,* 523 F.2d 1088, 1096 (D.C. Cir. 1975); *U.S. v. Alvarado,* 519 F.2d 1133, 1135 (5th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976) (judicial notice of previous criminal proceeding regarding location and physical aspects of border checkpoint); *People ex rel. Snead v. Kirkland,* 462 F. Supp. 914, 919 (E.D. Pa. 1978); *U.S. v. Salzmann,* 417 F. Supp. 1139 (E.D.N.Y. 1976) (extradition practice and treatment in previous cases); *Oburn v. Shapp,* 393 F. Supp. 561 (E.D. Pa.), *aff'd,* 521 F.2d 142 (3d Cir. 1975). Additionally, federal courts will take judicial notice of the current status of a state criminal action. *Powers v. Schwartz,* 448 F. Supp. 54, 56 n.2 (S.D. Fla. 1978). Judicial notice has been taken of a state court pleading referred to in a state court judgment entry. *Matter of Phillips,* 593 F.2d 356, 358 (8th Cir. 1979).

Courts are more willing to notice a general than a specific fact. For example, "[a] court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states ... but not of the extent of the depreciation at a given time and place." *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 301 (1937). Similarly, courts are usually more willing to notice facts judicially when they are collaterally involved in the case, rather than the central point in issue. *Id.*

In seeking to inform itself, the trial court is free to consult any source that it considers reliable, but it is error for it to notice textbooks not a part of the record unless the facts are matters of common knowledge or are capable of certain verification. *Alvary v. U.S.,* 302 F.2d 790, 794 (2d Cir. 1962). A fact enters the realm of "common knowledge" when sufficient notoriety attaches to it so as to make it proper to assume its existence without proof. *Waters-Pierce Oil Co. v. Deselms,* 212 U.S. 159 (1909); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). A

medical treatise has been cited as a basis for taking judicial notice, as has the dictionary. *U.S. v. Umentum,* 401 F. Supp. 746, 748-749 (E.D. Wis. 1975), *aff'd,* 547 F.2d 987, 992 (7th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). Judicial notice of facts may be taken by reference to commonly available sources of information such as an encyclopedia. *Wearly v. F.T.C.,* 462 F. Supp. 589, 592 n.1 (D.N.J. 1978) (*Encyclopedia Americana* was considered reliable and not open to question).

The wide variety of facts that may properly be noticed is indicated by the following recent criminal cases: *Canal Zone v. Burjan,* 596 F.2d 690, 693-694 (5th Cir. 1979) (governmental boundaries); *U.S. v. Foster,* 580 F.2d 388 (10th Cir. 1978) (reliability and general acceptance of equipment used by telephone company); *U.S. v. Hughes,* 542 F.2d 246, 248 n.1 (5th Cir. 1976) (certain named streets and intersections being located on a federal enclave); *U.S. v. Gould,* 536 F.2d 216, 219 (8th Cir. 1976) (cocaine hydrochloride derived from coca leaves and therefore a controlled substance); *U.S. v. Harris,* 530 F.2d 576 (4th Cir. 1976) ("national bank" established by name on charter); *U.S. v. Anderson,* 528 F.2d 590 (5th Cir. 1976), *cert. denied,* 439 U.S. 898 (1977) (federal correctional institution within the special territorial jurisdiction of the United States); *Brathwaite v. Manson,* 527 F.2d 363, *rev'd on other grounds,* 432 U.S. 98 (1977) (time of sunset); *U.S. v. Alvarado,* 519 F.2d at 1135 (immutable geographical and physical facts); *U.S. v. Quinones,* 516 F.2d 1309 (1st Cir. 1975), *cert. denied,* 423 U.S. 852 (1976) (Fort Buchanan is a military base); *U.S. v. H.B. Gregory Co.,* 502 F.2d 700 (7th Cir. 1974), *cert. denied,* 422 U.S. 1007 (1975) (cornmeal, poppy seed, caraway seed, and corn grits are "foods" within meaning of the Federal Food, Drug, and Cosmetic Act); *U.S. v. Mauro,* 501 F.2d 45 (2d Cir.), *cert. denied,* 419 U.S. 969 (1974) ("national bank" is established where the bank employed "national" in name); *U.S. v. Daniels,* 429 F.2d 1273 (6th Cir. 1970) (Jehovah's Witnesses were responding to court orders to perform identical conscientious objector work that they would not perform in response to Selective Service Board orders); *U.S. v. Tucker,* 380 F.2d 206, 212 (2d Cir. 1967) (outright perjury by federal agents not a common occurrence); *U.S. v. Armone,* 363 F.2d 385, 406 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966) ("Many who would touch pen to paper will not stand up to be counted in person under oath and in Court"); *U.S. v. Ricciardi,* 357 F.2d 91, 97 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966) (a labor dispute involving apartment buildings would have a palpable effect on interstate commerce); *Hansford v. U.S.,* 353 F.2d 858, 859 n.1 (D.C. Cir. 1965) (most "street peddlers" of narcotics are themselves addicts whose habit is exploited by others); *U.S. v. Kelly,* 349 F.2d 720, 779 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966) (population of the various counties in the Southern District of New York); *U.S. v. Fatico,* 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd on other grounds,* 579 F.2d 707 (2d Cir. 1978) (major hijacking gangs have preyed on Kennedy Airport); *U.S. v. Umentum, supra* (cocaine is derived from coca leaves, a controlled substance); *U.S. v. Bell,* 335 F. Supp. 797, 800-801 n.2 (E.D.N.Y. 1971), *aff'd,* 464 F.2d 667 (2d Cir. 1972) (finding made by a brother judge that the FAA "profile" used in aid of the preflight apprehension of air pirates did not rely on characteristics the use of which might be constitutionally impermissible).

Further examples of proper judicial notice may be found in the following civil cases: *Massachusetts v. Westcott,* 431 U.S. 322, 323 n.2 (1977) (Coast Guard records); *Mitchell v. Rose,* 570 F.2d 129, 132 n.2 (6th Cir. 1978) (census figures); *United Klans of America v. McGovern,* 453 F. Supp. 836, 838 (N.D. Ala. 1978) (United Klans of America is a "white hate group"); *Harris v. U.S.,* 431 F. Supp. 1173, 1177 (E.D. Va.), *aff'd without opinion,* 565 F.2d 156 (4th Cir. 1977) (pyramid plan).

CHAPTER XI

WEIGHT OF THE EVIDENCE AND RELEVANCY

A. BURDEN OF PROOF

In criminal cases, the burden is on the government to establish each and every element of the crime charged beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970); *Davis v. U.S.,* 160 U.S. 469 (1895). This burden never shifts to the defendant. The defendant maintains his presumption of innocence throughout the trial. *Wilbur v. Mullaney,* 496 F.2d 1303, 1307 (1st Cir. 1974), *aff'd,* 421 U.S. 684 (1975). Even for defenses, the burden of proof does not shift to the defendant. The defendant is only required to produce sufficient evidence to place a matter of defense in issue; the government then has the burden of negating the defense beyond a reasonable doubt. This rule has been applied to insanity, *U.S. v. Schmidt,* 572 F.2d 206 (9th Cir. 1978); *U.S. v. Manetta,* 551 F.2d 1352 (5th Cir. 1977); *U.S. v. Carr,* 550 F.2d 1058 (6th Cir. 1977); entrapment, *U.S. v. Hammond,* 598 F.2d 1008 (5th Cir. 1979); *U.S. v. Johnson,* 590 F.2d 250, *aff'd on rehearing en banc,* 605 F.2d 1025 (7th Cir. 1979), *cert. denied,* 100 S. Ct. 706 (1980); *U.S. v. Steinberg,* 551 F.2d 510 (2d Cir. 1977); *U.S. v. Rosenfeld,* 545 F.2d 98 (10th Cir. 1976), *cert. denied,* 430 U.S. 941 (1977); self-defense, *Berrier v. Egler,* 428 F. Supp. 750 (D.C. Mich. 1976), *aff'd,* 583 F.2d 515 (6th Cir.), *cert. denied,* 439 U.S. 955 (1978); and alibi, *U.S. v. Burse,* 531 F.2d 1151 (2d Cir. 1976); *U.S. v. Booz,* 451 F.2d 719 (3d Cir. 1971), *cert. denied,* 414 U.S. 820 (1973); *U.S. v. Carter,* 433 F.2d 874 (10th Cir. 1970).

1. MOTION FOR JUDGMENT OF ACQUITTAL

If the government fails to present evidence sufficient "to sustain a conviction" the trial court, on motion, must acquit the defendant. Rule 29(a), Fed. R. Crim. P. Evidence sufficient to sustain a conviction and to overcome a Rule 29 motion is that evidence which would warrant a jury finding the defendant guilty beyond a reasonable doubt. *Burks v. U.S.,* 437 U.S. 1, 16 (1978). In considering such a motion, the trial court should not weigh the evidence or assess the credibility of the witnesses, but must view the evidence and the inferences to be drawn therefrom in the light most favorable to the government. *Burks v. U.S.,* 437 U.S. at 16-17; *U.S. v. Malatesta,* 590 F.2d 1379 (5th Cir.), *cert. denied,* 100 S. Ct. 91 (1979); *U.S. v. Walton,* 552 F.2d 1354 (10th Cir.), *cert. denied,* 431 U.S. 959 (1977); *U.S. v. Hall,* 552 F.2d 273 (9th Cir. 1977); *U.S. v. Conti,* 339 F.2d 10 (6th Cir. 1964). Where the facts equally support inferences of guilt beyond a reasonable doubt or of innocence, the motion for acquittal must be denied. *U.S. v. Bohle,* 475 F.2d 872 (2d Cir. 1973). *But see U.S. v. Kelton,* 446 F.2d 669 (8th Cir. 1971).

The test for considering the sufficiency of the evidence under Rule 29 is the same whether made at the close of the government's case, at the close of all the

evidence, after the jury verdict, or on appeal. *U.S. v. Austin,* 585 F.2d 1271 (5th Cir. 1978); *U.S. v. Anderson,* 532 F.2d 1218 (9th Cir.), *cert. denied,* 429 U.S. 839 (1976). If the defendant introduces evidence on his own behalf, he waives any objection to the sufficiency of the government's case alone. *McGautha v. California,* 402 U.S. 183, 215-216 (1971), *vacated on other grounds,* 408 U.S. 941 (1972); *U.S. v. Evans,* 572 F.2d 455 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978); *U.S. v. Black,* 525 F.2d 668 (6th Cir. 1975). However, if a Rule 29 motion is made at the close of the government's case, the trial court must rule on it then. It cannot reserve decision until after the defendant rests. *U.S. v. Wyant,* 576 F.2d 1312 (5th Cir. 1978); *U.S. v. House,* 551 F.2d 756, *cert. denied,* 434 U.S. 850 (1977); *U.S. v. Brown,* 456 F.2d 293 (2d Cir.), *cert. denied,* 407 U.S. 910 (1972).

Although it is now clear that an appellate court must order an acquittal where the government failed to present evidence sufficient to sustain a conviction for the offense charged, *Burks v. U.S.,* 437 U.S. at 17, an appellate court may still, in its discretion, modify a judgment by reducing the conviction to that of a lesser included offense which is supported by the evidence. *U.S. v. Industrial Laboratories Co.,* 456 F.2d 908 (10th Cir. 1972); *U.S. v. Berkowitz,* 429 F.2d 921, 928 (1st Cir. 1970).

2. SPECIFIC ITEMS OF PROOF

Time: The government is generally not required to prove the exact time or date of the offense. It is only required to prove that the offense occurred "during a period of time reasonably related to the date alleged in the indictment." *U.S. v. Henderson,* 434 F.2d 84, 86 (6th Cir. 1970); *U.S. v. Francisco,* 575 F.2d 815 (10th Cir. 1978).

Amount: The government need not prove the exact amount or quantity of an item charged in an indictment where there is proof of a substantial amount, and, if applicable, proof of the jurisdictional minimum. *U.S. v. Shafer,* 445 F.2d 579 (7th Cir.), *cert. denied,* 404 U.S. 986 (1971); *Ramsey v. U.S.,* 245 F.2d 295, 297 (9th Cir. 1957), *rev'd on other grounds,* 263 F.2d 805 (1959).

Multispecification counts: Where, as in a perjury or mail fraud indictment, a single count alleges more than one specification of falsity or misrepresentation, the government is not required to prove each and every specification alleged. *U.S. v. Stirling,* 571 F.2d 708 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978); *U.S. v. Bonacorsa,* 528 F.2d 1218 (2d Cir.), *cert. denied,* 426 U.S. 935 (1976); *U.S. v. Joyce,* 499 F.2d 9, 22-23 (7th Cir.), *cert. denied,* 419 U.S. 1031 (1974).

Charges made in the conjunctive: The government need only prove one of the several means of commission alleged where they are set forth in the conjunctive. *U.S. v. UCO Oil Co.,* 546 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977); *Fields v. U.S.,* 408 F.2d 885 (5th Cir. 1969).

B. PRESUMPTIONS AND INFERENCES

Traditionally, a "presumption" was defined as a conclusion that the law directs the jury to find from other established facts, and an "inference" was defined as a conclusion that the law permits the jury to find from other established facts. *U.S. v. Burns,* 597 F.2d 939, 943 n.7 (5th Cir. 1979). In recent cases, however, the Supreme Court has spoken not of presumption versus inference but of differing degrees of presumptions. *Ulster County Court v. Allen,* 442 U.S. 140 (1979); *Sandstrom v. Montana,* 442 U.S. 510 (1979).

1. CONSTITUTIONALITY OF PRESUMPTIONS IN CRIMINAL CASES

A mandatory or conclusive presumption, *i.e.,* a presumption that the trier of fact must accept, is unconstitutional as it conflicts with the presumption of innocence and invades the fact-finding function. *U.S. v. U.S. Gypsum,* 438 U.S. 422 (1978); *Morissette v. U.S.,* 342 U.S. 246 (1952). A presumption, though not conclusive, that has the effect of shifting the burden of proof to the defendant, is also unconstitutional for like reasons. *See Sandstrom v. Montana,* 442 U.S. 510, 524 (1979); *Patterson v. New York,* 432 U.S. 197 (1977); *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

A presumption, not conclusive, but which shifts to the defendant the burden of production, may be constitutional on the facts if (1) there is a rational connection between the fact proved and the ultimate fact presumed, *Tot v. U.S.,* 319 U.S. 463, 467-472 (1943), and (2) the "fact proved is sufficient to support the inference of guilt beyond a reasonable doubt," *Ulster County Court v. Allen,* 442 U.S. 140, 167 (1979).

A permissive presumption is constitutional and may be applied if there is a rational connection between the fact proved and the ultimate fact presumed to the extent that the "presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. U.S.,* 395 U.S. 6, 32-36 (1969); *Ulster County Court v. Allen,* 442 U.S. at 165-167. A permissive presumption is one on which the jury may rely, but only in concert with all of the evidence, and one which the jury may also reject.

2. SPECIFIC PRESUMPTIONS AND INFERENCES

a. PRESUMPTION OF INNOCENCE

The presumption of innocence is a mandatory presumption in favor of the defendant which can only be overcome by proof of guilt beyond a reasonable doubt. Although there is no constitutional requirement to give a specific instruction on presumption of innocence, the trial court must make it clear to the jury that it cannot convict unless and until the government has proved its case beyond a reasonable doubt. *Kentucky v. Whorton,* 441 U.S. 786 (1979); *Taylor v. Kentucky,* 436 U.S. 478 (1978).

b. SANITY

A defendant is presumed to be sane. But if the defense presents some evidence of insanity, the government must then establish the defendant's sanity beyond a reasonable doubt. The circuits, however, vary as to the degree of evidence required before the presumption is rebutted. *U.S. v. Hall,* 583 F.2d 1288 (5th Cir. 1978) (some evidence which need only be slight); *U.S. v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978) (substantial evidence); *U.S. v. Dresser,* 542 F.2d 737, 742 n.7 (8th Cir. 1976) (prima facie); *U.S. v. Smith,* 437 F.2d 538, 541 (6th Cir. 1970) (prima facie). And there are lingering questions as to whether, upon presentation of evidence of insanity by the defense, the presumption disappears or may still be considered. *Davis v. U.S.,* 160 U.S. 469, 485-487 (1895); *U.S. v. Hendrix,* 542 F.2d 879 (2d Cir. 1976), *cert. denied,* 430 U.S. 959 (1977).

c. INTENT

The Supreme Court recently has held a jury instruction that a defendant is presumed to intend the natural and probable consequences of his acts, or that a jury may so infer, in a case where intent is an element, violates the constitutional requirement that the prosecution prove every element of the offense charged beyond a reasonable doubt. *Sandstrom v. Montana,* 442 U.S. 510 (1979). Some circuit courts have also criticized various forms of this presumption or inference. *U.S. v. Garrett,* 574 F.2d 778 (3d Cir.), *cert. denied,* 436 U.S. 919 (1978); *U.S. v. Robinson,* 545 F.2d 301 (2d Cir. 1976). However, a defendant's intent, although not presumed as a matter of law, can be inferred from all the evidence presented, including direct and circumstantial evidence. *U.S. v. McCracken,* 581 F.2d 719 (8th Cir. 1978); *U.S. v. Flickinger,* 573 F.2d 1349 (9th Cir.), *cert. denied,* 439 U.S. 836 (1978); *U.S. v. Haldeman,* 559 F.2d 31, 115-116 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

d. CONTINUANCE OF CONSPIRACY

Once a conspiracy has been established involving a defendant, it is presumed to continue unless and until the defendant proves, by showing affirmative acts, that the conspiracy was terminated or that he had withdrawn from it. *Hyde v. U.S.,* 225 U.S. 347, 369-370 (1912); *U.S. v. Panebianco,* 543 F.2d 447 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977). The burden is on the defendant to show that he has withdrawn. *U.S. v. Gillen,* 599 F.2d 541 (3d Cir.), *cert. denied,* 100 S. Ct. 137 (1979); *U.S. v. Wentland,* 582 F.2d 1022 (5th Cir. 1978), *cert. denied,* 439 U.S. 1133 (1979); *U.S. v. Parnell,* 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied,* 439 U.S. 1076 (1979); *U.S. v. Dorn,* 561 F.2d 1252 (7th Cir. 1977). Mere cessation of activity is not enough. *U.S. v. Goldberg,* 401 F.2d 644, 648 (2d Cir. 1968), *cert. denied,* 393 U.S. 1099 (1969). There must be "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators ...." *U.S. v. U.S. Gypsum Co.,* 438 U.S. 422, 464 (1978).

e. KNOWLEDGE OF THE LAW

Generally, a defendant is presumed to know the law. *U.S. v. Bryza,* 522 F.2d 414, 423 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976). However, in cases involving specific intent as an essential element, there is no such presumption. *U.S. v. Davis,* 583 F.2d 190 (5th Cir. 1978); *U.S. v. Ehrlichman,* 546 F.2d 910, 919 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977); *U.S. v. San Juan,* 545 F.2d 314 (2d Cir. 1976).

f. REGULARITY OF PROCEEDINGS

There is a presumption that proceedings before a legally constituted and unbiased grand jury are in all respects regular and adequate. *Costello v. U.S.,* 350 U.S. 359, 363 (1956); *U.S. v. Helstoski,* 576 F.2d 511 (3d Cir. 1978), *aff'd,* 99 S. Ct. 2432 (1979); *U.S. v. Dzialak,* 441 F.2d 212 (2d Cir.), *cert. denied,* 404 U.S. 883 (1971). A heavy burden is placed on one who seeks to overcome this presumption. *U.S. v. West,* 549 F.2d 545 (8th Cir.), *cert. denied,* 430 U.S. 956 (1977).

There is a presumption that trial jurors properly followed the court's instructions of law. *U.S. v. Eldred,* 588 F.2d 746 (9th Cir. 1978); *U.S. v. Cosby,* 529 F.2d 143 (8th Cir.), *cert. denied,* 426 U.S. 935 (1976). Upon a showing of improper extrinsic influence on a jury, the presumption is rebutted, and the

burden shifts to the government to establish that the influence was harmless. *U.S. v. Winkle,* 587 F.2d 705 (5th Cir.), *cert. denied,* 100 S. Ct. 51 (1979).

There is a presumption that executive officials act pursuant to the authority conferred upon them. *Wilson v. U.S.,* 369 F.2d 198, 200 (D.C. Cir. 1966); *Maresca v. U.S.,* 277 F. 727, 735-736 (2d Cir. 1921), *cert. denied,* 257 U.S. 657 (1922). There is a presumption that official acts of public officers are in all respects regular, until evidence to the contrary can be shown. *Lewis v. U.S.,* 279 U.S. 63, 73 (1929); *U.S. v. Hulphers,* 421 F.2d 1291, 1292 (9th Cir. 1969). And there is a presumption of regularity attached to official proceedings of administrative bodies. *U.S. v. Burnett,* 476 F.2d 726, 728 (5th Cir. 1973); *U.S. v. Roberts,* 466 F.2d 193, 196 (7th Cir.), *cert. denied,* 409 U.S. 1026 (1972).

g. RECENT POSSESSION OF FRUITS OF CRIME

Possession of the fruits of crime, recently after its commission, may, if not satisfactorily explained, create a permissible inference, in light of all the circumstances of the case, that the possessor was concerned in the crime or knew that the items in question were wrongfully acquired. *Barnes v. U.S.,* 412 U.S. 837, 843-846 (1973); *U.S. v. Cowden,* 545 F.2d 257 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977); *U.S. v. Jacobson,* 536 F.2d 793 (8th Cir.), *cert. denied,* 429 U.S. 864 (1976); *U.S. v. Ortiz,* 507 F.2d 1224 (6th Cir. 1974). It has been held that this inference may extend to guilty participation in the crime. *McNamara v. Henkel,* 226 U.S. 520, 524-525 (1913); *U.S. v. Jennewein,* 590 F.2d 191 (6th Cir. 1978). And possession in one state of property recently stolen in another state may create an inference that the defendant transported the stolen property in interstate commerce. *U.S. v. Allen,* 497 F.2d 160 (5th Cir.), *cert. denied,* 419 U.S. 1035 (1974); *U.S. v. Coppola,* 424 F.2d 991, 993 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

Based on all of the evidence, a jury is not bound to accept this inference, however, even though the defendant offers no satisfactory explanation. *U.S. v. Coppola,* 424 F.2d at 994. And conversely, a jury may convict upon such an inference, regardless of the defendant's explanation. The court may therefore give a charge on the inference even though the defendant has offered evidence to explain his possession of recently stolen property. *U.S. v. Fairchild,* 505 F.2d 1378 (5th Cir. 1975); *U.S. v. Carneglia,* 468 F.2d 1084, 1087-1088 (2d Cir. 1972), *cert. denied,* 410 U.S. 945 (1973).

h. FAILURE TO CALL A WITNESS

"[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption [or inference] that the testimony, if produced, would be unfavorable." *Graves v. U.S.,* 150 U.S. 118, 121 (1893). *Accord, U.S. v. Di Re,* 332 U.S. 581, 593 (1948). As with other inferences, the jury need not draw the inference if it does not wish to. *U.S. v. Comulada,* 340 F.2d 449, 452 (2d Cir.), *cert. denied,* 380 U.S. 978 (1965). Before arguing the inference to a jury, an advance ruling should be sought from the court. *U.S. v. Beeler,* 587 F.2d 340, 343 (6th Cir. 1978); *U.S. v. Blakemore,* 489 F.2d 193 (6th Cir. 1973).

Whether to charge on the "missing witness" inference is largely within the sound discretion of the trial court. *U.S. v. Williams,* 604 F.2d 1102 (8th Cir. 1979); *U.S. v. Johnson,* 562 F.2d 515 (8th Cir. 1977). Defendant requests for

instructions on the missing witness inference have been denied where the witness' testimony would not have been favorable to the defendant, *U.S. v. Long,* 533 F.2d 505 (9th Cir.), *cert. denied,* 429 U.S. 829 (1976), where it would be cumulative or unnecessary, *U.S. v. Mahone,* 537 F.2d 922 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976), and where it was found that the party was not in full control of the witness, *U.S. v. Williams,* 604 F.2d at 1119-1120; *U.S. v. Johnson,* 562 F.2d at 517; *U.S. v. Wilson,* 534 F.2d 375 (D.C. Cir. 1976).

When a witness is equally available to both parties and neither party calls the witness, the jury may draw such inferences as it chooses: that the testimony would have been unfavorable to either party, to neither party, or to both. *U.S. v. Ploof,* 464 F.2d 116, 119 (2d Cir.), *cert. denied,* 409 U.S. 952 (1972). But, when a witness is unavailable to both parties, no inferences, favorable or unfavorable, may be drawn from a party's failure to call the witness, absent a showing that he was under the control of either party or that his absence resulted from conduct of either party. *U.S. v. Secondino,* 347 F.2d 725, 726 (2d Cir.), *cert. denied,* 382 U.S. 931 (1965).

A codefendant is regarded as being equally available to both parties. *U.S. v. Deutsch,* 451 F.2d 98, 117 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972). Although in some cases the government may have the power to free a codefendant from fifth amendment claims by a grant of use or transactional immunity, this is not a situation that is recognized as leaving the codefendant within the government's power. *U.S. v. Stofsky,* 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); *Morrison v. U.S.,* 365 F.2d 521, 524 (D.C. Cir. 1966). Similarly, the government is under no duty to grant a prospective witness any kind of immunity in order to permit him to testify. *U.S. v. Bautista,* 509 F.2d 675, 677-678 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975). Therefore, a defendant is not entitled to an instruction that the jury is entitled to draw an inference adverse to the government from its failure to grant immunity to a witness whose testimony, had he not invoked the fifth amendment, would arguably have favored the defendant. *U.S. v. Stulga,* 584 F.2d 142 (6th Cir. 1978); *U.S. v. Sircovich,* 555 F.2d 1301 (5th Cir. 1977); *Bowles v. U.S.,* 439 F.2d 536 (D.C. Cir. 1970), *cert. denied,* 401 U.S. 995 (1971); *Morrison v. U.S.,* 365 F.2d 521 (D.C. Cir. 1966).

I. FAILURE OF DEFENDANT TO TESTIFY

No unfavorable inference may be drawn from a defendant's failure to testify, and no comment on a defendant's failure to testify may be made by a prosecutor. *Griffin v. California,* 380 U.S. 609, 613 (1965). In instances where a presumption arises in the government's favor, however, an instruction to the jury that the defendant must offer evidence to rebut the presumption is not a commentary on the defendant's failure to testify. *U.S. v. Gainey,* 380 U.S. 63, 70-71 (1965); *U.S. v. Gulley,* 374 F.2d 55, 60 (6th Cir. 1967).

If the defendant does not request an instruction on his right not to testify, it is not reversible error if the judge does give such an instruction that no inference of guilt arises from the silence of the accused. *Lakeside v. Oregon,* 435 U.S. 333 (1978); *U.S. v. Ballard,* 418 F.2d 325, 326-327 (9th Cir. 1969); *U.S. ex rel. Miller v. Follette,* 397 F.2d 363, 367 n.6 (2d Cir. 1968), *cert. denied,* 393 U.S. 1039 (1969).

C. CIRCUMSTANTIAL EVIDENCE

"Circumstantial evidence is that evidence which tends to prove a disputed fact, by proof of other facts ...." *Rumely v. U.S.,* 293 F. 532, 551 (2d Cir. 1923). Circumstantial evidence may be accorded the same weight and probative value as direct evidence and may be sufficient by itself to sustain a conviction. *U.S. v. Bycer,* 593 F.2d 549 (3d Cir. 1979); *U.S. v. Brown,* 584 F.2d 252 (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979); *U.S. v. Harper,* 579 F.2d 1235 (10th Cir.), *cert. denied,* 439 U.S. 968 (1978); *U.S. v. Brady,* 579 F.2d 1121 (9th Cir. 1978), *cert. denied,* 439 U.S. 1074 (1979); *Durns v. U.S.,* 562 F.2d 542 (8th Cir.), *cert. denied,* 434 U.S. 959 (1977); *U.S. v. Pariente,* 558 F.2d 1186 (5th Cir. 1977); *U.S. v. Colclough,* 549 F.2d 937 (4th Cir. 1977).

There is no requirement that circumstantial evidence exclude every reasonable hypothesis except that of guilt. *Holland v. U.S.,* 348 U.S. 121, 139-140 (1954); *U.S. v. Kirk,* 584 F.2d 773 (6th Cir.), *cert. denied,* 439 U.S. 1048 (1978); *U.S. v. Parnell,* 581 F.2d 1374 (10th Cir. 1978), *cert. denied,* 439 U.S. 1076 (1979); *U.S. v. Pelton,* 578 F.2d 701 (8th Cir.), *cert. denied,* 439 U.S. 964 (1978); *U.S. v. Gabriner,* 571 F.2d 48 (1st Cir. 1978); *U.S. v. George,* 568 F.2d 1064 (4th Cir. 1978); *U.S. v. Cooper,* 567 F.2d 252 (3d Cir. 1977); *U.S. v. Davis,* 562 F.2d 681 (D.C. Cir. 1977); *U.S. v. Daniels,* 549 F.2d 665 (9th Cir. 1977); *U.S. v. Warren,* 453 F.2d 738, 745 (2d Cir.), *cert. denied,* 406 U.S. 944 (1972). Although a conviction may rest solely on circumstantial evidence, there must be a logical and convincing connection between the facts established and the conclusions inferred. *U.S. v. Bycer,* 593 F.2d 549 (3d Cir. 1979). A conviction may not rest on mere conjecture or speculation. *U.S. v. Knife,* 592 F.2d 472 (8th Cir. 1979); *U.S. v. Thomas,* 453 F.2d 141 (9th Cir. 1971), *cert. denied,* 405 U.S. 1069 (1972). In the Fifth Circuit, circumstantial evidence must be such as to exclude every reasonable hypothesis except that of guilt. *U.S. v. Sink,* 586 F.2d 1041 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 3102 (1979); *U.S. v. Marshall,* 557 F.2d 527 (5th Cir. 1977); *U.S. v. Brown,* 547 F.2d 1264 (5th Cir. 1977).

D. RELEVANCY

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The bottom-line question of relevancy is asked in the Advisory Committee's Note: "Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand."

Rule 403 of the Federal Rules of Evidence provides that "relevant" evidence may be inadmissible "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The trial judge has broad discretion in ruling on questions of "relevancy" and in balancing the probative value of relevant evidence against any undue prejudice, confusion of issues, etc. *Hamling v. U.S.,* 418 U.S. 87, 124-125 (1974); *U.S. v.*

Brady, 595 F.2d 359 (6th Cir.), *cert. denied,* 100 S. Ct. 129 (1979); *U.S. v. Hernandez,* 588 F.2d 346 (2d Cir. 1978); *U.S. v. Cassasa,* 588 F.2d 282 (9th Cir. 1978), *cert. denied,* 441 U.S. 909 (1979); *U.S. v. Johnson,* 585 F.2d 119 (5th Cir. 1978); *U.S. v. Long,* 574 F.2d 761 (3d Cir.), *cert. denied,* 439 U.S. 985 (1978); *U.S. v. Robinson,* 560 F.2d 507 (2d Cir. 1977), *cert. denied,* 435 U.S. 905 (1978); *U.S. v. Johnson,* 558 F.2d 744 (5th Cir. 1977), *cert. denied,* 434 U.S. 1065 (1978); *U.S. v. Williams,* 545 F.2d 47 (8th Cir. 1976). Only an abuse of discretion will result in the reversal of a trial court's ruling on this point. *U.S. v. Williams,* 545 F.2d at 50. It has been held that, in reviewing a trial court's decision on an issue of relevancy, the appellate court should look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect. *U.S. v. Brady,* 595 F.2d at 361.

Each case, of course, turns on its own set of facts. Circuit cases have dealt with photographs of dead victims, *U.S. v. Brady,* 595 F.2d at 361-362; *U.S. v. Shoemaker,* 542 F.2d 561, 564 (10th Cir.), *cert. denied,* 429 U.S. 1004 (1976), mug shots, *U.S. v. Fosher,* 568 F.2d 207 (1st Cir. 1978), computer information, *U.S. v. Scholle,* 553 F.2d 1109 (8th Cir.), *cert. denied,* 434 U.S. 940 (1977), reports of government agents, *U.S. v. Juarez,* 549 F.2d 1113 (7th Cir. 1977), possession of a shotgun in a drug case, *U.S. v. Daniels,* 572 F.2d 535 (5th Cir. 1978), informer's compensation from government, *U.S. v. Leja,* 568 F.2d 493 (6th Cir. 1977), possession of a .38-caliber revolver 10 weeks after a bank robbery, *U.S. v. Robinson,* 560 F.2d 507 (2d Cir. 1977), *cert. denied,* 435 U.S. 905 (1978), and alleged threats by defendant against informant and FBI agent, *U.S. v. Weir,* 575 F.2d 668 (8th Cir. 1978).

1. EVIDENCE OF THE DEFENDANT'S CHARACTER

Under Rule 404(a)(1) of the Federal Rules of Evidence, the defendant may offer evidence of a pertinent trait of his character for the purpose of proving that he acted in conformity therewith on a particular occasion. That is, the defendant may present evidence of pertinent good character traits to suggest to the jury that a person of his good character would not commit the offense with which he is charged. *Michelson v. U.S.,* 335 U.S. 469 (1948); *U.S. v. Cylkouski,* 556 F.2d 799 (6th Cir. 1977); *U.S. v. Lechoco,* 542 F.2d 84 (D.C. Cir. 1976); *U.S. v. Lewin,* 467 F.2d 1132 (7th Cir. 1972); *U.S. v. Sedillo,* 496 F.2d 151 (9th Cir.), *cert. denied,* 419 U.S. 947 (1974). On the other hand, the government may offer evidence of a pertinent trait of the defendant's bad character, but only in limited circumstances: (1) in rebuttal of defendant's character evidence where the defendant has put his good character "in issue"; (2) where the defendant's character trait is an element of the charge, as in a perjury case, *U.S. v. Ridling,* 350 F. Supp. 90, 98 (E.D. Mich. 1972), or a Hobbs Act prosecution, *U.S. v. Billingsley,* 474 F.2d 63, 66 (6th Cir.), *cert. denied,* 414 U.S. 819 (1973); *see also* Rule 405(b), Fed. R. Evid.; and (3) where the purpose is to show motive, opportunity, intent, preparation, plan, knowledge, identify, absence of mistake, or accident under Rule 404(b). Beyond these limited circumstances, however, the government may not offer evidence of a defendant's bad character or character trait to circumstantially show the defendant's propensity to commit the crime with which he is charged. *Michelson v. U.S.,* 335 U.S. 469 (1948).

Character testimony is admissible only when relevant to a particular issue, and witnesses may testify only about the character trait relevant to that issue. Usually,

this issue is the state of mind necessary to the commission of the offense charged. *U.S. v. Lechoco,* 542 F.2d at 88. For example, the character traits of honesty and dishonesty relate to theft and fraud offenses and the character trait of peacefulness relates to assault and homicide cases. But the character trait of truthfulness has been held not pertinent to a controlled substance case. *U.S. v. Jackson,* 588 F.2d 1046 (5th Cir.), *cert. denied,* 99 S. Ct. 2882 (1979).

Character evidence must be considered with all other evidence in determining if the defendant is guilty beyond a reasonable doubt. *U.S. v. Callahan,* 588 F.2d 1078 (5th Cir.), *cert. denied,* 100 S. Ct. 49 (1979); *U.S. v. Crosby,* 294 F.2d 928, 948 (2d Cir. 1961), *cert. denied,* 368 U.S. 984 (1962); *Poliafico v. U.S.,* 237 F.2d 97 (6th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957). In *U.S. v. Haller,* 543 F.2d 62, 64 (9th Cir. 1976), and *U.S. v. Lewis,* 482 F.2d 632 (D.C. Cir. 1973), it was held that character evidence, standing alone, may be enough to create reasonable doubt. And, in *Michelson v. U.S.,* 335 U.S. at 476, the Supreme Court also held that character evidence alone, in some circumstances, may be enough to create reasonable doubt. But no defendant may be convicted upon his bad reputation or character alone. *U.S. v. Tropiano,* 418 F.2d 1069, 1081 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970). (Character of a victim is dealt with in Rule 404(a)(2), but it has limited application in federal criminal prosecutions as, generally, such evidence is only offered in homicide or rape cases. Character of a witness, Rule 404(a)(3), is considered in Chapter XIV, under "Impeachment and Support.")

a. METHODS OF PROVING CHARACTER

Rule 405 deals with the methods of proving character, once it has been determined that character evidence, good or bad, is relevant and admissible. Rule 405 provides that the methods of proving character are (1) testimony as to reputation, (2) testimony in the form of an opinion, and (3) where character or a trait of character is an essential element of a charge, claim, or defense, testimony as to specific instances of conduct.

Reputation is the community's opinion of the defendant. When a character witness testifies as to a defendant's "reputation," he is summarizing what he has heard in the community. Such testimony is, indeed must be, hearsay in nature. It may not properly include personal observations or knowledge about the defendant (opinion testimony), nor testimony as to the defendant's specific acts or courses of conduct. *Michelson v. U.S.,* 335 U.S. 469, 477 (1948); *U.S. v. Lewis,* 482 F.2d 632, 637 (D.C. Cir. 1973). The reputation or character witness must first be qualified "by showing such acquaintance with the defendant, the community in which he has lived, and the circles in which he has moved as to speak with authority of the terms in which generally he is regarded." *Michelson v. U.S.,* 335 U.S. at 478.

Opinion testimony, not admissible prior to the Federal Rules of Evidence, is specifically authorized in Rule 405 as a means by which the defendant may introduce evidence of his good character. Thus, a defense character witness can give his personal opinion of the defendant's character, based on personal contacts with the defendant. But such a witness may only give an opinion; he may not testify about the specific acts or conduct of the defendant upon which his opinion is based.

The trial court may, in its discretion, limit the number of character witnesses. *Michelson v. U.S.,* 335 U.S. at 480; *U.S. v. Henry,* 560 F.2d 963 (9th Cir. 1977).

b. CROSS-EXAMINATION AND REBUTTAL OF CHARACTER WITNESSES

Rule 405(a) permits cross-examination of defendant's character witnesses, including inquiry into the witnesses' knowledge of relevant specific instances of the defendant's past conduct. This includes inquiry about the defendant's past crimes or wrongful acts and even the defendant's arrests. *Michelson v. U.S.*, 335 U.S. 469, 482-487 (1948); *U.S. v. Watson,* 587 F.2d 365 (7th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979); *U.S. v. Evans,* 569 F.2d 209 (4th Cir.), *cert. denied,* 435 U.S. 975 (1978); *U.S. v. Morgan,* 554 F.2d 31 (2d Cir.), *cert. denied,* 434 U.S. 965 (1977); *U.S. v. Edwards,* 549 F.2d 362 (5th Cir.), *cert. denied,* 434 U.S. 828 (1977); *U.S. v. Lewis,* 482 F.2d 632, 638 (D.C. Cir. 1973). The two preconditions to such cross-examination are that there be a good faith basis for belief in the incident inquired about, and that the incidents inquired about are relevant to the character trait involved. *U.S. v. Bright,* 588 F.2d 504 (5th Cir.), *cert. denied,* 440 U.S. 972 (1979); *U.S. v. Crippen,* 570 F.2d 535, 539 (5th Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979). This form of cross-examination should not be confused with the impeachment of a witness under Rules 608 and 609. *Kilgore v. U.S.*, 467 F.2d 22 (5th Cir. 1972). For example, inquiry into knowledge of prior convictions of the defendant is not necessarily limited to convictions within the past 10 years. *U.S. v. Edwards,* 549 F.2d at 366-368.

The trial court has wide discretion in allowing or disallowing this form of cross-examination. *Michelson v. U.S.*, 335 U.S. at 480. The trial court should apply the balancing test set forth in Rule 403, *U.S. v. Lewis,* 482 F.2d at 639, and in this regard may consider the remoteness of the prior incident, *Michelson v. U.S.*, 335 U.S. at 484; *U.S. v. DeVincent,* 546 F.2d 452 (1st Cir. 1976), *cert. denied,* 431 U.S. 903 (1977), *rev'd on other grounds,* 602 F.2d 1006 (1979); *U.S. v. Null,* 415 F.2d 1178 (4th Cir. 1969), and whether the incident is similar or dissimilar to the offense charged, *Michelson v. U.S.*, 335 U.S. at 483; *McCowan v. U.S.*, 376 F.2d 122, 124 (9th Cir. 1967). Inquiry about a defendant's juvenile record has been questioned. *U.S. v. Canniff,* 521 F.2d 565, 573 n.8 (2d Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976). *See* Rule 609(d), Fed. R. Evid. But inquiry about the facts of the case for which the defendant is on trial has been held to be proper. *U.S. v. Morgan,* 554 F.2d at 33. If, on cross-examination, a defense character witness denies knowledge of an alleged prior incident of misconduct committed by the defendant, or a prior arrest of the defendant, the government may not thereafter prove such prior act of misconduct or prior arrest by extrinsic evidence. *U.S. v. Herman,* 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

In addition to cross-examining defendant's character witnesses, the government may rebut defendant's evidence of good character by calling its own witnesses to testify to the defendant's bad character. *U.S. v. Reece,* 568 F.2d 1246 (6th Cir. 1977). But such evidence must conform to all the requirements of Rules 403, 404, and 405. Thus, it is limited to statements of reputation or opinion about the relevant character trait involved and may not include testimony about the defendant's specific instances of misconduct. *U.S. v. Reece,* 568 F.2d at 1251-1252.

2. PROOF OF OTHER CRIMES

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

a. PREREQUISITES

Before such evidence of other crimes is admissible, it must be shown to be relevant to an issue other than the propensity of character of the defendant for committing crime, such as identity, knowledge, plan, or scheme, etc., and the probative value must not be substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading material. *U.S. v. McPartlin,* 595 F.2d 1321 (7th Cir.), *cert. denied,* 100 S. Ct. 65 (1979); *U.S. v. Beechum,* 582 F.2d 898 (5th Cir. 1978); *U.S. v. Young,* 573 F.2d 1137 (9th Cir. 1978); *U.S. v. Gubelman,* 571 F.2d 1252 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978); *U.S. v. Benedetto,* 571 F.2d 1246 (2d Cir. 1978); *U.S. v. James,* 555 F.2d 992 (D.C. Cir. 1977); *U.S. v. Scholle,* 553 F.2d 1109 (8th Cir.), *cert. denied,* 434 U.S. 940 (1977); *U.S. v. Largent,* 545 F.2d 1039 (6th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977). The trial court has broad discretion in this area. *U.S. v. Cooper,* 577 F.2d 179 (6th Cir.), *cert. denied,* 439 U.S. 868 (1978); *U.S. v. Corey,* 566 F.2d 429 (2d Cir. 1977); *U.S. v. Juarez,* 561 F.2d 65 (7th Cir. 1977); *U.S. v. Scholle,* 553 F.2d at 1121; *U.S. v. Myers,* 550 F.2d 1036 (5th Cir. 1977).

The Advisory Committee's Note for Rule 404(b) states that, in determining whether evidence of other crimes, wrongs, or acts is admissible, "no mechanical solution is offered." The rule has been described liberally as a rule of inclusion rather than a rule of exclusion. *U.S. v. Halper,* 590 F.2d 422 (2d Cir. 1978); *U.S. v. Long,* 574 F.2d 761 (3d Cir.), *cert. denied,* 439 U.S. 985 (1978); *U.S. v. James,* 555 F.2d 992 (D.C. Cir. 1977). Although there is no "rigid checklist" to follow, *U.S. v. Czarnecki,* 552 F.2d 698, 702 (6th Cir.), *cert. denied,* 431 U.S. 939 (1977), the courts have identified various appropriate considerations: (1) Similarity between the offense charged and the other crime, wrong, or act may be the key factor when it is offered to prove identity, *U.S. v. Powell,* 587 F.2d 443 (9th Cir. 1978); *U.S. v. Beechum,* 582 F.2d 898, 912 n.15 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); *U.S. v. Myers,* 550 F.2d 1036 (5th Cir. 1977), but not necessarily a key factor when it is offered to prove motive, intent, plan, or design, *U.S. v. McPartlin,* 595 F.2d 1321 (7th Cir.), *cert. denied,* 100 S. Ct. 65 (1979); *U.S. v. Beechum,* 582 F.2d at 912 n.15. (2) Remoteness of a prior crime, wrong, or act is also a factor. *U.S. v. Myers,* 550 F.2d at 1044; *U.S. v. Taglione,* 546 F.2d 194, 199 (5th Cir. 1977); *U.S. v. Largent,* 545 F.2d 1039, 1043 (6th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977). (3) Whether the other crime, wrong, or act is before or after the offense charged is generally not a factor. *U.S. v. Beechum,* 582 F.2d at 903 n.1; *U.S. v. Espinoza,* 578 F.2d 224 (9th Cir.), *cert. denied,* 439 U.S. 849 (1978). But, where the relevant issue is the defendant's intent or predisposition at the time of the offense, subsequent acts may not be admissible. *U.S. v. Boyd,* 595 F.2d 120 (3d Cir. 1978); *U.S. v. Daniels,* 572 F.2d 535 (5th Cir. 1978).

If such evidence is offered, the prior crime, wrong, or act must be established by clear and convincing proof. *U.S. v. McPartlin,* 595 F.2d at 1344; *U.S. v. Beechum,* 582 F.2d at 910; *U.S. v. Scholle,* 553 F.2d at 1121; *U.S. v. Myers,* 550 F.2d at 1044; *U.S. v. Taglione,* 546 F.2d at 199. And it is better practice for the trial judge to give the jury a cautionary instruction at the time such evidence is offered, limiting its purpose. *U.S. v. Danzey,* 594 F.2d 905 (2d Cir.), *cert. denied,*

441 U.S. 951 (1979); *U.S. v. Day,* 591 F.2d 861, 878 (D.C. Cir. 1978); *U.S. v. Carleo,* 576 F.2d 846 (10th Cir.), *cert. denied,* 439 U.S. 850 (1978); *U.S. v. Young,* 573 F.2d 1137 (9th Cir. 1978). In one case, failure by the trial judge to give such a cautionary instruction requested by defense counsel was considered "plain error." *U.S. v. Yopp,* 577 F.2d 362 (6th Cir. 1978).

Acts or wrongs, as well as crimes for which the defendant was convicted, come within Rule 404(b). *U.S. v. Cooper,* 577 F.2d 1079 (6th Cir.), *cert. denied,* 439 U.S. 868 (1978); *U.S. v. Miller,* 573 F.2d 388 (7th Cir. 1978). There is no requirement to prove that the defendant was convicted for the prior or subsequent crime. *U.S. v. Nolan,* 551 F.2d 266 (10th Cir.), *cert. denied,* 434 U.S. 904 (1977). Evidence of prior arrests has been admissible, *U.S. v. Black,* 595 F.2d 1116 (5th Cir. 1979), and charges of crimes that were later dismissed, *U.S. v. Juarez,* 561 F.2d 65 (7th Cir. 1977). Evidence of foreign convictions may also be admitted. *U.S. v. Rodarte,* 596 F.2d 141 (5th Cir. 1979); *U.S. v. Nolan,* 551 F.2d at 270.

As evidence of other crimes, wrongs, or acts is admissible to show motive, intent, identity, knowledge, plan, or design—issues which may be material to proving the government's case-in-chief—the government is not required to wait for the defendant to put those matters in issue. *U.S. v. Danzey,* 594 F.2d at 913-914; *U.S. v. Juarez,* 561 F.2d at 73; *U.S. v. Adcock,* 558 F.2d 397, (8th Cir.), *cert. denied,* 434 U.S. 921 (1977). However, some courts have held that, where possible, such evidence should await the conclusion of the defendant's case. This enables the trial court to better evaluate the need for such evidence. *U.S. v. Benedetto,* 571 F.2d 1246, 1249 (2d Cir. 1978); *U.S. v. Brunson,* 549 F.2d 348 (5th Cir.), *cert. denied,* 434 U.S. 842 (1977).

b. MOTIVE

Although motive is never an element itself, evidence of it is often relevant to show the defendant's state of mind and purpose for committing the crime charged. If the motive can be proved by prior or subsequent crimes, wrongs, or acts, Rule 404(b) permits their admission in evidence. *U.S. v. Cook,* 592 F.2d 877 (5th Cir.), *cert. denied,* 99 S. Ct. 2847 (1979). The other crimes, wrongs, or acts offered to prove motive may be totally dissimilar to the acts giving rise to the offense charged. For example, evidence of an offer to purchase heroin for $1,000 was admitted to prove defendant's motive for bank robbery. *U.S. v. Cyphers,* 553 F.2d 1064 (7th Cir.), *cert. denied,* 434 U.S. 843 (1977). Evidence of defendant's homosexual relationship with the victim was properly admitted to prove defendant's motive for killing him. *U.S. v. Free,* 574 F.2d 1221 (5th Cir.), *cert. denied,* 439 U.S. 873 (1978). Evidence of the break-in of Daniel Ellsberg's office was admissible to prove the defendant's motivation in making "Watergate" cover-up payments and concealing the identities of higher-ups. *U.S. v. Haldeman,* 559 F.2d 31, 88-91 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977). Evidence of a defendant's escape was admitted to show motive for his subsequent theft of a car. *U.S. v. Stover,* 565 F.2d 1010 (8th Cir. 1977). Thus, when the issue is motive, similarity of the physical elements of the crime charged with the extrinsic act need not be established. *U.S. v. Beechum,* 582 F.2d 898 (5th Cir. 1978).

c. INTENT AND KNOWLEDGE

Intent and knowledge, or the lack thereof, are often contested issues in criminal cases. A defendant may agree that he did the physical acts which form the basis for the charge, but assert that he lacked the intent or criminal knowledge necessary to find him guilty. In such a case, evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) to prove that the defendant did, in fact, have the requisite intent and knowledge. *U.S. v. Taglione,* 546 F.2d 194 (5th Cir. 1977). Where intent or knowledge is not a material issue, as where the defendant has denied committing the underlying acts, "other crimes" evidence to prove intent has been held inadmissible. *U.S. v. Gubelman,* 571 F.2d 1252 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978). Or, where by the nature of the offense, the defendant's intent is not in issue, "other crimes" evidence to prove intent is not admissible. *U.S. v. Coades,* 549 F.2d 1303, 1306 (9th Cir. 1977) (prior bank robbery to prove intent in committing charged bank robbery).

Not only must intent or knowledge be material to the government's proof, the proffered evidence of the other crimes, wrongs, or acts must be probative. It has been held that previous possession of stolen paintings is not probative of criminal intent with respect to charges of extortion of oil companies for return of credit card vouchers, *U.S. v. Taglione,* 546 F.2d at 199-200, and that possession of a sawed-off shotgun is not probative of predisposition to violate the drug laws. *U.S. v. Daniels,* 572 F.2d 535 (5th Cir. 1978). But where intent or knowledge is in any way contested and the probative value of the other crime, wrong, or act to the issue of intent or knowledge outweighs its dangers of unfair prejudice, etc., the proof is admissible. *U.S. v. Moreno-Nunez,* 595 F.2d 1186 (9th Cir. 1979); *U.S. v. DeFillipo,* 590 F.2d 1228 (2d Cir.), *cert. denied,* 99 S. Ct. 2844 (1979); *U.S. v. Weidman,* 572 F.2d 1199 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978); *U.S. v. Johnson,* 562 F.2d 515 (8th Cir. 1977); *U.S. v. Sparks,* 560 F.2d 1173 (4th Cir. 1977).

It has been held that the government need not wait for the defendant to deny wrongful intent before offering evidence of other acts that are relevant to intent. *U.S. v. Adcock,* 558 F.2d 397, 402 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977). However, if the government has other ample evidence to prove wrongful intent, the probative value of other acts is greatly reduced. *U.S. v. Dolliole,* 597 F.2d 102 (7th Cir.), *cert. denied,* 99 S. Ct. 2894 (1979).

Evidence of other crimes, wrongs, or acts to prove a defendant's criminal intent or knowledge has been held properly admitted in drug cases, *U.S. v. Moreno-Nunez,* 595 F.2d at 1186; *U.S. v. Black,* 595 F.2d 1116 (5th Cir. 1979); *U.S. v. Sigal,* 572 F.2d 1320 (9th Cir. 1978); *U.S. v. Smith,* 552 F.2d 257 (8th Cir. 1977); *U.S. v. Nolan,* 551 F.2d 266 (10th Cir.), *cert. denied,* 434 U.S. 904 (1977), in mail fraud cases, *U.S. v. Weidman,* 572 F.2d at 1201, in firearms cases, *U.S. v. Johnson,* 562 F.2d at 516; *U.S. v. Dudek,* 560 F.2d 1288 (6th Cir. 1977), *cert. denied,* 434 U.S. 1037 (1978), theft and receiving cases, *U.S. v. DeFillipo,* 590 F.2d at 1230; *U.S. v. Whetzel,* 589 F.2d 707 (D.C. Cir. 1978); *U.S. v. Reese,* 568 F.2d 1246 (6th Cir. 1977); *U.S. v. Nichols,* 534 F.2d 202 (9th Cir. 1976), false statement cases, *U.S. v. Miller,* 573 F.2d 388 (7th Cir. 1978); *U.S. v. Maslock,* 558 F.2d 1328 (8th Cir.), *cert. denied,* 434 U.S. 872 (1977), and where entrapment was raised as a defense, *U.S. v. Henciar,* 568 F.2d 489 (6th Cir. 1977), *cert. denied,* 435 U.S. 953 (1978).

d. IDENTITY

When the identity of the defendant is in issue, proof of other crimes, wrongs, or acts is generally limited to such crimes, wrongs, or acts as are substantially similar to the acts that make up the charged offense. *U.S. v. Powell,* 587 F.2d 443

(9th Cir. 1978); *U.S. v. Beechum,* 582 F.2d 898 (5th Cir. 1978). Such evidence has been held properly admitted in a drug case, *U.S. v. Baldarrama,* 566 F.2d 560 (5th Cir.), *cert. denied,* 439 U.S. 844 (1978), a kidnapping case, *Durns v. U.S.,* 562 F.2d 542 (8th Cir.), *cert. denied,* 434 U.S. 959 (1977), a check case, *U.S. v. Maestas,* 546 F.2d 1177 (5th Cir. 1977), and a bank robbery case, *U.S. v. Danzey,* 594 F.2d 905 (2d Cir.), *cert. denied,* 441 U.S. 951 (1979).

In some circumstances, however, other crimes or acts that are not unique signature crimes or the handiwork of the defendant may be probative of the defendant's identity. *U.S. v. Gubelman,* 571 F.2d 1252 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978). For example, evidence that the defendant had stolen weapons and retained them was held relevant to the issue of identity in a bank robbery charge where one of the weapons stolen was found in the getaway car. *U.S. v. Waldron,* 568 F.2d 185 (10th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978).

e. PLAN, SCHEME, OR DESIGN

Evidence of other crimes, wrongs, or acts is admissible where the other crime, wrong, or act is inextricably tied in with the offense charged. *U.S. v. Derring,* 592 F.2d 1003 (8th Cir. 1979); *U.S. v. Lamb,* 575 F.2d 1310 (10th Cir. 1978); *U.S. v. Carrillo,* 561 F.2d 1125 (5th Cir. 1977); *U.S. v. Dudek,* 560 F.2d 1288 (6th Cir. 1977), *cert. denied,* 434 U.S. 1037 (1978); *U.S. v. Roberts,* 548 F.2d 665 (6th Cir.), *cert. denied,* 432 U.S. 931 (1977); *U.S. v. Blewitt,* 538 F.2d 1099 (5th Cir.), *cert. denied,* 429 U.S. 1026 (1976); *U.S. v. Bloom,* 538 F.2d 704 (5th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977). This is sometimes referred to as the *res gestae* exception. *U.S. v. Blewitt,* 538 F.2d at 1101.

Evidence of other crimes, wrongs, or acts is also admissible to prove an ongoing or continuing plan or scheme, or the development of a course of conduct leading up to the offense charged. *U.S. v. Weidman,* 572 F.2d 1199 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978); *U.S. v. Adcock,* 558 F.2d 397, 401 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977); *U.S. v. Serlin,* 538 F.2d 737, 747 (7th Cir. 1976). *But see U.S. v. O'Connor,* 580 F.2d 38 (2d Cir. 1978), where evidence that defendant took three other bribes in the six-month to one-year period before he took the bribe for which he was charged was held insufficient to show a plan or scheme.

3. EVIDENCE OF A GUILTY MIND

a. FLIGHT AND CONCEALMENT OF IDENTITY

Evidence of flight is admissible to prove a consciousness of guilt. *Sibron v. New York,* 392 U.S. 40, 66 (1968); *U.S. v. Lyon,* 588 F.2d 581 (8th Cir. 1978), *cert. denied,* 441 U.S. 910 (1979); *U.S. v. Peltier,* 585 F.2d 314, 322-325 (8th Cir. 1978), *cert. denied,* 440 U.S. 945 (1979); *U.S. v. Myers,* 550 F.2d 1036, 1048-1051 (5th Cir. 1977); *U.S. v. Craig,* 522 F.2d 29 (6th Cir. 1975). Similarly, evidence that the defendant concealed his identity to avoid apprehension is admissible to prove consciousness of guilt. *U.S. v. James,* 576 F.2d 1121 (5th Cir. 1978); *U.S. v. Thompson,* 261 F.2d 809, 812 (2d Cir. 1958), *cert. denied,* 359 U.S. 967 (1959).

b. FALSE EXCULPATORY STATEMENTS

False exculpatory statements made by a defendant are admissible to prove consciousness of guilt. *U.S. v. Rajewski,* 526 F.2d 149 (7th Cir. 1975), *cert. denied,* 426 U.S. 908 (1976); *U.S. v. Parness,* 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); *DeVore v. U.S.,* 368 F.2d 396 (9th Cir. 1966).

c. SUPPRESSION, DESTRUCTION, AND FABRICATION OF EVIDENCE

In *U.S. v. Graham,* 102 F.2d 436, 442 (2d Cir.), *cert. denied,* 307 U.S. 643 (1939), the court stated, "The manufacture, destruction, or suppression of evidence in defense of a criminal charge is in the nature of an admission of guilt and, though not conclusive, is to be given consideration as such by the jury." *See also U.S. v. Brashier,* 548 F.2d 1315 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977); *U.S. v. Wilkins,* 385 F.2d 465 (4th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968); *Harney v. U.S.,* 306 F.2d 523 (1st Cir.), *cert. denied,* 371 U.S. 911 (1962).

Evidence that a defendant attempted to influence the testimony of a witness or attempted to impede or prevent a witness from testifying is also admissible to show consciousness of guilt. *U.S. v. Ochs,* 595 F.2d 1247 (2d Cir.), *cert. denied,* 100 S. Ct. 435 (1979); *U.S. v. Reamer,* 589 F.2d 769 (4th Cir. 1978), *cert. denied,* 440 U.S. 980 (1979); *U.S. v. Hall,* 565 F.2d 1052 (8th Cir. 1977); *U.S. v. Lord,* 565 F.2d 831 (2d Cir. 1977); *U.S. v. Papia,* 560 F.2d 827 (7th Cir. 1977).

4. HABIT AND CUSTOM

Rule 406 of the Federal Rules of Evidence provides that evidence of habit or custom is relevant to prove that the specific conduct of a person or organization was in conformity with the habit or routine custom. But, habit or custom must be distinguished from character. Character is a trait of an individual unrelated to specific conduct in specific circumstances. Character deals with general qualities such as honesty, peacefulness, and care. Habit or custom, on the other hand, deals with an individual's or organization's specific conduct in specific circumstances. As the Advisory Committee's Note states: "A habit ... is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving."

The admissibility of habit and custom has been considered by the federal courts primarily in civil cases. There are, however, a few criminal cases that have considered habit and custom evidence. *U.S. v. Callahan,* 551 F.2d 733 (6th Cir. 1977); *U.S. v. Riley,* 550 F.2d 233 (5th Cir. 1977).

5. MOTIVE

Motive is the state of feeling impelled toward an act and is distinguishable from intent, which is the mental state accompanying the act. Intent is an essential element of most crimes. Proof of motive, while always relevant, is never essential. *Pointer v. U.S.,* 151 U.S. 396, 414 (1894); *U.S. v. Simon,* 425 F.2d 796, 808 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970). Trial courts are given broad discretion to admit evidence of a fact tending to suggest a motive for the act charged. *U.S. v. King,* 560 F.2d 122 (2d Cir.), *cert. denied,* 434 U.S. 925 (1977); *U.S. v. Adcock,* 558 F.2d 397 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977); *U.S. v. Fernandez,* 497 F.2d 730 (9th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975); *U.S. v. Cifarelli,* 401 F.2d 512 (2d Cir.), *cert. denied,* 393 U.S. 987 (1968).

Evidence of defendant's need for money has been properly admitted in theft and robbery cases. *U.S. v. Seastrunk,* 580 F.2d 800 (5th Cir. 1978), *cert. denied,* 439 U.S. 1080 (1979); *U.S. v. Parker,* 549 F.2d 1217 (9th Cir.), *cert. denied,* 430 U.S. 971 (1977). Evidence of defendant's involvement in a grand jury investigation

was held properly admitted to prove his motive to intimidate a grand jury witness. *U.S. v. Bradwell,* 388 F.2d 619 (2d Cir.), *cert. denied,* 393 U.S. 867 (1968). And motive evidence has been held properly admitted in false statement cases. *U.S. v. Sackett,* 598 F.2d 739 (2d Cir. 1979); *U.S. v. Stephen,* 569 F.2d 860 (5th Cir. 1978).

Since evidence of motive may rebut as well as support the prosecution's case, a defendant may offer proof of his good motive to contradict suggestions that his motives were bad. *May v. U.S.,* 175 F.2d 994, 1009 (D.C. Cir.), *cert. denied,* 338 U.S. 830 (1949). He may offer both his own statements and evidence of facts and circumstances tending to show the nonexistence of the motive alleged. *U.S. v. Brown,* 411 F.2d 1134 (10th Cir. 1969); *May v. U.S.,* 175 F.2d at 1009; *Haigler v. U.S.,* 172 F.2d 986, 987 (10th Cir. 1949).

CHAPTER XII
DEMONSTRATIVE EVIDENCE

Demonstrative evidence is that class of proof requiring authentication before it may be admitted. It includes documents, records, recordings, photographs, and duplicates, as well as many items, not evidence in themselves, but used to illustrate, clarify, simplify, or emphasize testimony, such as charts, graphs, and summaries.

A. AUDIO AND VIDEO RECORDINGS

1. AUDIO RECORDINGS

Admission of evidence of recordings of conversations between a defendant and a government informant, electronically monitored with the consent of the informant, violates no fourth amendment right of an accused, *U.S. v. White,* 401 U.S. 745 (1971); *U.S. v. Hodge,* 594 F.2d 1163 (7th Cir. 1979); nor is the use of such evidence limited to corroboration of the informant's testimony, *U.S. v. Bonanno,* 487 F.2d 654 (2d Cir. 1973). However, a proper foundation must be laid for the introduction of relevant, recorded conversations. The Eighth Circuit has held that this foundation should include a showing:

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made on the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

U.S. v. McMillan, 508 F.2d 101, 104 (8th Cir.), *cert. denied,* 421 U.S. 916 (1975); *U.S. v. Brown,* 604 F.2d 557 (8th Cir. 1979).

The burden is on the offering party to produce clear and convincing evidence of the accuracy, authenticity, and trustworthiness of sound recordings. *U.S. v. Blakey,* 607 F.2d 779 (7th Cir. 1979); *U.S. v. King,* 587 F.2d 956 (9th Cir. 1978). A complaint of inaudibility is addressed to the sound discretion of the court. Tapes that are partially unintelligible are admissible unless those portions are so substantial as to render the recording as a whole untrustworthy. *U.S. v. Llinas,* 603 F.2d 506 (5th Cir. 1979).

A composite tape of selected conversations made from accurate duplicate copies may be played at trial. *U.S. v. Denton,* 556 F.2d 811 (6th Cir. 1977). Tapes of recorded conversations containing references to extraneous subjects may be

carefully constructed from the master tape. *U.S. v. Anderson,* 577 F.2d 258 (5th Cir. 1978). Irrelevant matter should be deleted, and the method of trial tape construction preserved as a foundation for the admissibility of the trial tapes. Composite tapes of representative conversations fall within the same principle. Trial courts may order the deletion of obscene language. *U.S. v. DiMuro,* 540 F.2d 503 (1st Cir. 1976). Evidence of the accuracy and authenticity of all tapes that the government proposes to use in trial must be offered along with a showing that the defendant was afforded a reasonable pretrial opportunity to examine and compare the master and the trial tapes. *U.S. v. Denton, supra.* Sufficient copies of any transcripts should be available and provided for each juror and defendant, and all counsel and concerned court personnel.

Verbatim transcripts of tape recorded conversations are prepared either from the original tape or an exact copy, made to protect the integrity of the master tape. While the circuits generally agree that a defendant may submit a transcript of his version of a recorded conversation and that trial courts are not obligated to conduct *in camera* hearings to determine the accuracy of transcripts (although the Tenth Circuit does recommend such a hearing absent a stipulation as to accuracy, *U.S. v. Watson,* 594 F.2d 1330 (10th Cir. 1979)), there is disagreement as to the admissibility of the transcript in evidence. The Fifth Circuit's position is that a transcript is more than an aid to the jury in understanding the recorded conversations; and transcripts offered by the government or the defendant are to be received for the limited purpose of identifying the speakers. *U.S. v. Onori,* 535 F.2d 938 (5th Cir. 1976). The Second and Sixth Circuits, however, agree that, although they may be read by the jury while the tapes are played in open court, transcripts are not admissible unless there is a stipulation that they are accurate. *U.S. v. Chiarizio,* 525 F.2d 289 (2d Cir. 1975); *U.S. v. Smith,* 537 F.2d 862 (6th Cir. 1976). *But see U.S. v. Smith,* 584 F.2d 759 (6th Cir.), *cert. denied,* 441 U.S. 922 (1979). The First and Ninth Circuits agree that only the tapes are admissible and that transcripts considered accurate by the trial court simply aid the jury in understanding the recordings. *U.S. v. Richman,* 600 F.2d 286 (1st Cir. 1979); *U.S. v. Rinn,* 586 F.2d 113 (9th Cir.), *cert. denied,* 441 U.S. 931 (1979).

2. VIDEO RECORDINGS

The investigative technique of videotaping the conduct of one who subsequently becomes a defendant presents only a proper foundation question. Once an adequate foundation has been laid through the testimony of agents who observed the activity, videotapes may be received in evidence and played for the jury. *U.S. v. Medina-Herrera,* 606 F.2d 770 (7th Cir. 1979). There is no requirement, however, that the admitted video recordings be played, unless the defense demands that the jury see and hear what the tapes contain. A defendant cannot complain successfully if he fails to request a viewing. *U.S. v. Taylor,* 612 F.2d 1272, 1276 (10th Cir. 1980). Videotapes containing references to other, prior crimes are subject to editing because of the prejudicial impact of such comments, unless such crimes are relevant to the issue of intent. *U.S. v. Childs,* 598 F.2d 169 (D.C. Cir. 1979). In a prosecution for failing to file income tax returns, use of a videotape of a television "talk show" on which defendant appeared was held to be prejudicial error where other show participants emphasized defendant's own lack of belief in his arguments about the unlawfulness of income taxes and predicted his conviction and confinement. *U.S. v. Schiff,* 612 F.2d 73 (2d Cir. 1979).

Videotapes that are made from a position which prevents the recording of voices or the substance of a defendant's conversation with an agent need not be made available to the defense before trial if there is no factual dispute about what was or was not recorded. *U.S. v. Underwood,* 577 F.2d 157 (1st Cir. 1978). Release to news media of copies of videotaped encounters between a defendant and an undercover agent, while disapproved, was not reversible error where the tapes had been shown to the jury and the defense was entrapment. *U.S. v. Alberico,* 604 F.2d 1315 (10th Cir.), *cert. denied,* 100 S. Ct. 524 (1980).

A videotaped deposition "supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm." *U.S. v. Benfield,* 593 F.2d 815, 821 (8th Cir. 1979) (defendant monitored the deposition of an alleged kidnapped victim who was kept unaware of defendant's presence in the building; the victim deponent was cross-examined by defense counsel).

Motion pictures are admissible in evidence if they are based upon evidence of accuracy and fairness. *Sanchez v. The Denver & Rio Grande Western Railroad Company,* 538 F.2d 304 (10th Cir.), *cert. denied,* 429 U.S. 1042 (1976). Movies purporting to represent the reenactment of an event are cautiously scrutinized for detail and may be accepted or rejected in the sole and sound discretion of the court. *Wagner v. International Harvester Company,* 611 F.2d 224 (8th Cir. 1979); *Johnson v. William C. Ellis and Sons, Iron Works, Inc.,* 604 F.2d 950 (5th Cir. 1979).

B. PHOTOGRAPHS

Photographs are admissible as graphic portrayals of oral testimony. Typically, a witness must testify that the photograph or moving picture correctly and accurately represents facts observed by the witness. *Mikus v. U.S.,* 433 F.2d 719 (2d Cir. 1970). However, if direct testimony as to foundation matters is absent, the contents of the photographs themselves, together with other circumstantial or indirect evidence, may serve to explain and authenticate a photograph sufficiently to justify its admission. *U.S. v. Stearns,* 550 F.2d 1167 (9th Cir. 1977); *U.S. v. Taylor,* 530 F.2d 639 (5th Cir. 1976). A photograph may be enlarged without affecting its admissibility. *U.S. v. Parhms,* 424 F.2d 152 (9th Cir.), *cert. denied,* 400 U.S. 846 (1970); *U.S. v. Nolan,* 416 F.2d 588 (10th Cir.), *cert. denied,* 396 U.S. 912 (1969).

C. SUMMARY CHARTS

Summary charts used to illustrate testimonial and documentary evidence may be essential to jury understanding in cases involving numerous items of evidence. Rule 1006 of the Federal Rules of Evidence provides for their use when a case involves "voluminous writings, recordings, or photographs which cannot conveniently be examined in court ...."

A summary chart may be based on testimony of witnesses or on documents which have been admitted into evidence or which are admissible. *U.S. v. Johnson,* 594 F.2d 1253 (9th Cir.), *cert. denied,* 100 S. Ct. 106 (1980); *U.S. v. Moody,* 339 F.2d 161 (6th Cir. 1964). Before adoption of Rule 1006, summarized documents had to have been already admitted into evidence; and juries were instructed that the documents, not the summary chart, constituted the evidence. The summary chart was only an aid to jury understanding of the documents. *Holland v. U.S.,* 348 U.S. 121 (1954); *Gordon v. U.S.,* 438 F.2d 858, 876-877 (5th Cir. 1971). However, Rule 1006 provides that the summary chart may be admitted into evidence in lieu of voluminous documents. *See U.S. v. Smyth,* 556 F.2d 1179 (5th Cir. 1977). *But see U.S. v. Foshee,* 606 F.2d 111, 113 (5th Cir. 1979), *cert. denied,*

100 S. Ct. 1036 (1980). Rule 1006 requires only that the summary chart be based on admissible documents that have previously been made available to the defendant at a reasonable time and place. A foundation for the admission of a chart or summary can be laid through the testimony of the witness who supervised the preparation of the exhibit. *U.S. v. Scales,* 594 F.2d 558 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979); *U.S. v. Mortimer,* 118 F.2d 266, 269 (2d Cir. 1941).

Summary charts must, of course, be accurate. They must fairly and accurately reflect the contents of the documents or testimony upon which they are based. *Holland v. U.S., supra; U.S. v. Conlin,* 551 F.2d 534 (2d Cir. 1977). There is, however, no requirement that a prosecution summary chart include the defendant's version of the facts. *U.S. v. Ambrosiani,* 610 F.2d 65 (1st Cir. 1979); *Myers v. U.S.,* 356 F.2d 469 (5th Cir.), *cert. denied,* 384 U.S. 952 (1966). However, they may not go beyond an objective summarization of the evidence. *See U.S. v. Kiamie,* 258 F.2d 924 (2d Cir.), *cert. denied,* 358 U.S. 909 (1958); *Elder v. U.S.,* 213 F.2d 876 (5th Cir.), *cert. denied,* 348 U.S. 901 (1954).

Rule 1008(c) of the Federal Rules of Evidence suggests that it is the function of the trier of the fact, rather than the court, to pass upon the accuracy of summary charts. However, it has been held that the use and admissibility of summary charts is a matter within the sound discretion of the trial court. *U.S. v. Johnson,* 319 U.S. 503 (1943); *U.S. v. Collins,* 596 F.2d 166 (6th Cir. 1979); *U.S. v. Honea,* 556 F.2d 906 (8th Cir. 1977); *U.S. v. Diez,* 515 F.2d 892 (5th Cir. 1975) (summaries themselves do not constitute the evidence on the case). The trial court should carefully examine summary charts and their underlying documents, out of the presence of the jury, to determine that everything contained therein is supported by admissible evidence. *U.S. v. Bartone,* 400 F.2d 459, 461 (6th Cir. 1968). But a voir dire by a defendant on the accuracy of a summary chart is not required where the chart is straight forward and its basis in the evidence is clear. *U.S. v. Collins, supra.*

Rule 16 of the Federal Rules of Criminal Procedure requires that the government show the defense any documents it plans to use at trial, and this includes summary charts. Rule 1006 of the Federal Rules of Evidence also requires the government to show the defense all documents upon which a summary chart is based. This disclosure must be made far enough in advance of trial to allow the defense to prepare cross-examination and/or its own summary chart.

If a defendant fails to object at trial to the use of a summary chart, any error is waived for purposes of appeal. *U.S. v. Miller,* 600 F.2d 498 (5th Cir.), *cert. denied,* 100 S. Ct. 434 (1979); *U.S. v. Brickley,* 426 F.2d 680 (8th Cir. 1970). Objections must be set forth with particularity. *U.S. v. Jalbert,* 504 F.2d 892, 894 (1st Cir. 1974).

The headings and captions of a summary chart must not contain conclusions or assumptions that may take on independent significance. *Holland v. U.S., supra; Watkins v. U.S.,* 287 F.2d 932 (1st Cir. 1961); *Lloyd v. U.S.,* 226 F.2d 9, 17 (5th Cir. 1955). This does not mean, however, that a summary chart must be devoid of assumptions. As the Fifth Circuit held in *U.S. v. Diez,* 515 F.2d 892, 905 (5th Cir. 1975), "the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." Some captions or headings which have been upheld include "Total Net Unreported Income," *U.S. v. Lacob,* 416 F.2d 756 (7th Cir. 1969); "Schedule of Sales, Net Taxable Gains to Peter A. Palori and Amounts Not Reported or Taxable Gain Reported by Others," *U.S. v. Diez,* 515 F.2d 892, 905 (5th Cir. 1975); "falsified data" and "difference between original/false," *U.S. v. Smyth,* 556

F.2d 1179 (5th Cir. 1977).

The trial court should instruct the jury on the nature and use of a summary chart. *Holland v. U.S.,* 348 U.S. 121, 128 (1954); *U.S. v. Foshee,* 606 F.2d 111 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 1036 (1980); *U.S. v. Scales,* 594 F.2d 558 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979); *U.S. v. Diez, supra.* Where the chart is admitted in lieu of voluminous documents, under Rule 1006, the court may instruct the jury that the chart is "evidence." *U.S. v. Smyth,* 556 F.2d 1179, 1184 (5th Cir. 1977). However, where the chart is used to summarize documents and testimony in evidence, it has been held that the jury should be instructed that the summary "chart is not itself evidence but only an aid in evaluating the evidence." *U.S. v. Scales,* 594 F.2d at 564.

Summary charts are not limited to summarizing documents. Testimonial evidence may be summarized. *Epstein v. U.S.,* 246 F.2d 563, 570 (6th Cir. 1957) *cert. denied,* 355 U.S. 868. A chart has been permitted to summarize government witness' review of 3,000 intercepted phone calls concluding that the gross revenue of a gambling operation exceeded $2,000 a day. *U.S. v. Clements,* 588 F.2d 1030 (5th Cir.), *cert. denied,* 440 U.S. 982 (1979). A chart has been used to summarize computer printouts. *U.S. v. Smyth,* 556 F.2d 1179 (5th Cir. 1977). Even the absence of records may be summarized. *U.S. v. Scales,* 594 F.2d at 562.

D. MODELS, OVERLAYS, AND EXPERIMENTS

1. MODELS

Considerations applicable to the admission of photographs, motion pictures, charts, and other forms of demonstrative evidence are equally applicable to scale models. A proper foundation must be laid and the substantial exactness of the model must be established before it may be used to compliment the testimony of a witness. Display and use in trial of models of homemade time bombs and molotov cocktails, constructed and explained by the government's principal investigator, are proper. *U.S. v. Curtis,* 520 F.2d 1300 (15th Cir. 1975). The trial court may, at its discretion, receive a model in evidence. The standard of review is abuse of discretion. *Gaspard v. Diamond M. Drilling Company,* 593 F.2d 605 (5th Cir. 1979) (refusal to admit into evidence a model of the crew boat stairway on which a fall occurred).

2. OVERLAYS

Photographic or transparent, individual colored overlays affixed to diagrams or charts, designed to illustrate differences and used for comparison purposes, are acceptable demonstrative evidence techniques. *U.S. v. Saniti,* 604 F.2d 603 (9th Cir.), *cert. denied,* 100 S. Ct. 461 (1979); *Baker v. Elcona Homes Corporation,* 588 F.2d 551 (6th Cir. 1978), *cert. denied,* 441 U.S. 933 (1979). Only considerations of confusion or misleading the jury properly prevent the use of such materials. Rule 403, Fed. R. Evid.

3. EXPERIMENTS

Experimental evidence is an attempt to replicate some part of an incident in issue. Both testimony about out-of-court experiments and scientific tests conducted in court, if relevant, are admissible to illustrate and clarify opinions of expert witnesses. *Midwestern Wholesale Drug, Inc. v. Gas Service Co.,* 442 F.2d

663 (10th Cir. 1971). Perfect identity between test and actual conditions is not required. Dissimilarities affect the weight of the evidence not its admissibility. *Ramseyer v. General Motors Corporation,* 417 F.2d 859 (8th Cir. 1969). Since an experiment is staged, it is subject to manipulation. Thus, even though the experimental evidence is relevant, it may be excluded if its probative worth is overborne by dangers of confusing the issues, lack of reliability, unnecessary delay, or undue prejudice. Rules 401 and 403, Fed. R. Evid.

The Sixth Circuit has fashioned a rule limiting a prosecutor's right to require in-court experiments of a testifying defendant. While a criminal defendant may be required in the presence of the jury to write a specific message, his fair trial right is violated if he is required "to perform acts which would unjustly prejudice him. This would be true in a case in which the requested performance or demonstration would unjustly humiliate or degrade the defendant or in a case in which such performance would be damaging to the defendant's image and irrelevant to the issue on trial." *U.S. v. Doremus,* 414 F.2d 252, 253-254 (6th Cir. 1969). The Fifth Circuit approved denying defense counsel the opportunity to test a law enforcement officer's ability to detect the smell of marijuana by offering to him packets of marjoram, tarragon, basil, oregano, and moloheia, some of which were mixed with marijuana. *U.S. v. Cantu,* 555 F.2d 1327 (5th Cir. 1977). The Fourth Circuit follows a "substantially same" rule and approved refusal to permit courtroom reenactment of a fire on a model of a railroad yard where tubing used to represent drainage pipes was not to scale. *Burriss v. Texaco, Inc.,* 361 F.2d 169 (4th Cir. 1966).

E. COMPUTER RECORDS

A sufficient showing of reliability of computer recording procedures generally assures the admissibility of printouts when they are relevant and not subject to a hearsay objection. The Second Circuit, however, cautions that a defendant is entitled to know "what operations the computer has been instructed to perform and to have the precise instruction that had been given ... a reasonable time before trial." *U.S. v. Dioguardi,* 428 F.2d 1033, 1038 (2d Cir.), *cert. denied,* 400 U.S. 825 (1970). The Seventh Circuit has approved the following showings as a means of establishing the reliability of computer printouts:

> (1) what the input procedures were, (2) that the input and printouts were accurate within two percent, (3) that the computer was tested for internal programming errors on a monthly basis, and (4) that the printouts were made, maintained and relied on by the agency in the ordinary course of its business activities.

U.S. v. Weatherspoon, 581 F.2d 595, 598 (7th Cir. 1978).

Computer printouts may be used as summaries of original and forged billings under such headings as "original data," "falsified data," "falsified data summarized," and "difference between original/false." *U.S. v. Smyth III,* 556 F.2d 1179 (5th Cir. 1977). Computer records maintained by customs officials of license plate numbers of vehicles passing through a border station are within the public records hearsay exception (Rule 803(8), Fed. R. Evid.) and were admissible in a narcotics prosecution as they are not of an adversarial, confrontational nature. *U.S. v. Orozco,* 590 F.2d 789 (9th Cir. 1979); *U.S. v. Cepeda Penes,* 577 F.2d 754 (1st Cir. 1978) (computer records showing that taxes had not been paid for four years were admissible to impeach a testifying defendant). ***But see*** *U.S. v. Ruffin,*

575 F.2d 346, 356 (2d Cir. 1978) (computer data compilations, otherwise admissible as a business or public record, could not be used against an accused).

F. JURY VIEW OF PREMISES

Whether considered as evidence, a jury view of the premises is not a right, and a trial court's decision to grant or deny a view will not be disturbed on appeal in the absence of abuse of discretion. *U.S. v. Bryant,* 563 F.2d 1227, 1230 (5th Cir. 1977); *U.S. v. Lopez,* 475 F.2d 537, 541 (7th Cir.), *cert. denied,* 414 U.S. 839 (1973); *Hughes v. U.S.,* 377 F.2d 515, 516 (9th Cir. 1967); *Virgin Islands v. Taylor,* 375 F.2d 771 (3d Cir. 1967). Considerations in determining whether such a view should be granted are (1) relevance to issues in the trial, (2) time required for a view, (3) territorial limitations, (4) supervision and conduct of the jury, and (5) changes in surrounding physical appearance of premises since the event in issue. Uncertainty in such factors has been held to diminish the value of inspecting premises. *U.S. v. Lopez,* 475 F.2d at 541; *Hughes v. U.S.,* 377 F.2d at 516; *U.S. v. Pinna,* 229 F.2d 216, 219 (7th Cir. 1956); *U.S. v. Pagano,* 207 F.2d 884, 885 (2d Cir. 1953). Photographs may be substituted should the jury need to know how a location appears. *U.S. v. Pagano, supra.*

The Supreme Court has held that the absence of the defendant from a view of the premises is not a denial of due process. *Snyder v. Massachusetts,* 291 U.S. 97 (1934). In *Burke v. U.S.,* 247 F. Supp. 418, 420 (D. Mass. 1965), *aff'd,* 358 F.2d 307 (1st Cir.), *cert. denied,* 384 U.S. 981 (1966), the court held that the trip to and from a view is not a "stage of the trial" for purposes of Rule 43 of the Federal Rules of Criminal Procedure.

CHAPTER XIII
DOCUMENTARY EVIDENCE

A. AUTHENTICATION AND ADMISSIBILITY

Authentication, or identification, is a precondition to establishing the relevancy of documentary evidence. The proponent must lay the proper foundation for admission of such evidence—he must offer evidence to show that the document in question is what he claims it is. Without such a foundation, the relevancy of the document cannot be established and it is, therefore, inadmissible. *See* Rule 402, Fed. R. Evid.

The procedure for authenticating or identifying documentary evidence is specifically addressed in Rules 901 and 902. Rule 901(a) requires that, for authentication, there must be "evidence sufficient to support a finding that the matter in question is what its proponent claims." This standard is identical to and is based upon that contained in Rule 104(b), the general rule for admission of evidence whose relevancy is conditioned on the fulfillment of a condition of fact. "[T]he traditional justifications for erecting a preliminary condition of fact for admission of writings—possibility of fraud, mistaken attribution, and jury credulity—still militate in favor of explicitly recognizing the special problems of authentication and identification." 5 J. Weinstein and M. Berger, *Commentary on Rules of Evidence*, para. 901(a) [02] at 901-19 (1978). Rule 901(b) enumerates, by way of illustration, examples of authentication or identification which conform to this general rule. Rule 901(b) does not purport to set forth the exclusive means of authenticating documentary evidence. Rule 902 sets out the specific instances where documentary evidence is self-authenticating, *i.e.*, where the evidence is admissible without any extrinsic evidence to show that the writing is what the proponent claims it to be.

Rule 901(a) only requires that the proponent offer evidence sufficient to support a finding of genuineness. Once this prima facie showing is made the document in question is admitted; however, the fact finder then is free, after considering all the evidence offered on the issue, either to rely on or disregard the document. If the evidence offered on authentication or identification does not rise to a prima facie level, the court will not admit the document in question. *See U.S. v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979); *In Re James E. Long Construction Co., Inc.*, 557 F.2d 1039 (4th Cir. 1977); *U.S. v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976).

Proponents should recognize that some courts may apply Rule 403 more rigorously when real evidence, as opposed to testimonial evidence, is involved since real evidence has more potential impact on a jury. Moreover, compliance with the requirement of authentication does not assure admission of an item into evidence. Hearsay, best evidence, and other rules must also be satisfied.

From a practical standpoint, it should always be remembered that the problems of authentication or identification can often be avoided by stipulation or admission.

1. OFFICIAL DOCUMENTS

Subparagraphs (1) through (5) of Rule 902 provide for the admissibility of a whole range of public or official documents and records without extrinsic evidence to establish authenticity. The rule sets forth the requirements for admission of domestic public documents under seal, domestic public documents not under seal, foreign public documents, certified copies of public records, and official publications.

While Rule 902 permits the authentication of numerous public documents or records without the use of extrinsic evidence, there may still be instances where resort to another statute or rule will be necessary or helpful to authenticate a specific official document: Rule 27, Fed. R. Crim. P. (incorporates by reference Rule 44, Fed. R. Civ. P. (proof of official record)); 28 U.S.C. §753(b) (authentication of records or proceedings by court reporters); 28 U.S.C. §1736 (authentication of Congressional journals); 28 U.S.C. §1738 (authentication of state and territorial statutes and judicial proceedings); 28 U.S.C. §1739 (authentication of state and territorial non-judicial records kept in public offices); 28 U.S.C. §1740 (authentication of consular papers); and 28 U.S.C. §1741 and 18 U.S.C. §§3491-3496 (authentication of foreign documents). These and other statutes and rules covering authentication of various writings are still in force. The Federal Rules of Evidence are not intended to abrogate them.

Subparagraphs (1) and (2) of Rule 902 provide that domestic public documents, bearing either a public seal and a signature purporting to be an attestation or execution or an official signature certified by an officer who has a seal, are self-authenticating. In addition, Rule 902(3) provides that copies of public records are self-authenticating when they bear a certificate complying with paragraphs (1) or (2). *See also* Rule 44, Fed. R. Civ. P.

Rule 803(10) of the Federal Rules of Evidence and Rule 44(b) of the Federal Rules of Civil Procedure provide an equally convenient way to prove the absence of a specified record or entry. A written statement to the effect that no record or entry has been found to exist after diligent search of designated records will suffice. The statement, however, must itself be authenticated in the same manner as is required for the record or entry if it had been found. *See U.S. v. Lee,* 589 F.2d 980, 987 (9th Cir. 1979), *cert. denied,* 100 S. Ct. 460 (1979) (affidavits of CIA officials reciting that search of CIA records failed to reveal defendant's employment); *U.S. v. Harris,* 551 F.2d 621 (5th Cir.), *cert. denied,* 434 U.S. 836 (1977) (authenticated certificate stating that defendant had not been granted a license to engage in the business as firearms dealer, despite fact that such certificate did not state diligent search of records had been made); *Hollingsworth v. U.S.,* 321 F.2d 342, 352 (10th Cir. 1963) (statement thus authenticated held admissible to prove the defendant did not file a declaration of intent to make a firearm); *U.S. v. Farris,* 517 F.2d 226, 227 (7th Cir.), *cert. denied,* 423 U.S. 892 (1975) (computer printout showing tax return not filed).

If an official document is not self-authenticating under Rule 902 and cannot be authenticated by employing one of the other methods mentioned in the preceding paragraph, resort to Rule 901(b)(7) should be considered. Under this

rule, one means of authenticating a writing to meet the requirements of Rule 901(a) is to show evidence that the writing is authorized by law to be recorded or filed and in fact is recorded or filed in a public office, or the writing is a purported public record, report, statement, or data compilation, in any form, and is from the public office where items of this nature are kept. *See U.S. v. Davis,* 571 F.2d 1354, 1356-1357 (5th Cir. 1978), where certain documents were found not to have been properly authenticated as public records or reports.

Certified copies of income tax returns and computer printouts of tax information are admissible when properly introduced in compliance with Rule 902(4). *U.S. v. Farris,* 517 F.2d at 227-228; *Stillman v. U.S.,* 177 F.2d 607, 617 (9th Cir. 1949).

2. PRIVATE OR NONOFFICIAL DOCUMENTS

Before private or nonofficial documents may be admitted into evidence, they must be properly authenticated or identified. Rule 901(b)(1) provides that this can be accomplished through the testimony of a witness with knowledge that the matter in question is what it is claimed to be. This rule has been the subject of broad interpretation as was intended. *See* Advisory Committee's Note. Witnesses with knowledge include those who actually write the document in question, *In re Taylor,* 7 F. Supp. 592 (W.D.N.Y. 1934), observed its execution or use in a transaction or otherwise, or acquired familiarity with it in general, *U.S. v. Helberg,* 565 F.2d 993 (8th Cir. 1977); *U.S. v. Levine,* 546 F.2d 658 (5th Cir. 1977); *Jennings v. U.S.,* 73 F.2d 470 (5th Cir. 1934), or were exposed to the document in connection with their work, *U.S. v. Rosenstein,* 474 F.2d 705 (2d Cir. 1973). The possible applications of this rule are almost limitless. *See U.S. v. Gallagher,* 576 F.2d 1028 (3d Cir. 1978); *U.S. v. Rochan,* 563 F.2d 1246 (5th Cir. 1977); *U.S. v. Richardson,* 562 F.2d 476 (7th Cir. 1977), *cert. denied,* 434 U.S. 1072 (1978).

However, even substantial contact with certain documents does not necessarily mean that a witness has the requisite knowledge required for authentication. In *Lipscomb v. U.S.,* 33 F.2d 33 (8th Cir. 1929), the defendant sought to introduce, upon his own testimony, a sheet of paper bearing his signature, allegedly taken from a hotel register, to prove that he was in a different city on the day of the crime. The court held the sheet inadmissible, *id.* at 36, saying:

> [I]t is first necessary to have the register identified by one who had it in custody and knew something about the entries made thereon. After it has been so identified as the register regularly kept in the hotel at the time it purports to cover, then the signature thereon can be identified.

When no one can directly identify the document, it may be satisfactorily identified by circumstantial evidence. *U.S. v. Natale,* 526 F.2d 1160, 1172-1173 (2d Cir. 1975); *U.S. v. King,* 472 F.2d 1 (9th Cir.), *cert. denied,* 414 U.S. 864 (1973). In *U.S. v. Imperial Chemical Industries, Ltd.,* 100 F. Supp. 504, 513 (S.D.N.Y. 1951), the court admitted unsigned declarations from the files of defendants. *See Morgan v. U.S.,* 149 F.2d 185 (5th Cir.), *cert. denied,* 326 U.S. 731 (1945) (fact that document was a memorandum sent by defendant to rationing board shown by circumstantial evidence). *See also U.S. v. Stearns,* 550 F.2d 1167 (9th Cir. 1977).

Where a document is alleged to be of a particular origin, authorship must be proved. Thus, the mere fact that a letter is signed in the name of the dfendant is not enough to prove that the defendant signed it. *Summers v. McDermott,* 138

F.2d 338 (3d Cir. 1943) (unauthenticated checks rightly excluded where drawer of checks not produced and signatures not identified); *Nicola v. U.S.*, 72 F.2d 780, 783 (3d Cir. 1934).

Even if documents are unsigned, however, their admissibility as documents executed by the defendant may still be shown. *See U.S. v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *U.S. v. Sutton*, 426 F.2d 1202 (D.C. Cir. 1969) (defendant's authorship of unsigned notes held sufficiently proved by circumstantial evidence; lengthy discussion of the point).

Rule 901(b)(2) and Rule 901(b)(3) provide that a document may be authenticated by nonexpert opinions as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation, or by comparison by the trier of fact or by expert witnesses with authenticated specimens. Thus, in the latter situation, the trier of fact is faced with deciding the authenticity of both the document in question and the specimen. The jury may make a handwriting comparison without the aid of expert testimony, and may even reach a conclusion contrary to that of an expert. *Stokes v. U.S.*, 157 U.S. 187, 193-194 (1895); *Strauss v. U.S.*, 311 F.2d 926, 932 (5th Cir.), *cert. denied*, 373 U.S. 910 (1963); *In re Goldberg*, 91 F.2d 996, 997 (2d Cir. 1937). *Cf. U.S. v. Mota*, 598 F.2d 995, 999 (5th Cir. 1979).

When a witness is identifying a document, he should not testify concerning the contents of the documents before it is admitted into evidence.

3. DOCUMENTS CONTAINING INADMISSIBLE MATERIAL

Generally, an admissible document is not rendered inadmissible because it contains some incompetent matter, *Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Baltimore & O.R. v. Felgenhauer*, 168 F.2d 12, 17 (8th Cir. 1948); unless that matter constitutes most of the document, *England v. U.S.*, 174 F.2d 466, 469 (5th Cir. 1949); *Olson v. Kilstofte & Vosejpka, Inc.*, 327 F. Supp. 583 (D. Minn. 1971), *aff'd*, 456 F.2d 1299 (8th Cir. 1972).

In handling such problems, consider Rule 106:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

See Worden v. Tri State Ins. Co., 347 F.2d 336, 341 (10th Cir. 1965); *U.S. v. Corrigan*, 168 F.2d 641, 645 (2d Cir. 1948). But only so much of the balance as is relevant and sheds light on the part already in evidence may be introduced. *U.S. v. Dennis*, 183 F.2d 201, 229-230 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). There is no rule that, once any part is admitted, the entire document must be received. *Camps v. N.Y.C. Transit Authority*, 261 F.2d 320, 322 (2d Cir. 1958). A limiting instruction may be necessary with respect to portions of the document received for background and not for the truth of the matter stated. *See U.S. v. Bohle*, 445 F.2d 54, 66 (7th Cir. 1971).

B. BEST EVIDENCE RULE

Where the contents of a writing are in issue, secondary evidence of the contents is inadmissible under the "best evidence rule" which requires production

of the original document in the absence of a satisfactory explanation for nonproduction. The rule seeks to protect against the inherent risk of inaccurate proof of a writing's contents through erroneous reproduction of the original or erroneous testimony of a witness who purports to recollect its contents. The "best evidence rule" is now codified in Rule 1002 which provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." *See U.S. v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); *U.S. v. Winkle*, 587 F.2d 705, 712 (5th Cir.), *cert. denied*, 100 S. Ct. 51 (1979).

Pursuant to Rule 1003, a duplicate as defined by Rule 1001(4) is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original. Rule 1001(3) specifies that an original includes "any counterpart intended to have the same effect by a person executing or issuing it." The Advisory Committee's Note states that a "carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer." The note also states that what is an original for some purposes may be a duplicate for others: "Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate." *See U.S. v. Rangel*, 585 F.2d 344 (8th Cir. 1978); *U.S. v. Morgan*, 555 F.2d 238, 243 (1977). A uniform act making regularly kept photographic copies of business and public records admissible without accounting for the original records has been incorporated as an amendment to the Federal Business Records Act, 28 U.S.C. §1732. Section 1732 provides for the admission of copies made in the ordinary course of business. *See U.S. v. Parker*, 491 F.2d 517 (1973), *cert. denied*, 416 U.S. 989 (1974); *U.S. v. Jones*, 392 F.2d 567 (4th Cir.), *cert. denied*, 393 U.S. 882 (1968).

1. EXCEPTIONS

The best evidence rule, as applied generally in federal courts, is limited to cases where the contents of a writing are to be proved. The rule is not applicable in those cases where the recorded transaction is not regarded by the law as essentially a written transaction. *U.S. v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1976) (content of tape recordings was not a factual issue and recordings should have been introduced); *U.S. v. Duffy*, 454 F.2d 809, 811-812 (5th Cir. 1972) (testimony that a shirt bore a certain laundry mark was admissible without producing the shirt); *Rice v. U.S.*, 411 F.2d 485, 486-87 (8th Cir. 1969); *Burney v. U.S.*, 339 F.2d 91, 94 (5th Cir. 1964); *Meyers v. U.S.*, 171 F.2d 800, 812-813 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 912 (1949) (oral evidence of former testimony before a congressional committee was received, even though it had been taken down and embodied in a formal transcript); *Herzig v. Swift & Co.*, 146 F.2d 444, 445-46 (2d Cir. 1945), *cert. denied*, 328 U.S. 849 (1946) (amount of earnings was provable without producing books of account); *U.S. v. Kushner*, 135 F.2d 668, 674 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943) (not necessary to show written bank record of withdrawal to prove that witness withdrew money from bank).

Also, it is possible, without producing the books or records, to introduce testimonial evidence that the books or records do not contain any entry of a particular character. Such negative evidence is ordinarily deemed not to be

testifying to the contents of the records and not to require their production. *U.S. v. Scales*, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979); *U.S. v. Prevatt*, 526 F.2d 400 (5th Cir. 1974); *U.S. v. Allen*, 522 F.2d 1229 (6th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); *Christoffel v. U.S.*, 200 F.2d 734, 740-41 (D.C. Cir. 1952), *vacated on other grounds*, 345 U.S. 947 (1953) (written statement by custodian of public records, that search of his office disclosed no particular entry in the record books, was admitted as evidence that no such record was ever made); *Darby v. U.S.*, 132 F.2d 928, 929 (5th Cir. 1943) (summary of records permitted even though records were required to be kept by the Fair Labor Standards Act, where originals were inaccessible under fourth amendment); *Paschen v. U.S.*, 70 F.2d 491, 501 (7th Cir. 1934).

2. ADMISSION OF SECONDARY EVIDENCE

Apart from Rule 1003, concerning the admissibility of duplicates, the rule governing admissibility of secondary evidence concerning content of a writing, recording, or photograph is Rule 1004, which allows admissions where the original is not available for any of several reasons or where only collateral matters are involved. Even though the fact of loss or destruction may excuse production of the original, however, authentication is still required under Rules 901 and 902. *U.S. v. Gerhart*, 538 F.2d 807 (8th Cir. 1976); *U.S. v. Savage*, 482 F.2d 1371 (9th Cir.), *cert. denied*, 415 U.S. 932 (1973); *Hass v. U.S.*, 93 F.2d 427, 437 (8th Cir. 1937); *Carey v. Williams*, 79 F. 906 (2d Cir. 1897). Moreover, when "other evidence" is proffered, its competency must be considered in light of the requirements contained in Rules 1003 and 1004. *Klein v. Frank*, 534 F.2d 1104 (5th Cir. 1976) (testimony concerning the contents of a lost letter was insufficient to authenticate the letter).

Under Rule 1008, preliminary questions related to the admissibility of "other evidence" about the contents of a writing, such as those presented by Rule 1004, are for the court, except where those fact questions are not merely preliminary but are themselves in issue, in which case the question or questions are for the jury, subject to general control by the court.

Loss or destruction may sometimes be provable by direct evidence. More often, however, the only available method is circumstantial, usually by proof of search for the document and inability to locate it, the only requirement being that all reasonable avenues of search should be explored to the extent that reasonable diligence under the circumstances would dictate. *U.S. v. Standing Solider*, 538 F.2d 196 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976); *U.S. v. Covello*, 410 F.2d 536 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *Robertson v. M/S Sanyo Maru*, 374 F.2d 463 (5th Cir. 1967) (secondary evidence was inadmissible without showing why the original was not introduced). *See also U.S. v. Winkle*, 587 F.2d 705, 712 (5th Cir.), *cert. denied*, 100 S. Ct. 51 (1979); *Merrill v. U.S.*, 365 F.2d 281 (5th Cir. 1966), *cert. denied*, 386 U.S. 994 (1967) (in Dyer Act prosecution, testimony of witness that defendant's written contract for rental of automobile had been lost was insufficient proof to permit introduction of parole evidence on terms of contract); *Simpson v. U.S.*, 195 F.2d 721 (9th Cir. 1952).

If the original document has been destroyed by the person who offers evidence of its contents, the evidence is not admissible unless such person, by showing that such destruction was accidental or was done in good faith without intention to prevent its use as evidence, rebuts to the satisfaction of the trial judge any inference of fraud. *Reynolds v. Denver & Rio Grande Western R. Co.*, 174 F.2d 673 (10th Cir. 1949); *McDonald v. U.S.*, 89 F.2d 128 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937) (in kidnapping prosecution, government not precluded from giving evidence of the serial numbers on bills after improvidently having them destoryed). *See U.S. v. Patterson*, 446 F.2d 1358 (5th Cir. 1971) (testimony concerning existence of letter was inadmissible where proponent-defendant had not attempted to locate custodian of letter); *U.S. v. Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967) (where witness recorded conversation with defendant and allowed government to make dubbed copy of the tape but retained and ultimately lost the original, government was not at fault and copy was admissible).

Where the originals are unobtainable because they are beyond the jurisdiction of the court, secondary evidence of the nature of their contents is admissible without more. *Burton v. Driggs*, 87 U.S. 125 (1873). *See U.S. v. Marcantoni*, 590 F.2d 1324 (5th Cir.), *cert. denied*, 441 U.S. 937 (1979); *U.S. v. Kaibney*, 155 F.2d 795 (2d Cir. 1946). However, where specific books and records are required by statute for the purpose of proving the matter in issue, testimony thereon in lieu of records themselves is inadmissible. *Bergdoll v. Pollock*, 95 U.S. 337 (1877); *Allen v. W.H.O. Alfalfa Milling Co.*, 272 F.2d 98 (10th Cir. 1959).

There are no clearly defined rules on the types of secondary evidence that may be offered. Copies of the original are better evidence than the recollection of witnesses, but when there are no copies, the recollection of witnesses may be the best secondary evidence. *U.S. v. Marcantoni*, 590 F.2d at 1329 (testimony of police officer concerning serial numbers on money was admissible when bills could not be found); *Kenner v. Commissioner*, 445 F.2d 19 (7th Cir. 1971); *U.S. v. Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963) (testimony of contents of written list admitted without proof of search where list was of little significance and could reasonably have been supposed lost); *U.S. v. Bernard*, 287 F.2d 715 (7th Cir.), *cert. denied*, 366 U.S. 961 (1961); *Wiley v. U.S.*, 257 F.2d 900 (8th Cir. 1958); *Corbett v. U.S.*, 238 F.2d 557 (9th Cir. 1956), *cert. denied*, 352 U.S. 990 (1957) (oral testimony of expert accountants permitted on contents of bank records which had been destroyed in the ordinary course of the bank's business); *Darby v. U.S.*, 132 F.2d 928 (5th Cir. 1943).

CHAPTER XIV
EXAMINATION OF A WITNESS

A. LEADING QUESTIONS

The test of a leading question is whether it so suggests or indicates the particular answer desired "that such a reply is likely to be given irrespective of an actual memory." *U.S. v. McGovern,* 499 F.2d 1140, 1142 (1st Cir. 1974); *U.S. v. Johnson,* 495 F.2d 1097, 1101 (5th Cir. 1974); *U.S. v. Durham,* 319 F.2d 590, 592 (4th Cir. 1963).

Rule 611(c) of the Federal Rules of Evidence provides that leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony, but should be permitted on cross-examination, or with a hostile witness, an adverse party, or a witness identified with an adverse party.

Whether a question is leading depends on the circumstances under which the examination of the witness has been conducted, and the fact that it is a leading question does not necessarily make it objectionable. *See U.S. v. Durham,* 319 F.2d 590 (4th Cir. 1963). Under no circumstances, however, may a material fact in issue properly be assumed in a question asked. But, the mere fact that a question can be answered "yes" or "no" does not necessarily make it leading. *DeWitt v. Skinner,* 232 F. 443 (9th Cir. 1916).

Rule 611(c) states that, ordinarily, leading questions should be permitted on cross-examination. The purpose for which the testimony is offered may also determine the propriety of leading questions. In *U.S. v. Montgomery,* 126 F.2d 151, 153 (3d Cir.), *cert. denied,* 316 U.S. 681 (1942), a rebuttal witness was properly permitted to answer leading questions on direct examination for the purpose of proving a prior contradictory statement of a previous witness. Where new matter has been introduced on cross-examination, there is authority that the witness may be led on redirect with respect to that new matter. In *U.S. v. Stirone,* 168 F. Supp. 490, 500 (W.D. Pa. 1957), *aff'd,* 262 F.2d 571 (3d Cir. 1958), *rev'd on other grounds,* 361 U.S. 212 (1960), the court permitted leading questions where cross examination had elicited new matter in the form of evidence of the defendant's character. *See also* Rule 404(a)(1), Fed. R. Evid. However, if the witness undergoing cross-examination proves to be biased in favor of the cross-examiner, the court may again limit the leading questions put to the witness. *Mitchell v. U.S.,* 213 F.2d 951, 956 (9th Cir. 1954), *cert. denied,* 348 U.S. 912 (1955).

There are four exceptions to the general proposition that leading questions are undesirable on direct examination: (1) the witness is hostile, unwilling, or biased; (2) the witness is a child or an adult with communication problems; (3) the witness' recollection is exhausted; (4) or the questions relate to undisputed preliminary matters. *See* Advisory Committee's Note. And, Rule 611(c) includes a

specific provision authorizing leading questions when a party calls a "hostile witness, an adverse party, or a witness identified with an adverse party."

Whether leading questions will be permitted is generally within the trial court's discretion. *See, e.g., U.S. v. Brown,* 603 F.2d 1022, 1026 (1st Cir. 1979). However, persistence by the prosecutor in asking impermissible, leading questions may be held to be reversible error, and perhaps contempt, *see Locken v. U.S.,* 383 F.2d 340, 341 (5th Cir. 1967), and, excessive use of leading questions to recite to a recalcitrant witness his unsworn oral statements was held to be reversible error in *U.S. v. Shoupe,* 548 F.2d 636 (6th Cir. 1977).

As to children and adults with communication problems, *see Rotolo v. U.S.,* 404 F.2d 316, 317 (5th Cir. 1968) (leading questions were permitted to be asked of a 15-year-old witness who was also nervous and upset), and *U.S. v. Littlewind,* 551 F.2d 244, 245 (8th Cir. 1977).

Where the witness' recollection is exhausted by non-leading questions and he has further information, leading questions may be permitted. *See Thomas v. U.S.,* 227 F.2d 667, 671 (9th Cir.), *cert. denied,* 350 U.S. 911 (1955). *See also* the discussion in *U.S. v. Braunstein,* 474 F. Supp. 1 (D.N.J. 1979). (For other techniques to overcome the problem of the witness with faulty memory, *see* Refreshing Recollection, Rule 612; Recorded Recollection, Rule 803(5); and Impeachment, Rule 607, *infra.*)

There is no requirement that the direct examiner of a witness actually be surprised by the witness' recalcitrance or lack of memory before the use of leading questions may be permitted. *See U.S. v. Long Soldier,* 562 F.2d 601 (9th Cir. 1977).

Finally, where an attorney may lead the witness on preliminary, undisputed matters, he must discontinue such leading when approaching the crucial issues in the case. *U.S. v. Bryant,* 461 F.2d 912, 918 (6th Cir. 1972); *U.S. v. Lewis,* 4606 F.2d 486, 493 (7th Cir.), *cert. denied,* 394 U.S. 1013 (1969).

B. REFRESHING RECOLLECTION

Rule 612 of the Federal Rules of Evidence provides that a witness may use a writing, either while testifying or before testifying, to refresh his memory. If used while testifying or, at the court's discretion, before testifying, the adverse party may have the writing produced, inspected, and may cross-examine from it, and introduce into evidence portions which relate to the witness' testimony. The rule also provides for *in camera* inspection and excision of unrelated portions, as well as sanctions for failure to comply with the rule. The Jencks Act, 18 U.S.C. §3500, may supersede certain applications of Rule 612.

If a witness states in response to a question that he is unable to recall the information requested, he may use any writing or other object, to refresh his memory while testifying on the stand, even if the document or object itself would be inadmissible. *U.S. v. Schwartzbaum,* 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied,* 424 U.S. 942 (1976) (summary of a previous interview used to refresh a witness' recollection on redirect after he had retreated on cross from his direct testimony); *U.S. v. Smith,* 521 F.2d 957, 968 (D.C. Cir. 1975); *U.S. v. Rappy,* 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied,* 329 U.S. 806 (1947). *But see NLRB v. Federal Dairy Co.,* 297 F.2d 487, 489 (1st Cir. 1962) (witness was not permitted to use specially prepared testimonial notes to refresh his memory). The forgetful witness may examine the writing and then, if he says that his recollection is

thereby refreshed, testify on the basis of refreshed recollection. *Id.* at 488. But, before the witness may testify, it must be apparent that his memory actually is refreshed by the writing shown to him. *U.S. v. Riccardi,* 174 F.2d 883, 889 (3d Cir.), *cert. denied,* 337 U.S. 941 (1949).

The initial determination that a witness' need for refreshing material justifies its use and the determination that a witness' recollection actually has been refreshed by the document, are within the discretion of the trial judge. *U.S. v. Conley,* 503 F.2d 520 (8th Cir. 1974). However, the document may not be used to put words into the mouth of the witness. *U.S. v. Faulkner,* 538 F.2d 724, 727 (6th Cir.), *cert. denied,* 429 U.S. 1023 (1976). The witness' recollection must be in need of refreshing, else the use of the prior statement may be considered a pretext for the improper use of inadmissible evidence and constitute reversible error. *U.S. v. Morlang,* 531 F.2d 183, 191 (4th Cir. 1974).

In the following cases documents were successfully used to refresh the recollection of witnesses: *U.S. v. Socony Vacuum Oil Co.,* 310 U.S. 150, 233 (1940) (grand jury minutes properly used to refresh the recollection of a recalcitrant witness); *U.S. v. Landof,* 591 F.2d 36, 39 (9th Cir. 1978); *U.S. v. Cheyenne,* 558 F.2d 902, 904 (8th Cir. 1977), *cert. denied,* 434 U.S. 957 (1977) (FBI agent permitted to testify at trial after previously refreshing his recollection at suppression hearing with memorandum transcribed from notes, where notes had been destroyed pursuant to standard FBI procedure); *U.S. v. Godwin,* 522 F.2d 1135, 1136 (4th Cir. 1975) (FBI agent permitted to refresh his recollection of a stolen vehicle's serial number from an NCIC report); *O'Quinn v. U.S.,* 411 F.2d 78, 79 (10th Cir. 1969) (summaries prepared by government investigators were proper aids to refresh their recollection); *U.S. v. Harris,* 409 F.2d 77, 82 (4th Cir.), *cert. denied,* 396 U.S. 965 (1969) (government witnesses in conspiracy case properly permitted to refer to statements previously given to government and to notes made from witnesses' own records).

A tape recording of telephone conversations, instead of a transcript, has been allowed to refresh a witness' recollection where it was not played within the hearing of the jury, but only listened to by the witness on earphones. *U.S. v. American Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 191 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); *U.S. v. McKeever,* 271 F.2d 669 (2d Cir. 1959). *See also U.S. v. Faulkner,* 538 F.2d 724, 727 (6th Cir.), *cert. denied,* 429 U.S. 1023 (1976). Hypnotically refreshed recollections may also be used in an appropriate case. *U.S. v. Awkard,* 597 F.2d 667 (9th Cir.), *cert. denied,* 100 S. Ct. 179 (1979).

The reliability of the memorandum used to refresh recollection need not be established before the witness is permitted to say whether his recollection is refreshed. *U.S. v. Riccardi,* 174 F.2d 883 (3d Cir.), *cert. denied,* 337 U.S. 941 (1949). The reliability or truthfulness of the memorandum is relevant only to a determination of the weight and credibility to be accorded the witness' testimony. *U.S. v. Jackson,* 451 F.2d 259, 261 (5th Cir. 1971). The memorandum used need not be a contemporaneous account of the events it describes, *Fanelli v. U.S. Gypsum Co.,* 141 F.2d 216 (2d Cir. 1944); and for the purpose of refreshing the witness' recollection, the document itself need not be admitted or even admissible as evidence, *U.S. Faulkner, supra.*

It has been held reversible error, however to read aloud in its entirety the prior disavowed, unsworn statement of a witness in order to refresh his recollection. *U.S. v. Shoupe,* 548 F.2d 636, 643 (6th Cir. 1977). *See U.S. v. Davis,* 551 F.2d 233, 235 (8th Cir.), *cert. denied,* 431 U.S. 923 (1977); *U.S. v. Morlang,*

531 F.2d 183, 190 (4th Cir. 1975); *Goings v. U.S.*, 377 F.2d 753, 759-760 (8th Cir. 1967).

The concept of refreshing a witness' recollection should not be confused with that of "past recollection recorded."

1. INSPECTION OF AN EXHIBIT

When exhibits are used at trial to refresh present recollection of past events, the only evidence is the recollection of the witness; but the exhibit which the witness uses to refresh his recollection at the time of testifying may be seen by opposing counsel and shown to the jury so that they may determine what weight is to be given the testimony of the witness whose memory has been thereby refreshed. *See U.S. v. Smith,* 521 F.2d 957, 968 (D.C. Cir. 1975); *U.S. v. Caserta,* 199 F.2d 905, 909 (3d Cir. 1952); *U.S. v. Rappy,* 157 F.2d 964 (2d Cir. 1946), *cert. denied,* 329 U.S. 806 (1947).

Rule 612 permits the trial judge to order disclosure of documents used by a witness to refresh his recollection either during or prior to taking the stand. This is a significant departure from the preexisting case law, which held that opposing counsel had no right of access to documents consulted by a witness prior to his taking the witness stand. *See Goldman v. U.S.*, 316 U.S. 129, 132 (1942). The rule states, however, that such writings must have been consulted "for the purpose of testifying," if they are to be subject to inspection by opposing counsel. The party seeking the disclosure under Rule 612(2) must, therefore, make some showing that inspection of the writings is "necessary in the interests of justice." *See U.S. v. Nobles,* 422 U.S. 225, 230 (1975), *rev'g U.S. v. Brown,* 501 F.2d 146, 155 (9th Cir. 1974). A court may "enforce a preclusion sanction against a defendant who insists on offering testimony of a witness while resisting disclosure of his prior (and possibly inconsistent) statements and reports." *U.S. v. Smith,* 524 F.2d 1288, 1290 (D.C. Cir. 1975) (citing *Nobles, supra*).

This rule is also explicitly made subject to the provisions of 18 U.S.C. §3500. To the extent that any such writings used to refresh recollection are discoverable pursuant to §3500, therefore, they need not be turned over to the defense until the conclusion of the witness' direct examination. However, the Advisory Committee's Note makes clear that Rule 612, unlike §3500, applies both to writings used by prosecution and defense witnesses.

2. USE ON CROSS-EXAMINATION

Once a witness has had his recollection refreshed, opposing counsel may impeach his recollection on cross-examination. A witness may be confronted with a document and asked whether such document refreshes his recollection. *U.S. v. Baratta,* 397 F.2d 215, 221-222 (2d Cir.), *cert. denied,* 393 U.S. 939 (1968). The document, however, may not be referred to or displayed to the jury or to the witness in the presence of the jury under the guise of refreshing his recollection when in fact it is being used for purposes of impeachment or as substantive evidence. *Eisenberg v. U.S.*, 273 F.2d 127, 131 (5th Cir. 1959).

C. CROSS-EXAMINATION

The purpose of cross-examination is to test the witness' propensity to perceive, remember, and communicate the substance of his direct testimony truthfully. To this end, cross-examination may be used to break down the testimony of the direct examination, to affect the credibility of the witness, or to show bias or motive to lie. *See Davis v. Alaska,* 415 U.S. 308 (1974); *Alford v. U.S.*, 282 U.S. 687 (1931); *U.S. v. Bleckner,* 601 F.2d 382, 385 (9th Cir. 1979); *U.S. v. Vasilios,* 598 F.2d 387, 389 (5th Cir. 1979); *U.S. v. Palmer,* 536 F.2d 1278, 1282 (9th Cir. 1976). If the court calls a witness, the witness is subject to impeachment upon cross-examination by either party. *U.S. v. Browne,* 313 F.2d 197, 199 (2d Cir.), *cert. denied,* 374 U.S. 814 (1963).

Rule 611(b) of the Federal Rules of Evidence provides that cross-examination should be limited to the subject matter of the direct examination, matters affecting the credibility of the witness, and, in the discretion of the court, additional matters as if on direct examination. As the rule indicates, in federal courts it is within the trial judge's discretion to confine the scope of cross-examination to the subject matter of the direct examination. *U.S. v. Jackson,* 576 F.2d 46, 48 (5th Cir. 1978); *U.S. v. Ellison,* 557 F.2d 128, 135 (7th Cir.), *cert. denied,* 434 U.S. 965 (1977); *U.S. v. Ong,* 541 F.2d 331, 341 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). And matters affecting the credibility of witnesses may also be limited by the trial court. *U.S. v. Franklin,* 598 F.2d 954, 958 (5th Cir.), *cert. denied,* 100 S. Ct. 147 (1979); *Skinner v. Cardwell,* 564 F.2d 1381, 1388 (9th Cir.), *cert. denied,* 435 U.S. 1009 (1978); *U.S. v. Turcotte,* 515 F.2d 145, 151 (2d Cir. 1975).

The scope of cross-examination may also be affected by the witness' assertion of a fifth amendment privilege against self-incrimination. *U.S. v. LaRiche,* 549 F.2d 1088, 1096 (6th Cir.), *cert. denied,* 430 U.S. 987 (1977). It is improper to call a witness simply for the purpose of having him invoke the privilege. *U.S. v. Beechum,* 582 F.2d 898, 908 (5th Cir.), *cert. denied,* 440 U.S. 920 (1978); *Skinner v. Cardwell,* 564 F.2d at 1389. Assertion of the privilege may require that the direct testimony be stricken or a curative charge be given to the jury, *U.S. v. Stephens,* 492 F.2d 1367, 1374-1375 (6th Cir. 1974), or, in some circumstances, the declaration of a mistrial, *U.S. v. Demchak,* 545 F.2d 1029, 1031-1032 (5th Cir. 1977).

Although the court's exercise of discretion will not be readily set aside, *U.S. Pacelli,* 521 F.2d 135 (2d Cir. 1975); *U.S. v. Jenkins,* 510 F.2d 495, 500 (2d Cir. 1975), restrictions on a defendant's right of cross-examination may, in certain instances, be deemed violative of his sixth amendment right to confront the witnesses against him. *Davis v. Alaska,* 415 U.S. 308 (1974); *Pointer v. Texas,* 380 U.S. 400 (1965); *U.S. v. Wolfson,* 573 F.2d 216, 223 (5th Cir. 1978); *U.S. v. Callahan,* 551 F.2d 733, 737 (6th Cir. 1977); *U.S. v. Miranda,* 510 F.2d 385, 387 (9th Cir. 1975). Undue restriction of cross-examination, even on matters affecting the witness' credibility, has been deemed violative of the sixth amendment in some cases. *U.S. v. Croucher,* 532 F.2d 1042, 1044-1045 (5th Cir. 1976); *Snyder v. Coiner,* 510 F.2d 224, 225 (4th Cir. 1975).

The rule must not be so strictly applied as to deprive a defendant of the opportunity to present to the jury a vital element of his defense. *U.S. v. Callahan,* 551 F.2d at 737; *U.S. v. Lewis,* 447 F.2d 134, 139 (2d Cir. 1971); *U.S. v. Fitzpatrick,* 437 F.2d 19, 23 (2d Cir. 1970) (necessity for full cross-examination held particularly acute when its purpose is to demonstrate lack of credibility of an identification by attempting to determine whether the witness had a recollection of specific characteristics of the defendant).

It has been held reversible error to deny wide latitude in cross-examination when the testimony of an accomplice is involved. *U.S. v. Wolfson,* 437 F.2d 862, 874 (2d Cir. 1970). *But see U.S. v. Bagsby,* 489 F.2d 725, 727 (9th Cir. 1973); *U.S.*

v. Cole, 449 F.2d 194, 199 (8th Cir. 1971), *cert. denied,* 405 U.S. 931 (1972) (exercise of discretion in limiting cross-examination will not be reversed unless there has been a clear abuse and a showing of prejudice to the defendant). In *U.S. v. Demchak,* 545 F.2d at 1031, a new trial was granted where it became necessary for the trial court to limit cross-examination for fifth amendment reasons and the trial court attempted to remedy the damage by striking the direct testimony.

In *U.S. v. Rudolph,* 403 F.2d 805, 806 (6th Cir. 1968), the court held that a defendant may not be cross-examined about whether he participated in unrelated specific acts of criminal conduct not resulting in a conviction, as there is "no relevancy to the issue of defendant's guilt or innocence of the crime charged, and such evidence is likely to be extremely prejudicial."

Where a witness testifies about a matter on direct, he may "open the door" to cross-examination on a topic not otherwise subject to cross-examination. *See U.S. v. Turquitt,* 557 F.2d 464, 468 (5th Cir. 1977), where the admission into evidence of an unrelated phony lease prejudiced a defendant on trial for possession of stolen mail. In *U.S. v. Parr-Pla,* 549 F.2d 660, 663 (9th Cir.), *cert. denied,* 431 U.S. 972 (1977), after defendant's girlfriend testified as to his probationary status, the government was permitted to disclose the defendant's murder conviction.

In *U.S. v. Fowler,* 465 F.2d 664 (D.C. Cir. 1972), the court held that for impeachment purposes defense counsel had a right to cross-examine the principal government witness, a former narcotics agent, as to the reasons for his dismissal and whether he was using narcotics at the time he observed defendant committing the alleged offense, when counsel had a reasonable basis, however slight, for pursuing the inquiry. Such questions should be non-accusatory or should be asked outside the presence of the jury. *U.S. v. Knight,* 509 F.2d 354, 357 (D.C. Cir. 1974). *See U.S. v. Finkelstein,* 526 F.2d 517, 527, 529 (2d Cir. 1975), *cert. denied,* 425 U.S. 960 (1976); *U.S. v. Harvey,* 526 F.2d 529, 536 (2d Cir. 1975), *cert. denied,* 424 U.S. 956 (1976).

Where there are multiple defendants, what is probative as to one may be prejudicial to another. *U.S. v. Dansker,* 537 F.2d 40, 59-60 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977).

D. IMPEACHMENT AND SUPPORT

1. IMPEACHING OWN WITNESS

Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." The rule thereby removes the previous requirement that a party be "surprised" by the testimony of his own witness before impeachment was permitted. *See U.S. v. Benedetto,* 571 F.2d 1246, 1250 (2d Cir. 1978); *U.S. v. Long Soldier,* 562 F.2d 601, 605 (8th Cir. 1977); *U.S. v. Dixon,* 547 F.2d 1079, 1081-1082 (9th Cir. 1976). *But see U.S. v. Shoupe,* 548 F.2d 636 (6th Cir. 1977).

2. CHARACTER EVIDENCE

Rule 608(a) of the Federal Rules of Evidence is the general provision governing opinion and reputation evidence of the character of a witness. It provides that the credibility of a witness may be attacked by reputation or opinion evidence as to the witness' character for truthfulness, provided that evidence of truthfulness, used to support the witness' credibility, is only admissible after his

credibility has been attacked. *See U.S. v. Benedetto,* 571 F.2d 1246, 1250 (2d Cir. 1978); *U.S. v. Petsas,* 542 F.2d 525, 527-528 (9th Cir.), *cert. denied,* 99 S. Ct. 2824 (1979). The community in which the witness has established a reputation need not be the community in which he lives; it may be the community in which he works, etc. *U.S. v. Mandel,* 591 F.2d 1347, 1370 (4th Cir. 1979).

3. PRIOR MISCONDUCT AND OTHER CRIMES

Rule 608(b) prohibits the use of extrinsic evidence of misconduct, except Rule 609 convictions, for the purpose of attacking the credibility of the witness, and it permits only cross-examination as to specific instances of conduct concerning the truthfulness or untruthfulness of the witness, subject to the discretion of the court. Rule 609 of the Federal Rules of Evidence establishes ground rules for the introduction of evidence of prior convictions and misconduct. It must be read with Rule 608(b), which provides in general that a witness' credibility may be the subject of cross-examination, but may not be attacked through the introduction of extrinsic evidence. Specific instances of conduct are not generally admissible, except as to prior convictions of a felony or a lesser crime involving dishonesty or false statements, or in the discretion of the court, specific acts of misconduct which did not result in such a conviction if probative of truthfulness or untruthfulness. *U.S. v. Werbrouck,* 589 F.2d 273, 277 (7th Cir. 1978), *cert. denied,* 440 U.S. 962 (1979); *U.S. v. Cluck,* 544 F.2d 195 (5th Cir. 1976); *U.S. v. Kahn,* 472 F.2d 272, 279-280 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); *U.S. v. Provoo,* 215 F.2d 531, 536 (2d Cir. 1954), *aff'd,* 350 U.S. 857 (1955).

Rule 609(a) strikes a balance between the traditional view that any prior felony conviction could be used to impeach and the more recent view that only convictions for crimes involving dishonesty or false statements could be so used. *U.S. v. Fearwell,* 595 F.2d 771, 777 (D.C. Cir. 1978); *U.S. v. Vannelli,* 595 F.2d 402, 407 (8th Cir. 1979); *U.S. v. Cavender,* 578 F.2d 528, 534 (4th Cir. 1978) (dictum); *U.S. v. Ashley,* 569 F.2d 975, 978 (5th Cir.), *cert. denied,* 439 U.S. 853 (1978); *U.S. v. Seamster,* 568 F.2d 188, 190 (10th Cir. 1978); *U.S. v. Ortega,* 561 F.2d 803, 806 (9th Cir. 1977); *U.S. v. Papia,* 560 F.2d 827, 847-848 (7th Cir. 1977); *U.S. v. Hayes,* 553 F.2d 824, 827 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977); *Virgin Islands v. Toto,* 529 F.2d 278, 281 (3d Cir. 1976).

Neither the rule itself nor the accompanying Advisory Committee's Note offers any guidance as to the manner in which the trial court is to weigh the probative value of a conviction against its prejudicial effect on the defendant. A hearing on the record, as well as a specific finding by the court that the probative value outweighs the prejudicial effect to the defendant, was a recommended prerequisite to the admission of such evidence in *U.S. v. Mahone,* 537 F.2d 922 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976). Quoting *Gordon v. U.S.,* 383 F.2d 936, 940 (D.C. Cir. 1967), the *Mahone* court listed the following factors to be considered in the probative/prejudicial assessment:

(1) The impeachment value of the prior crime.
(2) The point in time of the conviction and the witness' subsequent history.
(3) The similarity between the past crime and the charged crime.
(4) The importance of the defendant's testimony.
(5) The centrality of the credibility issue.

U.S. v. Mahone, 537 F.2d at 929. *See also U.S. v. Sims,* 588 F.2d 1145 (6th Cir. 1978); *U.S. v. Johnson,* 588 F.2d 961, 962-963 (5th Cir.), *cert. denied,* 440 U.S.

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985 (1979); *U.S. v. Mahler,* 579 F.2d 730 (2d Cir.), *cert. denied,* 439 U.S. 991 (1978); *U.S. v. Lamb,* 575 F.2d 1310, 1314-1315 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978).

In *U.S. v. Fulton,* 549 F.2d 1325, 1327 (9th Cir. 1977), the defendant's election not to testify after the trial court denied his motion *in limine* regarding a prior conviction precluded a review of the ruling. In other cases the trial court's decision to admit the prior conviction was reviewed and sustained in like circumstances. *U.S. v. Langston,* 576 F.2d 1138 (5th Cir.), *cert. denied,* 439 U.S. 932 (1978); *U.S. v. Ortiz,* 553 F.2d 782, 784 (2d Cir.), *cert. denied,* 434 U.S. 897 (1977).

The conviction should not be excluded where such ruling "may allow an accused to appear as one entitled to full belief when that is not the fact." *U.S. v. Palumbo,* 401 F.2d 270, 273 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969); *U.S. v. Hayes,* 553 F.2d 824, 828 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977). *But see U.S. v. Martinez,* 555 F.2d 1273 (5th Cir. 1977), where the use of prior convictions was deemed improper. In *U.S. v. Langston,* 576 F.2d at 1139, the defendant's prior conviction was used to impeach credibility in his assertion that he lacked the requisite mental state to commit bank robbery.

It is discretionary with the court whether to give an advance ruling on the admissibility of a prior conviction. *U.S. v. Oakes,* 565 F.2d 170 (1st Cir. 1977). In some circumstances, the desirability of a pretrial ruling should be considered. *U.S. v. Apuzzo.* 555 F.2d 306, 307 (2d Cir. 1977), *cert. denied,* 435 U.S. 916 (1978); *U.S. v. Smith,* 551 F.2d 348, 356-361 (D.C. Cir. 1976). The defendant may request an advance ruling on prior convictions. *U.S. v. Cavender,* 578 F.2d 528, 530 (4th Cir. 1978).

It is clear that any prior conviction involving perjury or false statement may be used to impeach. Other forms of dishonesty such as shoplifting, *U.S. v. Dorsey,* 591 F.2d 922, 934-935 (D.C. Cir. 1979), attempted robbery, *U.S. v. Hawley,* 554 F.2d 50, 53 n.7 (2d Cir. 1977), and the sale of marijuana, *U.S. v. Williams,* 587 F.2d 1 (6th Cir. 1978), have been held inadmissible as crimes not bearing on the propensity to testify untruthfully.

Rule 609(b) provides that convictions more than 10-years-old may not be used to impeach unless the court determines that their probative value substantially outweighs their prejudicial effect. *U.S. v. Cathey,* 591 F.2d 268, 274 (5th Cir. 1979); *U.S. v. Sims,* 588 F.2d 1145, 1150 (6th Cir. 1978); *U.S. v. Little,* 567 F.2d 346, 349-350 (8th Cir. 1977), *cert. denied,* 435 U.S. 969 (1978). The burden of demonstrating the relevance of such convictions clearly lies with the government. *U.S. v. Shapiro,* 565 F.2d 479, 480-481 (7th Cir. 1977). The government must give advance written notice of its intent to use such a conviction, and the defense must be given the opportunity to contest its use. *U.S. v. Cathey,* 591 F.2d at 274 n.9 (5th Cir. 1979); *U.S. v. Sims,* 588 F.2d at 1150. (*See* 43 A.L.R. Fed. 390 for a discussion of the time limit on admissibility under Rule 609(b).)

Under Rule 609(c) a conviction that is the subject of a pardon, annulment, or certificate of rehabilitation is not generally admissible for impeachment purposes. *U.S. v. Thorne,* 547 F.2d 56, 58-59 (8th Cir. 1976). Where the conviction is not a federal offense, the pardon, annulment, or rehabilitation provisions of the local jurisdiction are relevant as to the effect of pardon, etc., on the conviction and its admissibility. *U.S. v. Wiggins,* 566 F.2d 944, 946 (5th Cir.), *cert. denied,* 436 U.S. 950 (1978); *U.S. v. Dinapoli,* 557 F.2d 962, 965-966 (2d Cir.), *cert. denied,* 434 U.S. 858 (1977); *U.S. v. Moore,* 556 F.2d 479, 484 (10th Cir. 1977).

Rule 609(d) generally bars admission of a juvenile adjudication unless

conviction for the offense would be admissible to impeach an adult and the court finds admission necessary for a fair determination of guilt or innocence. *U.S. v. Jones,* 557 F.2d 1237, 1238-1239 (8th Cir. 1977); *U.S. v. Decker,* 543 F.2d 1102, 1104 (5th Cir. 1976), *cert. denied,* 431 U.S. 906 (1977); *U.S. v. Lind,* 542 F.2d 598, 599 (2d Cir. 1976), *cert. denied,* 430 U.S. 947 (1977).

Rule 609(e) codifies the preexisting majority rule that a witness may be cross-examined on prior convictions even when they are pending on appeal. *U.S. v. Soles,* 482 F.2d 105, 107-108 (2d Cir.), *cert. denied,* 414 U.S. 1027 (1973); *U.S. v. Franicevich,* 471 F.2d 427, 428-429 (5th Cir. 1973); *U.S. v. Allen,* 457 F.2d 1361, 1363 (9th Cir.), *cert. denied,* 409 U.S. 869 (1972); *U.S. v. Empire Packing Co.,* 174 F.2d 16, 20 (7th Cir.), *cert. denied,* 337 U.S. 959 (1949). A prior conviction, obtained where the defendant was not represented by counsel, however, may not be used for the purpose of proving guilt, *Burgett v. Texas,* 389 U.S. 109, 114-116 (1967), enhancing punishment, *U.S. v. Tucker,* 404 U.S. 443 (1972), escalating the degree of the crime, *Baldasar v. Illinois,* 100 S. Ct. 1585 (1980), or impeaching credibility, *Loper v. Beto,* 405 U.S. 473 (1971), *Zilka v. Estelle,* 529 F.2d 388 (5th Cir.), *cert. denied,* 429 U.S. 981 (1976) (held to be harmless error in light of other evidence of guilt). *See also U.S. ex. rel. Walker v. Follette,* 443 F.2d 167 (2d Cir. 1971), where prior uncounseled convictions were used on cross-examination to refute defendant's direct testimony that he had never been convicted of a crime.

Rule 608(b) slightly broadens the preexisting doctrine that a witness ordinarily may not be cross-examined on acts of misconduct not resulting in a felony conviction. Under the current rule, particular instances of misconduct, even though not the subject of a conviction, may be inquired into if they bear upon the truthfulness of the witness. Inquiry may be made either of the witness himself or of character witnesses called on behalf of the witness. Acts of misconduct may not, however, be proved by extrinsic evidence. *U.S. v. Werbrouck,* 589 F.2d at 277-278; *U.S. v. Ling,* 581 F.2d 1118, 1121 (4th Cir. 1978); *U.S. v. Wood,* 550 F.2d 435, 441 (9th Cir. 1976); *U.S. v. Cluck,* 544 F.2d at 196.

Under some circumstances, where the defendant has "opened the door," the prosecution may be permitted to cross-examine concerning further acts of misconduct. *U.S. v. Hykel,* 461 F.2d 721, 728-729 (3d Cir. 1972); *Carpenter v. U.S.,* 264 F.2d 565, 569 (4th Cir.), *cert. denied,* 360 U.S. 936 (1959). It is well established that questions about prior criminal activities are proper to contradict a specific false factual assertion elicited on a defendant's direct examination. *U.S. v. Opager,* 589 F.2d 799, 801-803 (5th Cir. 1979); *U.S. v. Batts,* 558 F.2d 513, 517-518 (9th Cir. 1977), *cert. denied,* 439 U.S. 859 (1978); *U.S. v. Colletti,* 245 F.2d 781, 782 (2d Cir.), *cert. denied,* 355 U.S. 874 (1957) (defendant put his good conduct in issue by testifying on direct examination that he had never been convicted of any "crime or offense"). *But see U.S. v. Forsythe,* 594 F.2d 947, 948-951 (3d Cir. 1979). Inquiries concerning a defendant's youthful offender status may be justified where he has created an erroneous impression on the uniformed jury that he is "lily-white." *U.S. v. Caniff,* 521 F.2d 565, 570 (2d Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976).

If the defendant does not seek a limiting instruction as to the proper purpose of the evidence of prior misconduct, the prosecutor or the court itself should require one. *U.S. v. Diaz,* 585 F.2d 116, 118 (5th Cir. 1978). The court may also question the jurors on their ability to put the evidence to proper use. *U.S. v. Hall,* 588 F.2d 613, 615 (8th Cir. 1978).

Evidence not normally admissible to impair the credibility of a witness may be permissible to show bias. An inquiry into an arrest is permissible for the legitimate

purpose of showing bias. Such inquiry is subject to limitation only where the jury already has "sufficient other information" to measure the witness' bias. *U.S. v. Hart,* 565 F.2d 360, 362 (5th Cir. 1978); *U.S. v. Baker,* 494 F.2d 1262, 1267 (6th Cir. 1974). If a government witness is the subject of a pending indictment or arrest, that fact may be established, since it constitutes the predicate of an arguable motive to please the prosecution by giving testimony favorable to the government. *U.S. v. Musgrave,* 484 F.2d 327, 338 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973); *U.S. v. Bonanno,* 430 F.2d 1060, 1062 (2d Cir.), *cert. denied,* 400 U.S. 964 (1970). It is rarely proper to curtail cross-examination relating to a witness' bias or motive to testify falsely. *U.S. v. Brown,* 546 F.2d 166, 169 (5th Cir. 1977). Thus, a defendant is entitled to establish a possible predicate for bias resulting from favorable treatment given the witness by a government agency. *See U.S. v. Wolfson,* 437 F.2d 862, 871, 874 (2d Cir. 1970) (SEC gave witness a "no action" letter allowing him to sell certain stock). Where the witness is an accomplice or coconspirator who has struck a plea bargain, courts generally permit rigorous cross-examination to ascertain possible grounds for bias. *U.S. v. Brown,* 546 F.2d at 170; *Boone v. Paderick,* 541 F.2d 447, 451 (4th Cir. 1976), *cert. denied,* 430 U.S. 959 (1977) (failure to inform defense of promise of leniency made by police officer, undisclosed on cross-examination, held improper and warranted reversal); *U.S. v. Verdoon,* 528 F.2d 103, 107 (8th Cir. 1976) (unsuccessful plea negotiations are confidential and not subject to cross-examination); *U.S. v. Harris,* 462 F.2d 1033, 1035 (10th Cir. 1972). The same considerations apply when the witness is an informant, *U.S. v. Alvarez-Lopez,* 559 F.2d 1155, 1160 (9th Cir. 1977), or where immunity has been granted to the witness, *U.S. v. Scharf,* 558 F.2d 498, 501 (8th Cir. 1977); *U.S. v. Smolar,* 557 F.2d 13, 21 (1st Cir.), *cert. denied,* 434 U.S. 971 (1977).

The court is not required to permit cross-examination into all possible grounds for bias and, in its discretion, may limit such inquiry. *U.S. v. Garza,* 574 F.2d 298, 300-302 (5th Cir. 1978); *Skinner v. Cardwell,* 564 F.2d 1381, 1388 (9th Cir. 1977), *cert. denied,* 435 U.S. 1009 (1978); *U.S. v. Poulack,* 556 F.2d 83, 89 (1st Cir.), *cert. denied,* 434 U.S. 986 (1977); *U.S. v. Pfeiffer,* 539 F.2d 668, 671-672 (8th Cir. 1976); *U.S. v. Bastone,* 526 F.2d 971, 981 (7th Cir.), *cert. denied,* 425 U.S. 973 (1976); *U.S. v. Padgent,* 432 F.2d 701 (2d Cir. 1970). *See also U.S. v. Campbell,* 426 F.2d 547, 549 (2d Cir. 1970) (defendant held not entitled to prove IRS made numerous beneficial decisions respecting witness' tax liability in absence of showing that witness knew he was being thus benefited); *U.S. v. DeLeon,* 498 F.2d 1327, 1332-1333 (7th Cir. 1974) (court properly limited cross-examination as to prior wrong doing about which the government had no knowledge).

The line between showing bias and improperly impeaching a witness on the basis of prior bad acts is narrow. For example, the defense in *U.S. v. Edelman,* 414 F.2d 539, 541 (2d Cir. 1969), *cert. denied,* 396 U.S. 1053 (1970), sought to subpoena customs and postal records to show that the witness was under investigation. Defendant's theory was that since he knew about these cases, the government witness was testifying against him to silence him. The court found no abuse of discretion in the trial judge's decision to exclude this testimony since it bore only slightly on bias but would more likely constitute an improper impeachment of the witness for conduct not resulting in a conviction. *See U.S. v. Harris,* 542 F.2d 1283, 1302 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977); *Johnson v. Brewer,* 521 F.2d 556 (8th Cir. 1975).

On direct examination the government may elicit the full criminal record of its own witness or other derogatory information, such as a plea of guilty to the very

indictment on which the defendant is standing trial. *U.S. v. Medical Therapy Sciences, Inc.,* 583 F.2d 36, 39-40 (2d Cir. 1978), *cert. denied,* 439 U.S. 1130 (1979); *U.S. v. Rothman,* 463 F.2d 488, 490 (2d Cir.), *cert. denied,* 409 U.S. 956 (1972); *U.S. v. Panetta,* 436 F. Supp. 114, 128 (E.D. Pa.), *aff'd,* 568 F.2d 771 (3d Cir. 1977) (government witness properly permitted to testify as to unrelated crime committed by defendant to clarify the witness' role in the crime and her motive for testifying).

4. PRIOR INCONSISTENT STATEMENTS

a. FOR IMPEACHMENT

Rule 613 of the Federal Rules of Evidence provides that prior inconsistent statements of a witness are admissible for impeachment of the witness' credibility with respect to both material and collateral issues of fact. However, a witness may be impeached by extrinsic proof of a prior inconsistent statement only as to non-collateral matters, *i.e.,* those matters that are relevant to the issues in the case and could be proved independently. *U.S. v. Nace,* 561 F.2d 763, 771 (9th Cir. 1977); *U.S. v. Shoupe,* 548 F.2d 636, 642-643 (6th Cir. 1977) (discussing the problems of the merely forgetful and the hostile forgetful witness); *U.S. v. Harvey,* 547 F.2d 720, 722 (2d Cir. 1976); *U.S. v. Dinitz,* 538 F.2d 1214, 1224 (5th Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977); *U.S. v. Mendell,* 538 F.2d 1238 (6th Cir. 1976).

In *U.S. v. Barash,* 365 F.2d 395 (2d Cir. 1966), *cert. denied,* 396 U.S. 832 (1969), a bribery prosecution, a government witness denied on cross-examination that he had threatened the defendant into giving him money. Defense counsel then attempted to impeach the witness by questioning him on the basis of tape recordings in which the witness had expressed such threats. The trial court's refusal to permit this examination on the ground that the tapes were not being used for impeachment was held reversible error because "[i]mpeachment was the precise enterprise in which the defense counsel had been properly engaging ...." *Id.* at 401; *U.S. v. Benedetto,* 571 F.2d 1246, 1250 (2d Cir. 1978); *U.S. v. Marzano,* 537 F.2d 257, 264-269 (7th Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). *See U.S. v. Borelli,* 336 F.2d 376, 392 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965), where it was held that the trial court erroneously excluded an inconsistent prior written statement of a witness that he acknowledged to have been false. The defense should not have been limited in its impeachment evidence to the fleeting oral admission of a previous lie.

The government may use prior inconsistent statements to its own advantage in cases where its witness gives unexpected testimony exculpating the accused. The witness' credibility may then be impeached by examining him with respect to prior statements inconsistent with his trial testimony. In *U.S. v. Kahaner,* 317 F.2d 459, 474 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963), a government witness on cross-examination "completely exculpated" the defendant. The trial court was upheld in permitting the prosecution, on redirect, to examine the witness respecting inconsistent answers previously given before the grand jury.

A witness who has "forgotten" a prior inconsistent statement may be impeached by extrinsic evidence of his statement. *U.S. v. Rogers,* 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); 40 A.L.R. Fed. 605 (provides a thorough analysis). But there are limits. *See U.S. v. Shoupe,* 548 F.2d 636, 643

(6th Cir. 1977). *See also U.S. v. Rivera,* 513 F.2d 519, 528 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975). In *U.S. v. Cunningham,* 446 F.2d 194 (2d Cir.), *cert. denied,* 404 U.S. 950 (1971), the government witness testified that he had seen the defendant and the witness' brother, who was identified as a participant in the robbery, together only two or three times. The prosecutor, who was surprised by such testimony, was then allowed to ask the witness whether he had previously made statements concerning more frequent meetings and to confront him with reports of contrary statements to an agent. However, the prosecutor was criticized for overreaching in calling still another agent to testify as to unsworn inconsistent statements made to him by the now recalcitrant witness. Since the effect of the adverse answers had already been cancelled by impeachment, it was said that the testimony of the additional agent could not be offered for impeachment purposes. *See also U.S. v. Long Soldier,* 562 F.2d 601 (8th Cir. 1977); *U.S. v. Joyner,* 547 F.2d 1199, 1201-1202 (4th Cir. 1977); *U.S. v. Torres,* 503 F.2d 1120, 1125 (2d Cir. 1974).

When a witness has been impeached on the basis of a prior inconsistent statement, the witness may be rehabilitated by permitting him to explain away the effect of the supposed inconsistency. *U.S. v. Perry,* 550 F.2d 524, 532 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977). Thus, the government may show that the inconsistency was due to the witness' fear for the safety of himself and his family. *U.S. v. Rivera,* 513 F.2d at 526-528; *U.S. v. Franzese,* 392 F.2d 954, 959-961 (2d Cir. 1968), *vacated per curiam on other grounds,* 394 U.S. 310 (1969).

b. AFFIRMATIVE EVIDENCE

Rule 801(d)(1)(A) of the Federal Rules of Evidence provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is "inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." *See U.S. v. Champion International Corporation,* 557 F.2d 1270, 1274 (9th Cir.), *cert. denied,* 434 U.S. 938 (1977); *U.S. v. Blitz,* 533 F.2d 1329, 1345 (2d Cir.), *cert. denied,* 429 U.S. 819 (1976); *U.S. v. Rivera,* 513 F.2d 519, 525-528 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975); *U.S. v. De Sisto,* 329 F.2d 929, 932-934 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964).

5. INSANITY AND NARCOTICS ADDICTION

Mental derangement may also serve as a ground for impeachment. A ruling on the competency of a witness to testify is within the trial court's discretion. *U.S. v. Heath,* 528 F.2d 191, 192 (9th Cir. 1975). In *U.S. v. Haro,* 573 F.2d 661, 666-667 (10th Cir.), *cert. denied,* 439 U.S. 851 (1978), the court considered the witness' competency in light of the relevant rules of evidence and permitted him to testify in the absence of evidence of demonstrated incapacity. In *Sinclair v. Turner,* 447 F.2d 1158, 1162 (10th Cir. 1971), *cert. denied,* 405 U.S. 1048 (1972), the court noted that "[t]he capacity of a person offered as a witness is presumed, and in order to exclude a witness on the ground of mental or moral incapacity, the existence of the incapacity must be made to appear." This may be shown at the time of testifying, on cross-examination, or by extrinsic evidence. *See U.S. v. Roach,* 590 F.2d 181, 185-186 (5th Cir. 1979) (discussing Rule 601 and its intent); *U.S. v. Glover,* 588 F.2d 876, 878 (2d Cir. 1978); *U.S. v. Honneus,* 508 F.2d 566, 573 (1st Cir. 1974). In *U.S. v. Jackson,* 576 F.2d 46, 48-49 (5th Cir. 1978), it was noted that court-ordered psychiatric examinations of witnesses would not only invade their privacy, but opinion evidence of the results would also invade the jury's province to determine credibility. *See also U.S. v. Moten,* 564 F.2d 620, 629 (2d Cir.), *cert. denied,* 434 U.S. 942 (1977); *U.S. v. Wertis,* 505 F.2d 683, 685 (5th Cir. 1974), *cert. denied,* 422 U.S. 1045 (1975).

In *U.S. v. Green,* 523 F.2d 229 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976), the district court ruled that a government witness could not be cross-examined about his consultations with a psychiatrist, where the only reason offered by the defense for this questioning was that it might "help to question his credibility." The ruling was affirmed by the Second Circuit, which noted that the witness' credibility had already been extensively and sufficiently attacked by other means on cross-examination. *Id.* at 237.

A witness' use of narcotics at the time of the reported events or at the trial also may serve to impeach his credibility. *U.S. v. Killian,* 524 F.2d 1268, 1275 (5th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976). In *Wilson v. U.S.,* 232 U.S. 563, 568 (1914), where the defendant testified and was asked on cross-examination whether she was addicted to the use of morphine and had used it before coming to court, the Supreme Court ruled that, although the defendant's character had not been put in issue, the examination was proper as bearing on her reliability as a witness. *See U.S. v. Fowler,* 465 F.2d 664 (D.C. Cir. 1972), where limited non-accusatory or *voir dire* examination of the witness was suggested.

In *U.S. v. Leonard,* 494 F.2d 955, 971 (D.C. Cir. 1974), it was held that, before defense counsel could cross-examine a government witness about his narcotics habit, a foundation was required "consisting of evidence that [the witness] had used narcotics on the day he observed the events." This foundation could be established through a *voir dire* of the witness conducted outside the presence of the jury, but if defense counsel was unable to establish the requisite foundation, he would be precluded from cross-examining the witness about his addiction. The court further held that the district court properly excluded defense counsel's proffer of extrinsic evidence to establish the witness' addiction, ruling that the addiction "was plainly a collateral issue." *Id.* at 972. But the court also pointed out the importance of judicial appreciation of the effects of drugs on perception and memory. *See U.S. v. Kearney,* 420 F.2d 170 (D.C. Cir. 1969). For purposes of charging the jury as to the effect of a witness' addiction on his credibility, however, a court is not warranted in taking judicial notice that narcotics addiction lessens the reliability of a witness' testimony. *Weaver v. U.S.,* 111 F.2d 603, 606 (8th Cir. 1940). As a result, to obtain such an instruction, it is necessary to introduce expert medical testimony on the effect of narcotics addiction on the witness' capacities. A proper foundation regarding current drug usage may be required to overcome the court's resistance to extrinsic evidence of specific instances of conduct. There may also be privilege problems if the expert is treating or relying on treatment records of the witness. *U.S. v. Banks,* 520 F.2d 627, 630-631 (7th Cir. 1975).

E. REBUTTAL

Generally, in the trial judge's discretion, all facts having rational probative value are admissible in rebuttal unless some specific rule of evidence forbids

their admission. *U.S. v. Wallace,* 468 F.2d 571, 572 (4th Cir. 1972); *U.S. v. Glaziou,* 402 F.2d 8, 16 (2d Cir.), *cert. denied,* 393 U.S. 1121 (1968); *U.S. v. Coleman,* 340 F. Supp. 451, 454 (E.D. Pa.), *aff'd,* 474 F.2d 1337 (3d Cir. 1972). The trial court is vested with discretion to admit or exclude evidence introduced by the government in rebuttal which might have been introduced in its case-in-chief. *Goldsby v. U.S.,* 160 U.S. 70, 74 (1895); *U.S. v. Fench,* 470 F.2d 1234, 1239 (D.C. Cir. 1972), *cert. denied,* 410 U.S. 909 (1973); *U.S. v. Armstrong,* 462 F.2d 408, 411 (8th Cir. 1972); *U.S. v. Lieblich,* 246 F.2d 890, 895 (2d Cir.), *cert. denied,* 355 U.S. 896 (1957); *Lelles v. U.S.,* 241 F.2d 21, 25 (9th Cir.), *cert. denied,* 353 U.S. 974 (1957).

1. PERMISSIBLE SCOPE

Rebuttal evidence may be introduced to refute evidence on material issues of fact, whether elicited on direct or cross-examination, as well as to refute evidence on collateral issues of fact elicited on direct examination. *See U.S. v. Papia,* 560 F.2d 827, 848-849 (7th Cir. 1977); *Sullivan v. U.S.,* 411 F.2d 556, 558 (10th Cir. 1969). *See also U.S. v. Newman,* 481 F.2d 222, 224 (2d Cir.), *cert. denied,* 414 U.S. 1007 (1973); *U.S. v. Hykel,* 461 F.2d 721, 729 (3d Cir. 1972). Rebuttal evidence is, however, inadmissible to refute evidence on collateral issues of fact first elicited on cross-examination. *U.S. v. Schennault,* 429 F.2d 852, 855 (7th Cir. 1970).

On the other hand, rebuttal evidence has been held properly introduced by the government to refute additional elements of a defendant's testimony further elicited on cross-examination. In *Scott v. U.S.,* 172 U.S. 343, 347-348 (1899), a mail carrier charged with theft of a letter stated on direct examination that "somebody had done him a dirty trick," and on cross stated that the money contents of the allegedly stolen letter had been placed on his person by two fellow employees. In rebuttal, the government introduced the testimony of the two employees who refuted the defendant's testimony implicating them in the crime. Although the names of the employees had not been elicited until cross-examination, the court held that the rebuttal evidence was properly received: "The evidence was not collateral to the main issue of guilt or innocence, nor was the subject first drawn out by the Government." *Id.* at 348. Similar cases to the same effect are *U.S. v. Boatner,* 478 F.2d 737, 743 (2d Cir.), *cert. denied,* 414 U.S. 848 (1973), and *Black v. U.S.,* 294 F. 828 (5th Cir. 1923), *cert. denied,* 264 U.S. 580 (1924). *See U.S. v. Perry,* 550 F.2d 524, 531-532 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); *U.S. v. Hykel,* 461 F.2d at 729; *U.S. v. Perea,* 413 F.2d 65, 68 (10th Cir.), *cert. denied,* 397 U.S. 945 (1969).

It should be noted, however, that, so far as rebuttal evidence is concerned, a party is bound by the answer of a witness on cross-examination with respect to a collateral issue. *U.S. v. Robinson,* 530 F.2d 1076, 1079 (D.C. Cir. 1976). Evidence that a witness has lied in refusing to implicate an unrelated person not indicted is inadmissible even under a liberal test of "collateralness." *Tinker v. U.S.,* 417 F.2d 542, 545 n.16 (D.C. Cir.), *cert. denied,* 396 U.S. 864 (1969); *U.S. v. Franzese,* 392 F.2d 954, 962 (2d Cir. 1968), *vacated per curiam on other grounds,* 394 U.S. 310 (1969).

Because the issue of the bias of a witness is always deemed to be material, rebuttal evidence is permitted to refute assertions related to bias even where first elicited on cross. *U.S. v. Blackwood,* 456 F.2d 526, 530 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972). In *U.S. v. Briggs,* 457 F.2d 908 (2d Cir.), *cert. denied,* 409 U.S. 986 (1972), the court allowed the testimony of a government agent to rebut the denial by a defense witness on cross-examination that the defendant had threatened the witness' life unless he testified in an exculpatory manner. The agent was permitted to testify that the witness had said on two previous occasions that the defendant had attempted to get favorable testimony by such threats on his life. The court observed that, where the relevance of the bias evidence is so apparent, it need not be limited to cross-examination. *Id.* at 910-911. *See also U.S. v. DeFillipo,* 590 F.2d 1228, 1235 n.10 (2d Cir. 1979), *cert. denied,* 442 U.S. 920 (1979); *U.S. v. Brown,* 547 F.2d 438, 445-446 (8th Cir.), *cert. denied,* 430 U.S. 937 (1977); *U.S. v. Kinnard,* 465 F.2d 566, 573-574 (D.C. Cir. 1972); *U.S. v. Blackwood,* 456 F.2d at 530; *U.S. v. Schennault,* 429 F.2d at 855; *U.S. v. Lester,* 248 F.2d 329, 334 (2d Cir. 1957).

2. EVIDENCE INADMISSIBLE UNDER AN EXCLUSIONARY RULE

Evidence inadmissible in the government's case-in-chief under an exclusionary rule may be admissible on cross of defendant's witnesses or on rebuttal, solely to impeach the credibility of a defendant on an issue of fact first elicited by the defendant on direct. *See Harris v. New York,* 401 U.S. 222 (1971), relying on *Walder v. U.S.,* 347 U.S. 62 (1954). *See also U.S. v. Bowers,* 593 F.2d 376, 378-379 (10th Cir. 1979), *cert. denied,* 100 S. Ct. 106 (1979); *U.S. v. Nussen,* 531 F.2d 15, 20-21 (2d Cir.), *cert. denied,* 429 U.S. 839 (1976). In *Walder,* the defendant had been indicted in May 1950, for purchasing and possessing one grain of heroin, but defendant's motion to suppress the heroin capsule as the product of an illegal search and seizure was granted and the case was dismissed. In January 1952, he was again indicted in connection with four other drug transactions, and on direct, the defendant stated that he had never possessed or acted as a conduit for any narcotics in his life. In rebuttal, the government called the agent and chemist who had respectively seized and analyzed the heroin capsule in 1950, and their testimony about the capsule was admitted with a caution by the trial court that the jury should consider the evidence solely with respect to the defendant's credibility as a witness. The Supreme Court affirmed, stating that the Constitution guarantees the defendant the opportunity to deny the charges and put the government to its proof, but it does not shield him from exposure when he perjures himself. *Id.* at 65. *See U.S. v. Kenny,* 462 F.2d 1205, 1225 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972). In *U.S. v. Nathan,* 476 F.2d 456, 460 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973), a defendant charged with conspiracy to import narcotics testified that he did not use cocaine or heroin and had never engaged in the transportation or distribution of narcotic drugs. On cross-examination, however, he admitted to two arrests on drug charges but denied possession of drugs at the time of one arrest or knowledge of the presence of drugs in his apartment at the time of the other arrest. The court held that it was not error to permit the arresting officer to testify as to the circumstances surrounding defendant's post-conspiracy arrests on drug charges.

The Supreme Court held in *Harris v. New York,* 401 U.S. 222 (1971), that statements made by defendants to law enforcement agents in circumstances rendering such statements inadmissible to establish the prosecution's case-in-

chief under *Miranda v. Arizona*, 384 U.S. 436 (1966), may, nevertheless, be used to impeach that defendant's credibility. The petitioner in *Harris v. New York* was convicted of the illegal sale of heroin. Statements made by the petitioner were not introduced by the prosecution in its case-in-chief because the statements were concededly inadmissible under *Miranda v. Arizona*. On cross-examination, however, in an attempt to impeach the defendant's testimony that he did not make one sale in issue and that a second transaction involved baking soda rather than heroin, petitioner was asked whether he had made the statements that had been improperly obtained. In this case, the statements used to impeach, unlike those used in *Walder, supra*, specifically dealt with matters directly related to the crime for which petitioner was on trial. The Court, however, was "not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*." *Harris v. New York*, 401 U.S. at 225. In summary, under the *Harris* decision, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances," *Id.* at 226. *Accord, U.S. v. Scott*, 592 F.2d 1139, 1141-1142 (10th Cir. 1979); *U.S. v. Johnson*, 525 F.2d 999, 1004-1006 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

In practice, the *Harris* opinion offers the prosecution a great opportunity to prevent a technical *Miranda* violation from causing a miscarriage of justice. To invoke the rationale of *Harris*, however, care should be exercised to avoid exceeding its bounds. *Harris* does not apply if the defendant does not testify. Nor does *Harris* apply if, in addition to a *Miranda* violation, the statements are involuntary, since the evidence offered for impeachment must still satisfy legal standards of trustworthiness. *Harris v. New York*, 401 U.S. at 224. *Accord, U.S. v. Scott*, 592 F.2d at 1142 (a hearing on voluntariness should be held when there is an allegation or indication of coercion); *U.S. v. Canniff*, 521 F.2d 565, 570-571 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). And, of course, *Harris* will not apply if the defendant's statements are not relveant to the credibility of his testimony. If, on the other hand, a defendant takes the stand and gives testimony that conflicts with a prior voluntary statement, the prior inconsistent statement may be used for impeachment. In such cases, however, prosecutors should insure the court instructs the jury that the prior inconsistent statement is admissible only on the issue of the defendant's credibility as a witness and not as evidence of guilt or innocence.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that a defendant's post-arrest silence following *Miranda* warnings may not be used to impeach his exculpatory trial testimony through cross-examination inquiry of why he did not give the arresting officer the exculpatory explanation. The "insolubly ambiguous" nature of the silence makes its use unfair to impeach the "substance" of a defendant's exculpatory testimony. *Charles v. Anderson*, 610 F.2d 417 (6th Cir. 1979). Post-arrest silence may be used, however, for impeaching the defendant's testimony that he cooperated with the police. *U.S. v. Vega*, 589 F.2d 1147, 1150 (2d Cir. 1978) (no *Miranda* warnings given); *Stone v. Estelle*, 556 F.2d 1242, 1244-1245 (5th Cir. 1977), *cert. denied*, 434 U.S. 1019 (1978).

In *U.S. v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971), the court held that statements by the defendant, overheard through unlawful wiretaps, could properly be considered by the sentencing judge in determining that defendant was a professional criminal who deserved an

unusually severe sentence. *See U.S. v. Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 154 (1979), where defendant's probation officer testified as to statements made to him by the defendant prior to commission of the crime and in the absence of *Miranda* warnings. *See also U.S. v. Blackwood*, 456 F.2d 526, 529 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).

In *U.S. ex rel. Walker v. Follette*, 443 F.2d 167 (2d Cir. 1971), the defendant testified on direct examination that he had never been convicted of a crime. The court there held that it was proper on cross-examination to elicit the fact that he had been convicted earlier, even though the prior convictions had been obtained without the assistance of counsel in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *But see Loper v. Beto*, 405 U.S. 473, 480-83 (1972), where the Court distinguished *Follette* as being a case in which the record of a prior conviction had been used for the purpose of directly rebutting a specific false statement made by the defendant on direct examination, and not for the purpose of impeaching of his character.

In *Agnello v. U.S.*, 269 U.S. 20, 35 (1925), the government sought to introduce a suppressed can of cocaine as rebuttal evidence to impeach the defendant's statement on cross that he had never seen narcotics. Since the defendant did not testify on direct concerning prior possession of narcotics, the Court held that he "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." The Court in *Walder v. U.S.*, 347 U.S. at 66, distinguished *Agnello* by pointing out that there the government endeavored to "smuggle" the tainted evidence into the record by introducing the subject on cross-examination. *See also U.S. v. Whitson*, 587 F.2d 948, 952-953 (9th Cir. 1978), holding the prosecutor may not use tainted evidence to impeach statements which it elicited on cross-examination and were not raised on direct.

F. EXCLUSION OR SEPARATION OF WITNESSES

Rule 615 of the Federal Rules of Evidence provides for the exclusion or separation of witnesses and provides exceptions for parties, officers of parties, or persons shown to be essential to the presentation of his cause. Whereas previously the decision to exclude witnesses lay in the sound discretion of the trial court, *see, e.g., Holder v. U.S.*, 150 U.S. 91 (1893), Rule 615 now makes exclusion mandatory upon the motion of a party. The rule preserves the recognized exception for government agents who participate in the investigation of the case. The agent is permitted to sit at counsel table to consult with the prosecutor, even though he may subsequently testify as a witness. *See U.S. v. Holmes*, 594 F.2d 1167, 1172-1173 (8th Cir. 1979); *U.S. v. Auton*, 570 F.2d 1284, 1285 (5th Cir.), *cert. denied*, 439 U.S. 899 (1978).

If a witness disobeys an order excluding him from the courtroom, the trial judge may nevertheless permit the witness to testify, and the decision of a trial court on this point will not be reversed absent an abuse of discretion. *See Holder v. U.S.*, 150 U.S. at 92; *U.S. v. McClain*, 469 F.2d 68, 69 (3d Cir. 1972); *U.S. v. Leftwich*, 461 F.2d 586, 589-590 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972); *Taylor v. U.S.*, 388 F.2d 786, 788 (9th Cir. 1967).

In *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972), the court stated that, while defendant's counsel had invoked the rule, the witness had violated it without the knowledge, procurement, or consent of the defendant

or his counsel. Since defendant's *pro forma* act of invoking the rule does not rise to wavier under *Johnson v. Zerbst,* 304 U.S. 458 (1938), exclusion by the trial court of a witness who was vital to the defense violated defendant's right to call witnesses in his behalf. The court observed that "perhaps the consent, procurement, or knowledge on the part of defendant or his counsel might rise to the level of a waiver ...." *Braswell v. Wainwright,* 463 F.2d at 1155. In this case, however, the court concluded that the trial court had arbitrarily excluded the witness upon no other basis than that he had violated the rule and that such discretion "cannot be permitted when it denies a defendant a fundamental constitutional right." *Id.* at 1156. *See U.S. v. Robbins,* 579 F.2d 1151, 1154 (9th Cir. 1978); *U.S. v. Berdick,* 555 F.2d 1329, 1331 (5th Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978). The defendant must be substantially prejudiced by a violation of a sequestration order before the error gives rise to a reversal. *U.S. v. Bobo,* 586 F.2d 355, 366 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979).

The advisability of keeping witnesses separated before trial is discussed in *U.S. ex. rel. Clark v. Fine,* 538 F.2d 750, 758 (7th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977). The court may also require sequestration during opening statements, *U.S. v. Brown,* 547 F.2d 36, 37 (3d Cir. 1976), *cert. denied,* 431 U.S. 905 (1977), and argument, *U.S. v. Juarez,* 573 F.2d 267, 281 (5th Cir.), *cert. denied,* 439 U.S. 915 (1978).

Among those cases where a violation of the separation order resulted in a refusal to permit the disobeying witness to testify are *Stone v. Wingo,* 416 F.2d 857, 867 (6th Cir. 1969); *Nick v. U.S.,* 531 F.2d 936, 937 (8th Cir. 1976); and *U.S. v. Torbert,* 496 F.2d 154, 157-158 (9th Cir.), *cert. denied,* 419 U.S. 857 (1974), where the defendant himself violated the court's sequestration order by speaking with the witnesses in the courthouse.

G. USE OF INTERPRETERS

Witnesses who do not speak English or who are deaf or dumb may testify through interpreters. *Cf.* Rule 28, Fed. R. Crim. P.; Rule 604, Fed. R. Evid. The appointment of an interpreter lies within the sound discretion of the court, and the exercise of that discretion will be reversed on appeal only where it has been abused. *U.S. v. Salsedo,* 607 F.2d 318, 320 (9th Cir. 1979).

The right to interpretation may be waived. *Gonzales v. Virgin Islands,* 109 F.2d 215, 217 (3d Cir. 1940). In *Wilcoxon v. U.S.,* 231 F.2d 384, 387 (10th Cir.), *cert. denied,* 351 U.S. 943 (1956), the interpreter failed to translate the oath to two witnesses, and the court observed that the oath itself can be waived and held that the defendant waived this defect by failing to make timely objection.

The determination of the competence, impartiality, and fitness of an interpreter is left to the discretion of the trial judge. *Thiede v. Utah,* 159 U.S. 510, 519-20 (1895) (use of a juror as interpreter was held not prejudicial); *U.S. v. Guerra,* 334 F.2d 138, 142-143 (2d Cir.), *cert. denied,* 379 U.S. 936 (1964) (slight errors in translation held not significant); *U.S. ex rel. Marino v. Holton,* 227 F.2d 886, 897-898 (7th Cir. 1955), *cert. denied,* 350 U.S. 1006 (1956) (where interpreter was alleged to have been biased). The use of a government employee as an interpreter does not deny the effective assistance of counsel, absent specific instances of prejudice resulting from this relationship. *Chee v. U.S.,* 449 F.2d 747, 748 (9th Cir. 1971). Use of a witness' wife as an interpreter

for the witness was within the discretion of the court where the court examined the wife as to her ability to translate and any motive to distort the testimony. *U.S. v. Addonizio,* 451 F.2d 49, 68 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972). In a prosecution for burglary with intent to commit rape, however, the appointment of the husband of the deaf mute victim as an interpreter for the victim violated due process since the husband was not an impartial interpreter. *Prince v. Beto,* 426 F.2d 875 (5th Cir. 1970).

CHAPTER XV

PRIVILEGES

A. PRIVILEGE AGAINST SELF-INCRIMINATION

Every citizen has a duty to testify and aid in enforcement of the law. *Brown v. Walker,* 161 U.S. 591 (1896). *See U.S. v. Dionisio,* 410 U.S. 1, 9-11 (1973). On the other hand, this principle may conflict with the privilege against self-incrimination as stated in the fifth amendment: no person "shall be compelled in any criminal case to be a witness against himself." A witness, whether he is the defendant, cannot be compelled to answer any question which may incriminate him or the reply to which would supply evidence by which he could be convicted of a criminal offense. *Ullmann v. U.S.,* 350 U.S. 422 (1956); *Counselman v. Hitchcock,* 142 U.S. 547 (1892). As the Supreme Court emphasized in *Miranda v. Arizona,* 384 U.S. 436, 460 (1966), citing its opinion in *Malloy v. Hogan,* 378 U.S. 1, 8 (1964), "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"

Factors determinative of whether the privilege applies in a particular situation are who is asserting the privilege, whether compulsion exists, and the nature and impact of the evidence involved.

1. APPLICABILITY OF THE PRIVILEGE

The privilege against self-incrimination applies only to natural persons. *U.S. v. White,* 322 U.S. 694 (1944). A corporation or other institutional entity as such may not assert the privilege. *Bellis v. U.S.,* 417 U.S. 85 (1974). *See also U.S. v. Allied Towing Corp.,* 578 F.2d 978 (4th Cir. 1978); *U.S. v. Osborn,* 561 F.2d 1334 (9th Cir. 1977); *U.S. v. Joseph,* 560 F.2d 742 (6th Cir. 1977).

Generally, the privilege cannot be asserted on behalf of another. One may not refuse to answer because of a desire to protect others from punishment. *Rogers v. U.S.,* 340 U.S. 367, 371 (1951); *U.S. v. Seavers,* 472 F.2d 607, 611 (6th Cir. 1973); *U.S. v. Seewald,* 450 F.2d 1159, 1161-1162 (2d Cir. 1971), *cert denied,* 405 U.S. 978 (1972); nor may a defendant assert an accomplice's or a coconspiritor's privilege against self-incrimination, *U.S. v. Le Pera,* 443 F2d 810, 812 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971). An employer possessing depositions and interrogatories of employees may not assert the fourth and fifth amendment rights of his employees in response to a grand jury subpoena for those documents. *Flavorland Industries, Inc. v. U.S.,* 591 F.2d 524 (9th Cir. 1979).

In certain cases an attorney may assert his client's fifth amendment privilege as a basis for refusing to turn over documents. *Fisher v. U.S.,* 425 U.S. 391 (1976); *U.S. v. Judson,* 322 F.2d 460 (9th Cir. 1963); *Colton v. U.S.,* 306 F2d 633 (2d Cir.), *cert. denied,* 371 U.S. 951 (1962). *But see U.S. v. White,* 477 F.2d 757,

aff'd per curiam on rehearing en banc, 497 F.2d 1335 (5th Cir. 1973), *cert. denied,* 419 U.S. 872 (1974). Documents in the hands of an attorney supplied by a client in order to obtain legal assistance are protected from compulsory disclosure by the attorney-client privilege if the documents, in the hands of the client, would have been privileged by reason of the fifth amendment. *Fisher v. U.S., supra.* But the enforcement of a subpoena against a taxpayer's lawyer does not "compel" the taxpayer to be a witness against himself, and thus does not violate the privilege. *Id.* Both the Second and Ninth Circuits have distinguished *Fisher.* In *U.S. v. Beattie,* 541 F.2d 329 (2d Cir. 1976), the court noted that, because the taxpayer prepared and could authenticate the papers, the privilege did apply. In *U.S. v. Helina,* 549 F.2d 713 (9th Cir. 1977), the court concluded that under *Fisher* the subpoena against the taxpayer's attorney did not "compel" the taxpayer to do anything; the court thus ignored *Fisher's* premise, 425 U.S. at 405, that an attorney may refuse to produce only if the taxpayer could properly do so. *See also Andresen v. Maryland,* 427 U.S. 463 (1976), where the Court held no compulsion exists when private business records are seized under a search warrant and the individual claiming the privilege is not asked to identify the documents.

Where the individual holds papers or documents in a representative capacity, rather than personally, he may not claim the personal privilege against self-incrimination as to them. *U.S. v. Silverstein,* 314 F.2d 789, 790 (2d Cir.), *cert. denied,* 374 U.S. 807 (1963). However, an agent retains a personal privilege against self-incrimination. *U.S. v. O'Henry's Film Works, Inc.,* 598 F.2d 313 (2d Cir. 1979).

An officer, agent or custodian of a corporation or unincorporated association, such as a labor union, may not refuse to produce books of the organization on the ground that they may incriminate the organization. *U.S. v. White,* 322 U.S. 694, 698, 700 (1944); *U.S. v Peter,* 479 F.2d 147, 149 (6th Cir. 1973). This rule applies even if the records or items sought may incriminate the custodian. *Rogers v. U.S.,* 340 U.S. 367, 371-372 (1951). *Cf. Perial Amusement Corp. v. Morse,* 482 F.2d 515, 519 n.5 (2d Cir. 1973). Morever, corporate records, which would tend to incriminate a corporate officer, can be subpoenaed even where the corporation is a mere alter ego of its owner. *U.S. v. Rosenstein,* 474 F.2d 705, 715 (2d Cir. 1973); *Fineberg v. U.S.,* 393 F.2d 417, 420 (9th Cir. 1968); *Hair Industry, Ltd. v. U.S.,* 340 F.2d 510 (2d Cir.), *cert. denied,* 381 U.S. 950 (1965); *Wild v. Brewer,* 329 F.2d 924 (9th Cir.), 379 U.S. 914 (1964). *See Shelton v. U.S.,* 404 F.2d 1292, 1302 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969). The privilege may properly be invoked, however, in response to oral inquiries designed to locate corporate or association records. *Curcio v. U.S.,* 354 U.S. 118 (1957).

Once books are produced, an officer may be required to testify to their identity. *U.S. v. Austin-Bagley Corp.,* 31 F.2d 229, 233 (2d Cir.), *cert. denied,* 279 U.S. 863 (1929). *But see U.S. v. Beattie,* 541 F.2d 329 (2d Cir. 1976). It has been held, however, that partnership records, under certain circumstances, may be subject to the privilege because of their personal nature. *Cf. U.S. v. Slutsky,* 352 F. Supp. 1105 (S.D.N.Y. 1972). In *U.S. v. White,* 322 U.S. 694, 701 (1944), the Court said:

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.

This privilege has been held inapplicable to records: of a dissolved law firm of three partners, *Bellis v. U.S.,* 417 U.S. 85 (1974), of an "association" of lawyers, not a partnership, *U.S. v. Schoendorf,* 454 F.2d 349 (7th Cir. 1971), of an inpersonal partnership with all the aspects of a corporate enterprise, *In re Mal Bros. Contracting Co.,* 444 F.2d 615 (3d Cir.), *cert. denied,* 404 U.S. 857 (1971), of a general partner of five limited partnerships, *U.S. v. Silverstein,* 314 F.2d 789, 791 (2d Cir.), *cert. denied,* 374 U.S. 807 (1963), of a two-man partnership, after the death of one, regarding papers not the private property of the surviving partner, *U.S. v. Hankins,* 565 F.2d 1344 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979).

A witness may not create a privilege as to his accountant's work papers by taking possession of, or title to them, or by transferring custody of those papers to his attorney. Where records in a safe in corporate custody are individually owned, the individual owner may claim the privilege so long as the corporation has no access to the safe. *U.S. v. Guterma,* 272 F.2d 344 (2d Cir. 1959). That the entries in private documents were actually written by another person does not vitiate the privilege *Wilson v. U.S.,* 221 U.S. 361, 378 (1911).

Although the privilege prevents compulsory production of private documents which may tend to incriminate the witness, it is usually inapplicable when the witness does not have possession of the documents or papers. *Johnson v. U.S.,* 228 U.S. 457 (1913); *U.S. v. Cohen,* 388 F.2d 464 (9th Cir. 1967). When records have been surrendered to an independent accountant to prepare tax returns, the taxpayer has relinquished any claim to the privilege; the element of compulsion is lacking. *Couch v. U.S.,* 409 U.S. 322 (1973); *In re Horowitz,* 482 F.2d 72, 82-87 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *U.S. v. Rosenstein,* 474 F.2d 705, 715 (2d Cir. 1973). *See U.S. v. Falley,* 489 F.2d 33 (2d Cir. 1973) (document must be owned, possessed, and self-incriminating before fifth amendment privilege attaches); *U.S. v. Cleveland Trust Co.,* 474 F.2d 1234 (6th Cir.), *cert. denied,* 414 U.S. 866 (1973) (financial record submitted to a trust company with application for a loan).

Records required to be kept as part of a regulatory scheme with public purposes are not "private" and thus are not subject to a claim of privilege. *Shapiro v. U.S.,* 335 U.S. 1 (1948) (records required by OPA); *U.S. v. Turner,* 480 F.2d 272, 276 (7th Cir. 1973) (records of a tax preparer); *U.S. v. Kaufman,* 429 F.2d 240, 247 (2d Cir.), *cert. denied,* 400 U.S. 925 (1970); *U.S. v. Stirling,* 571 F.2d 708 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978) (SEC records of a broker-dealer). A doctor's records of acquisition and distribution of amphetamines, made and kept pursuant to regulation, are not protected by the privilege. *U.S. v. Warren,* 453 F.2d 738 (2d Cir.), *cert. denied,* 406 U.S. 944 (1972). The requirement of the Jenkins Act, 15 U.S.C. §§375-378, that a seller or shipper of cigarettes in interstate commerce file a monthly statement of such shipments with the state tobacco tax administration does not violate the fifth amendment privilege. *U.S. v. E. A. Goodyear, Inc.,* 334 F. Supp. 1096 (S.D.N.Y. 1971). Nor does the privilege protect against the use of records filed by an attorney as required with a state court which show, *inter alia,* amounts received on a contingent fee basis. *U.S. v. Silverman,* 449 F.2d 1341, 1345 (2d Cir. 1971), *cert. denied,* 405 U.S. 918 (1972). Required reports in bankruptcy proceedings were properly admitted against the defendant in a subsequent trial for concealing assets. *U.S. v. Falcone,* 544 F.2d

607 (2d Cir. 1976), *cert. denied,* 430 U.S. 916 (1977). However, a claim of the privilege may be a complete defense to a charge of failure to pay a tax or keep a record if the court finds that the statute requires information which has no public aspect, is of a kind not customarily kept by the defendant, is not required in an essentially noncriminal and regulatory area, and compliance would subject petitioner to a real and appreciable risk of incrimination. *Leary v. U.S.,* 395 U.S. 6, 16-18 (1969) (marijuana transfer tax); *Haynes v. U.S.,* 390 U.S. 85, 95-100 (1968) (possession of unregistered firearm); *Grosso v. U.S.,* 390 U.S. 62, 67-69 (1968) (excise tax on wagering proceeds). *See Marchetti v. U.S.,* 390 U.S. 39, 44-57 (1968) (registration and payment of occupational tax on wagers). But if the statement made in attempted compliance with such a statute is false, the privilege is neither a defense to a perjury prosecution, *U.S. v. Knox,* 396 U.S. 77 (1969), nor a proper objection to the admissibility of the statement at a trial, *U.S. v. Willoz,* 449 F.2d 1321, 1324-1325 (5th Cir. 1971).

2. SCOPE OF THE PRIVILEGE

The privilege against self-incrimination extends not only to "answers that would in themselves support a conviction under a federal criminal statute," but also to answers that furnish a link in the chain of evidence necessary for prosecution. *Hoffman v. U.S.,* 341 U.S. 479, 486 (1951). This is so even though the crime that would be revealed is only collateral to the matter under inquiry. *See Malloy v. Hogan,* 378 U.S. 1, 11 (1964); *U.S. v. Doto,* 205 F.2d 416 (2d Cir. 1953). The privilege has also been held to apply where the information compelled would supply an investigatory lead or focus investigation on a witness. *Kastigar v. U.S.,* 406 U.S. 441, 460 (1972). *See also U.S. v. Powe,* 591 F.2d 833 (D.C. Cir. 1978).

The original rule in *Hoffman v. U.S., supra,* pertaining to federal prosecutions, was extended by the Supreme Court in *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964), to protect both state and federal witnesses against incrimination in either system. *Id.* at 77-78. *See also U.S. v. Domenech,* 476 F.2d 1229, 1231 (2d Cir.), *cert. denied,* 414 U.S. 840 (1973). The law currently is unsettled on whether a witness may present possible foreign prosecution as the basis for his claim of privilege. It has been held, however, that a witness may not make such a claim if he has been granted immunity against the use of his testimony in federal and state prosecutions. *In re Federal Grand Jury Witness,* 597 F.2d 1166 (9th Cir. 1979); *U.S. v. Yanagita,* 552 F.2d 940 (2d Cir. 1977). In any event, the witness claiming the privilege must demonstrate a real and substantial fear of foreign prosecution, *Zicarelli v. New Jersey Investigation Commission,* 406 U.S. 472, 478 (1972) (fifth amendment issue not reached), but the witness cannot make this showing where his testimony is given before a federal grand jury and is subject to the secrecy rules, *In re Tierney,* 465 F.2d 806 (5th Cir. 1972), or if the questions objected to would not elicit facts that occurred in the foreign country, *U.S. v. Doe,* 361 F. Supp. 226 (E.D. Pa.), *aff'd mem.,* 485 F.2d 682 (3d Cir. 1973), *cert. denied,* 415 U.S. 689 (1974).

A witness may not refuse to answer on the ground that his answers might tend to disgrace him or bring him into disrepute; the fifth amendment applies solely to incrimination. *U.S. v. Frascone,* 299 F.2d 824, 827 (2d Cir.), *cert. denied,* 370 U.S. 910 (1962); *Brown v. Walker,* 161 U.S. 591, 598 (1896) (the latter case also discusses inapplicability of privilege where incrimination is not possible by reason of prior conviction or acquittal, statute of limitations, pardon, or

immunity). *See U.S. v. Stewart,* 445 F.2d 897, 900 (8th Cir. 1971), regarding the statute of limitations. Upon a grant of derivative and use immunity there is no danger of incrimination, and testimony may be compelled. *Kastigar v. U.S.,* 406 U.S. 441 (1972). *See also U.S. v. Frumento,* 552 F.2d 534 (3d Cir. 1977); *U.S. v. Silkman,* 543 F.2d 1218 (8th Cir. 1976), *cert. denied,* 431 U.S. 919 (1977); *Block v. Consino,* 535 F.2d 1165 (9th Cir.), *cert. denied,* 429 U.S. 861.

Conviction of a crime may result in limitation or termination of the privilege against self-incrimination as to that crime. A convicted defendant, serving a period of probation as all or part of his sentence, may not rely on the privilege in refusing to answer questions asked by a probation officer. Such a refusal may result in revocation of the probation and the imposition of a jail sentence. *U.S. v. Manfredonia,* 341 F. Supp. 790, 794-795 (S.D.N.Y.), *aff'd per curiam on opinion below,* 459 F.2d 1392 (2d Cir.), *cert. denied,* 490 U.S. 851 (1972).

Exercise of the privilege is not restricted to criminal matters; it may be claimed in any proceeding where persons are called upon to give testimony. *In re Gault,* 387 U.S. 1, 47 (1966); *Murphy v. Waterfront Commission,* 378 U.S. 52, 94 (1964) (White, J., concurring). *See De Vita v. Sills,* 422 F.2d 1172, 1177 (3d Cir. 1970) (disciplinary proceedings against an attorney); *Yiu Fong Cheung v. INS,* 418 F.2d 460, 464 (D.C. Cir. 1969) (alien deportation proceedings). The witness must, however, have reasonable cause to apprehend danger from a direct answer. *NLRB v. Trans Ocean Export Packing, Inc.,* 473 F.2d 612, 617 (9th Cir. 1973); *U.S. v. Seewald,* 450 F.2d 1159, 1163 (2d Cir. 1971), *cert. denied,* 405 U.S. 978 (1972).

The fifth amendment protects only evidence that is testimonial or communicative in nature from compelled disclosure. *Schmerber v. California,* 384 U.S. 757 (1966). The privilege does not prohibit the introduction in evidence of information obtained through an examination or display of physical characteristics. Thus a piece of clothing may be put on a defendant to ascertain if it fits. *See, e.g., Holt v. U.S.,* 218 U.S. 215, 252 (1910) (blouse); *U.S. v. Roberts,* 481 F.2d 892, 895 (5th Cir. 1973) (stocking mask). A defendant may be compelled to yield his shoes to police. *Jones v. U.S.,* 405 U.S. 957 (1972); *U.S. v. De Larosa,* 450 F.2d 1057, 1067 (3d Cir. 1971), *cert. denied,* 405 U.S. 927 (1972). A passport is admissible on a cocaine importation charge to show presence in a country, as entries thereon are neither testimonial nor violative of the fifth amendment. *U.S. v. Friedman,* 593 F.2d 109 (9th Cir. 1979). Standardized medical tests, such as the extraction of blood samples, may be made. *Schmerber v. California,* 384 U.S. 757 (1966). Police may take sample scrapings from a suspect's fingernails, *cf. Cupp v. Murphy,* 412 U.S. 291 (1973) (fifth amendment issues not raised), or swab a suspect's hands with a solution to discover traces of nitrate, *U.S. v. Love,* 482 F.2d 213 (5th Cir.), *cert. denied,* 414 U.S. 1026 (1973). A suspect may be required to furnish handwriting or voice exemplars and submit to fingerprinting. *U.S. v. Dionisio,* 410 U.S. 1 (1973); *Gilbert v. California,* 388 U.S. 263 (1967); *U.S. v. Doe,* 457 F.2d 895 (2d Cir. 1972), *cert. denied,* 410 U.S. 941 (1973); *U.S. v. Gibson,* 444 F.2d 275, 277 (5th Cir. 1971); *U.S. v. Izzi,* 427 F.2d 293, 295-296 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970); *U.S. v. Doe,* 405 F.2d 436 (2d Cir. 1968). An individual may be required to appear in a lineup, perform movements, speak certain phrases, or exhibit identifying marks on his body. *U.S. v. Wade,* 388 U.S. 218, 221-223 (1967). *See Stovall v. Denno,* 388 U.S. 293 (1967); *U.S. v. McCarthy,* 473 F.2d 300, 304 n.3 (2d Cir. 1972) (tattoo marks).

The trial court may order a mental examination of the accused under 18 U.S.C. §4244. *U.S. v. Baird,* 414 F.2d 700 (2d Cir. 1969), *cert. denied,* 396 U.S. 1005 (1970). *But see U.S. v. Driscoll,* 399 F.2d 135 (2d Cir. 1968). However, where

sanity was the sole issue, compelling the defendant to exercise his own peremptory challenges, necessarily revealing information such as his thought process, was held to produce unreliable information and also to violate his privilege against self-incrimination. *Walker v. Butterworth,* 599 F.2d 1074 (1st Cir. 1979), *cert. denied,* 100 S. Ct. 288 (1980). A videotape of the defendant's confession is, in itself, not violative of the fifth amendment protection. *Hendricks v. Swenson,* 456 F.2d 503 (8th Cir. 1972).

3. EXERCISE OF THE PRIVILEGE

The government may call a witness even though it is aware he may claim the fifth amendment privilege. *Namet v. U.S.,* 373 U.S. 179, 188 (1963); *U.S. v. Leighton,* 265 F. Supp. 27, 37 (S.D.N.Y.), *aff'd,* 386 F.2d 822 (2d Cir. 1967), *cert denied,* 390 U.S. 1025 (1968). A witness may not avoid appearing by submitting an affidavit stating that he will claim the privilege and refuse to testify, *U.S. v. Pilnick,* 267 F. Supp. 791, 798-799 (S.D.N.Y. 1967), or refuse to be sworn, *U.S. v. Romero,* 249 F.2d 371, 375 (2d Cir. 1957). The reluctance of a witness to testify at trial can be adequately established only by compelling his presence and questioning him before the court, but this testing need not take place before the jury. *U.S. v. Sanchez,* 459 F.2d 100 (2d Cir.), *cert. denied,* 409 U.S. 864 (1972). Usually, the privilege must be claimed separately in respect to each question which the witness refuses to answer; and, in general, the claim may not be asserted before the stating of the question. *U.S. v. Harmon,* 339 F. 2d 354 (6th Cir. 1964), *cert. denied,* 380 U.S. 944 (1965). But where the position of the witness at a hearing is virtually that of an accused on trial, his blanket refusal to answer may be justified. *Maffie v. U.S.,* 209 F.2d 225 (1st Cir. 1954); *Marcello v. U.S.,* 196 F.2d 437 (5th Cir. 1952). While the prosecutor cannot repeatedly elicit assertions of the fifth amendment privilege without a reasonable relation to the direct testimony, if the defendant makes an issue of his credibility such a line of questioning is not improper. *U.S. v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978). However, in these circumstances, impeachment of the credibility of an accomplice, who testifies in the trial of the defendant, cannot be the basis for introduction of the accomplice's confession which implicates the defendant. *Douglas v. Alabama,* 380 U.S. 415 (1965).

The witness must exercise the privilege; the court cannot do so when the witness is not reluctant to answer a question. *U.S. v. Colyer,* 571 F.2d 941, 946 (5th Cir.), *cert. denied,* 439 U.S. 933 (1978). Once the privilege is asserted, the court must use discretion and "personal perceptions of the peculiarities of the case" to determine if the claim is valid. In *Hoffman v. U.S.,* 341 U.S. 479 (1951), the Supreme Court delineated the test, at 486-487:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified ... and to require him to answer if it clearly appears to the court that he is mistaken. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

See in re Brogna, 589 F.2d 24 (1st Cir. 1978); *In re U.S. Hoffman Can Corp.,* 373 F.2d 622 (3d Cir. 1967); *U.S. v. Frascone,* 299 F.2d 824 (2d Cir.), *cert. denied,* 370 U.S. 910 (1962); *U.S. v. Trigilio,* 255 F.2d 385 (2d Cir. 1958); *U.S. v. Gordon,* 236 F.2d 916 (2d Cir. 1956).

When it is not readily evident from the question itself or the setting in which it is asked that an injurious disclosure might result from either a response or an explanation why no response could be given, as, for example, when large numbers of documents are subpoenaed by the grand jury, the witness may not be free to rest on a blanket claim of the privilege but may be required to make an *in camera* showing to the court of how each response may tend to incriminate him. *In re Horowitz,* 482 F.2d 72, 82 n.11 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973). *See U.S. v. Reynolds,* 345 U.S. 1, 8-9 (1958); *Brown v. U.S.,* 276 U.S. 134 (1928). This is the procedure currently followed when an Internal Revenue Service summons in a civil investigation is resisted on the fifth amendment claim of privilege. *U.S. v. Ponder,* 475 F.2d 37, 39 (5th Cir. 1973); *U.S. v. Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969). *See Donaldson v. U.S.,* 400 U.S. 517, 531-536 (1971), holding that the summons must be issued in good faith before any recommendation for prosecution.

A witness may refuse to testify upon a showing the privilege could be asserted properly regarding all relevant questions. *See, e.g., U.S. v. Harris,* 542 F.2d 1283 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977); *U.S. v. Melchor Moreno,* 536 F.2d 1042 (5th Cir. 1976). Before excusing a witness from testifying, the court must determine that the witness will assert the privilege as to essentially all questions which may be asked of him, *U.S. v. Reese,* 561 F.2d 894 (D.C. Cir. 1977), and whether reasonable grounds exist to fear incrimination. *U.S. v. Melchor Moreno, supra.* A refusal to testify must not be permitted where a narrower application of the privilege adequately protects the witness' rights. *Id.*

4. REGISTRATION AND REPORTING PROVISIONS

The government may not prosecute someone for failing to register or report activities or possessions when the registration or filing of the report would subject the individual to substantial hazards of self-incrimination. Thus, for example, the government may not prosecute for failure to pay wagering taxes or failure to register as someone liable to pay wagering taxes because wagering activity subjects a participant to possible state and federal prosecution. *Marchetti v. U.S.,* 390 U.S. 59 (1968). *See also Haynes v. U.S.,* 390 U.S. 85 (1968) (registration of sawed-off shotgun); *Grosso v. U.S.,* 390 U.S. 62 (1968) (wagering tax and registration statement); *U.S. v. Lewis,* 475 F.2d 571 (5th Cir. 1972); *Communist Party v U.S.,* 384 F.2d 957 (D.C. Cir. 1967) (party registration violated fundamental fifth amendment rights of its members).

A forfeiture proceeding for failure to pay wagering taxes, although civil in form, is criminal in nature, and the privilege against self-incrimination is therefore a defense. *U.S. v. U.S. Coin & Currency,* 401 U.S. 715 (1971). However, the privilege is not a bar to a civil action to recover either the wagering tax or the tax on the transfer of marijuana. *Simmons v. U.S.,* 476 F.2d 715 (10th Cir. 1973); *Cancino v. U.S.,* 451 F.2d 1028 (Ct. Cl. 1971), *cert. denied,* 408 U.S. 925 (1972).

The fifth amendment privilege is not a defense, however, where there is no "real and substantial possibility" that the registration provisions will be utilized. *Minor v. U.S.,* 396 U.S. 87, 93 (1969). (marijuana and heroin order forms); *McCutcheon v. Estelle,* 483 F.2d 256 (5th Cir. 1973); *U.S. v. Castanon,* 453 F.2d

932 (9th Cir.), *cert. denied,* 406 U.S. 922 (1972). *See also U.S. v. Whitehead,* 424 F.2d 446 (6th Cir. 1970) (alcohol tax law). In *California v. Byers,* 402 U.S. 424 (1971), the Supreme Court looked to the essentially regulatory nature of a statute requiring a driver involved in a car accident to stop and give his name and address and the slight likelihood of incrimination this entailed, in holding the statute did not violate the privilege. Similarly, a court order requiring a defendant, found in violation of the antifraud provisions of the securities laws, to report all future transactions, was not violative of the privilege. *SEC v. Radio Hill Mines Col, Ltd.,* 479 F.2d 4, 7 (2d Cir. 1973). Nor is the National Firearms Act, 26 U.S.C. §§5801-5803, a violation of the privilege. *U.S. v. Freed,* 401 U.S. 601 (1971); *U.S. v. Black,* 472 F.2d 130 (6th Cir. 1972), *cert. denied,* 411 U.S. 969 (1973).

Similarly, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801-904, has eliminated the fifth amendment problems dealt with in *Leary v. U.S.,* 395 U.S. 6 (1969), and *U.S. v. Covington,* 395 U.S. 57 (1969), concerning the marijuana transfer tax, for crimes committed after that date. The provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520, as amended by the Organized Crime Control Act of 1970) permitting electronic surveillance of oral and wire conversations, do not violate the fifth amendment. *U.S. v. Tortorello,* 480 F.2d 764, 774 n.6 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973) (cases collected); *U.S. v. Bobo,* 477 F.2d 974, 981 (4th Cir. 1973), *cert. denied,* 421 U.S. 909 (1975); *U.S. v. Cafero,* 473 F.2d 489, 501 (3d Cir.), *cert. denied,* 417 U.S. 918 (1974).

A taxpayer is required to report his income from an illegal source, even though it may increase his risk of prosecution. *U.S. v. Sullivan,* 274 U.S. 259 (1927) (bootlegger's failure to file a return). Similarly, the privilege does not authorize false answers on a filed return. *U.S. v. Knox,* 396 U.S. 77 (1969). The privilege against self-incrimination also is not violated by introduction of a defendant's tax returns into evidence as proof of a federal gambling conspiracy, because disclosures made without claiming the privilege remove the element of compulsion. *Garner v. U.S.,* 424 U.S. 648 (1976).

Inspection of packages and briefcases of persons entering a United States courthouse does not violate the privilege. *Barrett v. Kunzig,* 331 F. Supp. 266, 274 (M.D. Tenn. 1971), *cert. denied,* 409 U.S. 914 (1972).

Statements obtained under threat of removal from office are "compelled" or "coerced" and may not be used in a subsequent criminal proceeding. *Garrity v. New Jersey,* 385 U.S. 493 (1967). A statute providing for removal from office for refusal to testify or waive immunity against subsequent criminal prosecution is unconstitutional in that it compels self-incrimination by imposing sanctions. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). A witness has no fifth amendment right to refuse to answer questions directly related to the performance of his official duties. However, the witness may not be fired from his post for refusing to waive the privilege; he may not be made to suffer penalties on account of his insistence upon his constitutional right. *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968); *Gardner v. Broderick,* 392 U.S. 273 (1968). *See Spevack v. Klein,* 385 U.S. 511 (1967) (disbarment); *Turley v. Lefkowitz,* 342 F. Supp. 544 (W.D.N.Y. 1972), *aff'd* 414 U.S. 70 (1973).

5. WAIVER OF THE PRIVILEGE

Waiver of the privlege against self-incrimination may take many forms and may be made at any time, even after immunity has been secured. *Smith v. U.S.,* 337 U.S. 137, 150 (1949).

One who volunteers information at any time does not meet the fifth amendment's requirement of "compulsion." Thus voluntary disclosure of an incriminating fact waives the privilege as to that and all other relevant facts where no further incrimination would result. *Garner v. U.S.,* 424 U.S. 648 (1976) (tax returns). Otherwise, permitting a witness to testify selectively may result in a distortion of the facts. *Rogers v. U.S.,* 340 U.S. 367, 371 (1951). *See Malloy v. Hogan,* 378 U.S. 1, 14 (1964); *U.S. v. Courtney,* 236 F.2d 921 (2d Cir. 1956). *But see Shendal v. U.S.,* 312 F.2d 564 (9th Cir. 1963).

For a waiver to be effective, it must be knowing and voluntary, with sufficient awareness of relevant circumstances and likely consequences. *Brady v. U.S.,* 397 U.S. 742, 748 (1970); *U.S. v. Larry,* 536 F.2d 1149 (6th Cir. 1976), *cert. denied,* 429 U.S. 984 (1976). Failure to establish a knowing wavier of the fifth amendment privilege prevents the admission of any statements made while in a custodial atmosphere. *Miranda v. Arizona,* 384 U.S. 436, 476 (1966). But, where incriminatory statements are given by an uncounseled person who is ignorant of fifth amendment rights in a civil trial, the statements are not thereby inadmissible in a subsequent criminal case. *U.S. v. White,* 589 F.2d 1283 (5th Cir. 1979). Where a witness is not advised of his privilege against self-incrimination at his first trial, his testimony there cannot be considered a waiver for purposes of his second trial. *U.S. v. Larry, supra.*

Waiver must be clear and unequivocal. In *Emspak v. U.S.,* 349 U.S. 190 (1955), the witness was interrogated as follows: "This is a voluntary statement. You do not claim immunity with respect to that statement?" He answered, "No." *Id.* at 196. The Court held that there was sufficient ambiguity to prevent finding a waiver. "To conclude otherwise would be to violate this Court's own oft-repeated admonition that courts 'must indulge every reasonable presumption against waiver of fundamental constitutional rights.' " *Id.* at 198. Defendant's statement that he would not answer "any" of the prosecutor's questions constituted a proper invocation of the privilege. *U.S. v. Urasovich,* 580 F.2d 1212 (3d Cir. 1978).

Waiver does not automatically occur as a result of a contractural obligation. *See, e.g., Gardner v. Broderick,* 392 U.S. 273 (1968) (police officer); *Curcio v. U.S.,* 354 U.S. 118 (1957) (secretary-treasurer of a union); *Morgan v. Thomas,* 448 F.2d 1356 (5th Cir. 1971), *cert. denied,* 405 U.S. 920 (1972) (surety on a bond).

Waiver occurs by the accused's plea of guilty only in respect to the crime for which he is charged. *See U.S. v. Damiano,* 579 F.2d 1001 (6th Cir. 1978). When the witness has admitted all the elements of the crime, he cannot withhold mere details such as the name of the person to whom embezzled monies were delivered, *U.S. v. St. Pierre,* 132 F. 2d 837 (2d Cir. 1942), *cert. dismissed,* 319 U.S. 41 (1943), unless such details could supply leads which might result in his conviction of another crime, *U.S. v. Yurasovich,* 580 F.2d 1212 (3d Cir. 1978); *U.S. v. Damiano, supra; U.S. v. Courtney,* 236 F.2d 921 (2d Cir. 1956). *Cf. Rogers v. U.S.,* 340 U.S. 367 (1951). A witness convicted on a conspiracy charge may claim the privilege on the theory he could be prosecuted on the underlying substantive crimes even though no charges are outstanding. *U.S. v. Miranti,* 253 F.2d 135 (2d Cir. 1958) (also holding that a waiver is not effective at a second appearance before the same grand jury after a lapse of time; a witness may claim the privilege before the grand jury even though he has previously made the incriminating statement to an FBI agent). *See U.S. v. Domenech,* 476 F.2d 1229 (2d Cir.), *cert. denied,* 414 U.S. 840 (1973), in which a codefendant who had pleaded guilty to one charge, but had a remaining charge yet to be dismissed, was permitted to claim his privilege when called as a witness by the defense. However, a defendant

who testifies concerning one charge waives the privilege for cross-examination on matters reasonably related to the subject matter and direct examination. *U.S. v. Lamb,* 575 F.2d 1310 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978). *See, e.g., U.S. v. Hood,* 593 F.2d 293 (8th Cir. 1979), where the defendant testified he had offered to talk to the FBI, and the court upheld cross-examination on his refusal to make statements to other law enforcement authorities. *See also U.S. v. Brannon,* 546 F.2d 1242 (5th Cir. 1977); *U.S. v. Palmer,* 536 F.2d 1278 (9th Cir. 1976). Similarly, failure to claim the privilege as to certain questions is a waiver regarding all questions on the same subject matter. *U.S. v. O'Henry's Film Works, Inc.,* 598 F.2d 313 (2d Cir. 1979).

In *Brown v. U.S.,* 356 U.S. 148 (1958), the Court held that the privilege had been waived as to questions asked on cross-examination relevant to the witness' direct examination. *See U.S. v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978). *But see U.S. v. Rogers,* 475 F.2d 821, 827 (7th Cir. 1973); *U.S. v. Lipton,* 467 F.2d 1161, 1167 n.13 (2d Cir. 1972), *cert. denied,* 410 U.S. 927 (1973); *U.S. v. Kravitz,* 281 F.2d 581, 588 (3d Cir. 1960), *cert. denied,* 364 U.S. 941 (1961); *Hamer v. U.S.,* 259 F.2d 274, 281 (9th Cir. 1958), *cert. denied,* 359 U.S. 916 (1959) (government witness permitted to raise privilege on cross-examination).

The effect of a waiver is limited to the particular proceeding in which the waiver occurs. *U.S. v. Yurosovich, supra; U.S. v. Cain,* 544 F.2d 1113 (1st Cir. 1976). A witness who testifies before a grand jury may still invoke the privilege at trial. *But see U.S. v. Davis,* ——— F.2d ——— (D.C. Cir. 1979), where the court held that statements before a grand jury pursuant to a plea agreement could be used against the defendant at trial when necessary after the plea was withdrawn. *U.S. v. Licavoli,* 604 F.2d 613 (9th Cir. 1979) *cert. denied,* 48 U.S.L.W. 3733 (1980). Similarly, statements made by a defendant during a supression hearing are not admissible at trial on the issue of guilt, *Simmons v. U.S.,* 390 U.S. 377 (1968); *U.S. v. Frazier,* 476 F.2d 891, 897, 903 (D.C. Cir. 1973), but may be admissible for impeachment purposes. *See, e.g., Woody v. U.S.,* 379 F.2d 130 (D.C. Cir. 1967), *cert. denied,* 389 U.S. (1962), and *Gordon v. U.S.,* 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1967). A witness does not waive his fifth amendment privilege when examined on matters which relate only to credibility, even though the witness is also the accused. Rule 608(b), Fed. R. Evid. However, when a defendant asks a magistrate for appointed counsel and lies about his assets, the government may use his false statements in its direct case at his trial without violating fifth or sixth amendment rights. *U.S. v. Kahan,* 415 U.S. 239 (1974).

Taking the stand does not constitute a waiver of earlier exercises of the fifth amendment privilege. In *Grunewald v. U.S.,* 353 U.S. 391 (1957), the Court held it was prejudicial error to permit revelation, on cross-examination of the petitioner, of petitioner's claim of the fifth amendment privilege before the grand jury, to impeach credibility. Similarly, in *Charles v. Anderson,* 610 F.2d 417 (6th Cir. 1979), the court distinguished between cross-examination about a prior inconsistent statement and cross-examination about a previous failure to give his present statement concerning the events, the latter being deemed unconstitutional. The court acknowledged that " ... the line of demarcation between permissible and impermissible cross-examination may be too difficult to discern." *Id.* at 422. In *Travis v. U.S.,* 247 F.2d 130, 133 (10th Cir. 1957), this reasoning was extended to a case where a character witness was asked whether he had ever heard that the defendant invoked the fifth amendment before a congressional investigating committee. In *U.S. v. Gross,* 276 F.2d 816, 821 (2d Cir.), *cert. denied,* 363 U.S. 831 (1960), the court held it was error for the prosecutor to ask the defendant on cross-examination whether he had told the same story to a congressional committee, on the ground that the witness' "no" answer could have given rise to an inference in the jurors' minds that he had invoked the fifth amendment before the committee. However, in *U.S. v. Sing Kee,* 250 F.2d 236, 240-241 (2d Cir. 1957), *cert. denied,* 355 U.S. 954 (1958), the court upheld questions to a defense witness concerning invocation of the privilege before a grand jury, where on direct examination defense counsel had sought to bolster the witness' credibility by indicating that the witness had been entirely cooperative and candid before the grand jury, and where, under the specific circumstances, the jury would not have been likely to infer the defendant's guilt from the witness' refusals to answer. *See U.S. v. Glasser,* 443 F.2d 994, 1006 (2d Cir.), *cert. denied,* 404 U.S. 854 (1971). In *Stewart v. U.S.,* 366 U.S. 1 (1961), the Court reversed a conviction where the prosecutor asked the defendant on cross-examination whether he had testified at his earlier trials, thereby suggesting that he had previously exercised his privilege not to testify. *See U.S. v. Semensohn,* 421 F.2d 1206, 1209-10 (2d Cir. 1970) (error to ask defendant why he had not discussed matters with government agents); *U.S. v. Mullings,* 364 F.2d 173, 175 (2d Cir. 1966); *Faqundes v. U.S.,* 340 F.2d 673, 677-678 (1st Cir. 1965) (error to impeach defendant on his refusal to talk and request for counsel upon arrest); *U.S. v. Walker,* 313 F.2d 236, 239 (6th Cir.), *cert. denied,* 374 U.S. 807 (1963); *U.S. v. Provoo,* 215 F.2d 531 (2d Cir. 1954), *aff'd,* 350 U.S. 857 (1955). *See also U.S. v. Hale,* 422 U.S. 171 (1975); *U.S. v. Rose,* 525 F.2d 1026 (2d Cir. 1975), *cert. denied,* 424 U.S. 956 (1976). Post-arrest silence following *Miranda* warnings cannot be used to impeach an explanation given at trial. *Doyle v. Ohio,* 426 U.S. 610 (1975). However, proof that a defendant remained silent in the face of questioning upon arrest may constitute harmless error when there is overwhelming evidence of guilt. *Rothschild v. New York,* 525 F.2d 686 (2d Cir. 1975); *U.S. v. Williams,* 523 F.2d 407 (2d Cir. 1975). *Cf. U.S. v. Sobell,* 314 F.2d 314 (2d Cir.), *cert. denied,* 374 U.S. 857 (1963). *But see U.S. v. Tomaiolo,* 249 F.2d 683, 690-693 (2d Cir. 1957), where it was held error to ask defense witness if he refused to testify before grand jury.

6. COMMENT ON FAILURE TO TESTIFY

A defendant in a criminal trial has the right either to take the stand or not, as he chooses, and his failure to take the stand may not be commented upon by the prosecution. 18 U.S.C. §3481; *Griffin v. California,* 380 U.S. 609 (1965).

B. PRIVILEGED COMMUNICATIONS

Privileged communications, even if highly probative and trustworthy, are protected from disclosure because "their disclosure is inimical to a principle or relationship ... that society deems worthy of preserving and fastening." Graham C. Lilly, *An Introduction to the Law of Evidence* (1978) at 317.

As a general rule, privileges and exclusionary rules can be asserted only by persons whose privacy is affected. Privileges usually can be claimed only by the owner of the privilege, that is, by the person vested with the relationship protected by that particular privilege, whether he be a party or a witness. *U.S. v. Hoffa,* 349 F.2d 20 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966).

Privileges of witnesses in criminal cases are governed by the "principles of common law as they may be interpreted by courts of the United States in the light

of reason and experience." Rule 501, Fed. R. Evid.; Rule 26, Fed. R. Crim. P. Unlike civil cases where reference to state law is mandatory, in criminal cases courts are merely permitted to refer to state law for guidelines, if appropriate, under Rule 501 and Rule 26. *See U.S. v. Allery*, 526 F.2d 1362 (8th Cir. 1975). However, the Supreme Court recently reiterated that "the admissibility of evidence in criminal trials in the federal courts 'is to be controlled by common-law principles, not by local statute,' " and held that an evidentiary privilege for a state legislator under that state's constitution did not compel application of the privilege in a federal criminal prosecution. *U.S. v. Gillock*, 100 S. Ct. 1185, 1190 (1980).

1. MARITAL COMMUNICATIONS PRIVILEGE

Two distinct privileges arising from the marital relationship are recognized by federal courts. The first is the "adverse testimony" or "anti-marital facts" privilege, which permits one spouse to refrain from testifying adversely against the other. *See, e.g., Hawkins v. U.S.*, 358 U.S. 74, 75-76 (1958); *U.S. v. Lustig*, 555 F.2d 737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977); *U.S. v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976). The second and more traditional type of privilege protects confidential communications arising from the marital relationship. *Blare v. U.S.*, 340 U.S. 332, 333 (1954); *U.S. v. Lilley*, 581 F.2d 182 (8th Cir. 1978); *U.S. v. Lustig, supra; U.S. v. Fisher*, 518 F.2d 836 (2d Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976).

a. ADVERSE TESTIMONY PRIVILEGE

The adverse testimony privilege stems from two principles of medieval jurisprudence: that an accused could not testify on his own behalf because of his interest in the proceedings, and that one spouse was incompetent to testify against the other because they were considered to be one person. With the evolution of this rule into one of privilege and not disqualification, its modern justification is "its perceived role in fostering the harmony and sanctity of the marriage relationship." *See* discussion in *Trammel v. U.S.*, 100 S. Ct. 906 (1980).

The Supreme Court in *Trammel* adopted for the federal system the state law trend of erosion of an accused's privilege to bar adverse spousal testimony. With all justices concurring in the judgment, the Supreme Court modified its earlier ruling in *Hawkins v. U.S., supra*, and held that the witness-spouse alone has the privilege of refusing to testify adversely. Consequently, in federal criminal proceedings a spouse can be neither compelled to testify nor precluded from testifying.

For the privilege to be available, the testimony in question must be adverse to the spouse's interest in the case at hand. *U.S. v. Burks*, 470 F.2d 432 (D.C. Cir. 1972). This privilege differs from that arising from confidential communications in two respects. First, it prohibits adverse testimony regardless of the source of knowledge, while the communications privilege covers only knowledge obtained through confidential communications. Second, the privilege exists only when the accused and the prospective witness are married at the time of trial; the privilege ends at the termination of the marriage. *Pereira v. U.S.*, 347 U.S. 1 (1954); *U.S. v. Bolzer*, 556 F.2d 948 (9th Cir. 1977); *U.S. v. Lustig*, 555 F.2d 737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977); *U.S. v. Crockett*, 534 F.2d 589 (5th Cir. 1976).

b. CONFIDENTIAL COMMUNICATIONS

The spousal "confidential communications" privilege applies only to utterances or expressions by one spouse to convey a message to another. *Pereira v. U.S.*, 347 U.S. 1 (1954). For the privilege to extend to gestures, they must be communicative in nature or intended as such. *Id.; U.S. v. Lewis*, 433 F.2d 1146 (D.C. Cir. 1970). A husband's practice of secreting heroin on his wife was not such a communication in *U.S. v. Smith*, 533 F.2d 1077 (8th Cir. 1976), nor were spousal observations of a drug transaction in *U.S. v. Lustig*, 555 F.2d 737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977). Some courts have extended the privilege to cover expressive acts, *Fraser v. U.S.*, 145 F.2d 139 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945) (recognizing a Tennessee statute extending the privilege to acts, but holding it does not necessarily extend to such "communication" in furtherance of a fraud), while others have declined to do so, *Pool v. U.S.*, 260 F.2d 57 (9th Cir. 1958) (regarding the manner in which a statement was made).

One is protected from indirect as well as direct exposure of a marital communication. *See, e.g., Blau v. U.S.*, 340 U.S. 332 (1951) (husband was asked for his wife's whereabouts, which he learned only from her secret communications). Only those communications which are confidential are privileged, *see, e.g., U.S. v. Cotton*, 567 F.2d 958 (10th Cir. 1977), *cert. denied*, 436 U.S. 959 (1978), but all communications in private between a husband and wife are presumed to be confidential, *Wolfle v. U.S.*, 291 U.S. 7, 14 (1934), unless the subject of the message or the circumstances of the communication show otherwise, *Blau v. U.S.*, 340 U.S. at 333-334. Circumstances surrounding a communication may remove the presumption of confidentiality. For example, the presence of a third party will automatically remove the presumption, *U.S. v. Burks*, 470 F.2d 432, 436-437 (D.C. Cir. 1972); *U.S. v. Lustig*, 555 F.2d 737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977), even if the third party is eavesdropping and the spouses are not aware of his presence, *Hopkins v. Grimshaw*, 165 U.S. 342, 351 (1897); *Narten v. Eyman*, 460 F.2d 184, 191 (9th Cir. 1969). A spouse may testify to circumstances which would remove the presumption and thereby open the door to testimony regarding the communication. *Picciurro v. U.S.*, 250 F.2d 585, 589 (8th Cir. 1958). If the subject of the communication indicates that it was intended to be published, no privilege will attach. *Dobbins v. U.S.*, 157 F.2d 257, 260 (D.C. Cir.), *cert. denied*, 329 U.S. 734 (1946) (business).

Designed to encourage marital communications, the privilege is limited to communications occurring during the marriage. *See Lutwak v. U.S.*, 344 U.S. 604 (1953). This minimizes the possibility of suppressing testimony by marrying the witness. *U.S. v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1975). Communications which occur before the marriage, *U.S. v. Pensinger*, 549 F.2d 1150 (8th Cir. 1977); *U.S. v. Van Drunen, supra; U.S. v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794, or after divorce, *Volianitis v. INS*, 352 F.2d 766 (9th Cir. 1965); *Yoder v. U.S.*, 80 F.2d 665 (10th Cir. 1935), are not privileged. However, unlike the adverse testimony privilege, the termination of a marriage does not invalidate the privileged nature of a confidential communication made during a valid marriage. *Pereira v. U.S.*, 347 U.S. 1 (1954); *U.S. v. Termini*, 267 F.2d 18 (2d Cir.), *cert. denied*, 361 U.S. 822 (1959).

c. EXISTENCE OF MARRIAGE

Both the adverse testimony and confidential communications privileges depend on there being a valid marriage under state law. *U.S. v. Lustig*, 555 F.2d

737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977), *U.S. v. Apodaca*, 522 F.2d 568 (10th Cir. 1975). This is a question of law for the court. *U.S. v. Barnes*, 368 F.2d 567 (4th Cir. 1966). Voidable and common law marriages, if recognized by state law, qualify for the privilege.

d. OBJECTION AND WAIVER

The marital communications privilege can be claimed only by a holder of the privilege; third parties may not assert the privilege even if they may be incriminated by the disclosure. *U.S. v. Crockett*, 534 F.2d 589, 604 (5th Cir. 1976). There is a split in the authorities as to which spouse holds the privilege regarding confidential communications. Some courts assert that the privilege belongs only to the communicating spouse, *Fraser v. U.S.*, 145 F.2d 139, 144 (6th Cir. 1944), *cert. denied* 324 U.S. 849 (1945), while other courts hold that the privilege belongs to both spouses and can be asserted by either, *U.S. v. Mitchell*, 137 F.2d 1006, 1008 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944), and must be waived by both, *Wyatt v. U.S.*, 362 U.S. 525, 528-29 (1960). Either spouse may now waive the privilege against testifying adversely in federal criminal proceedings. *Trammel v. U.S.*, 100 S. Ct. 906 (1980).

Waiver occurs several ways. As it relates to confidential communications, the privilege is waived when the subject of the communication is disclosed by the spouse claiming the privilege. *U.S. v. Lilley*, 581 F.2d 182 (8th Cir. 1978). Waiver may also occur through failure to make timely objection. *Benson v. U.S.*, 146 U.S. 325 (1892); *U.S. v. Fisher*, 518 F.2d 836 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975); *U.S. v. Figueroa-Paz*, 468 F.2d 1055, 1057 (9th Cir. 1972); *Canady v. U.S.*, 354 F.2d 849, 857 (8th Cir. 1966).

Failure to object to a spouse's testimony in the first trial, ending in a hung jury, is a waiver of the privilege for the second trial. *U.S. v. Fisher, supra.* Admission into evidence of a spouse's testimony after a timely objection by the defendant-spouse constitutes reversible error. *Hawkins v. U.S.*, 358 U.S. 74 (1958). It is generally considered prejudicial to require a defendant to claim the privilege in the presence of the jury. *Tallo v. U.S.*, 344 F.2d 467, 469 (1st Cir. 1965); *U.S. v. Tomaiolo*, 249 F.2d 683, 690 (2d Cir. 1957). *But see Grulkey v. U.S.*, 394 F.2d 244 (8th Cir. 1968). Comment may be made on a defendant's failure to call his spouse if the circumstances indicate that her testimony would be material and relevant. *Bisno v. U.S.*, 299 F.2d 711, 721 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). However, such comment may be reversible error where the privilege has been exercised timely. *Courtney v. U.S.*, 390 F.2d 521, 527 (9th Cir.), *cert. denied*, 393 U.S. 857 (1968).

e. EXCEPTIONS

Communications in furtherance of crime or fraud are not privileged. *U.S. v. Cotroni*, 527 F.2d 708 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *U.S. v. Kahn*, 471 F.2d 191, 195 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Fraser v. U.S.*, 145 F.2d 139, 143 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945); *Federal Deposit Ins. Co. v. Alter*, 106 F. Supp 316 (W.D. Pa. 1952). Similarly, there can be no privilege if the marriage was entered into solely for the purpose of perpetrating a crime. *Lutwak v. U.S.*, 344 U.S. 604 (1953). Furthermore, where both spouses participated in the unlawful enterprise, exclusion of testimony based on the privilege is not required. *U.S. v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).

The general exception to the privilege where the spouse is the current victim of the crime with which the defendant is charged, *see, e.g., Wyatt v. U.S.*, 362 U.S. 525 (1960), is largely unnecessary with the Supreme Court's decision in *Trammel;* the substance of most offenses falls within the scope of the adverse testimony privilege, which the victim-spouse can now waive, and not the confidential communications privilege. The exception has been extended in some states and by some courts to include testimony regarding offenses by a spouse against offenses done to a child of either spouse. *See U.S. v. Allery*, 526 F.2d 1362 (8th Cir. 1975).

2. ATTORNEY-CLIENT PRIVILEGE

The purpose of the attorney-client privilege is to encourage full disclosure by clients to attorneys. *Fisher v. U.S.*, 425 U.S. 391 (1976). Because, its effect, is to withhold information from the fact-finder, however, the privilege is strictly construed. *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) *(en banc).*

In the leading case of *U.S. v. U.S. Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950), Judge Wyzanski set out in detail the rule of law relating to the attorney-client privilege. He states at 358-359:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services of (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See In re Grand Jury Investigation, 599 F.2d at 1233, citing *U.S. v. Machinery Corp., supra.*

(1) The privilege applies only if "the asserted holder of the privilege is or sought to become a client." A person becomes a client by consulting with a lawyer even though a retainer is refused, although no privilege can be asserted as to communications occurring after the attorney refuses the case. *See Sawyer v. Barczak*, 129 F. Supp. 687, 696-697 (E.D. Wis. 1955), *aff'd*, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956) (no privilege where attorney was consulted in bribery attempt). Corporations as well as individuals can be clients for the purpose of the privilege. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See U.S. v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969).

Because a corporation communicates through its human agents, however, a question arises whether the attorney-client privilege extends to the individual making the statement. Some courts rely on the "control group" test and require that the statement come from a corporate figure with actual authority to speak for the entity, or from top management personnel who have a substantial role in directing the corporation's response to the legal advice received. *U.S. v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980); *In re Grand Jury Investigation, supra; Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *In re Grand Jury Subpoena*, 81 F.R.D. 691 (S.D.N.Y. 1979), *rev'd on other*

grounds, 599 F.2d 504 (2d Cir. 1979). *See also* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424 (1970).

Other circuits have applied the broader "subject matter" test, and recognize the privilege if certain conditions are met: generally, if the information is acquired in the ordinary course of his employment and is communicated confidentially to corporate counsel to aid his giving legal advice to the corporation. *See Diversified Industries, Inc. v. Meredith, supra; Harper and Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd without opinion by an equally divided Court,* 400 U.S. 348 (1971). The privilege does extend to corporate communication with house counsel. *U.S. v. United Shoe Machinery Corp., supra.*

(2) The privilege applies only if "the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer." Communication to a member of the bar, while a prerequisite to assertion of the privilege, does not alone bring it into operation. *Modern Woodmen v. Watkins,* 132 F.2d 352 (5th Cir. 1942); *Underwater Storage, Inc. v. U.S. Rubber Co.,* 314 F. Supp. 546 (D.D.C. 1970). While the lawyer must be admitted to practice before a court, he need not be a member of the bar of the court in which the privilege is asserted. *Garrison v. General Motors Corp,* 213 F. Supp. 515 (S.D. Cal. 1963).

Most problems in this area arise when a client seeks advice of a legal nature from a nonlawyer, such as a banker-accountant. There is no banker-client, *Rosenblatt v. Northwest Airlines, Inc.,* 54 F.R.D. 21, 22 (S.D.N.Y. 1971), or accountant-client, *Couch v. U.S.,* 409 U.S. 322, 335 (1973); *U.S. v. Wainwright,* 413 F.2d 796, 803 (10th Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970), privilege in federal law. But one court has held that, where an accountant is relied upon for legal advice as in a tax investigation, he must be treated as a lawyer for due process purposes and the privilege does attach. *U.S. v. Tarlowski,* 305 F. Supp. 112, 123-124, (E.D.N.Y. 1969). It is also clear that, when information sought to be withheld by an accountant was given to him at the direction of an attorney for the purpose of obtaining legal advice, the accountant may claim the privilege as an agent or subordinate of the attorney. *U.S. v. Kovel,* 296 F.2d 918, 920-921 (2d Cir. 1961). *But see In re Horowitz,* 482 F.2d 72, 80-81 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *U.S. v. Brown,* 478 F.2d 1038 (7th Cir. 1973); *U.S. v. Gurtner,* 474 F.2d 297, 299 (9th Cir. 1973).

Further, for a communication to qualify for the privilege, the client must be consulting with the lawyer as a lawyer, *U.S. v. Stern,* 511 F.2d 1364 (2d Cir. 1975), *cert. denied,* 423 U.S. 829 (1975); *In re Bonanno,* 344 F.2d 830, 833 (2d Cir. 1965); *U.S. v. Brown,* 349 F. Supp. 420, 427 (N.D. Ill. 1972), *modified,* 478 F.2d 1038 (7th Cir. 1973), and not in the capacity as a participant in a business transaction, *U.S. v. Rosenstein,* 474 F.2d 705, 714 (2d Cir. 1973), or accountant, *Colton v. U.S.,* 306 F.2d 633, 638 (2d Cir.), *cert. denied,* 371 U.S. 951 (1962), or engineering adviser, *Paper Converting Mach. Co. v. F.M.C. Corp.,* 215 F. Supp. 249, 252 (E.D. Wis. 1963), or personal advisor, *Young v. Taylor,* 466 F.2d 1329, 1332 (10th Cir. 1972); *Radiant Burners, Inc. v. American Gas Ass'n,* 320 F.2d 314, 324 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963); *Lowry v. Commissioner,* 262 F.2d 809, 812 (2d Cir. 1959), or scrivener, *Canaday v. U.S.,* 354 F.2d 849, 857 (8th Cir. 1966), or go-between in the transfer of a deed or money in a real estate transaction, *U.S. v. DeVasto,* 52 F.2d 26, 30 (2d Cir.), *cert. denied,* 284 U.S. 678 (1931), or messenger, *McFee v. U.S.,* 206 F.2d 872, 876 (9th Cir. 1953), *vacated,* 348 U.S. 905, *aff'd,* 221 F.2d 807 (9th Cir. 1955), or one who merely deposits money for another, *Pollock v. U.S.,* 202 F.2d 281, 286 (5th Cir.), *cert. denied,* 345 U.S. 993 (1953), or parent, *In re Kinoy,* 326 F. Supp. 400, 405-406 (S.D.N.Y. 1970). The privilege fails if the client attempts to secure other than legal services or advice from the attorney. *Colton v. U.S.,* 306 F.2d 633 (2d Cir.), *cert. denied,* 371 U.S. 951 (1962).

(3) The privilege applies only if the communication relates to a fact of which the attorney was informed "(a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort."

The privilege belongs to the client, and applies only to communications made by the client, or in some cases, by his agent. *U.S. v. Goldfarb,* 328 F.2d 280 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964). It is not violated by recording a conversation between the client and his attorney when the client gives his consent. *U.S. v. Kahn,* 251 F. Supp. 702, 709 (S.D.N.Y.), *aff'd,* 366 F.2d 259 (2d Cir.), *cert. denied,* 385 U.S. 948 (1966). A communication from the attorney to the client is protected insofar as it has the effect of revealing a confidential communication from the client. *See Colton v. U.S.,* 306 F.2d 633, 639 (2d Cir.), *cert denied,* 371 U.S. 951 (1962). *Cf. U.S. v. Silverman,* 430 F.2d 106, 122 (2d Cir.), *modified,* 439 F.2d 1198 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971).

There can be no privilege if the communication is made to an attorney to aid someone other than the person who made the communication. *City of Philadelphia v. Westinghouse Electric Co.,* 210 F. Supp. 483 (E.D. Pa. 1962). Neither the client nor the attorney may assert the privilege as to communications with third parties, *Rucker v. Wabash R.R.,* 418 F.2d 146, 154 (7th Cir. 1969); and communications received from third parties cannot be made privileged by conveyance to an attorney, *Hickman v. Taylor,* 329 U.S. 495, 508 (1947). Further, a third party may not assert the privilege or complain on appeal that the client's claim of privilege was erroneously rejected. *Cf. U.S. v. Silverman,* 430 F.2d 106, 120-122 (2d Cir.), *modified,* 439 F.2d 1198 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971).

It is not enough that the subject of the communication is the product of the attorney-client relationship. *Mead Data Central, Inc. v. U.S. Dept. of Air Force,* 566 F.2d 242 (D.C. Cir. 1977). *See U.S. v. Pipkins,* 528 F.2d 559, 562-563 (5th Cir.), *cert. denied,* 426 U.S. 952 (1976). To be protected, the communication must be confidential. *U.S. v. Merrell,* 303 F. Supp. 490, 492 (N.D.N.Y., 1969). *See U.S. v. Friedman,* 445 F.2d 1076, 1085 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971). It is not privileged if it is made in the presence of a third party. *U.S. v. Blackburn,* 446 F.2d 1089, 1091 (5th Cir. 1971), *cert. denied,* 404 U.S. 1017 (1972). *See also U.S. v. Lechoco,* 542 F.2d 84 (D.C. Cir. 1976); *U.S. v. Gordon-Nikkar,* 518 F.2d 972 (5th Cir. 1975). Furthermore, a communication is not privileged if the communication was made with the intent or understanding that it be imparted to third parties. *U.S. v. Merrel,* 303 F. Supp. at 493. A specific concern for confidentiality, however, is not necessary for invocation of the privilege. *U.S. v. Buckley,* 586 F.2d 498 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979).

Communication to, or the presence of, certain third parties, such as a clerk, agent, or secretary of either the lawyer or the client, who are necessary to provide the legal service or to make the communication, does not destroy the privilege. *Himmelfarb v. U.S.,* 175 F.2d 924, 939 (9th Cir.), *cert. denied,* 338 U.S. 860 (1949). *See Young v. Taylor,* 466 F.2d 1329, 1332 (10th Cir. 1972); *U.S. v. Kovel,* 296 F.2d 918, 920-921 (2d Cir. 1961). The privilege extends to communications to, or in the presence of, an accountant if it is made in confidence for the purpose of

obtaining legal advice from the attorney. *U.S. v. Kovel,* 296 F.2d at 922.

The privilege does not protect an accountant's papers prepared while employed by the taxpayer even though that accountant is subsequently employed by the taxpayer's attorney. *U.S. v. Brown,* 349 F. Supp. 420, 426 (N.D. Ill. 1972), *aff'd,* 478 F.2d 1038 (7th Cir. 1973). There is no privilege where, after advice is received from the attorney, the client makes the communications available to the accountant for purposes unrelated to seeking legal advice. *In re Horowitz,* 482 F.2d 72, 81 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973).

A document that is not confidential to begin with, does not become so merely because it is communicated in private to an attorney. *Fisher v. U.S., supra* (documents used to prepare tax returns and transferred to attorneys subject to subpoena). However, documents in the hands of an attorney supplied by a client to obtain legal assistance are protected by the attorney-client privilege from compulsory disclosure, if in the hands of the client the documents would be privileged under the fifth amendment. In *U.S. v. Silverman,* 430 F.2d 106, 120-122 (2d Cir.), *modified,* 439 F.2d 1198 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971), the court held the privilege inapplicable to an attorney's report describing the minutes of a labor union, the minute book itself being a public record.

The privilege applies in any legal proceeding, whether judicial, *Continental Oil Co. v. U.S.,* 330 F.2d 347, 349-50 (9th Cir. 1964), or administrative proceedings, *CAB v. Air Transport Ass'n of America,* 201 F. Supp. 318 (D.D.C. 1961). One need not be a party to invoke the privilege, and the privilege is not destroyed by a grant of immunity. *U.S. v. Pappadio,* 346 F.2d 5, 9 (2d Cir. 1965), *vacated on other grounds,* 384 U.S. 364 (1966).

The privilege applies only to statements made and advice given concerning legal services. *In re Bonanno, supra.* Accordingly, there is no privilege as to the identity or physical characteristics and mental condition of a client. *U.S. v. Ponder,* 475 F.2d 37, 39 (5th Cir. 1973); *In re Semel,* 411 F.2d 195 (3d Cir.), *cert. denied,* 396 U.S. 905 (1969); *U.S. v. Kendrick,* 331 F.2d 110 (4th Cir. 1964). Likewise, there is no privilege as to the fact and conditions of the attorney-client employment relationship, including the existence of a retainer and the amount of the fee, *In re January 1976 Grand Jury,* 534 F.2d 719 (7th Cir. 1976); *In re Semel, supra,* or whether the attorney has advised a client or provided services for him on a certain matter, *Colton v. U.S., supra.* The privilege will attach, however, to a client's identity where its revelation would amount to a disclosure of a confidential communication, as where the substance of a communication has already been revealed but not its source. *Colton v. U.S.,* 306 F.2d at 637. Even if the disclosure is not within the attorney-client privilege, an attorney may claim the fifth amendment privilege regarding an answer that would be compelled self-incriminating testimony. *Matter of Grand Jury Empanelled Feb. 14, 1978,* 603 F.2d 469 (3d Cir. 1979).

Communications between an attorney and his client about a crime or fraud to be committed sometime in the future are not privileged. *U.S. v. Hoffa,* 349 F.2d 20, 37 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966). A prima facie showing of fraud has been required to defeat a claim of the privilege. *Natta v. Zletz,* 418 F.2d 633, 637 (7th Cir. 1969).

(4) The privilege has been "(a) claimed and (b) not waived by the client." The privilege belongs to the client. *U.S. v. Kahn,* 251 F. Supp. 702, 709 (S.D.N.Y.), *aff'd,* 366 F.2d 259, 265 (2d Cir.), *cert. denied,* 385 U.S. 948 (1966). *See Garner v. Wolfinbarger,* 430 F.2d 1093, 1096 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971). It can be claimed by him alone, although a lawyer is "duty-bound" to

claim the privilege on behalf of a client, even when the client is not a part of the proceeding in which disclosure is sought. *Republic Gear Co. v. Borg Warner,* 381 F.2d 551, 556 (2d Cir. 1967). An attorney can neither invoke the privilege for his own benefit when his client desires to waive it, nor waive the privilege without his client's consent. *Id. See also U.S. v. Juarez,* 573 F.2d 267 (5th Cir.), *cert. denied,* 439 U.S. 915 (1978).

The general rule as to waiver is that, once there has been disclosure to a third party of a confidential communication by the client or by the attorney with the client's permission, such communication is no longer privileged. *In re Horowitz,* 482 F.2d 72 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *U.S. v. Aronoff,* 466 F. Supp. 855 (S.D.N.Y. 1979). Where the disclosure is partial, however, courts have held that the privilege is waived with respect to the yet unrevealed communications only to the extent that they are relevant to that part of the communication already disclosed. *See Hearn v. Rhay,* 68 F.R.D. 574 (E.D. Wash. 1975); *Magida v. Continental Can Co.,* 12 F.R.D. 74, 77 (S.D.N.Y. 1951); *U.S. v. Monti,* 100 F. Supp. 209, 212 (E.D.N.Y. 1951). The mere failure to invoke the privilege without a disclosure of confidential information is not a waiver. *U.S. v. Jacobs,* 322 F. Supp. 1299, 1303 (C.D. Cal. 1971). Generally, a waiver occurs when the attorney and client become adverse parties, as where a breach of duty is alleged. *See* Graham C. Lilly, *An Introduction to the Law of Evidence* (1978) at 334; *U.S. v. McCambridge,* 551 F.2d 865, 873-874 (1st Cir. 1977); *Johnson v. U.S., 542 F.2d 941, 942 (5th Cir. 1976), cert. denied,* 430 U.S. 934 (1977). A habeas corpus petition based on communications between the petitioner and his trial attorney constituted a waiver of the client's privilege against disclosure, and the attorney was free to disclose all relevant facts at a hearing. *U.S. ex. rel. Richardson v. McMann,* 408 F.2d 48, 53 (2d Cir. 1969), *vacated on other grounds,* 397 U.S. 759 (1970). *See U.S. v. Bostic,* 206 F. Supp. 855, 857 (D.D.C. 1962), *aff'd,* 317 F.2d 143 (D.C. Cir. 1953).

In balancing the privilege against social policy, courts have found no waiver when the disclosure was made inadvertently while complying with a court discovery order in a civil suit, *IBM v. U.S.,* 471 F.2d 507 (2d Cir. 1972), *appeal and petition for mandamus dismissed,* 480 F.2d 293 (2d Cir.), *cert. denied,* 416 U.S. 979 (1973), or when disclosure was made pursuant to settlement negotiations, *IBM v. Sperry Rand Corp.,* 44 F.R.D. 10, 13 (D. Del. 1968). The court in *Diversified Industries, Inc. v. Meredith, supra,* held that only a limited waiver occurred in relation to a separate civil case upon voluntary disclosure of privileged material pursuant to an SEC subpoena in a different and nonpublic proceeding. However, in *Byrnes v. IDS Realty Trust,* 48 U.S.L.W. 2621 (S.D.N.Y. 1980), the court distinguished *Meredith, supra,* and held that the privilege had not been waived for purposes of a private securities fraud suit brought by individuals who were not parties to an SEC investigation in which voluntary disclosures were made. However, where disclosure was made for use by a third party in a United States Patent Office interference proceeding, it was held to be a waiver of the privilege for all third persons. *In re Natta,* 48 F.R.D. 319, 322 (D. Del.), *aff'd on other grounds,* 410 F.2d 187 (3d Cir. 1969).

3. PHYSICIAN-PATIENT PRIVILEGE

The physician-patient privilege, unlike the attorney-client privilege, did not exist at common law. It later was established in about half the states as a statutory innovation. Under Rule 501 of the Federal Rules of Evidence, however, the privileges of witnesses are governed by the rules of common law except where

a federal statute otherwise provides. Therefore, in the absence of such a statute, the physician-patient privilege has been held inapplicable in the federal courts. *U.S. v. Mullings*, 364 F.2d 173, 176 n.2 (2d Cir. 1966). *See U.S. v. Harper*, 450 F.2d 1032, 1035 (5th Cir. 1971); *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). *But see Ramer v. U.S.*, 411 F.2d 30, 39 (9th Cir.), *cert. denied*, 396 U.S. 965 (1969).

Although the *Mullings* and *Harper* cases appear to have resolved the question of the general inapplicability of the privilege, at least in the Second and Fifth Circuits, that does not mean all physician-patient communications will be admissible. There may be circumstances where, because of the need for medical treatment, such communications are involuntary and thus inadmissible under traditional concepts. *Haynes v. Washington*, 373 U.S. 503 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *U.S. v. Mullings*, 364 F.2d 173 (2d Cir. 1966). Furthermore, in the case of *Hawaii Psychiatric Society v. Ariyoshi*, 481 F. Supp. 1028 (D. Hawaii 1979), a district court applied the concepts of confidentiality and the privacy-based right to seek treatment in enjoining the enforcement of a Hawaii statute authorizing administrative warrants to search psychiatrists' confidential Medicaid patient files.

Incriminating statements made during the course of a compulsory psychiatric exam cannot be used on the issue of guilt. 18 U.S.C. §4244. Such use is permissible on the issue of competency to stand trial or sanity at the time of the offense, however. Generally, the basis for this proscription is the fifth amendment privilege against self-incrimination, and not the physician-patient privilege. *See Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978); *U.S. v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976); *U.S. v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *U.S. v. Julian*, 469 F.2d 371 (10th Cir. 1972); *U.S. v. Harper*, 450 F.2d 1032 (5th Cir. 1971); *U.S. v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *U.S. v. Driscoll*, 399 F.2d 135 (2d Cir. 1968). Furthermore, notice of a court-ordered examination by a psychiatrist regarding competency does not give adequate notice to the defendant that he is being examined for criminal responsibility, such that the psychiatrist could testify as to the latter at trial. *U.S. v. Driscoll, supra.*

C. GOVERNMENT PRIVILEGE—IDENTITIES OF INFORMANTS

The law is settled that the government may refuse to disclose the identities of its informants at trial. *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. U.S.*, 353 U.S. 53 (1957); *U.S. v. Van Orsdell*, 521 F.2d 1323 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). The rationale underlying this privilege was expressed in *Roviaro*, 353 U.S. at 59:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The privilege, however, is not an absolute one, and where the defendant can show that disclosure is necessary to insure a "fair trial," the informant's identity must be revealed. *See U.S. v. Hanna*, 341 F.2d 906, 907 (6th Cir. 1965); *U.S. v. Coke*, 339 F.2d 183, 184-185 (2d Cir. 1964). *See also U.S. v. Silva*, 580 F.2d 144 (5th Cir. 1978); *U.S. v. McManus*, 560 F.2d 747 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *U.S. v. Tucker*, 552 F.2d 202 (7th Cir. 1972).

In *Roviaro*, the court stated that where the "disclosure of an informer's identity ... is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61. The Court, however, recognized that there was "no fixed rule" and that disclosure of the informant's identity "must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony and other relevant factors." *Id.* at 62. The determination on disclosure is within the discretion of the trial court. *U.S. v. Soles*, 482 F.2d 105 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973). The government's intention to assert the privilege and resist defense demand for disclosure should be made clear promptly to prevent any misunderstanding and prejudice. *U.S. v. Truesdale*, 400 F.2d 620, 623 (2d Cir. 1968). A mere request for disclosure of the informant's identity is generally held to be insufficient. *U.S. v. Mainello*, 345 F. Supp. 863, 881-882 (E.D.N.Y. 1972). Speculation of helpfulness will not compel disclosure, *U.S. v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978), nor will the mere possibility of obtaining relevant testimony, *U.S. v. Moreno*, 588 F.2d 490 (5th Cir.), *cert. denied*, 99 S. Ct. 2061 (1979). *See also U.S. v. Ortega*, 471 F.2d 1350, 1357-1359 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973). Rather, disclosure is only required upon the trial court's determination that the need for information of the person seeking disclosure outweighs the government's claim of privilege. *In re U.S.*, 565 F.2d 19 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).

The extent of the informant's participation in the crime charged is a significant factor in deciding whether his identity should be disclosed. A mere witness or tipster is not necessarily an "informant" whose identity must be disclosed. *U.S. v. Alonzo*, 571 F.2d 1384 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978); *U.S. v. Oliver*, 570 F.2d 397 (1st Cir. 1978). Absent a showing the informant was present on the occasions cited in the indictment, disclosure is not required. *U.S. v. Robinson*, 530 F.2d 1076 (D.C. Cir. 1976). In *Roviaro v. U.S., supra*, disclosure was required because the informant was an essential participant in the offense, having actually purchased the narcotics from the defendant. *Accord, U.S. v. Lloyd*, 400 F.2d 414, 415-416 (6th Cir. 1968); *Portomene v. U.S.* 221 F.2d 582, 583-584 (5th Cir. 1955). But mere presence of the informant during a transaction may not require disclosure of the identity. *U.S. v. Alonzo*, 571 F.2d 1384 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978). The same is true when the informant has played only a small role, or is unlikely to make any material contribution. *See U.S. v. Morris*, 568 F.2d 396 (5th Cir. 1978); *Simpson v. Kreiger*, 565 F.2d 390 (6th Cir.), *cert. denied*, 435 U.S. 946 (1978).

Where the informant merely introduces the defendant to an undercover agent and thereafter plays no other significant role, disclosure will not be required without some special showing of prejudice; nor will disclosure be ordered where the testimony of the informant would only be cumulative. *U.S. v. Russ*, 362 F.2d 843 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966); *U.S. v. Coke*, 339 F.2d 183 (2d Cir. 1964). *See U.S. v. Pelley*, 572 F.2d 264 (10th Cir. 1978); *U.S. v. Estrella*, 567 F.2d 1151 (1st Cir. 1977); *U.S. v. McManus*, 560 F.2d 747 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *U.S. v. Simonetti*, 326 F.2d 614, 616 (2d Cir. 1964); *U.S. v. Holiday*, 319 F.2d 775 (2d Cir. 1963).

Denial of a request for disclosure of the informant in a search warrant affidavit was not error where there was no evidence that disclosure would help the defense, facts furnished by this source were cumulative, and the informant's

knowledge was not essential to the presentation of the government's case. *U.S. v. Sherman,* 576 F.2d 292 (10th Cir.), *cert. denied,* 439 U.S. 913 (1978). *See also U.S. v. Alexander,* 559 F.2d 1339 (5th Cir. 1977), *cert. denied,* 434 U.S. 1078 (1978). Similarly, where the information provided was too attenuated to be essential to the defense, disclosure of the informant's identity was not mandatory. *U.S. v. Hare,* 589 F.2d 242 (5th Cir. 1979). However, where the informant was the only witness in a position to buttress or contradict the agent's testimony and the defendant alleged the informant might have a revenge motive, disclosure of the informant's identity was required. *U.S. v. Silva, supra.*

Upon a showing that the defendant's participation in the crime was the result of entrapment by the informant, disclosure is required. *Cf. U.S. v. Simonetti,* 326 F.2d 614 (2d Cir. 1964); *U.S. v. White,* 324 F.2d 814, 816 (2d Cir. 1963). But, where the government's proof at trial indicates a predisposition to commit the crime as a matter of law, error, if any, in failing to disclose the informer's identity may be harmless. *U.S. v. Eddings,* 478 F.2d 67, 70-72 (6th Cir. 1973). *See also U.S. v. Fredia,* 319 F.2d 853, 854 (2d Cir. 1963).

Where hearsay evidence derived from an informant is the basis for the issuance of a search warrant, but there is a substantial basis for crediting the hearsay, the court will not require disclosure of the informant's identity. *Jones v. U.S.,* 362 U.S. 257, 271-272 (1960).

Independent verification of an informant's information lessens the necessity of disclosure of the informant's identity to safeguard against fabrication. *See U.S. v. Comissiong,* 429 F.2d 834, 837-839 (2d Cir. 1970). *See also U.S. v. Allen,* 566 F.2d 1193 (3d Cir. 1977), *cert. denied,* 435 U.S. 926 (1978); *U.S. v. Carneglia,* 468 F.2d 1084, 1088-1089 (2d Cir. 1972), *cert. denied,* 410 U.S. 945 (1973).

To compel disclosure, a defendant must show that the informant's testimony would probably be material to a substantial issue in the case. *See Encinas-Sierras v. U.S.,* 401 F.2d 228 (9th Cir. 1968); *U.S. v. Franzese,* 392 F.2d 954 (2d Cir. 1968), *vacated per curiam on other grounds,* 394 U.S. 310 (1969). *See also U.S. v. Willis,* 473 F.2d 450 (6th Cir.) *cert. denied,* 412 U.S. 908 (1973).

The timing of disclosure and the particular circumstances of each case, as well as the state of the proceedings at which the issue arises, for example, at a suppression hearing rather than a trial, are also significant factors. *See, e.g., McCray v. Illinois,* 386 U.S. 300 (1967). Disclosure must be timely enough to provide the benefits intended, such as an opportunity to adequately interview the witness. *See U.S. v. Opager,* 589 F.2d 799 (5th Cir. 1979). *But see U.S. v. Hyatt,* 565 F.2d 229 (2d Cir. 1977), in which any error was held to have been cured by disclosure of the informant's identity at the close of defendant's direct testimony and where the identity, and perhaps the whereabouts, of the informant were known to the defendant. Where it appears that the defendant may benefit from disclosure, but the government claims a compelling need to protect the informant, an *in camera* hearing may be necessary for a determination of whether disclosure is required. *Suarez v. U.S.,* 582 F.2d 1007 (5th Cir. 1978).

The government is not the guarantor of the informant's presence at trial. *U.S. v. Prada,* 451 F.2d 1319 (2d Cir. 1971). The defense cannot rely on the government's calling all witnesses on a witness list, and, absent evidence the informant was crucial to the defense of entrapment, cannot rely on the inclusion of the informant's name on a witness list. *U.S. v. Fuentes,* 563 F.2d 527 (2d Cir.), *cert. denied,* 434 U.S. 959 (1977).

CHAPTER XVI
OPINION EVIDENCE

A. TESTIMONY OF LAY WITNESSES

Rule 701 of the Federal Rules of Evidence provides that opinion testimony by lay witnesses is limited to those opinions or inferences that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." The primary purpose of this rule is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or jury. However, this rule does not permit a lay witness to express an opinion on matters that are beyond the realm of common experience and which require the special skill and knowledge of an expert witness. *Randolph v. Collectramatic, Inc.,* 590 F.2d 844 (10th Cir. 1979).

The limitation contained in Rule 701(a) "is the familiar requirement of first-hand knowledge or observation." Advisory Committee's Note; *U.S. v. McClintic,* 570 F.2d 685 (8th Cir. 1978); *U.S. v. Jackson,* 569 F.2d 1003 (7th Cir.), *cert. denied,* 437 U.S. 907 (1978). Consequently, testimony of lay witnesses is admissible if predicated on concrete facts within their own observation and recollection, *i.e.,* perceived from their own senses, as distinguished from opinions and conclusions drawn from such perceptions. *Randolph v. Collectramatic, Inc.,* 590 F.2d at 847-848.

The limitation of Rule 701(b) "is phrased in terms of requiring testimony to be helpful in resolving issues." Advisory Committee's Note. This differs from the practical necessity test used in many common-law jurisdictions. *U.S. v. Smith,* 550 F.2d 277, 281 (5th Cir.), *cert. denied,* 434 U.S. 841 (1977).

Whether a lay witness will be permitted to testify about any matter of opinion is a preliminary determination within the sound discretion of the trial court. *Randolph v. Collectramatic, Inc.,* 590 F.2d at 847; *John Hancock Mutual Life Insurance Co. v. Dutton,* 585 F.2d 1289, 1294 (5th Cir. 1978); *Cardwell v. Chesapeake & Ohio Railway Co.,* 504 F.2d 444, 448 (6th Cir. 1974). It rarely is held to be reversible error to admit such testimony. *See U.S. v. Trenton Potteries Co.,* 273 U.S. 392 (1927); *Randolph v. Collectramatic, Inc.,* 590 F.2d at 847-848; *U.S. v. Butcher,* 557 F.2d 666 (9th Cir. 1977); *U.S. v. Pierson,* 503 F.2d 173 (D.C. Cir. 1974); *SEC v. Texas Gulf Sulphur Co.,* 446 F.2d 1301 (2d Cir.), *cert. denied,* 404 U.S. 1005 (1971); *Stone v. U.S.,* 385 F.2d 713 (10th Cir. 1967), *cert. denied,* 391 U.S. 966 (1968). *But see U.S. v. Calhoun,* 544 F.2d 291 (6th Cir. 1976), where a trial court did abuse its discretion in admitting lay opinion testimony.

Rule 704 states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Advisory Committee's Note states that the

"ultimate issue" rule (prohibiting witnesses from giving opinions on the ultimate issue of the case) is specifically abolished by Rule 704 as applied to qualified lay and expert opinions. *U.S. v. Arrasmith,* 557 F.2d 1093 (5th Cir. 1977) (border patrol officer was permitted to testify as to odor of marijuana); *Arcement v. Southern Pacific Transportation Co.,* 517 F.2d 729 (5th Cir. 1975) (nonexpert may testify to what a reasonable person would do); *Panger v. Duluth, Winnipeg and Pacific Railroad Co.,* 490 F.2d 1112 (8th Cir. 1974) (nonexpert employee permitted to testify whether accident could have been avoided). This rule is subject to the requirements of Rules 701 and 702 that the opinion be helpful to the trier of fact and to Rule 403 considerations, however.

The opinions or conclusions of lay witnesses have been admitted into evidence on various matters:

(1) The apparent physical condition of a person, *U.S. v. Mastberg,* 503 F.2d 465, 469-470 (9th Cir. 1974); *Niagara Fire Ins. Co. v. Muhle,* 208 F.2d 191, 196 (8th Cir. 1953); *Cox v. U.S.,* 103 F.2d 133, 135 (7th Cir. 1939);

(2) The apparent mental capacity or condition of a person, *Queenan v. Oklahoma,* 190 U.S. 548 (1903); *Verzosa v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.,* 589 F.2d 974 (9th Cir. 1978); *John Hancock Mutual Life Insurance Co. v. Dutton,* 585 F.2d at 1294; *U.S. v. Smith,* 550 F.2d 277 (5th Cir.), *cert. denied,* 434 U.S. 841 (1977); *Evalt v. U.S.,* 359 F.2d 534 (9th Cir. 1966); *Smith v. U.S.,* 353 F.2d 838 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 910 (1966); however, the witness must have had a reasonable opportunity to observe and form an opinion for his testimony to be admissible, *U.S. v. Kossa,* 562 F.2d 959 (5th Cir. 1977), *cert. denied,* 434 U.S. 1075 (1978); *Kaufman v. U.S.,* 350 F.2d 408, 414-415 (8th Cir. 1965), *cert. denied,* 383 U.S. 951 (1966); the brevity of the observation goes to weight, not admissibility, *U.S. v. Greene,* 497 F.2d 1068, 1084 (7th Cir. 1974), *cert. denied,* 420 U.S. 909 (1975); *U.S. v. Minor,* 459 F.2d 103 (5th Cir. 1972); *Mason v. U.S.,* 402 F.2d 732 (8th Cir. 1968), *cert. denied,* 394 U.S. 950 (1969); a witness cannot testify about his own mental condition, *Frisone v. U.S.,* 270 F.2d 401 (9th Cir. 1959);

(3) The unexpressed state of mind of an accused, *U.S. v. Phillips,* 593 F.2d 553, 558 (4th Cir. 1978), *cert. denied,* 441 U.S. 947 (1979); *U.S. v. McClintic,* 570 F.2d 685 (8th Cir. 1978) (accomplice-witness permitted to give opinion that the defendant knew goods were fraudulently obtained when such opinion was based on the witness' perceptions); *U.S. v. Smith,* 550 F.2d 277 (5th Cir.), *cert. denied,* 434 U.S. 841 (1977) (witness in CETA fraud prosecution permitted to give opinion that defendant knew and understood requirements of CETA);

(4) The meaning of words spoken to the witness by one whom he knew well, *U.S. v. Fayer,* 573 F.2d 741 (2d Cir.), *cert. denied,* 439 U.S. 831 (1978) (witness in perjury prosecution allowed to testify what defendant's words meant to him); *U.S. v. Cioffi,* 493 F.2d 1111 (2d Cir.), *cert. denied,* 419 U.S. 917 (1974); *Wiley v. U.S.,* 257 F.2d 900 (8th Cir. 1958);

(5) The handwriting of another, *Rogers v. Ritter,* 79 U.S. 317 (1870); *U.S. v. Gomez,* 603 F.2d 147 (10th Cir.), *cert. denied,* 100 S. Ct. 460 (1979) (and cases cited therein); *cf. Ryan v. U.S.,* 384 F.2d 379 (1st Cir. 1967) (witness may testify that a piece of writing was written by a specified individual only if that opinion is based on experience in handwriting analysis or on familiarity with the handwriting of the individual in question); Rule 901(b)(2) of the Federal Rules of Evidence requires that familiarity must not have been acquired for purposes of the litigation; 28 U.S.C. §1731 makes admissible the admitted or proved handwriting of any person for comparison to determine the genuineness of other handwriting

attributed to such person; Rule 901(b)(3) provides that the trier of fact may make its own determination without any opinion testimony at all; *see U.S. v. Ranta,* 482 F.2d 1344 (8th Cir. 1973); *Strauss v. U.S.,* 311 F.2d 926 (5th Cir.), *cert. denied,* 373 U.S. 910 (1963); *Brandon v. Collins,* 267 F.2d 731 (2d Cir. 1959); *Desimone v. U.S.,* 227 F.2d 864 (9th Cir. 1955);

(6) The value of the owner's property, or his employer's property, and the value of the damage inflicted on it, *Justice v. Pennzoil Co.,* 598 F.2d 1339 (4th Cir.), *cert. denied,* 100 S. Ct. 457 (1979); *Rich v. Eastman Kodak Co.,* 583 F.2d 435 (8th Cir. 1978); *Meredith v. Hardy,* 554 F.2d 764 (5th Cir. 1977) (owner always competent to value his own property); *Baldwin Cooke Co. v. Keith Clarke, Inc.,* 420 F. Supp. 404 (N.D. Ill. 1976);

(7) The speed of moving objects or vehicles, *Leadbetter v. Glaisyer,* 44 F.2d 350 (9th Cir. 1930); *Attal v. Pennsylvania Railroad Co.,* 212 F. Supp. 306 (W.D. Pa.), *aff'd per curiam,* 323 F.2d 363 (3d Cir. 1963); however, the witness must indicate the basis for his estimate of speed, *Ho v. U.S.,* 331 F.2d 144 (9th Cir. 1964); *Gilliand v. Ruke,* 280 F.2d 544 (4th Cir. 1960); *Carpino v. Kuehnle,* 54 F.R.D. 28 (W.D. Pa. 1971), *aff'd,* 474 F.2d 1339 (3d Cir. 1973) (witness could not testify where he observed for only a split second);

(8) The "irregularity" of the conduct of a business, *U.S. v. Cotter,* 60 F.2d 689 (2d Cir.), *cert denied,* 287 U.S. 666 (1932);

(9) The identification of a person in a photograph, *U.S. v. Young Buffalo,* 591 F.2d 506 (9th Cir. 1979), *cert. denied,* 441 U.S. 950 (1979); *U.S. v. Butcher,* 557 F.2d 666 (9th Cir. 1977); *U.S. v. Robinson,* 544 F.2d 110 (2d Cir. 1976), *cert. denied,* 434 U.S. 1050 (1978);

(10) The fact that defendant knew that merchandise had been fraudulently obtained, *U.S. v. McClintic,* 570 F.2d 685 (8th Cir. 1978); *see also U.S. v. Freeman,* 514 F.2d 1184 (10th Cir. 1975);

(11) General identification, *U.S. v. Brown,* 540 F.2d 1048 (10th Cir. 1976), *cert. denied,* 429 U.S. 1100 (1977) (if there is an opportunity for personal observation, then testimony is allowed by lay person for personal identification);

(12) Comparison of marijuana, *U.S. v. Honneus,* 508 F.2d 566 (1st Cir. 1974), *cert. denied,* 421 U.S. 948 (1975);

(13) Impact on another's personality because of disfigurement, *Drayton v. Jiffee Chemical Corp.,* 591 F.2d 352 (6th Cir. 1978);

(14) Conduct, *i.e.,* what a person appeared to be doing, based on personal observation and common experience as to physical condition or actions of such person, *U.S. v. Alexander,* 415 F.2d 1352 (7th Cir. 1969), *cert. denied,* 397 U.S. 1014 (1970).

B. TESTIMONY OF EXPERT WITNESSES

1. SCIENTIFIC, TECHNICAL, OR SPECIALIZED KNOWLEDGE

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness. *Kline v. Ford Motor Co.,* 523 F.2d 1067 (9th Cir. 1975); *U.S. v. R. J. Reynolds Tobacco Co.,* 416 F. Supp. 313 (D.N.J. 1976). As distinguished from a lay witness, who, except under Rule 701, may not give opinion testimony, an expert witness possesses knowledge and skill not possessed by the ordinary witnesses. The expert is in a superior position,

because of his training and experience, to draw inferences and conclusions from underlying evidentiary facts.

There is no fixed or general rule that dictates when and if expert testimony on a particular topic is required. However, if that topic requires special experience then only the testimony of one having such special experience should be received. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848 (10th Cir. 1979).

Under Rule 702 a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." Fields of knowledge for which experts may be used include not only scientific and technical but also specialized knowledge. An expert is not viewed in a narrow sense, *e.g.*, architects or physicians, but as a person qualified by knowledge, skill, experience, training, or education, *Soo Line R. R. Co. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977); *U.S. v. Brown*, 540 F.2d 1048 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); and there is no requirement that the expert witness be outstanding in his field or have certificates of training, or memberships in professional organizations, *U.S. v. Barker*, 553 F.2d 1013, 1024 (6th Cir. 1977). Rule 702 is not limited to experts in the strictest sense of the word but also encompasses a large group called "skilled" witnesses such as owners, bankers, and landowners testifying on the value of property. *U.S. v. Johnson*, 575 F.2d 1347, 1360 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979) (coconspirator who testified at conspiracy-to-import-marijuana trial held properly permitted to give expert opinion as to the origin of marijuana he smoked during conspiracy, even though he had no special training or education, where his qualifications came entirely from "the experience of being around a great deal and smoking it"); *Soo Line R. R. Co. v. Fruehauf Corp.*, 547 F.2d at 1377; *U.S. v. Bermudez*, 526 F.2d 89, 97-98 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976) (DEA agent held qualified as expert to testify that white powder was cocaine); *U.S. v. Atkins*, 473 F.2d 308 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973) (heroin addict qualified as expert in identification of heroin).

Although Rule 702 broadens the range of admissible expert testimony, *U.S. v. Barker*, 553 F.2d at 1024, the rule does not alter the well-established principle that the assessment of the expert's qualifications is a matter within the discretion of the trial court which should not be disturbed on appeal unless manifestly erroneous. *Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681 (5th Cir. 1979); *N.V. Maatschappij, Etc. v. A. O. Smith Corp.*, 590 F.2d 415, 418 (2d Cir. 1978); *U.S. v. Viglia*, 549 F.2d 335 (5th Cir.), *cert. denied*, 434 U S. 834 (1977) (physician who had degrees in medicine and pharmacy, but no experience in treating obesity, could properly provide expert opinion in prosecution for issuance of prescriptions for controlled substances without legitimate medical reason). (A common tactical manuever, sometimes encouraged by the court, is the practice of stipulating to the opposing expert's qualifications to eliminate an impressive litany of such from the jury's hearing. This tactic may be improper in some instances. "[A] jury can better assess the weight to be accorded an expert's opinion if the witness is permitted to explain his qualifications." *Murphy v. National R. R. Passenger Corp.*, 547 F.2d 816, 817 (4th Cir. 1977).)

Under Rule 702, factors to be considered by a trial court in deciding whether to admit expert testimony are (1) whether expert testimony will assist the trier of fact, (2) whether the witness is qualified as an expert, and (3) whether the expert has a sufficient acquaintance with the basic facts, either through personal observation or on the basis of a proper hypothetical question, to express an opinion. *See generally U.S. v. Scavo*, 593 F.2d 837 (8th Cir. 1979); *U.S. v. Watson*, 587 F.2d 365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *U.S. v. Johnson*, 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

Whether a witness is shown to be qualified as an expert is a preliminary question to be determined by the trial court. If the expert testimony is admitted, then it is for the trier of fact to decide what weight, if any, is to be given to the testimony. *U.S. v. Stifel*, 433 F.2d 431, 438-439 (6th Cir. 1970), *cert. denied* 401 U.S. 994 (1971) (expert testimony concerning neutron activation analysis properly permitted). Whether such evidence will be admitted lies within the sound discretion of the trial judge, and his decision will not be reversed unless he abuses that discretion, *Hamling v. U.S.*, 418 U.S. 87, 108 (1974); *Perkins v. Volkswagen of America, Inc.*, 596 F.2d at 682; *U.S. v. Watson*, 587 F.2d at 369; *U.S. v. Moten*, 564 F.2d 620, 629 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977); *U.S. v. Stifel*, 433 F.2d at 441; *Wolford v. U.S.*, 401 F.2d 331 (10th Cir. 1968); *White v. U.S.*, 399 F.2d 813 (8th Cir. 1968); *Harris v. Afran Transport Co.*, 252 F.2d 536 (3d Cir. 1958), or there is a showing that the trial court's decision is "manifestly erroneous," *U.S. v. Brown*, 557 F.2d 541 (6th Cir. 1977); *U.S. v. Viglia*, 549 F.2d at 336-337.

A necessary predicate to the admission of expert testimony is that the principle upon which the expert opinion is based must be nonspeculative, and the principles and procedures that underlie it must be sufficiently established to have gained general acceptance in the particular field or scientific community to which it belongs. *U.S. v. Cyphers*, 553 F.2d 1064 (7th Cir.), *cert. denied*, 434 U.S. 843 (1977) (microscopic comparison of hair samples proper); *U.S. v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) (voiceprint analysis properly admitted); *Frye v. U.S.*, 293 F.1013 (D.C. Cir. 1923). The decision as to the state of the technology in the field is a decision for the trial court, and neither "newness nor lack of absolute certainty in a test suffices to render it inadmissible in court. Every useful new development must have its first day in court," *U.S. v. Stifel*, 433 F.2d at 438. In cases where the trial court finds the state of the technology too speculative, it should disallow the proffered expert opinion. *US. v. Fosher*, 590 F.2d 381 (1st Cir. 1979) (expert opinion evidence relating to perception and memory of eyewitnesses and effects on eyewitnesses' identification held not reliable and not generally accepted in scientific community); *U.S. v. Watson*, 587 F.2d at 369 (exclusion of expert testimony regarding unreliability of cross-racial and cross-ethnic eyewitnesses' identification was proper); *U.S. v. Benveniste*, 564 F.2d 335 (9th Cir. 1977) (trial court affirmed in not permitting defendant to introduce expert psychiatric testimony concerning psychological susceptibility to inducement and lack of predisposition, proffered to establish entrapment defense); *U.S. v. Brown*, 557 F.2d at 557 (ion microprobic analysis not generally accepted in scientific community—too experimental to provide acceptable basis for expert testimony). Although the testimony must not be speculative, there is no requirement that the expert's opinion be expressed in terms of absolute certainty. *U.S. v. Cyphers*, 553 F.2d at 1072 (opinion that, after microscopic comparison, hair samples could have come from defendant, not too speculative and admissible under Rule 702.)

Nothwithstanding the expanded use of expert testimony under Rule 702, an additional factor to be taken into consideration by the trial court in determining its application in criminal cases, over and above those set forth in Rule 702, is the potentially unfair prejudicial impact of the expert's testimony upon the substantial rights of the accused. Where the probative value of the expert testimony is outweighed by the prejudicial effect upon substantial rights, the expert testimony may be excluded under Rule 403. *U.S. v. Green*, 548 F.2d 1261 (6th Cir. 1977)

(improperly admitted prejudicial expert testimony concerning distribution of drug DMT). *See also U.S. v. Amaral,* 488 F.2d 1148, 1152 (9th Cir. 1973).

The credibility to be accorded conflicting expert opinions is up to the jury. The trial court only considers whether the expert will aid the trier of fact in arriving at the truth. *U.S. v. Brown,* 557 F.2d at 556; *U.S. v. Barker,* 553 F.2d 1013, 1024 (6th Cir. 1977); *U.S. v. Makris,* 535 F.2d 899 (5th Cir. 1976), *cert. denied,* 430 U.S. 954 (1977). Conflicting conclusions drawn by experts, where they are based on generally accepted and reliable scientific principles, go to the weight of the testimony, not its admissibility. *U.S. v. Brown,* 557 F.2d 556; *U.S. v. Franks,* 511 F.2d at 33. Generally, properly admitted expert testimony may be given such weight as the fact finder thinks circumstances dictate. *Skar v. City of Lincoln, Nebraska,* 599 F.2d 253 (8th Cir. 1979).

The fact that one party may offer more experts on a particular subject than the other party is not controlling. The issue is to be determined, not by the number of expert witnesses who may testify on behalf of either side, but by the quality of their testimony. *U.S. v. Shepard,* 538 F.2d 107, 110 (6th Cir. 1976); *U.S. v. Handy,* 454 F.2d 885, 888 (9th Cir. 1971), *cert. denied,* 409 U.S. 846 (1972).

Expert testimony introduced by one party may be rejected by the trier of fact even when the opposing party has introduced no expert testimony to contradict it. *U.S. v. Mota,* 598 F.2d 995 (5th Cir. 1979) (jury may find testimony on issue of defendant's sanity rebutted by observations of laymen); *U.S. v. Dube,* 520 F.2d 250 (1st Cir. 1975); *U.S. v. Lutz,* 420 F.2d 414 (3d Cir.), *cert. denied,* 398 U.S. 911 (1970); *Magno v. Corros,* 439 F. Supp. 592, 603-604 (D.S.C. 1977). *But see U.S. v. Smith,* 437 F.2d 538 (6th Cir. 1970) (brief observation by two lay witnesses does not raise a question of fact sufficient to counter defendant's prima facie case of insanity); *Brock v. U.S.,* 387 F.2d 254 (5th Cir. 1967) (testimony of three witnesses, only one of whom had recently seen the defendant, was not sufficient for the jury to reject the testimony of the psychiatric expert).

An expert can be compelled to testify in his area of expertise, as there is no constitutional or statutory privilege not to do so, and there is no need to show the unavailability of other experts. *Kaufman v. Edelstein,* 539 F.2d 811 (2d Cir. 1976).

Opinions of expert witnesses have been admitted into evidence on a wide variety of matters:

(1) The mental capacity or condition of a person, *U.S. v. Davis,* 523 F.2d 1265 (5th Cir. 1975); the results of compulsory psychiatric examinations are admissible on the issue of sanity, but the use of an incriminating statement made during a compulsory examination is impermissible on the issue of guilt; *Gibson v. Zahradnick,* 581 F.2d 75 (4th Cir.), *cert. denied,* 439 U.S. 996 (1978) (and cases cited therein); *but see U.S. v. Reason,* 549 F.2d 309 (4th Cir. 1977); *U.S. v. Reifsteck,* 535 F.2d 1030 (8th Cir. 1976); *U.S. v. Matos,* 409 F.2d 1245 (2d Cir. 1969), *cert. denied,* 397 U.S. 927 (1970); that experts may differ in their opinions concerning the mental condition of a defendant does not mean, in and of itself, that there is a reasonable doubt as to sanity, *U.S. v. Urbanis,* 490 F.2d 384, 386 (9th Cir.), *cert. denied,* 416 U.S. 944 (1974); *U.S. v. Ortiz,* 488 F.2d 175 (9th Cir. 1973). The issue of a defendant's mental condition should be determined from all the evidence rather than from the opinions of experts alone, *U.S. v. Fortune,* 513 F.2d 883, 890-891 (5th Cir.), *cert. denied,* 423 U.S. 1020 (1975); *Mims v. U.S.,* 375 F.2d 135, 143 (5th Cir. 1967);

(2) The teachings and purposes of the Communist Party, *Frankfeld v. U.S.,* 198 F.2d 679 (4th Cir. 1952), *cert. denied,* 344 U.S. 922 (1953);

(3) Current propaganda themes, *U.S. v. German-American Vocational League, Inc.,* 153 F.2d 860 (3d Cir.), *cert. denied,* 328 U.S. 833 (1946);

(4) Value of particular property, *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944);

(5) Cause of death, *Clay County Cotton Co. v. Home Life Insurance Co.,* 113 F.2d 856 (8th Cir. 1940);

(6) Bookkeeping and income tax returns, *U.S. v. Gray,* 507 F.2d 1013 (5th Cir.), *cert. denied,* 423 U.S. 824 (1975); *U.S. v. Augustine,* 189 F.2d 587 (3d Cir. 1951);

(7) Retail value of consumer goods, *Cave v. U.S.,* 390 F.2d 58 (8th Cir.), *cert. denied,* 392 U.S. 906 (1968);

(8) Markings and stamps on bank checks, *U.S. v. Mustin,* 369 F.2d 626 (7th Cir. 1966);

(9) Mechanics of how the numbers game or bookmaking organizations operate, *U.S. v. Barletta,* 565 F.2d 985 (8th Cir. 1977) (testimony of an FBI agent who had done considerable investigative work in the area); *Moore v. U.S.,* 394 F.2d 818 (5th Cir. 1968), *cert. denied,* 393 U.S. 1030 (1969); *see U.S. v. Scavo,* 593 F.2d 837 (8th Cir. 1979) (agent allowed to testify as to defendant's role in bookmaking operation);

(10) The modus operandi of criminal schemes, *U.S. v. Stull,* 521 F.2d 687 (6th Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976) (testimony of postal inspector describing a mail fraud scheme); *U.S. v. Jackson,* 425 F.2d 574 (D.C. Cir. 1970) (testimony of operation of pickpocket scheme);

(11) Handwriting, *U.S. v. Reece,* 547 F.2d 432 (8th Cir. 1977); *U.S. v. Green,* 523 F.2d 229 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976); *U.S. v. Galvin,* 394 F.2d 228 (3d Cir. 1968); *U.S. v. Acosta,* 369 F.2d 41 (4th Cir. 1966), *cert. denied,* 386 U.S. 921 (1967); *Wood v. U.S.,* 357 F.2d 425 (10th Cir.), *cert. denied,* 385 U.S. 866 (1966);

(12) The technical operation of the United States Mint, *U.S. v. Sheiner,* 410 F.2d 337 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969);

(13) The ineffectiveness of a weight-reducing drug, *U.S. v. Andreadis,* 366 F.2d 423 (2d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967);

(14) Spectrograms or "voiceprints," *U.S. v. Williams,* 583 F.2d 1194 (2d Cir. 1978), *cert. denied,* 439 U.S. 1117 (1979); *U.S. v. Baller,* 519 F.2d 463 (4th Cir.), *cert. denied,* 423 U.S. 1019 (1975); *U.S. v. Franks,* 511 F.2d 25 (6th Cir.), *cert. denied,* 422 U.S. 1042 (1975); *but see U.S. v. Addison,* 498 F.2d 741 (D.C. Cir. 1974) (spectrographic identification not then sufficiently accepted in scientific community);

(15) The operation of equipment for the purpose of producing counterfeit currency, *U.S. v. Wilson,* 451 F.2d 209 (5th Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972);

(16) The genuineness of government bonds, *U.S. v. Martin,* 459 F.2d 1009 (9th Cir.), *cert. denied,* 409 U.S. 864 (1972);

(17) The source of marijuana, *U.S. v. Johnson,* 575 F.2d 1347 (5th Cir. 1978), *cert. denied,* 440 U.S. 907 (1979);

(18) Firearms and ballistics, *Davis v. Freels,* 583 F.2d 337 (7th Cir. 1978); *U.S. v. Bowers,* 534 F.2d 186 (9th Cir.), *cert. denied,* 429 U.S. 942 (1976);

(19) Architecture, *Scholz Homes, Inc. v. Wallace,* 590 F.2d 860 (10th Cir. 1979);

(20) Valuation of pecuniary loss, *Driscoll v. U.S.,* 456 F. Supp. 143 (D. Del. 1978), *aff'd,* 605 F.2d 1195 (1979); *D'Angelo v. U.S.,* 456 F. Supp. 127 (D. Del.

1978), *aff'd,* 605 F.2d 1194 (1979);

(21) Aircraft, *Dychalo v. Copperloy Corp.*, 78 F.R.D. 146 (E.D. Pa.), *aff'd,* 588 F.2d 820 (1978) (safety of loading ramp);

(22) Defective products, *Nanda v. Ford Motor Co.,* 509 F.2d 213 (7th Cir. 1974);

(23) Design, *Soo Line R. R. Co. v. Fruehauf, Corp.,* 547 F.2d 1365, 1375-1376 (8th Cir. 1977) (design of railroad cars); *Holmgren v. Massey-Ferguson, Inc.,* 516 F.2d 856 (8th Cir. 1975) (defective design of corn picker);

(24) Law, *U.S. v. Sturgis,* 578 F.2d 1296 (9th Cir.), *cert. denied,* 439 U.S. 970 (1978) (sentences customarily imposed by state courts);

(25) Narcotics, *U.S. v. Wolk,* 398 F. Supp. 405, 414-415 (E.D. Pa. 1975);

(26) Photographs, *U.S. v. Sellers,* 566 F.2d 884 (4th Cir. 1977) (expert on photographs allowed to assist the jury by explaining light, shadowy reflections).

An expert witness may identify and explain charts summarizing his own testimony or the testimony of other witnesses. *U.S. v. Gray,* 507 F.2d 1013 (5th Cir.), *cert. denied,* 423 U.S. 824 (1975); *U.S. v. Rath,* 406 F.2d 757 (6th Cir.), *cert. denied,* 394 U.S. 920 (1969). *See also U.S. v. Scales,* 594 F.2d 558 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979) (expert not needed; agent who catalogued exhibit and who had knowledge of analysis of materials was permitted to summarize).

2. BASIS OF OPINION TESTIMONY BY EXPERTS

Before the codification of the Federal Rules of Evidence, the traditional rule was that expert opinion testimony was inadmissible if based upon information obtained out of court from third parties. "The rationale behind this rule is that the trier of fact should not be presented with evidence grounded on otherwise inadmissible hearsay statements not subject to cross-examination and other forms of verification." *U.S. v. Sims,* 514 F.2d 147, 149 (9th Cir.), *cert. denied,* 423 U.S. 845 (1975); *Elgi Holding, Inc. v. Insurance Company of North America,* 511 F.2d 957, 959-960 (2d Cir. 1975). Under Rule 703, however, and in accord with the strong pre-Rule 703 trend, an expert is no longer tied to the restrictive limitations on the use of facts or data which, technically, may be hearsay. Whether the facts or data relied on by the experts are in evidence, or even could be in evidence, is not controlling where the facts or data relied upon are of the type reasonably relied upon by experts in this particular field. *Bauman v. Centex Corp.,* 611 F.2d 1115, 1120 (5th Cir. 1980). *See U.S. v. Genser,* 582 F.2d 292, 298 (3d Cir. 1978), *cert. denied,* 100 S. Ct. 269 (1979) (IRS expert properly permitted to rely on facts and data not admitted into evidence which fell within permissible standards of Rule 703); *U.S. v. Shields,* 573 F.2d 18 (10th Cir. 1978) (handwriting expert could properly rely on known exemplars of defendant's handwriting excluded from evidence on grounds that they contained impermissible references to defendant's prior criminal record); *Higgins v. Kinnebrew Motors, Inc.,* 547 F.2d 1223, 1226 (5th Cir. 1977) (expert was properly permitted to use figures taken from U.S. Department of Labor Bureau of Labor Statistics tables); *U.S. v. Golden,* 532 F.2d 1244 (9th Cir.), *cert. denied,* 429 U.S. 842 (1976) (DEA expert's opinion on market value of heroin was not rendered inadmissible due to its basis in part on information obtained from other undercover narcotics agents familiar with the markets involved); *U.S. v. Morrison,* 531 F.2d 1089 (1st Cir.), *cert. denied,* 429 U.S. 837 (1976) (FBI gambling expert was properly permitted to rely on notes and reports of others in arriving at opinion).

Generally, the facts or data upon which an expert bases his opinion can be derived from three possible sources: (1) the firsthand observations of the expert witness, such as a treating physician, *U.S. v. Reece,* 547 F.2d 432 (8th Cir. 1977); *Elgi Holding, Inc. v. Insurance Co. of North America,* 511 F.2d at 959-960; (2) presentation at the trial through hypothetical questions or having the expert attend the trial and hear testimony establishing the facts (thus, one expert can predicate his opinion on another expert's, if he normally relies on such in his profession); and (3) presentation of pertinent data to the expert outside of court other than by his own perception, *U.S. v. Genser,* 582 F.2d at 298-299; *U.S. v. Golden,* 532 F.2d at 1247-1248; *U.S. v. Sims,* 514 F.2d at 149-150.

3. ULTIMATE ISSUE RULE

With the enactment of Rule 704 of the Federal Rules of Evidence, the ultimate issue rule, previously limiting expert testimony that would "invade the province of the jury" by touching upon ultimate issue, was formally abolished. "The approach to admission adopted by the Rules is simply whether an expert opinion will be helpful to the jury in understanding the evidence or determining a fact in issue." *Bauman v. Centex Corp.,* 611 F.2d 1115, 1120-1121 (5th Cir. 1980); *U.S. v. Scavo,* 593 F.2d 837, 844 (8th Cir. 1979). If expert testimony is appropriately helpful, Rule 704 provides that the opinion given is not objectionable as an invasion of the province of the jury, notwithstanding that it may be on the very issue that the jury must decide. *U.S. v. Johnson,* 319 U.S. 503 (1943); *U.S. v. Miller,* 600 F.2d 498 (5th Cir.), *cert. denied,* 100 S. Ct. 434 (1979); *U.S. v. Scavo,* 593 F.2d at 843-844; *U.S. v. Smith,* 550 F.2d 277, 281 (5th Cir. 1977), *cert. denied,* 434 U.S. 841 (1978); *U.S. v. Davis,* 564 F.2d 840, 845 (9th Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978).

This rule is subject both to the qualification of helpfulness to the trier of fact and to a Rule 403 weighing of probative value versus prejudicial effect. *U.S. v. Scavo,* 593 F.2d at 844; *Nielson v. Armstrong Rubber Co.,* 570 F.2d 272 (8th Cir. 1978); *U.S. v. Taylor,* 562 F.2d 1345 (2d Cir.), *cert. denied,* 432 U.S. 909 (1977); *U.S. v. Melton,* 555 F.2d 1198 (5th Cir. 1977); *U.S. v. McCoy,* 539 F.2d 1050 (5th Cir. 1976), *cert. denied,* 431 U.S. 919 (1977). The trial court has wide discretion in admitting such ultimate issue opinions. *Stoler v. Penn Central Transp. Co.,* 583 F.2d 896 (6th Cir. 1978); *United Telecommunications, Inc. v. American Television & Communications Corp.,* 536 F.2d 1310 (10th Cir. 1976). Thus, in a federal firearms prosecution, the testimony of a government expert that the defendant's weapon was a machine gun required to be registered under the law was held proper. *U.S. v. McCauley,* 601 F.2d 336, 339 (8th Cir. 1979). *See also U.S. v. Miller,* 600 F.2d at 500 (government expert accounting witness properly permitted to express opinion on ultimate issue that securities were obtained by fraud); *U.S. v. Masson,* 582 F.2d 961 (5th Cir. 1978) (FBI gambling expert permitted to testify that defendant was bookmaker rather than mere player); *U.S. v. Davis,* 564 F.2d 845 (in a prosecution of physician for unlawful prescription and distribution of controlled substances, expert was properly permitted to express opinion that the prescriptions were neither in usual course of professional practice nor for a legitimate medical purpose); *U.S. v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978) (opinion as to duress and voluntariness in bank robbery prosecution held proper).

Notwithstanding the abolition of the ultimate issue rule, however, some courts are cautious not to permit expert testimony on legal conclusions as opposed to factual conclusions. An expert should not be permitted to testify whether a

person's acts are a violation of law. That is a legal conclusion best left to the trial court's instructions and the verdict of the trier of fact. An expert's testimony may not properly act as a substitute for the court's instructions on applicable law. *U.S. v. Milton,* 555 F.2d 1198, 1204-1205 (5th Cir. 1977).

4. HYPOTHETICAL QUESTIONS

The chief objective of Rule 705 is to eliminate the need for the lengthy hypothetical question; such questions are no longer mandatory. *U.S. v. Mangan,* 575 F.2d 32, 47 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978). If, however, hypothetical questions are used, they should include all material facts necessary for the expert to draw rational conclusions. The question properly must be based upon facts already in the record. *Mears v. Olin,* 527 F.2d 1100 (8th Cir. 1975).

Whether a hypothetical question is a fair statement of all facts in the case is largely a determination within the discretion of the trial judge. *Shapiro, Bernstein & Co. v. Remington Records, Inc.,* 265 F.2d 263, 266-267 (2d Cir. 1959). *Alman Bros. Farms and Feed Mill, Inc. v. Diamond Laboratories, Inc.,* 437 F.2d 1295 (5th Cir. 1971).

5. COURT-APPOINTED EXPERTS

Before the enactment of Rule 706, the inherent power of a trial judge to appoint an independent expert was widely recognized. *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.,* 333 F.2d 202 (4th Cir. 1964), *cert. denied,* 387 U.S. 907 (1967); *Scott v. Spanjer Bros., Inc.,* 298 F.2d 928 (2d Cir. 1962). Rule 706 codifies this power and sets up the implementing details. Under Rule 706, the trial court has discretionary power to appoint an expert on its own motion or on the motion of any party. *Fugitt v. Jones,* 549 F.2d 1001 (5th Cir. 1977). When the court is not satisfied with the quality of expert testimony provided by the parties, the court may appoint an independent expert under Rule 706 to assist the trier of fact in investigating and understanding the entire case; and the court has the power to assess the fees of that expert to the parties in the litigation. *U.S. v. R. J. Reynolds Tobacco Co.,* 416 F. Supp. 313 (D.N.J. 1976).

CHAPTER XVII
HEARSAY AND EXCEPTIONS

Rule 801(c) of the Federal Rules of Evidence defines hearsay in the following terms:

> "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.

Further, Rule 802 provides that hearsay "is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." This limitation, therefore, bars admissibility of out-of-court statements only when they are offered to "prove the truth of the matter asserted" and when they do not fit an established exception to the rule of exclusion.

The form and content of the rules have the effect of presenting three basic questions where possible hearsay is involved. First, it must be determined if the evidence in question amounts to a statement, because only an out-of-court "statement" can be hearsay. Rule 801(a) defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Second, it must be determined if the statement is being offered to prove the truth of matter asserted in it and, if so, whether it may nevertheless be non-hearsay by definition. Rule 801(d) makes certain prior statements by a witness who testifies and is subject to cross-examination, certain statements deemed to be by a party-opponent, and certain out-of-court identifications all "not hearsay" by definition. Third, it must be determined if the hearsay is still admissable under one of the 29 exceptions provided in Rules 803 and 804 or for the limited purposes permitted under Rules 806 and 405.

Government use of hearsay in criminal cases may also be limited in certain situations by the confrontation clause of the sixth amendment. *See, e.g., Bruton v. U.S.,* 391 U.S. 123 (1968). Ordinarily, however, the introduction of evidence which is permitted by an exception to the hearsay rule violates no constitutional guarantee. *Salinger v. U.S.,* 272 U.S. 542 (1926).

A. OUT-OF-COURT STATEMENTS

The hearsay rule is primarily applicable to statements that are assertions in words, either oral or written. Rule 801(a)(1), Fed. R. Evid. However, Rule 801(a)(2) provides that nonverbal conduct by a person may be a statement "if it is intended by him as an assertion." This provision significantly expands the admissibility of conduct or silence that might otherwise be excludable as hearsay. *See Donnelly v. U.S.,* 228 U.S. 243, 273 (1913). Under prior law, if conduct was offered to show the actor's belief and hence the truth of that belief, such conduct was inadmissible hearsay. *U.S. v. Pacelli,* 491 F.2d 1108 (2d Cir.), *cert. denied,*

419 U.S. 826 (1974). That is no longer true under the rules, unless it can be shown that the conduct was intended as an assertion. Examples of conduct intended to be an assertion are pointing out the location of a heroin source, *U.S. v. Caro*, 569 F.2d 411 (5th Cir. 1978), and selection of a name from a list, *U.S. v. Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

The Advisory Committee's Note to Rule 801 makes clear, however, that "the rule is so worded as to place the burden upon the party claiming that the intention [to assert] existed" and that "ambiguous and doubtful cases will be resolved ... in favor of admissibility." The admissibility of conduct that may be viewed as assertive now requires a judicial determination whether the conduct was intended to be assertive. Rule 104(a), Fed. R. Evid.; *U.S. v. Mandel*, 591 F.2d 1347 (4th Cir. 1979).

B. NON-HEARSAY

The general hearsay prohibition is applicable only when the out-of-court statement is offered to prove the truth of the assertion it contains. When the statement is offered to prove something other than the truth of what it contains, it is not hearsay and is not inadmissible for that reason. On this, the evidence rules and prior case law are in agreement. *U.S. v. Anderson*, 417 U.S. 211 (1974); *U.S. v. Bernes*, 602 F.2d 716 (5th Cir. 1979). There are several well-recognized non-hearsay, and therefore permissable, uses of extrajudicial statements, and a number of others are, in effect, created by definition in Rule 801.

1. NON-HEARSAY BY USE

a. PROOF THAT A STATEMENT WAS MADE

Overheard threats by the victim against the defendant were admissible to show that they were made, and that ill-feelings existed. *U.S. v. Cline*, 570 F.2d 731 (8th Cir. 1978). Taped conversations of wagers and line information are admissible to show that the conversations took place, but not to prove that bets were made or the truth of the line information. *U.S. v. Boyd*, 566 F.2d 929 (5th Cir. 1978). In a mail fraud prosecution, evidence of untrue statements was received for the purpose of establishing that they were made. *U.S. v. Krohn*, 573 F.2d 1382 (10th Cir.), *cert. denied*, 436 U.S. 949 (1978). Evidence that a witness offered to give perjured testimony is admissible to prove making the offer. *Sawyer v. Barczak*, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956). *See also Hicks v. U.S.*, 173 F.2d 570 (4th Cir.), *cert. denied*, 337 U.S. 945 (1949) (reports of conversations in which defendant's agent sought to influence a juror). In *U.S. v. Harvey*, 526 F.2d 529 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976), a prosecution charging a civil rights violation for the murder of a potential witness, statements made by the victim indicating his awareness of federal crimes committed by defendant were held admissible as tending to show that the defendant killed the victim because of that knowledge. The hearsay rule was inapplicable to testimony by defrauded investors regarding defendant's representations because they were offered merely to show the statements were made. *U.S. v. McDonnel*, 550 F.2d 1010 (5th Cir.), *cert. denied*, 434 U.S. 835 (1977). A government witness' testimony of threats made by defendant was held not hearsay because it was used to show consciousness of guilt and not the truth of the matter asserted. *U.S. v. Pate*, 543 F.2d 1148 (5th Cir. 1976). Testimony relating to the existence of an automobile theft report was

admissible to prove that the car was reported stolen. *U.S. v. Jacobson*, 536 F.2d 793 (8th Cir.), *cert. denied*, 429 U.S. 864 (1976). (For a discussion of the purposes for the introduction of out-of-court declarations, *see U.S. v. Davis*, 551 F.2d 233 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977).)

b. TO SHOW EFFECT ON LISTENER'S CONDUCT

A defendant union officer's testimony that former union presidents had told him constitutions were flexible and could be interpreted to fit local needs was not objectionable hearsay, because it was not offered to prove the truth of what past union presidents said but to show the effect such statements had on defendant's actions. *U.S. v. Rubin*, 591 F.2d 278 (5th Cir.), *cert. denied*, 100 S. Ct. 133 (1979). *See also U.S. v. Abascal*, 564 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978). In a bank robbery prosecution, a police officer's description of a vehicle, as transmitted to him, was admissible to prove why the officer stopped the car and was not objectionable hearsay. *U.S. v. Stout*, 599 F.2d 866 (8th Cir.), *cert. denied*, 100 S. Ct. 163 (1979).

c. RES GESTAE—SPONTANEOUS, CONTEMPORANEOUS DECLARATIONS

A Statement is sometimes said to be admissible, irrespective of the hearsay rule, if it is a declaration that constitutes a part of the *res gestae* or "the thing done." Such a declaration is not really hearsay, however, simply because it is not offered to prove the truth of what was said. When the words spoken only explain the acts done, or when the declarations have an independent legal significance, hearsay is not involved. In *U.S. v. Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), a union business agent was prosecuted for receiving moneys from an employer. The court held that the hearsay rule did not prevent the admission of testimony by one witness that the deceased employer had told the witness to draw money for a second witness "to pay somebody," and testimony by the second witness that, upon handing him an envelope, the deceased employer asked him to take money to the defendant. In each instance, the circumstances of the declarations gave legal significance to otherwise ambiguous acts and completed the description of a material transaction.

A declaration of gift accompanying delivery of property is admissible when offered, not for its truth, but as part of the donative act. *U.S. v. White*, 377 F.2d 908 (4th Cir.), *cert. denied*, 389 U.S. 884 (1967) (testimony that a bank janitor had told defendant he had "dropped something" was held admissible to characterize defendant's subsequent conduct); *Shapiro v. U.S.*, 166 F.2d 240 (2d Cir.), *cert. denied*, 334 U.S. 859 (1948) (oral statements of deceased insured were admissible to remove ambiguity in policy).

2. NON-HEARSAY BY DEFINITION

a. PRIOR STATEMENT OF A WITNESS

Rule 801(d)(1) establishes as "not hearsay" certain prior statements of a witness who testifies and is subject to cross-examination.

(1) INCONSISTENT STATEMENTS

Rule 801(d)(1) excludes from the hearsay definition such prior statements of a testifying witness if "the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ."

Pretrial inconsistent statements of a witness have frequently raised the issue of whether they may be received in evidence as substantive proof of guilt or may be used only for the purpose of impeachment. Rule 801(d)(1)(A) substantially settles this issue by providing that, when the statement is "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition," it is not hearsay and the inconsistent statement may be received as proof of guilt of the accused. Prior unsworn inconsistent statements of a witness remain hearsay and may not be considered as direct evidence of guilt. *U.S. v. Palacios,* 556 F.2d 1359 (5th Cir. 1977). A special agent's rebuttal testimony as to a contradictory statement made to him by a defense alibi witness was hearsay, and instructions were necessary to limit its use to impeachment and to avoid it being considered as substantive proof. *U.S. v. Ragghianti,* 560 F.2d 1376 (9th Cir. 1977). *See also U.S. v. Eddy,* 597 F.2d 430 (5th Cir. 1979), holding where there were inconsistencies between a witness' trial testimony and his preliminary hearing testimony, such inconsistent statements were admissible as substantive evidence and not merely for impeachment. *See also U.S. v. Plum,* 558 F.2d 568 (10th Cir. 1977). Prior inconsistent statements before a grand jury implicating defendant in an armed robbery were properly admitted as substantive evidence where the declarant testified at trial, was subject to cross-examination, and his testimony was inconsistent with his earlier statements. *U.S. v. Mosley,* 555 F.2d 191 (8th Cir.), *cert. denied,* 434 U.S. 851 (1977). *See also U.S. v. Morgan,* 555 F.2d 238 (9th Cir. 1977), which acknowledges that trial judges have a high degree of flexibility in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness' trial testimony to permit its use in evidence; there was no abuse of discretion by the trial court in allowing two pages of a grand jury transcript to be received as an exhibit, the written form of the prior inconsistent statement providing no undue importance or improper emphasis to this substantive proof which is admitted for the truth of its contents.

"Other proceeding" includes interrogation under oath at a border station. Statements which are inconsistent with the trial testimony of illegal aliens are admissible for both impeachment value and evidence of guilt. *U.S. v. Coran,* 589 F.2d 70, (1st Cir. 1978); *U.S. v. Castro-Ayon,* 537 F.2d 1055 (9th Cir.), *cert. denied,* 429 U.S. 983 (1976).

(2) CONSISTENT STATEMENTS

Rule 801(d)(1)(B) provides that prior consistent statements are not hearsay and are admissible as substantive proof of guilt while rebutting an express or implied charge of recent fabrication, improper influence, or motive. The strict condition precedent to the reception of pretrial consistent declarations, therefore, is the presence of at least an attempt to impeach in-trial testimony. *U.S. v. Quinto,* 582 F.2d 224 (2d Cir. 1978) (holding that the proponent of the prior consistent statement has the burden of establishing that the statement is being offered to rebut charges of recent fabrication or that the prior consistent statement was made before any supposed motive to falsify arose); *U.S. v. Williams,* 573 F.2d 284 (5th Cir. 1978); *U.S. v. Zuniga-Lara,* 570 F.2d 1286 (5th Cir.), *cert. denied,* 436 U.S. 961 (1978); *U.S. v. Weil,* 561 F.2d 1109 (4th Cir. 1977); *U.S. v. Lombardi,* 550 F.2d 827 (2d Cir. 1977). *See also U.S. v. Albert,* 595 F.2d 283 (5th Cir. 1979); *U.S. v. Rinn,* 586 F.2d 113 (9th Cir. 1978); *U.S. v. McGrath,* 558 F.2d 1102 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978).

(3) PRETRIAL IDENTIFICATION

Rule 801(d)(1)(C) makes admissible as non-hearsay the out-of-court "identification of a person after perceiving him." This rule is conditioned upon the declarant testifying at trial and being subject to cross-examination concerning his out-of-court identification made while or after viewing the accused in non-suggestive photographic or corporeal lineup identification. *U.S. v. Lewis,* 565 F.2d 1248 (2d Cir. 1977), *cert. denied,* 435 U.S. 973 (1978); *U.S. v. Marchand,* 564 F.2d 983 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1977). *But see U.S. v. Oaxaca,* 569 F.2d 518 (9th Cir.), *cert. denied,* 439 U.S. 926 (1978). Witnesses' testimony that they had previously said that a sketch made by a police artist on the day after the robbery looked like the robber was properly admitted, even though a prior identification was equivocal; the jury is entitled to give it such weight as it will after direct examination and cross-examination. *U.S. v. Moskowitz,* 581 F.2d 14 (2d Cir.), *cert. denied,* 439 U.S. 871 (1978); *U.S. v. Hudson,* 564 F.2d 1377 (9th Cir. 1977). Voice identification of one allegedly making ransom calls is included in the rule, with weight, not admissibility, being the issue. *U.S. v. Moore,* 571 F.2d 76 (2d Cir. 1978).

Impermissibly suggestive identification procedures will, regardless of the evidence rule, render the evidence inadmissible. *Moore v. Illinois,* 434 U.S. 220 (1977); *Manson v. Brathwaite,* 432 U.S. 98 (1977); *Neil v. Biggers,* 409 U.S. 188 (1972); *Foster v. California,* 394 U.S. 440 (1969); *Stovall v. Denno,* 388 U.S. 293 (1967); *Gilbert v. California,* 388 U.S. 263 (1967).

b. ADMISSIONS

Rule 801(d)(2) provides that an admission by a party-opponent is not hearsay if the statement is offered against him and is (1) his statement, (2) a statement that he has adopted, (3) a statement by a person authorized to make the statement, (4) a statement by this agent concerning a matter within the scope of his agency, or (5) a statement by a coconspirator during the course and in furtherance of the conspiracy. By denominating admissions "not hearsay," the Federal Rules of Evidence resolve for the federal courts the academic controversy whether admissions are "exceptions" to the hearsay rule or simply not hearsay at all. *See U.S. v. Puco,* 476 F.2d 1099 (2d Cir.), *cert. denied,* 414 U.S. 844 (1973).

(1) ADMISSIONS BY DEFENDANT

Judicial admissions, including stipulations and guilty pleas, are included in Rule 801(d)(2)(A). Where neither is withdrawn with the consent of the court, each is binding and conclusive against the accused. However, if a guilty plea is withdrawn and a not guilty pleas is substituted, the former guilty plea is not admissible in a trial held on the substituted plea, nor may the judge or prosecutor comment on it. Rule 11(e)(6), Fed. R. Crim. P.; Rule 410, Fed. R. Evid. *See*

Kercheval v. U.S., 274 U.S. 220 (1927). The pertinent provisions of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence also preclude use of "offers" to plead guilty or of "any statements made in connection with" such plea or offer.

Provided that statements attributed to the accused pass constitutional muster, *i.e.*, they are freely, voluntarily, and intelligently given with full knowledge and understanding of rights, such extrajudicial declarations are not hearsay and are admissible as part of the government's rebuttal evidence even though they could have been produced during the case-in-chief. *U.S. v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *U.S. v. Cline*, 570 F.2d 731 (8th Cir. 1978); *U.S. v. Porter*, 544 F.2d 936 (8th Cir. 1976). Statements to non-law enforcement persons are included in the rule. *U.S. v. Franklin*, 586 F.2d 560 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); *U.S. v. Buttorff*, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978). *See also U.S. v. Weinrich*, 586 F.2d 481 (5th Cir. 1978), *cert. denied*, 441 U.S. 927 (1979), for avoidance of *Bruton* problems (*Bruton v. U.S.*, 391 U.S. 123 (1968)) in a joint trial.

Allegations in an indictment contrary to the proof brought out at trial are not admissions of the United States since an indictment is not a pleading of one of the parties but is an instrument of the grand jury. *Falter v. U.S.*, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

(2) DEFENDANT'S ADOPTIVE ADMISSIONS

Rule 801(d)(2)(B) restates the prior rule that an out-of-court statement acquiesced in or accepted by an accused may be received against him, by providing that such a statement is not hearsay. Where such adoption is manifested by words or actions of the accused that tend to explain or give meaning to the words of the declarant, courts have had little trouble in finding such statements admissible against the accused. *U.S. v. Crockett*, 534 F.2d 589 (5th Cir. 1976). The difficult cases are those involving silence in the face of accusation, comment, or directives about criminal activity. Whether silence may constitute adoptive admission in criminal cases now depends upon the status and position of the defendant at the time of the silence.

Where the defendant is under arrest and has been advised of his *Miranda* rights, his silence in the face of accusation cannot be used against him because he is not expected to speak or offer any exculpatory explanation. *Doyle v. Ohio*, 426 U.S. 610 (1976). *See also U.S. v. Hale*, 422 U.S. 171 (1975), where the Court ruled that failure to speak at the time of arrest is of insufficient probative value to be admissible, though this decision is not binding on the states as it was an exercise of the Court's supervisory power. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), adverse inferences could be drawn from the silence of inmates at a disciplinary hearing, but not at a criminal prosecution.

However, where one is not in custody prior to indictment, due process, fundamental fairness, and other explicit constitutional rights are not violated by evidence of the silence of the defendant in the face of accusations of criminal behavior. *U.S. v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 100 S. Ct. 480 (1979); *U.S. v. Kilbourne*, 559 F.2d 1263 (4th Cir.), *cert. denied*, 434 U.S. 873 (1977); *U.S. v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *U.S. v. Hoosier*, 542 F.2d 687 (6th Cir. 1976); *U.S. v. Flecha*, 539 F.2d 874 (2d Cir. 1976). Better practice suggests that the court initially determine whether the accusation or statement was such that, under the circumstances, an innocent person would normally be induced

to repsond. *U.S. v. Moore*, 522 F.2d 1068 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).

When the government files an affidavit for a search warrant, it may not later object on hearsay grounds to use of the contents of the affidavit during cross-examination. *U.S. v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978).

(3) VICARIOUS AND REPRESENTATIVE ADMISSIONS

Subdivisions (C) and (D) of Rule 801(d)(2) exclude from the definition of hearsay a "statement by a person authorized by [a party-opponent] to make a statement concerning the subject" or "a statement by [a party-opponent's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." This provision has been used effectively in criminal cases. In *U.S. v. Ojala*, 544 F.2d 940 (8th Cir. 1976), an IRS agent's testimony that defendant's attorney said the failure of his client to file returns was not the result of political beliefs, where the statements were unequivocal and were made in the presence of the client who registered no objection or complaint, was admissible as non-hearsay because the declarations were made in the scope of the attorney's authority. *See also Mahlandt v. Wild Canid Survival & Research Center Inc.*, 588 F.2d 626 (8th Cir. 1978). Statements of legislative aides of former Maryland Governor Marvin Mandel, concerning his views on legislative attempts to override his veto, were not hearsay and were properly admitted in his mail fraud trial, since the views expressed were within the scope of and made during the agency relationship. *U.S. v. Mandel*, 591 F.2d 1347 (4th Cir. 1979). *See also U.S. v. Summers*, 598 F.2d 450 (5th Cir. 1979).

(4) DECLARATIONS OF COCONSPIRATORS

Rule 801(d)(2)(E) provides that a statement is not hearsay if made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Under this rule an out-of-court declaration of a coconspirator is admissible against each conspirator even if the indictment fails to include a conspiracy count. *U.S. v. Smith*, 596 F.2d 319 (8th Cir. 1979); *U.S. v. Scavo*, 593 F.2d 837 (8th Cir. 1979); *U.S. v. Durland*, 575 F.2d 1306 (10th Cir. 1978); *U.S. v. Doulin*, 538 F.2d 466 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976); *U.S. v. Wright*, 491 F.2d 942 (6th Cir.), *cert. denied*, 419 U.S. 862 (1974); *U.S. v. Johnson*, 463 F.2d 216 (9th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *U.S. v. Jones*, 438 F.2d 461 (7th Cir. 1971); *Davis v. U.S.*, 409 F.2d 1095 (5th Cir. 1969), *aff'd on other grounds*, 411 U.S. 233 (1973); *Mares v. U.S.*, 409 F.2d 1083 (10th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969); *U.S. v. Rinaldi*, 393 F.2d 97 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968).

Proof of the existence of a joint venture determines the admissibility of the coconspirator's declaration. This is so even where the coconspirator to whom the extrajudicial statement is attributed does not testify. *Dutton v. Evans*, 400 U.S. 74 (1970). *See U.S. v. Schwanke*, 598 F.2d 575 (10th Cir. 1979); *U.S. v. Dawson*, 576 F.2d 656 (5th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979); *U.S. v. Green*, 548 F.2d 1261 (6th Cir. 1977). When a conspiracy count is included and a defendant is acquitted on that count, the coconspirator's statements may still be used because acquittal implies only a failure to prove the conspiracy beyond a reasonable doubt. *U.S. v. Durland*, 575 F.2d at 1308-1310; *U.S. v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *U.S. v. Beasley*, 545 F.2d 403, *remanded on other grounds*, 563 F.2d 1225 (5th Cir. 1977); *U.S. v. Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *U.S. v. Suchy*, 540 F.2d 254 (6th Cir. 1976)

(rejecting a per se rule requiring reversal on the substantive count where it is based on hearsay statements of an acquitted coconspirator). Moreover, the declaring coconspirator need not be indicted, nor identified in the charge as a conspirator, for the admission rule to apply. *U.S. v. Ziperstein,* 601 F.2d 281 (7th Cir. 1979).

Under the rule, coconspirator declarations are not admissible unless it is established that a conspiracy existed at the time and that the defendant participated therein. The trial court must make an initial determination of when a coconspirator declaration may be received; and this involves a balancing of the government's right to present its case with the defendant's right to be protected from inadmissible evidence. The trial court must decide whether proof of the conspiracy must precede, and be independent of, the coconspirator statement, what quantum of proof the government must furnish before the jury may consider the extrajudicial coconspirator statement as substantive proof of guilt, and whether the coconspirator declaration was made during and in furtherance of the conspiracy. In deciding these questions, the trial court may require the government to establish the conspiracy and the defendant's connection therewith before the coconspirator's declarations are admitted; admit the coconspirator's declarations subject to subsequent proof of the existence of the conspiracy and defendant's role therein; or hear what the government's proof of conspiracy will be and, if found to be sufficient, admit the coconspirator's statements at any stage of the trial. *U.S. v. Vinson,* 606 F.2d 149 (6th Cir. 1979); *U.S. v. Eubanks,* 591 F.2d 513 (9th Cir. 1979); *U.S. v. James,* 590 F.2d 575 (5th Cir.), *cert. denied,* 99 S. Ct. 2836 (1979); *U.S. v. Macklin,* 573 F.2d 1046 (8th Cir.), *cert. denied,* 439 U.S. 852 (1978); *U.S. v. Martorano,* 557 F.2d 1 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978).

The order of receiving evidence is a matter for the discretion of the trial court. However, evidence erroneously admitted cannot be retroactively justified on appeal on the ground that it fell under this exception, where the trial judge chose not to adopt that ground as a basis for admission. *U.S. v. Kaplan,* 510 F.2d 606, 611-612 (2d Cir. 1974). *Cf. U.S. v. Green,* 523 F.2d 229 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976).

The circuits do not agree whether initial establishment of the conspiracy may be proved by (1) non-hearsay evidence independent of the coconspirator's statements, (2) a combination of evidence of the defendant's acts and conduct and the coconspirator declaration, or (3) by the hearsay statement standing alone. *U.S. v. James,* 590 F.2d 575 (5th Cir.), *cert. denied,* 99 S. Ct. 2836 (1979); *U.S. v. Fredericks,* 586 F.2d 470 (5th Cir. 1978), *cert. denied,* 440 U.S. 962 (1979); *U.S. v. Di Rodio,* 565 F.2d 573 (9th Cir. 1977); *U.S. v. Peterson,* 549 F.2d 654 (9th Cir. 1977) (holding that substantial independent evidence to prove the conspiracy and defendant's connection with it is required and that the hearsay declarations do not qualify as part of the independent proof). *See also U.S. v. Valencia,* 609 F.2d 603 (2d Cir. 1979); *U.S. v. Vinson,* 606 F.2d at 153 (hearsay statements may be considered); *U.S. v. Gil,* 604 F.2d 546 (7th Cir. 1979); *U.S. v. Continental Group, Inc.,* 603 F.2d 444 (3d Cir. 1979); *U.S. v. Martorano,* 557 F.2d at 11-12; *U.S. v. Hassell,* 547 F.2d 1048 (8th Cir.), *cert. denied,* 430 U.S. 919 (1977); *U.S. v. Green,* 523 F.2d at 233 (non-hearsay evidence required). *But see U.S. v. Beecroft,* 608 F.2d 753 (9th Cir. 1979); *U.S. v. Williams,* 604 F.2d 1102 (8th Cir. 1979); *U.S. v. Littlefield,* 594 F.2d 682 (8th Cir. 1979).

The circuits also stand in disagreement about the quantum of non-hearsay evidence needed to establish the existence of the conspiracy and defendant's connection so as to make admissible the statements of coconspirators as

substantive proof of guilt. The swing is from the low prima facie proof level to a preponderance of the evidence. A fair preponderance of the evidence independent of proffered hearsay was held sufficient in *U.S. v. Calarco,* 424 F.2d 657 (2d Cir.), *cert. denied,* 400 U.S. 824 (1970). *Accord, U.S. v. Mangan,* 575 F.2d 32 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978). The prima facie rule was disregarded and the civil standard of preponderance of evidence was adopted in *U.S. v. Petrozziello,* 548 F.2d 20 (1st Cir. 1977); prima facie evidence was sufficient, and only slight evidence was required to link defendant to the conspiracy in *U.S. v. Beasley,* 545 F.2d 403 (5th Cir. 1977). Fair preponderance of independent evidence to connect defendant to conspiracy was sufficient in *U.S. v. Jones,* 542 F.2d 186 (4th Cir.), *cert. denied,* 426 U.S. 922 (1976); a preponderance was substituted for prima facie test in *U.S. v. Enright,* 579 F.2d 980 (6th Cir. 1978); a preponderance of evidence was required to prove defendants' link to conspiracy in *U.S. v. Bell,* 573 F.2d 1040 (8th Cir. 1978). *But see U.S. v. Hassell,* 547 F.2d 1048 (8th Cir.), *cert. denied,* 430 U.S. 919 (1977), where substantial independent evidence was required to establish the conspiracy, but only slight evidence was necessary to connect the defendant with it, and the hearsay declarations did serve as the independent evidence for either purpose. *Accord, U.S. v. Peterson,* 549 F.2d 654 (9th Cir. 1977).

Whether the conspiracy continues or has expired is determined as a matter of law by the court. A robbery has been held to be in progress until the money is divided. *U.S. v. Hickey,* 596 F.2d 1082 (1st Cir.), *cert. denied,* 100 S. Ct. 107 (1979). A conspiracy is not completed until the spoils are divided. *U.S. v. Knuckles,* 581 F.2d 305 (2d Cir.), *cert. denied,* 439 U.S. 986 (1978). A conspiracy is completed when its object is achieved and there is no evidence it is continuing, *U.S. v. DeVaugn,* 579 F.2d 225 (2d Cir. 1978); agreement to burn car after bank robbery was not admissible as the conspiracy was completed, *U.S. v. Floyd,* 555 F.2d 45 (2d Cir.), *cert. denied,* 434 U.S. 851 (1977). However, a statement made after arrest may be admissible, *U.S. v. Lam Lek Chong,* 544 F.2d 58 (2d Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977), or not admissible, *U.S. v. Barnes,* 586 F.2d 1052 (5th Cir. 1978). Pointing out the location of a heroin source after arrest was held not admissible in *U.S. v. Caro,* 569 F.2d 411 (5th Cir. 1978).

The last overt act charged and proved does not necessarily mark the duration of the conspiracy, *U.S. v. Mackey,* 571 F.2d 376 (7th Cir. 1978), and conversations with prospective conspirators for membership purposes may be admissible, *U.S. v. Dorn,* 561 F.2d 1252 (7th Cir. 1977), but casual comments between conspirators may not be admissible, *U.S. v. Green,* 600 F.2d 154 (8th Cir. 1979). A post-arrest statement was not admissible in *U.S. v. Di Rodio,* 565 F.2d 573 (9th Cir. 1977); and a letter written after the conspiracy ended, offered by a codefendant, was not admissible in *U.S. v. Montgomery,* 582 F.2d 514 (10th Cir. 1978), *cert. denied,* 439 U.S. 1075 (1979). Tape recordings of past events are admissible if they constitute activity which is plainly in furtherance of the conspiracy. *U.S. v. Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

Statements made after the termination of the conspiracy are not admissible. *Krulewitch v. U.S.,* 336 U.S. 440 (1949); *Wong Sun v. U.S.,* 371 U.S. 471 (1963). The burden of establishing withdrawal from the conspiracy lies on defendant who must demonstrate some type of affirmative action of disavowal either by communicating with law enforcement or informing his coconspirators. *U.S. v. Dorn,* 561 F.2d at 1256.

The fact that an assertion of a coconspirator is an "admission" does not make it a "statement of the defendant" and thus discoverable under Rule 16(a) of the

Federal Rules of Criminal Procedure. *U.S. v. Percevault,* 490 F.2d 126, 130 (2d Cir. 1974).

C. HEARSAY EXCEPTIONS—AVAILABILITY OF DECLARANT IMMATERIAL

Rule 803 provides that certain statements, otherwise inadmissible under the hearsay rule, are not excluded even though the declarant is available as a witness, because there are circumstantial guarantees of trustworthiness or reliability to justify the nonproduction of the declarant. "Trustworthiness" is the key to whether hearsay will be admitted. Rule 803 sets out 23 specific exceptions plus a catchall or general exception that allows other hearsay to be admitted where there are "circumstantial guarantees of trustworthiness." Both Rule 803 and Rule 804 are phrased in the negative ("The following are not excluded..."), rather than in positive terms of admissibility, meaning that even though the hearsay rule does not exclude a statement, there may be other grounds that would keep the statement from being admitted. The exceptions set out in Rule 803 follow:

1. PRESENT SENSE IMPRESSION: RULE 803(1)

This provision excepts from the hearsay rule statements "describing or explaining an event or condition" where the statement was "made while the declarant was perceiving the event or condition, or immediately thereafter." The Advisory Committee's Note says that the subject matter under this exception is limited to a description or explanation of the event or condition so contemporaneous as to "negate the likelihood of deliberate or conscious misrepresentation." There is no precise definition of "immediately thereafter," but one court held admissible hearsay statements made 15 to 45 minutes after the observation and absent a state of excitement. *Hilyer v. Howat Concrete Co., Inc.,* 578 F.2d 422, 426 n.7 (D.C. Cir. 1978). *See also U.S. v. Cain,* 587 F.2d 678 (5th Cir.), *cert. denied,* 440 U.S. 975 (1979); *U.S. v. Medico,* 557 F.2d 309 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977) (double hearsay identification of the license plate of a bank robber meeting all of the specific requirements of admission under Rule 803(1) was admitted under Rule 804(b)(5) because of the Advisory Committee's hesitancy to admit statements without more when a bystander's identity is unknown).

2. EXCITED UTTERANCES: RULE 803(2)

This provision permits admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The theory is that the spontaneous statement in the stress of excitement is not the product of reflective thought and as such is free of conscious fabrication. *See* Advisory Committee's Note; *United States v. Knife,* 592 F.2d 472, 481 n.10 (8th Cir. 1979).

This exception is broader than the "present sense impression" exception both as to subject matter and as to the time of the utterance. The statement need only "relate" to a startling event or condition, and actually might be made some time later, as where a person waking from a coma was still under the stress of excitement caused by the event or condition. Thus, the statement of a child to his

mother identifying the person who sexually assaulted him was admitted because the child was "suffering distress from the assault." *U.S. v. Nick,* 604 F.2d 1199 (9th Cir. 1979).

3. THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION: RULE 803(3)

This provision excepts from the hearsay rule a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) ...." Testimony by the former attorney of a defendant (who was charged with extortion) that defendant had asked if it would be legal to negotiate for a reward was admissible as a statement of defendant's then existing state of mind. *U.S. v. Taglione,* 546 F.2d 194 (5th Cir. 1977). In a Hobbs Act prosecution, the court allowed testimony by the one liquor representative that another liquor representative had said he paid money to the defendant to show the state of mind of the witness-victim. *U.S. v. Adcock,* 558 F.2d 397 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977).

This rule specifically excludes from the exception a "statement of memory or belief to prove the fact remembered or believed" except in relation to a declarant's will. "He told me that he 'met Smith in the parking lot yesterday' " is not permitted. Evidence of intention through hearsay statements, such as "He told me that he was 'going to meet Smith in the parking lot,' " is permitted as tending to prove the doing of the act intended. The Supreme Court permits such "[d]eclarations of intention, casting light upon the future, [which] 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." *Shepard v. U.S.,* 290 U.S. 96, 105-106 (1933). *See also Marshall v. Commonwealth Aquarium,* 611 F.2d 1 (1st Cir. 1979). Also, the statement of a missing person that he intended to meet a person with the same name by which one of the defendants was known could be introduced. From that evidence the jury might infer that the person carried out his stated intention to meet that defendant. *U.S. v. Pheaster,* 544 F.2d 353 (9th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977).

4. STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT: RULE 803(4)

This rule allows the admission of statements relating to medical diagnosis or treatment, including medical history, past or present symptoms, pain or sensations, and statements of causation where they are "reasonably pertinent to diagnosis or treatment." The Advisory Committee's Note points out that statements as to causation for the purpose of diagnosis or treatment would ordinarily qualify under the language but that statements about fault would not. Thus, a "patient's statement that he was struck by an automobile will qualify but not a statement that the car was driven through a red light." The statement need not have been made to a physician, and it need not refer to the declarant's physical condition.

The guarantee of the statement's trustworthiness is considered the declarant's need to give information for aid in diagnosis and treatment. One court has said that the test for applicability of the exception is whether a doctor would rely on

the facts contained in the utterance solely for the treatment of the patient's specific condition. *U.S. v. Narciso,* 446 F. Supp. 252 (E.D. Mich. 1977). And, another court has ruled that the exception applies to statements made to a physician consulted only for the purpose of enabling him to testify where the statement was relied on by the doctor in formulating his opinion. *O'Gee v. Dobbs Houses, Inc.,* 570 F.2d 1084 (2d Cir. 1978).

5. RECORDED RECOLLECTION: RULE 803(5)

When a witness once had knowledge about a matter but now has insufficient recollection to testify fully and accurately, counsel may attempt under Rule 612 to revive his memory through a writing. If the writing is sufficient to cause the witness to recall the matter there is no hearsay problem as the witness is then testifying from his present memory which has been revived by the writing. This is "present recollection revived." But where a witness, after reviewing the writing, is still unable to remember what is in the writing, a memorandum or record concerning the matter may be read into evidence under certain circumstances as "past recollection recorded," according to Rule 803(5).

The rule provides for the admission of recorded recollection if: (1) the "witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately"; (2) the witness can testify that the memorandum of record was "made or adopted by the witness when the matter was fresh in his memory"; and (3) the witness can testify that the recorded recollection reflected his then existing knowledge correctly. The memorandum or record may then be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party. *U.S. v. Judon,* 567 F.2d 1289 (5th Cir. 1978).

A signed statement of a witness in the words of a Secret Service agent was properly read into evidence because the witness adopted the statement by signing and swearing to it while the matter was fresh in his mind and was generally correct. *U.S. v. Williams,* 571 F.2d 344 (6th Cir.), *cert. denied,* 439 U.S. 841 (1978). A statement given by a witness to an agent was admitted notwithstanding the fact that he was inebriated at the time he made the statement. *U.S. v. Edwards,* 539 F.2d 689 (9th Cir.), *cert. denied,* 429 U.S. 984 (1976). Prior trial testimony may be read into evidence as past recollection recorded in a perjury trial if there is a proper foundation. *U.S. v. Arias,* 575 F.2d 253 (9th Cir.), *cert. denied,* 429 U.S. 868 (1978).

6. RECORDS OF REGULARLY CONDUCTED ACTIVITY: RULE 803(6)

This rule permits the admission of hearsay contained in a "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses" where the following conditions are met: (1) it must be "made at or near the time"; (2) it must be "by, or from information transmitted by, a person with knowledge"; (3) it must be "kept in the course of a regularly conducted business activity"; and (4) it must have been "the regular practice of that business activity to make the memorandum, report, record, or data compilation." These conditions must be shown by the testimony of (1) the custodian or (2) some other qualified witness. The evidence will not be admitted, however, if the "source of information or the method or circumstances of

preparation indicate lack of trustworthiness." The term "business" includes "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

A sampling of the types of records which have been admitted under this rule includes: appointment calendars kept by unindicted coconspirators, *U.S. v. McPartlin,* 595 F.2d 1321 (7th Cir.), *cert. denied,* 100 S. Ct. 65 (1979); invoice which owner received at the time of purchase of her automobile, *U.S. v. Hines,* 564 F.2d 925 (10th Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978); credit card receipt signed by defendant and maintained by issuing company, *U.S. v. Peden,* 556 F.2d 278 (5th Cir.), *cert. denied,* 434 U.S. 871 (1977); motel registrations, car rentals, and airline shipments, *U.S. v. Wigerman,* 549 F.2d 1192 (8th Cir. 1977); bank's bait money list, *U.S. v. Davis,* 542 F.2d 743 (8th Cir.), *cert. denied,* 429 U.S. 1004 (1976); delivery invoices in possession of manufacturer but prepared by common carrier, *U.S. v. Pfeiffer,* 539 F.2d 668 (8th Cir. 1976); notebooks of taxpayer's employee showing services performed and payments made, *U.S. v. Prevatt,* 526 F.2d 400 (5th Cir. 1976); photocopies of records proving out-of-state manufacture of firearms, *U.S. v. Powers,* 572 F.2d 146 (8th Cir. 1978); scrapbook of press clippings compiled by public relations department of hospital admitted to prove hospital visiting hours, *U.S. v. Reese,* 568 F.2d 1246 (6th Cir. 1977).

Included also as records under this rule is "data compilation" which the Advisory Committee's Note states "includes, but is by no means limited to, electronic computer storage." A computer printout of drug records was admitted, but the court stated that complex nature of computer storage calls for a more comprehensive foundation for the admission of computer printouts. *U.S. v. Scholle,* 553 F.2d 1109 (8th Cir.), *cert. denied,* 434 U.S. 940 (1977); *U.S. v. Verlin,* 466 F. Supp. 155 (N.D. Tex. 1979) (computerized telephone billing statement).

The rule also includes statements of "opinions or diagnoses" as a business records exception. A physician's diagnosis and treatment were admitted as part of the hospital record under Ohio's business records exception. *Stengel v. Belcher,* 522 F.2d 438 (6th Cir. 1975). The statement of defendant that his mother was "preterminal," contained in a hospital record, was admitted to show defendant's state of mind when he provided information on a loan application allegedly for his mother. *U.S. v. Sackett,* 598 F.2d 739 (2d Cir. 1979).

A business record does not necessarily have to be a written document. A fire department sound recording of emergency calls made by a defendant was held admissible in *U.S. v. Verlin,* 466 F. Supp. at 160.

A bank's loan procedure manual, however, was not admissible, as it was not a memorandum or record of any action, occurrence, or event, nor was it made at or near the time of the transaction. *Seattle-First National Bank v. Randall,* 532 F.2d 1291 (9th Cir. 1976).

Before a record may be introduced under this rule, a proper foundation must be laid showing that the requirements of the rule have been met. The phrase "person with knowledge" does not mean that a specific individual must be identified, but that the usual practice of the business was to get the information from a person with knowledge. *See* Senate Judiciary Committee's Note on Rule 803(6); *U.S. v. Ahrens,* 530 F.2d 781 (8th Cir. 1976); *U.S. v. Evans,* 572 F.2d 455 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978). Thus, the "custodian or other qualified witness" testifying at the trial need not have been the declarant or recorder of the items being offered, *U.S. v. Pfeiffer,* 539 F.2d at 671; *U.S. v. Jones,* 554 F.2d 251 (5th Cir. 1977), nor employed at the time the records were prepared, *U.S. v. Evans,* 572 F.2d at 490, nor have personal knowledge of the

particular evidence on the record, *U.S. v. Reese,* 568 F.2d 1246 (6th Cir. 1977), nor must the report have been prepared by the custodian of records, *U.S. v. Bowers,* 593 F.2d 376 (10th Cir.), *cert. denied,* 100 S. Ct. 106 (1979). One court has also admitted a record where the witness "only surmised" that the procedures used when the record was prepared were the same as when he thereafter became the custodian, *U.S. v. Rose,* 562 F.2d 409 (7th Cir. 1977). But where the only information was that the document was found in the corporation's records without a signature and the witness said, "I don't know who prepared it" and knew nothing else about its source, it was held to have been properly excluded for insufficient authentication. *Coughlin v. Capitol Cement Co.,* 571 F.2d 290 (5th Cir. 1978).

A letter from bank employees to bank management concerning a bank robbery with a postscript stating that the FBI had notified them that the robber was in custody was held inadmissible, as those statements were "made by a third party outside the scope of the business." *U.S. v. Yates,* 553 F.2d 518 (6th Cir. 1977). A claim form with a buyer's statement that stolen silver was worth $7,690 was not a record of regularly conducted activity, and thus was inadmissible. *U.S. v. Plum,* 558 F.2d 568 (10th Cir. 1977). *See also U.S. v. Powers,* 572 F.2d 146 (8th Cir. 1978); *U.S. v. Davis,* 571 F.2d 1354 (5th Cir. 1978).

Although otherwise admissible under Rule 803(6), a record may be excluded if "the source of information or the method or circumstances of preparation indicates lack of trustworthiness." One indicator may be the motivation in preparing a record. Was the purpose primarily for business purposes or was it prepared primarily for litigation? *Palmer v. Hoffman,* 318 U.S. 109 (1943). A telex providing a summary of the defendant's subpoenaed Korean bank records was held inadmissible for lack of trustworthiness. *U.S. v. Kim,* 595 F.2d 755 (D.C. Cir. 1979). However, inaccurate and incomplete records may be admitted, these deficiencies going to the weight of the evidence not to its admissibility. *Crompton Richmond Co., Inc., Factors v. Briggs,* 560 F.2d 1195 (5th Cir. 1977).

The term "business" is used broadly in the rule and has been interpreted to include a prison. *Stone v. Morris,* 546 F.2d 730 (7th Cir. 1976).

The trial court has broad discretion in determining admissibility under this rule, and its ruling will not be overturned except for an abuse of discretion. *U.S. v. Veytia-Bravo,* 603 F.2d 1187 (5th Cir. 1979); *U.S. v. Evans,* 572 F.2d at 490; *U.S. v. Reese,* 561 F.2d 894 (D.C. Cir. 1977); *U.S. v. Carranco,* 551 F.2d 1197 (10th Cir. 1977); *U.S. v. Page,* 544 F.2d 982 (8th Cir. 1976).

Rule 803(8) provides for the admission of public records and reports, but it is more restrictive than Rule 803(6) and it is controlling. If the public record or report does not meet the requirements of Rule 803(8), it generally will not be admitted under Rule 803(6) even though it may meet all of the requirements of the latter section. *See U.S. v. Oates,* 560 F.2d 45 (2d Cir. 1977); *U.S. v. American Cyanamid Co.,* 427 F. Supp. 859 (S.D.N.Y. 1977).

7. ABSENCE OF ENTRIES IN RECORDS KEPT IN REGULARLY CONDUCTED ACTIVITY: RULE 803(7)

This rule provides that failure of a record to include an entry of matter which would ordinarily be included in a record regularly made and preserved, within the meaning of Rule 803(6), is admissible to "prove the nonoccurrence or nonexistence of the matter, ... unless the sources of information or the circumstances indicate lack of trustworthiness." A U.S. Department of Agriculture auditor was permitted

to testify, for example, about his search for, and failure to find, deposits by defendant in the Federal Reserve Bank. *U.S. v. Lanier,* 578 F.2d 1246 (8th Cir.), *cert. denied,* 439 U.S. 856 (1978). *See also U.S. v. Zeidman,* 540 F.2d 314 (7th Cir. 1976).

The absence of records to prove the nonoccurrence of relevant matters under Rule 803(7) also may be included as part of summary charts introduced under Rule 1006. *U.S. v. Scales,* 594 F.2d 558 (6th Cir.), *cert. denied,* 99 S. Ct. 2168 (1979).

8. PUBLIC RECORDS AND REPORTS: RULE 803(8)

This rule provides a hearsay exception for records, reports, statements, or data compilations of public offices or agencies in any form setting forth: (1) "the activities of the office or agency"; (2) "matters observed pursuant to duty imposed by law to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel"; (3) "factual findings resulting from an investigation made pursuant to authority granted by law," but such findings are admissible in a criminal case only when used against the government. The Advisory Committee's Note states that the justification for this exception "is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." The rule makes no distinction between federal and nonfederal offices and agencies.

Examples of admission permitted under this rule include: a U.S. Marshal's return stating that he had served an injunction on a union and the union officers, *U.S. v. Union Nacional De Trabajadores,* 576 F.2d 388 (1st Cir. 1978); dates on certificates of copyright on record albums in record piracy prosecutions, *U.S. v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); records of the Ulster Constabulary showing routine recording of serial numbers and receipt of weapons, *U.S. v. Grady,* 544 F.2d 598 (2d Cir. 1976); routine, nonadversarial matters such as a simple recording by a customs inspector of license numbers of vehicles passing his station, *U.S. v. Orozco,* 590 F.2d 789 (9th Cir.), *cert. denied,* 442 U.S. 920 (1978); records of department of revenue showing car ownership, *U.S. v. King,* 590 F.2d 253 (8th Cir. 1978), *cert. denied,* 440 U.S. 973 (1979).

Examples where public records were found to be inadmissible include: reports and worksheets of U.S. Customs Service chemists analyzing a white powdery substance claimed by the prosecution to be heroin were found to be "matters observed" by "law enforcement personnel" and as such not admissible under 803(8)(B), *U.S. v. Oates,* 560 F.2d 45 (2d Cir. 1977); IRS computer printout setting forth matters observed by law enforcement personnel and as such inadmissible, *U.S. v. Ruffin,* 575 F.2d 346 (2d Cir. 1978); SEC release was held not a "determination of facts obtained after administrative proceedings" and as such was inadmissible, *U.S. v. Corr,* 543 F.2d 1042 (2d Cir. 1976). As any judgment from their orders would result in a fine and not a criminal conviction, building inspectors were held not to be law enforcement officers and so records of building code violations were admissible. *U.S. v. Hansen,* 583 F.2d 325 (7th Cir.), *cert. denied,* 439 U.S. 912 (1978).

The Seventh Circuit distinguished *U.S. v. Oates, supra,* and held that Rule 803(8)(B) does not exclude the referral report of an agent that satisfies the criteria of recorded recollection under Rule 803(5) where the agent is testifying. *U.S. v. Sawyer,* 607 F.2d 1190 (7th Cir. 1979).

9. RECORDS OF VITAL STATISTICS: RULE 803(9)

This rule allows "[r]ecords or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to the requirements of law."

10. ABSENCE OF PUBLIC RECORD OR ENTRY: RULE 803(10)

This rule, similar to Rule 803(7), permits proof of the nonoccurrence or nonexistence of a matter or an event by evidence of the absence of a record regularly made and preserved by a public office or agency. The absence of such record may be proven in accordance with Rule 902 or by testimony that a diligent search failed to disclose the record, report, statement, or data compilation or entry.

In a prosecution for dealing in firearms without a license, a certificate from an ATF agent stating that the defendant had not been granted a license to engage in the business of a firearm dealer was held properly admitted even though the certificate did not state that a diligent search of the records had been made. *U.S. v. Harris,* 551 F.2d 621 (5th Cir.), *cert. denied,* 434 U.S. 836 (1977). Affidavits of CIA officials stating that CIA records failed to reveal that the defendant had ever been employed by that agency were held properly admitted in an espionage prosecution where defendant claimed he was a CIA agent. *U.S. v. Lee,* 589 F.2d 980 (9th Cir. 1979). To refute the defendant's statements that he had filed tax returns, a government employee was permitted to testify that a computer check showed the defendant had not filed tax returns. Although there was no error found in this case because the computer program was uncomplicated, "the government is well advised" to give notice in advance of the trial if computer data is to be used. The court also noted that the prohibition in Rule 803(8)(B) and (C) precluding the use of certain public records against an accused is not present in Rule 803(10). *U.S. v. Cepeda Penes,* 577 F.2d 754 (1st Cir. 1978). Although it may be proper for the government to impeach a defense witness by showing the absence of a record indicating his receipt of an unemployment check on the day claimed, where the search has been less than diligent, reliability cannot be assured and admission to prove absence of a record was held to be reversible error. *U.S. v. Robinson,* 544 F.2d 110 (2d Cir. 1976), *cert. denied,* 439 U.S. 1050 (1978).

11. RECORDS OF RELIGIOUS ORGANIZATIONS; MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES; AND FAMILY RECORDS: RULE 803(11), (12), AND (13)

Rule 803(11) provides for the admission of "[s]tatements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization."

The principle of proof by certification which is recognized in Rule 803(8) for public officials is extended in Rule 803(12) to clergyman and others who perform marriages and other ceremonies or administer sacraments. When the person executing the certificate is not a public official, however, the document is not self-

authenticating, and proof is required that the person was authorized to perform the act and did make the certificate.

Rule 803(13) allows admission of "[s]tatements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like."

12. RECORDS OF DOCUMENTS AND STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY: RULE 803(14) AND (15)

Rule 803(14) permits the introduction of documents affecting an interest in property. Although these records might be offered as exceptions to the hearsay rule as public records, under Rule 803(14) they can be offered for the further purpose of proving execution and delivery, which is information outside the contents of the documents and information which the recorder could not testify to with firsthand knowledge. To be admissible the record must be a record of a public office and must be filed in that office pursuant to an applicable statute authorizing such recording.

Under Rule 803(15) statements and documents establishing or affecting an interest in property are exempt from the hearsay rule "if the matter stated was relevant to the purpose of the document," unless later dealings were inconsistent with the truth of the statement or the purport of the document. For example, a statement in a deed that the grantors are all of the heirs of the last record owner is admissible.

13. STATEMENTS IN ANCIENT DOCUMENTS: RULE 803(16)

This rule admits "[s]tatements in a document in existence twenty years or more ... " whose authenticity is established pursuant to Rule 901(b)(8). The Advisory Committee's Note states that "age affords assurance that the writing antedates the present controversy." The exception applies to all sorts of documents. *See Bell v. Combined Registry Co.,* 397 F. Supp. 1241 (N.D. Ill. 1975), *aff'd,* 536 F.2d 164 (7th Cir.), *cert. denied,* 429 U.S. 1001 (1976).

14. MARKET REPORTS, COMMERCIAL PUBLICATIONS: RULE 803(17)

This rule allows admission of "market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations," such as stock market reports, phone directories, life expectancy tables, and city directories.

15. LEARNED TREATISES: RULE 803(18)

This rule provides that "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art ... " are admissible. For example, the National Electrical Safety Code, *Gordy v. City of Canton, Mississippi,* 543 F.2d 558 (5th Cir. 1976); and handwriting charts, *U.S. v. Mangan,* 575 F.2d 32 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978).

The conditions that must be met are: (1) the treatise can be admitted only if it is (a) "called to the attention" of an expert witness upon cross-examination or (b)

is "relied upon by him" in direct examination. This requirement assures that an expert witness will be available to interpret or apply the learned treatises, but does away with a requirement, adopted in many jurisdictions, that the expert witness acknowledge the authority of the learned treatises; (2) the learned treatise must be "established as a reliable authority" (a) by the testimony or admission of the witness, (b) by other expert testimony, or (c) by judicial notice. Rather than requiring the witness to state his express reliance upon the treatise, this adopts the liberal position taken by the Supreme Court in *Reilly v. Pinkus,* 338 U.S. 269 (1949); and (3) if admitted, "the statements may be read into evidence but may not be received as exhibits." However, the Advisory Committee's Note emphasizes that, when received into evidence, learned treatises may be considered as substantive proof and not merely as impeaching material.

16. REPUTATION OF PERSONAL OR FAMILY HISTORY, BOUNDARIES OR GENERAL HISTORY, OR CHARACTER: RULE 803(19), (20), AND (21)

Rule 803(19) permits the admission of out-of-court statements or reputation as to facts of personal or family history, such as birth, adoption, marriage, legitimacy, and relationship by blood. This reputation may be among members of the family or associates, or in the community.

The first portion of Rule 803(20) allows evidence of reputation about land boundaries or customs affecting land as the reputation developed before the controversy. The second portion of the rule allows reputation testimony about events of general history important to the community, state, or nation.

Rule 803(21) allows evidence of the reputation of the person's character, even though it may be hearsay. But the Advisory Committee's Note emphasizes that this exception must be read together with the provisions of Rules 404, 405(a), and 608 dealing with other specific limitations on such character evidence. In *U.S. v. Prevatt,* 526 F.2d 400 (5th Cir. 1976), the prosecutor was permitted to ask the defendant's character witnesses if they had heard that the defendant while a county commissioner had accepted money from applicants for zoning changes or if the witnesses knew that the defendant had used county employees to make improvements on land he owned.

17. JUDGMENT OF PREVIOUS CONVICTION: RULE 803(22)

This section removes from the hearsay rule judgments of previous convictions introduced "to prove any fact essential to sustain the judgment" if the following requirements are met: (1) the judgment must have been entered after a trial or upon a plea of guilty, but not upon a plea of nolo contendere; (2) the crime underlying the conviction must have been punishable by death or imprisonment in excess of one year; and (3) the judgment cannot be used by the government in a criminal prosecution against any person other than the accused except for impeachment purposes. The pendency of an appeal may be shown, but does not affect admissibility.

The admission of a judgment of conviction is not conclusive, however. The person against whom the judgment was introduced may offer an explanation or show mitigating circumstances with respect to it. *See* Advisory Committee's Note; *Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3d Cir.), *cert. denied,* 439 U.S. 969 (1978). This rule has been interpreted to include foreign judgments. *Id.* at

1189. Admission of a judgment of acquittal was not permitted in *U.S. v. Viserto,* 596 F.2d 531 (2d Cir.), *cert. denied,* 100 S. Ct. 80 (1979). A judgment otherwise admissible under Rule 803(22) may be inadmissible for other reasons, such as unfair prejudice under Rule 403. *See Rozier v. Ford Motor Co.,* 573 F.2d 1332 (5th Cir. 1978).

18. JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES: RULE 803(23)

Evidence of a judgment as to proof of (1) personal or family history, (2) general history, or (3) boundaries is admissible to prove a fact which was essential to sustain the judgment if this same matter would be provable by evidence of reputation under Rule 803(19), (20), or (22).

19. OTHER EXCEPTIONS: RULE 803(24)

This rule provides that a statement, not specifically covered by one of the other 23 subdivisions of Rule 803, may still be excepted from the hearsay restriction if five conditions are found by the court:

(1) It must have "equivalent circumstantial guarantees of trustworthiness" as the other 23 specific exceptions listed in Rule 803. For example, a written summary of official Chilean records showing dates of defendant's entry into and exit from Chile was admitted in *U.S. v. Friedman,* 593 F.2d 109 (9th Cir. 1979). An affidavit of a witness contradicting his trial testimony was admitted as substantive evidence as it was made closer to the events than his trial testimony, had many handwritten alterations by the witness, and the jury could observe his demeanor when cross-examined about it in *U.S. v. Williams,* 573 F.2d 284 (5th Cir. 1978). Statements made by accomplices introduced for substance when in conflict with their trial testimony were admitted in *U.S. v. Leslie,* 542 F.2d 285 (5th Cir, 1976). However, a telex summary of defendant's subpoenaed Korean bank records did not have sufficient circumstantial guarantees of trustworthiness in *U.S. v. Kim,* 595 F.2d 755 (D.C. Cir. 1979). And, statements made by enemies of defendant in the heat of political battle, based on rumors and general discussions, especially from unidentified declarants, were held not to possess the requisite guarantees of trustworthiness in *U.S. v. Mandel,* 591 F.2d 1347 (4th Cir. 1979).

(2) The "statement is offered as evidence of a material fact."

(3) The statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Testimony of witness within the courthouse was held to have more probative value in establishing the truth than the statements transcribed by government agents. *U.S. v. Mathis,* 559 F.2d 294 (5th Cir. 1977).

(4) The general "purposes of these rules and the interests of justice" will best be served by admission of the statement into evidence. *U.S. v. Mathis,* 559 F.2d at 299.

(5) The proponent of the evidence must make known to the adverse party, sufficiently in advance of trial to allow for preparation, the intention to offer the statement and the particulars of it, including the name and address of the declarant. *U.S. v. Ruffin,* 575 F.2d 346 (2d Cir. 1978); *U.S. v. Davis,* 571 F.2d 1354 (5th Cir. 1978); *U.S. v. Guevara,* 598 F.2d 1094 (7th Cir. 1979). Where the declarant was unidentified, the notice requirements for offering the hearsay

evidence were not met. *U.S. v. Mandel*, 591 F.2d at 1369. Notice, however, does not mean that the defendant must be provided with copies of exhibits prior to trial. *U.S. v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978). In at least one case where the government did not comply with notice requirements, it was nevertheless held that the defendant had "fair opportunity to meet the statements." *U.S. v. Leslie*, 542 F. 2d 285 (5th Cir. 1976). Where the government failed to give notice prior to trial of its intention to offer a statement on rebuttal, but the need for rebuttal testimony was not apparent until after trial had commenced and the defendant did not claim he was unable to adequately prepare to meet rebuttal testimony, the defendant was considered to have been given sufficient notice. *U.S. v. Iaconetti*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

The trial court's determination as to admissibility of evidence under Rule 803(24) will not be overturned except for an abuse of discretion. *U.S. v. Friedman*, 593 F.2d at 118.

D. HEARSAY EXCEPTIONS—DECLARANT UNAVAILABLE

While Rule 803 provides for certain exceptions to the hearsay rule whether or not the declarant is available as a witness, the exceptions in Rule 804 apply only if the declarant is unavailable. As with the exceptions under Rule 803, the Advisory Committee's Notes emphasize that neither Rule 803 nor Rule 804 dispenses with the requirement of firsthand knowledge of the declarant as stated in Rule 602.

1. LIMITATIONS

a. SIXTH AMENDMENT CONFRONTATION CLAUSE

A government attorney in a criminal case must be aware that the confrontation clause of the sixth amendment may prevent use of hearsay testimony that would otherwise be admissible under some exception provided by these rules. Such situations arise, for the most part, under the exceptions in Rule 804. Specific examples are discussed below in connection with the exceptions as to which the questions have arisen.

b. UNAVAILABILITY SUFFICIENT TO QUALIFY UNDER THE RULE

"Unavailability as a witness" as defined in Rule 804(a) includes five situations:

(1) Where a declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." As the Advisory Committee's Note makes clear, a ruling by the judge is required, and thus an actual claim of privilege must be made. *U.S. v. Toney*, 599 F.2d 787, 789-790 (6th Cir. 1979); *Witham v. Mabry*, 596 F.2d 293, 297 (8th Cir. 1979); *U.S. v. Lilley*, 581 F.2d 182, 187 (8th Cir. 1978); *U.S. v. Mangan*, 575 F.2d 32, 44 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); *U.S. v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978); *U.S. v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977); *U.S. v. Wood*, 550 F.2d 435, 439 (9th Cir. 1976).

(2) Where the declarant "persists in refusing to testify ... despite an order of the court to do so." *U.S. v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (coconspirator-declarant's refusal to testify for fear of reprisals despite court order and grant of use of immunity rendered him unavailable).

(3) Where the declarant testifies "to a lack of memory of the subject matter of his statement." *U.S. v. Lyon*, 567 F.2d 777, 784 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978) (FBI agent, allowed to read transcribed interviews of defendant's landlady, gave detailed testimony about how he took and transcribed statement); *U.S. v. Davis*, 551 F.2d 233, 235 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977) (witness was ruled unavailable because he couldn't recall previous testimony at related trial); *U.S. v. Amaya*, 533 F.2d 188, 190-192 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977) (loss of memory after automobile accident satisfied unavailability requirement for admission of prior testimony). *See also U.S. v. Collins*, 478 F.2d 837 (5th Cir.), *cert. denied*, 414 U.S. 1010 (1973), in which a witness' prior testimony against defendants in a first trial was held admissible to impeach his claim of lack of memory and as implicit affirmation of the truth of prior testimony where witness was fully aware of prior testimony but claimed inability to recall virtually all matters testified to in great detail at former trial.

(4) Where the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." *U.S. v. Bell*, 500 F.2d 1287, 1290 (2d Cir. 1974) (permitting use of bank robbery witness' prior testimony at suppression hearing where witness not present at trial due to illness); *U.S. v. Ricketson*, 498 F.2d 367, 374 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974) (deposition of very ill burglary victim allowed at trial where defense had adequate prior opportunity to cross-examine); *U.S. v. Diehl*, 460 F.Supp. 1282, 1289 (S.D. Tex.), *aff'd per curiam*, 586 F.2d 1080 (5th Cir. 1978). *See also* Rule 32(a)(3), Fed. R. Civ. P., and Rule 15(e), Fed. R. Crim. P., concerning the use of depositions.

(5) Where the declarant is "absent from the hearing and the proponent of his statement has been unable to procure his attendance." In a criminal case, however, the government bears the heavy burden of demonstrating that it has taken every possible step to procure the declarant himself as a witness. *Barber v. Page*, 390 U.S. 719, 724 (1968) (use by the state of prior testimony of a witness then in federal custody in another state was held to deny the defendant his sixth amendment right). *Canal Zone v. P. (Pinto)*, 590 F.2d 1344, 1352-1354 (5th Cir. 1979) (where prosecution made no showing that it was unable to procure attendance of victims at trial, use of victims' disposition testimony was held not to be plain error); *U.S. v. Mann*, 590 F.2d 361, 367-368 (1st Cir. 1978) (government must show diligent effort to secure voluntary return of witnesses beyond jurisdiction before use of deposition at trial permitted). *But see U.S. v. Seijo*, 595 F.2d 116, 120 (2d Cir. 1979) (where government had done everything in its power to hold witnesses for trial and, failing that, witnesses' prior depositions held admissible); *U.S. v. Mathis*, 550 F.2d 180, 181-182 (4th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977) (testimony in previous trial which ended in mistrial admissible after prosecution unsuccessfully attempted to locate witness inadvertently released from penal institution); *U.S. v. Hayes*, 535 F.2d 479, 482 (8th Cir. 1976) (testimony in prior trial of defendant's wife whom the government was subsequently unable to locate admissible against defendant in later trial); *U.S. v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977) (establishment of the permanence of an illness not an absolute requirement; government need only establish that duration beyond time within which trial can reasonably be postponed).

2. FORMER TESTIMONY: RULE 804(b)(1)

This exception applies to 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 ... had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." Although the rule does not expressly state that the prior testimony must have been given under oath or affirmation, such a setting no doubt is contemplated. *See* J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 804(b)(1)[02], at 804-51-52. The requirement that the party harmed by the testimony have had an opportunity and a similar motive to cross-examine the witness in the prior case is designed to safeguard a defendant's sixth amendment right to confrontation. The general constitutionality of such use of prior testimony was upheld in *Mattox v. U.S.*, 156 U.S. 237 (1895). Where a witness testified to an inability to remember prior statements, his testimony against defendant at prior trial was held admissible in *U.S. v. Davis*, 551 F.2d 233, 235 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977). Testimony from a previous mistrial has likewise been held admissible. *U.S. v. Bowman*, 609 F.2d 12, 19 (D.C. Cir. 1979); *U.S. v. Mathis*, 550 F.2d 180, 182 (4th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977); *U.S. v. Brasco*, 516 F.2d 816, 818-819 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). The opportunity for cross-examination must have been full, substantial, and meaningful. *U.S. v. Fiore*, 443 F.2d 112 (2d Cir. 1971), *cert. denied*, 410 U.S. 984 (1973) (introduction of grand jury testimony of witness who refused to be sworn was held in violation of both the hearsay rule and the confrontation clause). *See also U.S. v. Marks*, 585 F.2d 164, 168-169 (6th Cir. 1978). Sufficient opportunity is available for cross-examination by defense at the preliminary hearing. *Phillips v. Wyrick*, 558 F.2d 489, 493-495 (8th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978). However, testimony of a codefendant given at a pretrial hearing was held inadmissible in favor of a defendant at trial since the government did not have the same motive to cross-examine at the hearing. *U.S. v. Wingate*, 520 F.2d 309, 316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

In an appropriate case, the attorney for the government should consider use of the pretrial deposition procedure set forth in Rule 15 of the Federal Rules of Criminal Procedure. That rule provides for the taking of a witness' deposition under "exceptional circumstances" on motion by either side and the preservation of his testimony for use at trial. Thereafter, the witness' deposition may be used as substantive evidence at trial if the witness is "unavailable" as that term is defined in Rule 804(a). A videotaped deposition supplies a substantially comparable situation to a trial, but adherence to the procedural prerequisites of Rule 15 is mandatory. *U.S. v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (where defendant was not permitted to be active participant, use of videotaped deposition violated his right to confrontation).

3. STATEMENT UNDER BELIEF OF IMPENDING DEATH: RULE 804(b)(2)

A "statement made by a declarant while believing that his death was imminent, concerning the cause of circumstances of what he believed to be his impending death" is excepted from the hearsay rule. This exception reflects traditional common law. It is available only in homicide cases to show the cause of death. *See U.S. v. Martinez*, 536 F.2d 886, 889 (9th Cir.), *cert. denied*, 429 U.S. 907 (1976) (declaration was admissible because declarant believed death imminent).

4. STATEMENTS AGAINST INTEREST: RULE 804(b)(3)

a. STATEMENTS AGAINST INTEREST GENERALLY

If the declarant is unavailable, his statement is not barred by the hearsay rule, providing that, at the time of its making, the statement was so far contrary to the declarant's "pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another," that "a reasonable man in his position would not have made the statement unless he believed it to be true." *See U.S. v. Santarpio*, 560 F.2d 448, 453 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977) (statements made by confessed bookmakers concerning gambling operation were held admissible as against penal interest).

Rule 403 requires the judge to evaluate the probative value of proffered statements prior to admission. Other evidence bearing on reliability of the evidence is also relevant to the evaluation. *See U.S. v. Metz*, 608 F.2d 147, 157 (5th Cir. 1979) (statement of codefendant exculpatory of defendant was held inadmissible where declarant stated he did not know defendant, and other guarantees of trustworthiness were lacking); *Witham v. Mabry*, 596 F.2d 293, 297-298 (8th Cir. 1979); *U.S. v. White*, 553 F.2d 310, 313 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977). *But see U.S. v. Toney*, 599 F.2d 787, 790 (6th Cir. 1979) (error for court not to admit alleged robber's statement against his penal interest to FBI following his arrest where sufficient corroborative factors were present). Statements against the penal interest of the declarant must be sufficiently inculpatory to be found admissible. *U.S. v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978). *See U.S. v. Oropeza*, 564 F.2d 316, 325 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). *But see U.S. v. Barrett*, 539 F.2d 244, 251-253 (1st Cir. 1976); *U.S. v. Alvarez*, 584 F.2d 694, 699-700 (5th Cir. 1978) (cases where disserving portions of statements against interest were fortified by a showing of insiders' knowledge).

The courts have also been willing to assume that a reasonable man would be aware of disserving nature of his remarks even when made to a supposed friend. *U.S. v. Goins*, 593 F.2d 88, 90-91 (8th Cir.), *cert. denied*, 100 S. Ct. 52 (1979), *U.S. v. Barrett*, 539 F.2d at 251; *U.S. v. Bagley*, 537 F.2d 162, 165 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). *See also U.S. v. Lang*, 589 F.2d 92 (2d Cir. 1978). Courts have had more difficulty, however, with statements which, although against interest on their face, may have been made to gain an advantage, especially where a person in custody makes a confession as part of a plea bargain. *U.S. v. Mackin*, 561 F.2d 958, 961-962 (D.C. Cir.), *cert. denied*, 434 U.S. 959 (1977); *U.S. v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977); *U.S. v. Rogers*, 549 F.2d 490, 498 n.8 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977). *Compare U.S. v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978). *See also U.S. v. White*, 553 F.2d at 313. *Cf. U.S. v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir. 1978), *cert. denied*, 439 U.S. 1005 (1979). Personal motives of a declarant are also considered by the court. *U.S. v. Pena*, 527 F.2d 1356, 1361 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976).

Rule 804(b)(1), of course, does not do away with the Rule 602 requirement of firsthand knowledge. *U.S. v. Lang*, 589 F.2d at 97-98 (statement against penal interest was not admitted because of declarant's admitted lack of knowledge of defendant's criminal involvement).

Inculpatory statements against the penal interest of the defendant offered against him may create confrontation clause problems. The inculpatory confession has been analogized to a statement having both self-serving and disserving aspects. Inculpatory statements, which on their face are against declarant's interest, are admitted only after analysis of reliability in the setting of the particular facts of each case. *See U.S. v. Alvarez,* 584 F.2d 694, 701 (5th Cir. 1978).

Aside from constitutional considerations, unreliable statements are excluded as a matter of evidentiary law. *See U.S. v. Lilley,* 581 F.2d 182, 188 (8th Cir. 1978) (portions of statements not against penal interest should have been excluded because of lack of indicia of truthfulness); *U.S. v. White,* 553 F.2d 310, 314 (2d Cir. 1977), *cert. denied,* 431 U.S. 972 (1977) (trial court redacted bulk of inculpatory statements).

In assessing reliability of declarant and probative value of inculpatory statements, the courts examine several factors, such as the role of the declarant, *see U.S. v. Harris,* 403 U.S. 573, 595 (1971); whether he was in custody; whether appropriate *Miranda* warnings were given before the making of the statement; the present status of the charges and their resolution, *see U.S. v. Love,* 592 F.2d 1022, 1025 (8th Cir. 1979); *U.S. v. Bailey,* 581 F.2d 341, 345-350 (3d Cir. 1978); whether declarant is being tried jointly, *see Bruton v. U.S.,* 391 U.S. 123 (1968). All the above factors are considered by the courts. *See U.S. v. Boyce,* 594 F.2d 1246, 1249-1251 (9th Cir.), *cert. denied,* 100 S. Ct. 112 (1979). *But see U.S. v. Alvarez,* 584 F.2d at 702 n.10, where the court noted several indicia of trustworthiness, including the apparent motive of declarant to misrepresent the matter, his general character, lack of other witnesses, and lack of statement's spontaneity.

Rule 403 provides that evidence must be excluded if its probative value is substantially outweighed by the danger of prejudice, and trial courts will often find that probative value is outweighed by the danger of unfair prejudice. *See U.S. v. White,* 553 F.2d at 314. *But cf. U.S. v. Lang,* 589 F.2d 92, 98 (2d Cir. 1978), in which the court excluded an inculpatory statement because it failed to meet personal knowledge test, but the court never mentioned the prejudice or confrontation problems.

b. STATEMENTS AGAINST PENAL INTEREST OFFERED TO EXCULPATE

The second sentence of Rule 804(b)(3) imposes a further specific requirement for statements "tending to expose the declarant to criminal liability and offered to exculpate the accused" that "corroborating circumstances must clearly indicate the trustworthiness of the statement." Before the exculpating statement is admitted or can be made in the presence of the jury, the court must make a preliminary finding pursuant to Rule 104(a) that sufficient corroborating evidence has been offered. *See U.S. v. Barrett,* 539 F.2d 244, 251 (1st Cir. 1976). This should be done at a hearing immediately before trial. *See* Rule 17.1, Fed. R. Crim. P.

Courts look for sufficient corroboration to satisfy a "reasonable man" standard, requiring that the statement be made in good faith and likely be true. *U.S. v. Satterfield,* 572 F.2d 687, 692 (9th Cir.), *cert. denied,* 439 U.S. 840 (1978) (declarant's statement was not admitted because corroborating circumstances did not "clearly" indicate trustworthiness of the statement); *U.S. v. Hoyos,* 573 F.2d 1111, 1115 (9th Cir. 1978) (the court applied factors in *Satterfield* in refusing to admit the statement offered).

Courts have admitted statements, however, where there is evidence that the declarant was near the scene and criminal motive or other factors connected him with the crime, thus insuring sufficient reliability. *U.S. v. Thomas,* 571 F.2d 285, 290 (5th Cir. 1978); *U.S. v. Benveniste, 564 F.2d 335, 341-342 (9th Cir. 1977); U.S. v. Atkins,* 558 F.2d 133, 135 (3d Cir. 1977), *cert. denied,* 434 U.S. 1071 (1978); *U.S. v. Barrett,* 539 F.2d at 253. Courts do not make the burden of corroboration on the part of defendants very high. *See U.S. v. Benveniste,* 564 F.2d at 341-342 (citing *Chambers v. Mississippi,* 410 U.S. 284 (1973)); *U.S. v. Barrett,* 539 F.2d at 253. *But cf. U.S. v. Brandenfels,* 522 F.2d 1259, 1264 (9th Cir.), *cert. denied,* 423 U.S. 1033 (1975).

The four considerations for admission, enunciated by the Supreme Court in *Chambers v. Mississippi,* 410 U.S. at 300-301, are: (1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; and (4) the availability of the declarant as a witness. Since Rule 804(b)(3) presupposes unavailability, it is the first three considerations that will normally be determinative as to admission. *See U.S. v. Guillette,* 547 F.2d 743, 753-755 (2d Cir. 1976), *cert. denied,* 434 U.S. 839 (1977) (testimony of government informant excluded because there was lack of requisite corroborative evidence).

Under Rule 804(b)(3), trustworthiness is determined primarily by analysis of two elements: (1) the probable veracity of the in-court witness, and (2) the reliability of the out-of-court declarant. *See U.S. v. Alvarez,* 584 F.2d 694, 701 (5th Cir. 1978). *See also U.S. v. Bagley,* 537 F.2d 162, 165-168 (5th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). Credibility of the witness may be considered as an aspect of probativeness. *U.S. v. Satterfield,* 572 F.2d at 691-692 (out-of-court statement was excluded where potential for fabrication and other elements were present suggesting it was untrustworthy).

The defendant must be told of any exculpatory statements in the hands of the government and can compel their production. *See U.S. v. Toney,* 599 F.2d 787, 790 (6th Cir. 1979) (alleged robber's statement to FBI following his arrest was against penal interest and corroborated defendant's story).

5. STATEMENT OF PERSONAL OR FAMILY HISTORY: RULE 804(b)(4)

This exception, which applies to statements concerning the declarant's own family history or the family history of someone related by blood or marriage, generally codifies the hearsay exception as it existed in common law. Many decisions previously held that the statement must be made prior to the existence of a lawsuit, but this requirement was dropped by the rule.

6. OTHER EXCEPTIONS: RULE 804(b)(5)

This subsection, providing exceptions for statements not specifically covered by the other exceptions, parallels the provisions of Rule 803(24), discussed at pp. 17-19—17-20, *infra.* Because of the unavailability of the witness, the need for admission of the evidence is self-evident. Where probative value is high, courts have admitted hearsay statements pursuant to this rule when the requisite circumstantial guarantees of trustworthiness have been demonstrated. *U.S. v. Lyon,* 567 F.2d 777, 784 (8th Cir. 1977), *cert. denied,* 435 U.S. 918 (1978) (FBI

agent's detailed testimony about how he took and transcribed an unavailable witness' testimony 10 years earlier was permitted); *U.S. v. Ward,* 552 F.2d 1080, 1082-1083 (5th Cir.), *cert. denied,* 434 U.S. 850 (1977) (FBI agent's testimony concerning interview of driver of stolen truck, then unavailable, was permitted where content of hearsay was corroborated by other testimony). *But see U.S. v. Bailey,* 581 F.2d 341, 349 n.12 (3d Cir. 1978) (corroborating evidence was found to have sufficient degree of reliability); *U.S. v. Hoyos,* 573 F.2d 1111, 1116 (9th Cir. 1978); *U.S. v. Medico,* 557 F.2d 309, 316 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977) (residual hearsay exception was properly relied upon to admit prosecution testimony concerning the license plate number of the getaway car in a bank robbery).

Grand jury testimony of unavailable witnesses might be admissible as evidence under Rule 804(b)(1) or (5). A conflict has arisen among the circuits concerning the effect of the sixth amendment confrontation clause. This issue has been resolved narrowly in every instance, with each case turning on its peculiar facts. *U.S. v. Carlson,* 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (government informant who testified before grand jury and refused to testify at trial, but reaffirmed grand jury testimony, was rendered "unavailable" because of threats by defendant). *Accord, U.S. v. Balano,* ___ F.2d ___, No. 78-1314 (10th Cir. 1979). Grand jury testimony has been admitted where there was sufficient corroboration at trial. *U.S. v. West,* 574 F.2d 1131, 1135-1136, 1138 (4th Cir. 1978); *U.S. v. Garner,* 574 F.2d 1141, 1146 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978). *But see U.S. v. Gonzalez,* 559 F.2d 1271, 1273 (5th Cir. 1977) (grand jury testimony of an unavailable declarant held inadmissible); *U.S. v. Fiore,* 443 F.2d 112, 115 (2d Cir. 1971), *cert. denied,* 410 U.S. 984 (1973) (introduction of grand jury testimony of witness who refused to be sworn was found to be in violation of hearsay rule and the confrontation clause). *See also U.S. v. Marks,* 585 F.2d 164, 168-169 (6th Cir. 1978). A videotaped deposition was ruled inadmissible for insufficient compliance with the confrontation clause in *U.S. v. Benfield,* 593 F.2d 815, 821 (8th Cir. 1979). Where indicia of reliability of declarant's out-of-court statement are found weak, confrontation clause restrictions are not easily overcome. *U.S. v. Love,* 592 F.2d 1022, 1026-1027 (8th Cir. 1979).

E. HEARSAY WITHIN HEARSAY

Rule 805 provides that hearsay included within hearsay is not excluded if each part of the out-of-court declaration qualifies for admission under some exception provided in these rules. In other words, multiple hearsay is not excluded so long as each link in the chain of transmission of the statement is covered by a recognized exception to the hearsay rule. *See U.S. v. Diez,* 515 F.2d 892, 895-896 n.2 (5th Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976); *U.S. v. Gerry,* 515 F.2d 130, 141-142 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975); *U.S. v. Maddox,* 444 F.2d 148, 150-151 (2d Cir. 1971). Courts, however, will look for the necessary indicia of reliability for each link in the chain. *See U.S. v. Lang,* 589 F.2d 92, 99 (2d Cir. 1978).

F. ATTACKING AND SUPPORTING THE CREDIBILITY OF DECLARANT

Rule 806 provides that, if a hearsay statement is admitted in evidence, the opposing party may attack the credibility of the out-of-court declarant. The

proponent of the statement may then introduce evidence to support the declarant's credibility. Credibility may be demonstrated "by any evidence which would be admissible for those purposes if declarant had testified as a witness." Where defense cross-examination of government witness brought out defendant's denial of involvement in crime, defendant's prior felony convictions were held admissible, even though defendant never testified. *U.S. v. Lawson,* 608 F.2d 1129 (6th Cir. 1979). *But see U.S. v. Lechoco,* 542 F.2d 84, 88-89 (D.C. Cir. 1976) (defendant was entitled to present supporting credibility evidence, even though he exercised fifth amendment privilege not to testify, when his credibility was open to attack).

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